NOTE

A Jesuit and Nine Justices: Environmental Protest as Protected Religious Exercise

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TABLE OF CONTENTS

INTRODUCTION: THE SUPREME COURT AND A SUPREME PONTIFF

In what Justice William Brennan Jr. referred to as "the most important principle of constitutional law," "the rule of five" represents the number of votes needed to

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win in the Supreme Court.[1] Thus, Supreme Court advocates are ultimately tasked with convincing at least five Justices that their interpretation of the law is the correct one. Of course, the nine Justices are human beings with beliefs, experiences, and opinions, and despite arguments to the contrary,[2] it seems plausible that these beliefs may influence their decisions.[3] As compared to the Warren, Burger, and Rehnquist Courts, "pro-religion" outcomes in the Roberts Court have had a remarkable "win rate" of 83%.[4] The current Court has been described as "the most conservative" in generations,[5] and it is also notably the most *Catholic*.[6] Between five conservative Justices (Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Brett Kavanaugh, and Amy Coney Barrett) and Justice Sonia Sotomayor, six members of the Court are Catholic.[7] Given the Court's increasing hostility towards environmental laws[8] and extreme friendliness towards religious liberty,[9] this Note proposes a Free Exercise Clause defense for pro-environmental protesters.

At the crossroads of Catholicism and the environmental movement lies Pope Francis's second encyclical, *Laudato Si'*, in which the Pope recognized the human cause of the climate catastrophe[10] and called Catholics—and indeed all

1. *See* Lisa Heinzerling, *The Rule of Five Guys*, 119 MICH. L. REV. 1137, 1139 (2021) (describing an anecdote about Justice Brennan's rule of five).

2. *See, e.g.*, Colleen Slevin, *Chief Justice John Roberts Defends Legitimacy of Court*, AP NEWS (Sept. 10, 2022, 2:18 AM), https://apnews.com/article/abortion-us-supreme-court-denver-public-opinion-john-roberts-6921c22df48b105cdff5fabdc6c459bb [https://perma.cc/528K-DUUA]; Joan Biskupic, *Analysis: Supreme Court Justices Respond to Public Criticism with Distance and Denial*, CNN (Sept. 13, 2022, 5:08 AM), https://www.cnn.com/2022/09/13/politics/supreme-court-public-criticism-distance-denial-roberts/index.html [https://perma.cc/9NRW-B9JE]; Ariane de Vogue, *Chief Justice Roberts Responds to Ethics Critics*, ABC NEWS (Dec. 31, 2011), https://abcnews.go.com/blogs/headlines/2011/12/chief-justice-roberts-responds-to-judicial-ethics-critics [https://perma.cc/4PFN-PJ4X].

3. *See* Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, *in* THE SUPREME COURT REVIEW 315, 321–22 (David A. Strauss et al. eds., 2022) (noting how Catholic Justices vote distinctly on death penalty, abortion, and religion cases).

4. *Id.* at 325. By contrast, pro-religion outcomes occurred in 46%, 51%, and 58% of cases in the Warren, Burger, and Rehnquist Courts, respectively. *Id.* The dataset includes all religion cases from 1953–2020. *See id.*

5. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/CD6C-DPCX].

6. Epstein & Posner, *supra* note 3, at 328–29.

7. *See* Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP (Apr. 8, 2022), https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx [https://perma.cc/9J2K-7BQ4]. Justice Neil Gorsuch is now Episcopalian but was raised Catholic. *Id.*

8. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 734–35 (2022) (holding that the Environmental Protection Agency (EPA) exceeded its authority in implementing the Clean Power Plan); Sackett v. EPA, 598 U.S. 651, 684 (2023) (limiting the Clean Water Act's protection of wetlands).

9. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014); Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 584 U.S. 617, 639 (2018). *See generally* Marcia Coyle, *The Justices' Faith and Their Religion Clause Decisions*, NAT'L CONST. CTR. (July 15, 2022), https://constitutioncenter.org/blog/the-justices-faith-and-their-religion-clause-decisions [https://perma.cc/GL2D-LEY3].

10. Pope Francis, *Encyclical Letter* Laudato Si' *of the Holy Father Francis on Care for Our Common Home*, VATICAN PRESS 18 (May 24, 2015), https://www.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf [https://perma.cc/QK2J-VBYV].

humans—to action.[11] Pope Francis is the *Supreme Pontiff*, the head of the Catholic Church.[12] A Catholic who sincerely believes in Pope Francis's authority and *Laudato Si'*s call to action could view an environmental protest—for example, against deforestation or building an oil pipeline—as a religious exercise. Indeed, language in *Laudato Si'* suggests that spiritual concern for the environment—what Pope Francis calls ecological conversion—is mandatory for Catholics.[13] Could an otherwise prohibited environmental protest, motivated by the protesters' Catholic faith, be defended under the Free Exercise Clause?[14] This Note argues that certain nonviolent, peaceful environmental protests should be protected under the Free Exercise Clause as an expression of the protesters' sincerely held religious beliefs.

Part I discusses the Free Exercise Clause as well as the Court's historical and modern jurisprudence. Part II introduces *Laudato Si'* and explains the importance of encyclicals and the Pope to the Catholic Church. Part III analyzes several hypothetical scenarios under the proposed Free Exercise Clause defense and argues that such a defense should apply to minor offenses, such as trespassing or abandoning property, but not more severe crimes, such as the destruction of property and arson. This Note concludes by discussing the line between environmental protests that would—or should—be protected under the Free Exercise Clause and those that would not be protected.

I. THE FREE EXERCISE CLAUSE

Section I.A describes the Free Exercise Clause and the Court's historical jurisprudence in religion cases. Section I.B examines where the Court has set the bounds of permissible government regulation of religious activities. Section I.C examines how more recent Free Exercise Clause cases have shifted the balance to be more pro-religion.

A. INTERNAL TENSION IN THE RELIGION CLAUSES

In the foundational case *Cantwell v. Connecticut*, the Supreme Court noted a tension between the First Amendment's Religion Clauses, the Establishment Clause and the Free Exercise Clause.[15] Together, they provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[16] The Court explained that, "[o]n the one hand, [the First

11. *See id.* at 12–13.

12. *Biography of the Holy Father: Francis*, VATICAN, https://www.vatican.va/content/francesco/en/biography/documents/papa-francesco-biografia-bergoglio.html [https://perma.cc/JP9E-FW9R] (last visited Sept. 2, 2024).

13. Francis, *supra* note 10, at 157, 159 ("Living our vocation to be protectors of God's handiwork is essential to a life of virtue; it is not an optional or a secondary aspect of our Christian experience.").

14. U.S. Const. amend. I (establishing that "Congress shall make no law . . . prohibiting the free exercise" of religion). The Free Exercise Clause is incorporated against the states via the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

15. *See Cantwell*, 310 U.S. at 303.

16. U.S. Const. amend. I.

Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship," but "[o]n the other hand it safeguards the free exercise of [one's] chosen form of religion."[17] Thus, federal and state governments—as well as courts—must simultaneously avoid preferencing any one religion, which would violate the Establishment Clause,[18] and restricting the practice or belief of a particular religion, which would violate the Free Exercise Clause.[19]

The Free Exercise Clause, however, does not proscribe all government regulation relating to religion. The Court in *Cantwell* noted that the Clause encompasses both "freedom to believe and freedom to act," but that while "[t]he first is absolute . . . the second cannot be."[20] That is, while beliefs may not be regulated or prohibited, conduct and actions remain "subject to regulation for the protection of society," though only so far as the regulations do not "unduly . . . infringe the protected freedom."[21] *Cantwell* involved petitioners who had been convicted of violating a state statute that prohibited soliciting money for religious causes without a permit and of inciting a breach of the peace.[22] The Court found that the constitutional mandate that "free exercise of religion be not prohibited" outweighed the state's interest in "preserv[ing] . . . peace and good order."[23] The state's requirement that Cantwell secure a license prior to soliciting funds for his religious group violated the Free Exercise Clause, and the Court overturned his conviction for breaching the peace.[24] Critical to the Court's holding was "the absence of a statute narrowly drawn to define and punish specific conduct" that would be a "clear and present danger to a substantial interest of the State."[25]

B. THE EVOLUTION OF THE FREE EXERCISE CLAUSE

The Court established the compelling interest test for the Free Exercise Clause in *Sherbert v. Verner*[26] and *Wisconsin v. Yoder*.[27] In those cases, the Court drew the lines between constitutional and unconstitutional regulations that may burden religious exercise. First, to fall under the protection of the Religion Clauses the belief must be *religious* rather than merely secular, philosophical, or personal in nature.[28] Second, the Court will examine whether the challenged regulation

17. *Cantwell*, 310 U.S. at 303.
18. *See* U.S. Const. amend. I.
19. *See id.*
20. *Cantwell*, 310 U.S. at 303–04.
21. *Id.* at 304.
22. *Id.* at 300–03.
23. *See id.* at 307–10.
24. *See id.* at 307.
25. *Id.* at 311.
26. 374 U.S. 398, 406 (1963).
27. 406 U.S. 205, 215 (1972).
28. *Id.* at 215–16; *see also* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981) (noting "[t]he determination of what is a 'religious' belief or practice" is often challenging but beliefs

creates "substantial infringement of . . . First Amendment right[s]."[29] In *Yoder*, the Court noted that even a facially neutral regulation may "in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[30] Similarly, even if the burden is only indirect, if "the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid."[31] If there is such a substantial infringement of the First Amendment right, the state must show that a "compelling state interest" justifies the restriction.[32] In turn, if there is such a compelling interest, the state must also show that the challenged regulation is "the least restrictive means of achieving" it.[33] Taken together, the need to show that the restriction is narrowly tailored to further a compelling interest is known as the "strict scrutiny" test.[34]

The Court narrowed its somewhat capacious view of the Free Exercise Clause in *Employment Division, Department of Human Resources v. Smith*, in which it held that the Free Exercise Clause did not forbid Oregon from including religiously inspired peyote use in its general prohibition of the drug.[35] In *Smith*, the Court did not apply the *Sherbert–Yoder* compelling interest test, finding that those decisions were inapplicable to "an across-the-board criminal prohibition on a particular form of conduct."[36] There was no law which attempted "to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs,"[37] and so Oregon's law was held to be constitutional without balancing state and religious interests.[38] *Smith* ultimately limited the compelling interest test's application to so-called hybrid situations where application of "a neutral, generally applicable law" to religious actions implicates both the Free Exercise Clause *and* some other constitutional protection such as freedom of speech or freedom of the press.[39] If the law is either not neutral or not

"need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection").

29. *Sherbert*, 374 U.S. at 406.

30. *Yoder*, 406 U.S. at 220.

31. *Sherbert*, 374 U.S. at 404 (quoting Braunfield v. Brown, 366 U.S. 599, 607 (1961)).

32. *Id.* at 406; *see also Yoder*, 406 U.S. at 215 (holding that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

33. *Thomas*, 450 U.S. at 718.

34. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 18 (2020) (per curiam) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

35. 494 U.S. 872, 890 (1990).

36. *Id.* at 884–85. The Court said that it "would not apply [*Sherbert*] to require exemptions from a generally applicable criminal law." *Id.* at 884.

37. *Id.* at 882.

38. *See id.* at 882–84.

39. *Id.* at 881–82. Critically, *Cantwell* and *Yoder* were hybrid cases that implicated other constitutional rights as well as the Free Exercise Clause. The Court noted that in those cases the parties' religious conduct involved communicating information rather than the consumption of an otherwise illegal drug like in *Smith*. *Id.* at 881–82 & n.1.

generally applicable, then the compelling interest test will still be applicable under *Smith*.[40]

Whether a law is neutral and generally applicable is essential for a free exercise claim, as a law failing either requirement "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[41] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, decided three years after *Smith*, the Court held that the city's ordinances banning the ritual slaughter of animals were unconstitutional because they were not neutral or generally applicable and were not narrowly tailored to achieve the asserted state interest.[42] "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context"[43] or if it "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[44] However, the inquiry does not end there: to determine whether a law is neutral, courts should look at the law's effect in operation,[45] legislative and administrative history,[46] the historical background of the decision,[47] and evidence of targeting particular religions.[48] Furthermore, laws "burdening religious practice must be of general applicability,"[49] a tenet which is violated when the state's objectives "are not pursued with respect to analogous nonreligious conduct."[50] To summarize, strict scrutiny applies where a law restricting religious practice is not neutral *or* is not generally applicable.[51] Under strict scrutiny, the law must "advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[52]

After *Smith* and *Lukumi*, there were a few paths for a free exercise claim based on religious belief. First, if a law was facially neutral and generally applicable, and infringed on only the free exercise right (as opposed to, for instance, both free exercise and free speech rights), then *Smith* would apply, and the analysis

40. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993); *see also* Fulton v. City of Philadelphia, 593 U.S. 522, 540–41 (2021).

41. *Lukumi*, 508 U.S. at 531–32.

42. *Id.* at 542–46.

43. *Id.* at 533.

44. *Id.* at 532.

45. *See id.* at 535.

46. *Id.* at 540.

47. *Id.*

48. *See id.* at 536 (noting that the ordinance exempted kosher slaughter while prohibiting the ritual slaughter essential to the practice of Santeria).

49. *Id.* at 542.

50. *Id.* at 546. The Court noted that the ordinances were underinclusive when applied to nonreligious conduct—by allowing exceptions for the slaughter of certain animals outside of slaughterhouses—and overinclusive when applied to religious conduct—by restricting Santeria sacrifices even if they occurred in otherwise "licensed, inspected, and zoned slaughterhouses." *See id.* at 538–39, 544–45.

51. The Court notes that "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531. However, a law need only violate the neutrality *or* the generally applicability requirement for strict scrutiny to apply. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522, 540–41 (2021).

52. *Lukumi*, 508 U.S. at 546 (internal citations omitted).

would not require a balancing test.[53] If the neutral and generally applicable law implicated another First Amendment issue, such as freedom of speech, then the court would apply the *Sherbert–Yoder* compelling interest test.[54] Even so, the Court would not apply *Sherbert* to exempt the petitioners from "a generally applicable criminal law."[55] If, however, a challenged regulation was neither neutral nor generally applicable, then it had to both support a compelling governmental interest and be narrowly tailored to pass constitutional muster.[56]

Though the Free Exercise Clause's reach was narrowed by *Smith*, the Roberts Court tipped the scales in a decidedly pro-religion way in recent cases by expanding the range of laws that are deemed not neutral or generally applicable.

C. MODERN FREE EXERCISE JURISPRUDENCE

Beginning in 2018, the Roberts Court began broadening the types of conduct that can be protected under the Free Exercise Clause. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* involved an order issued by the Colorado Civil Rights Commission (CCRC) directing the petitioner's cakeshop, which had refused to sell a wedding cake to a same-sex couple, to comply with the Colorado Anti-Discrimination Act.[57] The Court invalidated the decisions of the CCRC and lower courts, citing "official expressions of hostility to religion in some of the commissioners' comments" and their "disparate consideration of [the petitioner's] case compared to the cases of . . . other bakers" who had refused to bake cakes that conveyed disapproval of same-sex marriage.[58] With *Lukumi* and *Masterpiece Cakeshop*, the Court seemed to be endorsing the view that regulations that exempt a specific religious or secular action but do not exempt an analogous religious action may violate the Free Exercise Clause.[59]

In the midst of the COVID-19 pandemic, religious institutions challenged "quarantine orders" that banned certain gatherings to limit the spread of COVID-19.[60] Although early cases that made it to the Supreme Court were decided in favor of the government,[61] the majority shifted when Justice Barrett

53. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 881–82, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))).

54. *See id.* at 881–82.

55. *Id.* at 884.

56. *See Lukumi*, 508 U.S. at 546.

57. 584 U.S. 617, 625–30 (2018).

58. *Id.* at 639.

59. *See Lukumi*, 508 U.S. at 536, 539; *Masterpiece Cakeshop*, 584 U.S. at 638–39; *see also* Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 843, 854–55 (2022) (arguing whether general applicability requires an analogous religious exception turns on the level of generality applied to the regulation).

60. *See* Lund, *supra* note 59, at 855 (describing the "flurry of cases arising out of the COVID-19 pandemic" where the Court dealt with quarantine orders).

61. *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020).

joined the Court.[62] At issue in *Roman Catholic Diocese of Brooklyn v. Cuomo*[63] and *Tandon v. Newsom*[64] were rules in New York and California, respectively, that limited the size of religious gatherings.[65] In *Roman Catholic Diocese*, the Court found that the restrictions were neither neutral nor generally applicable because churches and synagogues were limited to ten or twenty-five people, but "acupuncture facilities, camp grounds, garages," and chemical and microelectronic manufacturing plants were exempt from the regulations.[66] In granting the requested injunction, the Court admitted that stemming the risk of COVID-19 was a compelling interest, but argued that the restrictions were not narrowly tailored and therefore failed the "strict scrutiny" test established in *Lukumi*.[67] *Tandon* went further by invalidating an arguably neutral California rule which limited gatherings in homes—religious or otherwise—to three families.[68] Because California failed to justify why it "treat[ed] some comparable secular activities more favorably than at-home religious exercise,"[69] the restrictions violated the Free Exercise Clause, therefore requiring that the application for injunctive relief be granted.[70] In *Tandon*, the Court blew open the doors to free exercise challenges that it had arguably shut in *Smith*,[71] stating that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[72] The question is—what constitutes "*any* comparable secular activity"?

Finally, *Fulton v. City of Philadelphia* obviated the need for an existing secular exemption to justify the requested religious one at issue.[73] Catholic Social Services (CSS), a private foster agency, refused to certify same-sex couples as foster or adoptive parents because of the agency's religious beliefs.[74] Because this refusal violated a non-discrimination provision in the City's contract with CSS, the City said it would no longer enter into full foster care contracts with it in the future, unless CSS consented to certify same-sex couples.[75] The Court found that the non-discrimination "provision [was] not generally applicable as required

62. Lund, *supra* note 59, at 856.
63. 592 U.S. 14 (2020) (per curiam).
64. 593 U.S. 61 (2021) (per curiam).
65. *See Roman Cath. Diocese*, 592 U.S. at 15–16; *Tandon*, 593 U.S. at 63.
66. *Roman Cath. Diocese*, 592 U.S. at 17–18.
67. *Id.* at 18.
68. *Tandon*, 593 U.S at 63–64.
69. *Id.* at 63.
70. *Id.* at 64.
71. *Smith* generally limited compelling interest or strict scrutiny analysis to laws that were not "neutral" or "generally applicable." *See supra* Section I.B.
72. *Tandon*, 593 U.S. at 62.
73. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 537 (2021).
74. *Id.* at 530.
75. *Id.* at 531.

by *Smith*,"[76] and thus required strict scrutiny analysis.[77] Because the City had "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others," the Free Exercise Clause was violated.[78] Despite the fact that "the commissioner had never actually made an exception for anyone else," the Court still found that strict scrutiny applied because of the "mere ability" to hypothetically make an exception.[79] Going beyond its generous interpretation in *Tandon*, the Court in *Fulton* seemed to find that the Free Exercise Clause limits the ability of governments to choose between permissible and impermissible activities where this discretion could be used to limit the free exercise of religion, even hypothetically.[80]

Fulton expanded the scope of the "neutrality" requirement by holding that a "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[81] On the other hand, "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"[82] or if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[83] Thus, *Fulton* greatly increased the ways by which religious conduct may come under the aegis of the Free Exercise Clause; for example, the Court may strike down government action that proceeds in a matter "intolerant of religion," laws that consider the reasons for a person's conduct, or regulations that give government officials—like the commissioner in *Fulton*—the discretion to approve of some secular conduct but not similar religious conduct. *Fulton* and these other recent cases pose an interesting question for environmental advocates: how might a pro-religion—and majority Catholic—Court handle environmental protests ostensibly carried out under the direction of the Supreme Pontiff?

II. POPE FRANCIS AND ENVIRONMENTALISM

Section II.A explains the Pope's position as head of the Catholic Church, his authority on matters of doctrine, and the role of Papal Encyclicals in the Catholic Church. Section II.B explains the importance that Papal Encyclicals have in the Catholic Church, summarizes the encyclical *Laudato Si'*, and argues that Pope Francis's environmental call to action is an essential part of Catholic doctrine.

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76. *Id.* at 534. The relevant provision read: "Rejection of Referral. Provider shall not reject a child or family including, but not limited to . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." *Id.* at 535 (omissions in original).

77. *See id.* at 541.

78. *See id.* at 542.

79. *See* Lund, *supra* note 59, at 858 (emphasis omitted).

80. *See id.*

81. *Fulton*, 593 U.S. at 533.

82. *Id.* (internal quotations and citations omitted).

83. *Id.* at 534.

A. POPE FRANCIS AND THE PAPAL ENCYCLICALS

In the Catholic Church, the Pope—as bishop of the Roman Church—is considered the successor to Saint Peter and the head of the Catholic Church.[84] As the "Roman Pontiff," he "possesses supreme, full, immediate, and universal ordinary power in the Church"[85] and "primacy of ordinary power over all particular churches and groups of them."[86] Consequently, the Pope's teachings carry enormous importance for Catholics worldwide.[87] Though distinct from the doctrine of "papal infallibility," when the Pope proposes teachings on matters of faith and morals, Catholics are nonetheless directed to "adhere to [them] with religious assent."[88] Without wading too deeply into a debate on Catholic Catechism and the extent of Pope Francis's teachings, it suffices to say that when the Pope speaks, Catholics listen.[89]

An encyclical is one of the best ways for the Pope to reach a wide audience of Catholics on matters of importance to the Church. Papal Encyclicals—from the Greek word for "circle"[90]—are pastoral, circular letters sent out from the Pope to the Roman Catholic Church "on matters of doctrine, morals, or discipline."[91] Encyclicals, including those of a social nature, are an important part of Catholic teaching and offer guidance on matters of faith and morality.[92] Encyclicals are more than one man's opinions on matters of morality and spirituality; for example, in *Laudato Si'*, the Pope notes that his encyclical "is now added to the body of the Church's social teaching."[93]

B. *LAUDATO SI'*S ENVIRONMENTAL CALL TO ACTION

In Pope Francis's second encyclical, *Laudato Si'*, the Pope invokes his moral and religious authority to call all of humanity to action to protect the Earth, which Catholics—and indeed many followers of Abrahamic religions generally—believe to be God's creation.[94] Mixing moral pleas with religious scripture, the Pope notes

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84. 1983 CODE c.330–31.

85. *Id.* c.331.

86. *Id.* c.333, §1.

87. *See* CATECHISM OF THE CATHOLIC CHURCH 235–36 (2000).

88. *Id.* at 236.

89. *See* PIUS XII, ENCYCLICAL HUMANI GENERIS OF THE HOLY FATHER ¶ 20 (1950), https://www.vatican.va/content/pius-xii/en/encyclicals/documents/hf_p-xii_enc_12081950_humani-gen eris.html [https://perma.cc/8EM2-5GT7] (describing how Encyclical Letters are exercises of the Pope's teaching authority); *see also* Pedro Rodriguez, *The Nature of Papal Primacy*, EWTN, https://www.ewtn.com/catholicism/teachings/nature-of-papal-primacy-228 [https://perma.cc/LCL2-SJKQ] (last visited Sept. 2, 2024) (discussing papal primacy and Vatican Council I's affirmation of the Pope's authority as well as "the resulting obligation to obey him").

90. *What Is an Encyclical?*, PAPAL ENCYCLICALS ONLINE, https://www.papalencyclicals.net/encyclical [https://perma.cc/K36R-F3ZU] (Feb. 20, 2020).

91. *Encyclical*, BRITANNICA, https://www.britannica.com/topic/encyclical [https://perma.cc/TV2G-3T79] (last visited Sept. 3, 2024).

92. *See* Tomás Insua, *What Is an Encyclical?*, LAUDATO SI' MOVEMENT (June 1, 2021), https://laudatosimovement.org/news/what-is-an-encyclical/ [https://perma.cc/WXT3-CXHG].

93. Francis, *supra* note 10, at 13.

94. *See id.* at 174.

the "global environmental deterioration"[95] and calls on us to "acknowledge the appeal, immensity and urgency of the challenge we face."[96] Notably, the encyclical acknowledges the "human roots of the ecological crisis"[97] and claims that climate change is "one of the principal challenges facing humanity in our day."[98] The Pope posits that the ecological crisis is more than a mere secular issue, explaining that "[l]iving our vocation to be protectors of God's handiwork is . . . not an optional or a secondary aspect of our Christian experience."[99] Indeed, by concluding his encyclical with two prayers, including one addressed to Christians to "ask for inspiration to take up the commitment to creation,"[100] the Pope emphasizes the religious mandate to protect the environment.

If *Laudato Si'* were merely a secular or philosophical call to action, then those protesters acting on its words would have a weaker argument that their actions constitute religious expression. However, the Pope makes numerous biblical references, noting that humans "are dust of the earth"[101] and "made in God's image and likeness."[102] Moreover, he points out that the Bible tells Christians to "'till and keep' the garden of the world,"[103] meaning humanity is charged with a "duty to protect the earth and . . . ensure its fruitfulness for coming generations."[104] Pope Francis states that "[c]learly, the Bible has no place for a tyrannical anthropocentrism unconcerned for other creatures."[105] In a 2015 speech, given shortly after *Laudato Si'* was published, the Pope called on people "to cry out, to mobilize and to demand—peacefully, but firmly—that appropriate and urgently-needed measures be taken" and asked them "in the name of God, to defend Mother Earth."[106] In sum, Pope Francis makes three major statements which, taken together, may inspire religious Catholics to act: first, he acknowledges the human origins of the environmental crisis; second, he establishes a mandatory religious duty to protect the Earth; and finally, he urges humanity to protect the planet "in the name of God."[107] After reading *Laudato Si'*, a pious Catholic could plausibly believe that taking pro-environmental action, for example in the form of a protest, may be a form of religious worship, and one could even argue that in light of the Pope's position, it is a *mandatory* part of a Catholic's religious experience.

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95. *Id.* at 4.
96. *Id.* at 13.
97. *Id.* at 31.
98. *Id.* at 20.
99. *Id.* at 159.
100. *Id.* at 177–78.
101. *Id.* at 3 (citing *Genesis* 2:7).
102. *Id.* at 47 (citing *Genesis* 1:31).
103. *Id.* at 49 (quoting *Genesis* 2:15).
104. *Id.*
105. *Id.* at 50.
106. Francis, Address of the Holy Father at the Second World Meeting of Popular Movements (July 9, 2015), https://www.vatican.va/content/francesco/en/speeches/2015/july/documents/papa-francesco_20150709_bolivia-movimenti-popolari.html [https://perma.cc/FX4J-X4SG].
107. *Id.*

III. ENVIRONMENTAL PROTESTS AS PROTECTED RELIGIOUS EXERCISE

Because *Laudato Si'* is a religious directive or instruction for Catholics to protect the Earth, it should therefore be considered their religious practice to conduct certain environmental protests. This Part argues that some of these protests should be protected under the Free Exercise Clause of the First Amendment. Moving from the "easiest" defenses to the "hardest," this Part attempts to ascertain which environmental protests would and would not be defensible under the Free Exercise Clause by analyzing how different scenarios—some hypothetical and some drawn from real events—would turn out if the defendants raised a Free Exercise Clause defense.[108] Section III.A starts with an easy example where the defense is likely to succeed: a hypothetical case drawn from *United States v. Hoffman*,[109] where the court actually ruled for the defendants based on their religious beliefs. Section III.B argues that the defense should apply to a hypothetical, environmental-based version of recent protests in the Hart Senate Office Building. Section III.C finds that the Free Exercise Clause defense may be limited in its ability to protect the actions of four Catholic Worker[110] activists who turned valves on a pipeline to stop the flow of oil. Finally, Section III.D analyzes how the Free Exercise Clause defense may not protect Catholic Workers who sabotaged the Dakota Access Pipeline. Each subsection will explain how the defendants' conduct was motivated by religious belief, assess how the violated law could be considered either not neutral or not generally applicable, and determine whether the law could survive strict scrutiny.

A. *HOFFMAN* HYPOTHETICAL

The first hypothetical case will be somewhat loosely based on *Hoffman*, in which the defendants argued that their prosecution was barred by the Religious Freedom Restoration Act of 1993 (RFRA).[111] Although the RFRA only protects against *federal* actions and was held unconstitutional as applied to the states,[112] it recognizes the *Sherbert–Yoder* compelling interest test[113] and therefore provides

108. Due to a dearth of environmental cases in which the Free Exercise Clause has been raised as a defense, this Note analyzes hypothetical cases and situations based on real facts as if the defendants had raised the Free Exercise Clause defense proposed here.

109. 436 F. Supp. 3d 1272 (D. Ariz. 2020).

110. Founded by Dorothy Day and Peter Maurin in 1933, the Catholic Worker Movement is "motivated by the teachings of Jesus . . . the Catholic Church . . . and the social encyclicals of the modern popes." Tom Cornell, *A Brief Introduction to the Catholic Worker Movement*, CATH. WORKER MOVEMENT (Sept. 11, 2005), https://catholicworker.org/cornell-history-html/ [https://perma.cc/3Q8M-GSDF]. Stressing voluntary poverty, Catholic Workers are known for providing food, clothing, and shelter in their "houses of hospitality" as well as nonviolent protests "against racism, unfair labor practices, social injustice and war." Jim Forest, *What Is the Catholic Worker?*, CATH. WORKER MOVEMENT (Dec. 1, 1997), https://catholicworker.org/forest-history-html/ [https://perma.cc/2PAF-WKH8].

111. *Hoffman*, 436 F. Supp 3d at 1277; 42 U.S.C. § 2000bb.

112. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695 (2014).

113. *See Hobby Lobby*, 573 U.S. at 694–95.

a helpful framework for assessing free exercise claims in light of the Court's recent jurisprudence.[114] In *Hoffman*, the defendants trespassed onto the Cabeza Prieta National Wildlife Refuge (the Refuge) without a permit, went down a restricted road, and left "supplies of food and water in an area of desert wilderness where people frequently die of dehydration and exposure."[115] The defendants were charged with entering the Refuge "without a permit," abandoning property, and "driving in a wilderness area" in violation of various federal regulations.[116] They were volunteers with "No More Deaths," a humanitarian aid organization which provides aid to immigrants traveling across the desert and also serves as the "ministry of the Unitarian Universalist Church of Tucson."[117]

Suppose that in this hypothetical the defendants were on a state-owned refuge rather than federal property, and thus violated analogous state laws.[118] Further, imagine that the location in question was a forest that was to be cut down by loggers and was the site of an environmental protest. Instead of bringing food and water for famished immigrants, suppose the volunteers trespassed to leave supplies for the environmental protesters. If these hypothetical defendants were charged in state court—and therefore the RFRA was unavailable—how would they fare if they argued that their prosecution violated the Free Exercise Clause?

The first bar the defendants would have to clear is demonstrating that the belief at issue is *religious* rather than secular, philosophical, or personal, and that the belief is sincere.[119] In theory, this should not be too hard for the defendants to show. The Supreme Court has interpreted this requirement rather loosely,[120] and if these defendants professed to believe that protecting the Earth was a religious command from the Pope, this would likely qualify as a religious belief. As illustrated in Section II.B, there is a strong argument that a duty to protect the Earth is a valid, and arguably essential, part of Catholicism. Moreover, in *Hoffman*, the court noted that the defendants were associated with a humanitarian aid "ministry" of the Unitarian Universalist Church and that providing humanitarian aid could be considered a form of exercising their faith.[121] Likewise, in this analogous case, if the defendants were associated with a Catholic environmentalist

114. *See supra* Section I.C.

115. 436 F. Supp. 3d at 1276–77.

116. *Id*. at 1278.

117. *Id*. at 1277.

118. This hypothetical replaces federal land and laws with analogous state land and laws because under state law, the defendants would not have the benefit of invoking the RFRA, which only protects against *federal* actions. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695 (2014). This subsection argues that applying modern free exercise jurisprudence to a similar set of facts should protect similarly situated defendants accused of violating state law.

119. *See* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

120. *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981) (stating that beliefs "need not be acceptable, logical, consistent, or comprehensible to others" to merit protection under the Religion Clauses); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 834 (1989) (holding that belonging to an organized religion is not a prerequisite for the protection of the Free Exercise Clause).

121. 436 F. Supp. 3d at 1281–82.

group, such as the Laudato Si' Movement, that would strengthen their argument that their actions were religious in nature.

Having passed the "sincerely held religious belief" portion of the test, the defendants would argue that the laws are not facially neutral and generally applicable. Where a law is not facially neutral or is not generally applicable as required by *Smith*, the court will conduct a strict scrutiny analysis.[122] 50 C.F.R. § 26.22(b), which the defendants (in the real case) were accused of violating, requires a Refuge "entrant to (1) obtain a permit and (2) follow the permit's terms and conditions."[123] On its face, this seems neutral and generally applicable; after all, any entrant would need to comply with those terms. However, recall from *Yoder* that a facially neutral regulation may "in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[124] The court in *Hoffman* recognized this issue as well, pointing out that because the permit "explicitly prohibited leaving food and water" the defendants "could not have exercised their religious beliefs . . . without violating the permitting regulation."[125] If the defendants needed to bring food and water to the environmental protesters to exercise their religion but the "damned-if-you-do, damned-if-you-don't" nature of the permit made it impossible for them to both comply with the regulation and exercise their religion, then the law might *not* be facially neutral and generally applicable.[126] After all, under *Tandon*, regulations "trigger strict scrutiny under the Free Exercise Clause . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[127] As mentioned in Section I.C, litigants can shift the level of generality of the regulation to find a secular activity against which to compare the prohibited religious activity.[128] If the regulation requiring the permit treats religious activity, e.g., leaving food and water to support environmental protesters, worse than *any* secular activity, e.g., getting a permit to research wildlife, then strict scrutiny may apply. Indeed, the court in *Hoffman* noted that "[m]embers of the public are also

122. *See* Tandon v. Newsom, 593 U.S 61, 62 (2021) (per curiam).

123. *Hoffman*, 436 F. Supp. 3d at 1287.

124. *Yoder*, 406 U.S. at 220. The Court approved of the *Sherbert–Yoder* test in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–95 (2014), and the reasoning of the test is still applicable in light of the Court's recent analyses in *Fulton* and *Tandon*. *See supra* Section I.C.

125. *Hoffman*, 436 F. Supp. 3d at 1287.

126. As a counterpoint, one could argue that the protesters could go somewhere else—e.g., a state without such laws—to protest, so they do not *need* to protest on the Refuge. The defendants could respond that traveling to protest elsewhere is not the same as protesting in their local area, which may have greater spiritual meaning to them. The petitioners in *Roman Catholic Diocese* or *Tandon* theoretically could have gone to a state without gathering limitations to pray, but this would have unconstitutionally burdened them. The Court in *Roman Catholic Diocese* stated that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," also noting that remote viewing of Mass is not equivalent to personal attendance. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020) (per curiam) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). The defendants could cite this decision for the theory that restricting where they can engage in religious exercise via protest is similarly unconstitutional.

127. *Tandon*, 593 U.S at 62.

128. *See* Lund, *supra* note 59, at 854–55.

regularly granted permission to drive on restricted-access roads for research or other purposes."[129]

Given the Roberts Court's capacious understanding of the Free Exercise Clause,[130] the regulation at issue here would need to meet the exacting standards of strict scrutiny. That is, the government would need to show a compelling interest *and* that the regulation is narrowly tailored to meet that interest.[131] In *Hoffman*, one of the government's purportedly compelling interests was to maintain the Refuge's "pristine nature";[132] that is, the government was concerned with litter and debris left behind by visitors. This is a plausible compelling interest for the government in this hypothetical case too, but given that the defendants left food and water for the purpose of assisting protesters in *protecting* the forest, the compelling interest seems much weaker. Furthermore, the defendants could mitigate their "abandoning" of supplies by picking up trash in the forest as was done in *Hoffman*.[133]

If a court found the government's interest in keeping the forest trash free compelling, it would then need to ask, "Is the regulation narrowly tailored?" This standard requires the government to use the "least restrictive means available" to advance its compelling interest.[134] Again, compared to the real defendants in *Hoffman*, there would be a strong argument that disallowing the religious visitors from leaving *any* supplies for the environmental protesters is not the least restrictive means of achieving the government's interest in preserving the "pristine nature" of the forest at issue. For example, the government could allow visitors to leave food and water in designated areas but require them to return to remove trash periodically.[135] Overall, this hypothetical should likely come out in favor of the defendants because the government's interest in protecting a forest that will be cut down is probably not compelling, and, even if it were, a blanket ban on leaving supplies would not be the "least restrictive means" of accomplishing it. Indeed, in *Hoffman* the court ruled similarly, finding that the government had failed to demonstrate a compelling interest, and even if there were a compelling interest, the government had not used the least restrictive means to accomplish it.[136] Therefore, the court found that the application of the regulation against the defendants violated the RFRA and accordingly reversed their convictions.[137] In

129. *Hoffman*, 436 F. Supp. 3d at 1288.

130. *See supra* Section I.C.

131. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 18 (2020) (per curiam).

132. *Hoffman*, 436 F. Supp. 3d at 1287.

133. *See id*. at 1288.

134. *See Roman Cath. Diocese*, 592 U.S. at 21 (Gorsuch, J., concurring); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring).

135. *See Hoffman*, 436 F. Supp. 3d at 1289 (finding that defendants' suggested alternate means would allow government to meet compelling interest without restricting religious exercise).

136. *Id*.

137. *Id*. This was an easy case for the defendants because they had the benefit of the RFRA; defendants in state court cannot use the RFRA because it was ruled unconstitutional as applied to the states. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695 (2014).

the environmental protest context, a court faced with a similar defense involving *constitutional* rights to free exercise, rather than statutory rights under the RFRA, should find that the defendants' actions were constitutionally protected.

B. HUMAN CROSS IN THE CAPITOL

On November 9, 2023, five Catholic protesters were arrested in the Hart Senate Office Building (the Senate building) while calling on Congress to support an Israel–Hamas ceasefire.[138] The protesters, in a group of approximately thirty, gathered, "formed a semicircle together," "spoke about the killing of civilians in Gaza, and urged members of Congress to call for a cease-fire."[139] Though the protesters had originally planned to say prayers and listen to speakers, U.S. Capitol Police officers arrived and read them warnings, indicating that those who did not intend to be arrested should move.[140] Subsequently, five "activists laid on the ground in the form of a cross, and were then arrested and escorted away."[141] Hypothetically, would the Free Exercise Clause protect these Catholic activists if they had instead been protesting to bring attention to climate change and to ask Congress not for a ceasefire, but an end to America's reliance on fossil fuels?

As in the prior hypothetical, the defendants would have an easy time demonstrating that their beliefs were of a religious, rather than secular, nature. First, some of those involved were members of Catholic groups, such as the Catholic Worker Movement and the Franciscan Action Network.[142] Second, the group had planned to pray towards their objectives;[143] similar to activists praying for the release of hostages, it is very plausible to suppose that Catholic environmental protesters would pray to end reliance on oil and stop climate change.[144] Finally, when confronted by the U.S. Capitol Police, the activists laid down in the form of a cross and allowed themselves to be arrested.[145] Using the symbol of Jesus Christ's self-sacrifice to indicate that the protesters, themselves, were willing to sacrifice their freedom for their cause is strong evidence that their actions were religiously based.

The defendants would next have to show that the law is either not facially neutral or not generally applicable.[146] In this case, they were arrested for violating

138. Aleja Hertzler-McCain, *5 Catholic Activists Arrested at US Capitol as Part of Protest for Israel-Hamas Cease-Fire*, NAT'L CATH. REP. (Nov. 10, 2023), https://www.ncronline.org/news/5-catholic-activists-arrested-us-capitol-part-protest-israel-hamas-cease-fire [https://perma.cc/RKX5-NC28].

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.* The Franciscan Action Network is a "collective Franciscan voice seeking to transform United States public policy related to peace making, care for creation, poverty, and human rights." *About*, FRANCISCAN ACTION NETWORK, https://franciscanaction.org/about/ [https://perma.cc/ZW7T-XS9D] (last visited Sept. 6, 2024).

143. Hertzler-McCain, *supra* note 138.

144. *See supra* Section II.B (noting that Pope Francis ended *Laudato Si'* with prayers).

145. Hertzler-McCain, *supra* note 138.

146. *See supra* Sections I.B, III.A.

§ 22-1307 of the Code of the District of Columbia[147] because, according to the U.S. Capitol Police, they had been "illegally protesting inside a Congressional Office Building."[148] Like the regulation in *Hoffman*, this law initially seems generally applicable and facially neutral, but as applied to the Catholic activists in our hypothetical, it is arguably *not*. As in the previous hypothetical, it would be impossible for Catholics who feel it is their religious duty to combat climate change to follow this law while also exercising their religion.[149] Even peacefully sitting down, if done to convince the public of something, is criminalized,[150] and it may help the defendants' argument that they were arrested only after lying down and arranging themselves into the shape of a cross.[151] Moreover, relying on *Tandon* and *Fulton*,[152] the defendants could point to numerous secular examples where the Senate building was crowded for one reason or another, but only the religious activity here has been persecuted.[153] Because secular exceptions undermine the government's interest in the same way that banned religious conduct does, it indicates the law is not generally applicable.[154] Furthermore, even *Smith* kept strict scrutiny alive in "hybrid" situations where another constitutional protection—like freedom of speech, in this case—was implicated.[155] Strict scrutiny should therefore apply here, either because the law is not facially neutral and generally applicable or because it is a hybrid case involving both the Free Exercise Clause and freedom of speech.

The burden would then shift to the Government to show that the law is narrowly tailored to serve a compelling interest. The defendants would probably concede that the federal government and District of Columbia have a compelling interest in preventing protesters from blocking senators' offices and the entrances or exits to government buildings. However, the defendants would have a strong argument that this statute is *not* narrowly tailored using the "least restrictive means available" to achieve the governmental interest. Subsection 22-1307(a)(1) of the Code of the District of Columbia makes it unlawful for a person or group "[t]o crowd, obstruct, or incommode" a street, building entrance, or the use of passages through certain public spaces.[156] Additionally, subsection (b)(1) makes

147. D.C. CODE § 22-1307 (2013).

148. Hertzler-McCain, *supra* note 138.

149. *See supra* note 126. The argument here is arguably stronger because, for Americans, the key location where they can protest *federal* policies is in *federal* buildings. Calling and writing one's congressperson does not have the same impact as being physically present to voice discontent over the climate catastrophe. Granted, climate change is a global problem, but if one believes they have a moral and religious duty to protest their federal government's involvement in fossil fuels, it might be essential to protest in and around federal buildings.

150. § 22-1307(b)(2).

151. Hertzler-McCain, *supra* note 138.

152. *See supra* Section I.C.

153. In fact, the Author was in the Senate building a week before the protest at issue and noticed tours being given throughout the building.

154. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 534 (2021).

155. *See supra* Section I.B.

156. D.C. CODE § 22-1307(a)(1).

it illegal to engage in a demonstration "where it is otherwise unlawful to demonstrate" and to continue doing so after being instructed by law enforcement to cease demonstrating.[157] Under subsection (b)(2), the term "demonstration" is defined broadly and includes "marching, congregating, standing, sitting, lying down, parading, demonstrating, or patrolling . . . for the purposes of persuading someone . . . or to protest some action, attitude, or belief."[158] Banning a small crowd from gathering peacefully and reciting prayers hardly furthers the government's interest in allowing access to and from government buildings. For example, the images in the National Catholic Reporter article[159] show that anyone passing through the Senate building would hardly have been encumbered by the group of roughly thirty activists; in fact, there were nearly as many police officers in the area as there were activists.[160] This illustrates that the statute could be more narrowly tailored to prevent people from engaging in violent protests, fully blocking access to federal buildings, or otherwise disrupting government functions. As written, therefore, the statute may be unconstitutionally broad and, like the commissioner's exemption authority in *Fulton*,[161] ought to include a religious exemption for the peaceful protests that occurred here. Because the statute restricts constitutionally protected religious exercise and freedom of speech, is not facially neutral and generally applicable, and is not narrowly tailored to meet the government's compelling interest, it should be held unconstitutional as applied to the defendants.

C. THE FOUR NECESSITY VALVE TURNERS

Trespassing on state or federal property which is legally accessible with a permit is one thing, but it seems less likely that the Free Exercise Clause defense goes so far as to protect protesters whose actions cause physical or economic damage. In 2019, four Catholic Workers, known as the "Four Necessity Valve Turners" in reference to the necessity defense,[162] "took necessary, non-violent action to address the climate crisis by turning off the valves of Enbridge Energy

157. *Id.* § 22-1307(b)(1).

158. *Id.* § 22-1307(b)(2).

159. Hertzler-McCain, *supra* note 138.

160. There were twenty-two officers present, by the Author's count.

161. *See supra* Section I.C.

162. In the context of civil disobedience such as environmental protests, the "necessity defense asserts that breaking the law was justified in order to avert a greater harm that would occur as a result of the government policy the offender was protesting." John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 111 (2007). The necessity defense is an affirmative defense whereby the defendant does not deny the wrongdoing but argues "that it was *necessary* to commit the crime." Joseph Rausch, *The Necessity Defense and Climate Change: A Climate Change Litigant's Guide*, 44 COLUM. J. ENV'T L. 553, 560 (2019). While some states have codified the defense and others recognize it through common law, there is no federal statute or explicitly recognized necessity defense. *See id.* at 561–62. However, some federal circuits, such as the Ninth Circuit, recognize four elements to the defense: "(1) [the defendants] were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law." *Id.* at 562–63.

oil pipelines" in northern Minnesota.[163] The Valve Turners were charged under state law with "aiding and abetting criminal damage to property under $500"[164] for "cutting the locks on an emergency cut-off valve in the pipeline, and then manually turning the valve closed."[165] Unfortunately, the court denied the necessity defense, citing that harm was not "imminent."[166] Ultimately, the defendants were found guilty, fined $75, and given a stayed sentence.[167] While the necessity defense did not sway the judge in this case, could a genuinely Catholic, faith-based protest group like the Four Necessity Valve Turners justify their actions under the Free Exercise Clause?

Here, the defendants would again have a reasonably strong argument that their beliefs were religious in nature. First of all, the Valve Turners were Catholic Workers, and multiple protesters ascribed religious motivation to their actions.[168] For example, Brenna Anglada specifically cited *Laudato Si'* as affirming her choice to take responsibility for climate change,[169] and during oral argument cited her faith as inspiration for her actions.[170] Michele Nar-Obed noted that she "followed God's laws . . . in direct opposition to our nation's laws" and that rather than intending to break the law, she intended "to fulfill the spirit of the law which is to safeguard and protect the human family, God's creation and the common good."[171] A court should find that these defendants have sincerely held religious beliefs because: (1) they are Catholics who have devoted their lives to the Catholic Worker Movement, and (2) their religious beliefs inspired these actions.

The defendants may have a tougher time arguing that the law is not facially neutral or generally applicable. Unlike in *Hoffman*, there is not an obvious secular alternative against which to compare the "religious exercise" of a protest that involved trespassing and turning off oil valves. Furthermore, this case seems unlike *Roman Catholic Diocese* and *Tandon*, where activities like acupuncture and manufacturing were exempt from regulations but attending church

163. *About*, FOUR NECESSITY VALVE TURNERS (Feb. 4, 2019), https://4necessitymn.wixsite.com/valveturners/about [https://perma.cc/L9NV-UFPD]. The defendants explained that the necessity defense was analogous to arguing, as an affirmative defense against charges of breaking and entering, that breaking the window of a locked car to prevent a child from overheating justified this otherwise illegal action. *See Trial Day 1: Jury Selection*, FOUR NECESSITY VALVE TURNERS (July 6, 2021), https://4necessitymn.wixsite.com/valveturners/post/trial-day-1-jury-sellection [https://perma.cc/D9XZ-NEMG].

164. *Day 3: Verdict*, FOUR NECESSITY VALVE TURNERS (July 11, 2021), https://4necessitymn.wixsite.com/valveturners/post/day-3-verdict [https://perma.cc/5DJB-8K5V].

165. Eric Holthaus, *Valve Turners Try to Shut Off Minnesota Pipelines, Say 'Politicians Won't Act,'* GRIST (Feb. 5, 2019), https://grist.org/article/valve-turners-try-to-shut-off-minnesota-pipelines-say-politicians-wont-act/ [https://perma.cc/L6VE-H3P3].

166. *Day 3: Verdict*, *supra* note 164.

167. *Id.*

168. *About*, *supra* note 163.

169. *See* Brenna Cussen Anglada, *Brenna*, FOUR NECESSITY VALVE TURNERS, https://4necessitymn.wixsite.com/valveturners/brenna [https://perma.cc/F9AV-JP63] (last visited Sept. 6, 2024).

170. *See Day Two: Oral Argument*, FOUR NECESSITY VALVE TURNERS (July 7, 2021), https://4necessitymn.wixsite.com/valveturners/post/day-two-oral-argument.

171. Michele Naar-Obed, *Michele*, FOUR NECESSITY VALVE TURNERS, https://4necessitymn.wixsite.com/valveturners/michele [https://perma.cc/R7F8-USE8] (last visited June Sept. 6, 2024).

or synagogue was not.[172] The religious exercise burdened in those cases was the common, otherwise legal, practice of attending religious services rather than the trespassing on and destruction of property at issue here.

Still, there are two plausible arguments the defendants could raise. First, they could try to find local examples involving other individuals who cut a lock and trespassed without being prosecuted. For example, perhaps some teens cut a lock, trespassed onto their local high school to hang out, and then turned on a hose in freezing weather, causing some minor damage. If the defendants could find multiple examples where other similar violations were not charged, then they could argue that a "comparable secular activity" has been treated "more favorably than religious exercise."[173] Second, there could be comparable exemptions in place for emergencies whereby it would be permissible to cut the lock and shut off the valves to prevent damage to the pipeline.[174] At first glance, these arguments seem rather tenuous, but recall that *Fulton* held the Free Exercise Clause was violated when the government had the ability to hypothetically grant exemptions and failed to grant one for the religious actor.[175] Thus, *Fulton* may require an exemption for a banned religious behavior when there is a hypothetical exemption the government could choose to allow—here, an exemption to close valves in an emergency, like the unspecified exemptions available in *Fulton*. The regulations at issue here are certainly more generally applicable and facially neutral than in the *Hoffman* hypothetical, but under the *Tandon* and *Fulton* standards, a court could plausibly find that strict scrutiny applies.

Minnesota, and indeed any government, has a clear and compelling interest in preventing people from intentionally damaging each other's property without their consent.[176] The Valve Turners' best argument would be that the regulation, as written, is not narrowly tailored. The subsection that the defendants were convicted of violating forbids intentionally damaging property "under *any* other circumstances" than those specifically enumerated in the felony subsections of the statute.[177] Surely, the defendants might argue, intentionally "damaging" others' property cannot be forbidden under *any* circumstances because there are circumstances where it may be justified. As written, a statute banning *any* intentional damage to property under *any* circumstances is arguably not the "*least* restrictive" means of achieving the state's compelling interest in protecting personal property. The defendants' harm to property was relatively minor, as was their

172. *See supra* Section I.C.

173. Tandon v. Newsom, 593 U.S. 61, 62 (2021) (per curiam).

174. This starts to sound like the "necessity defense," which the court rejected in this case because the climate catastrophe was not sufficiently "imminent." See *supra* note 162 for a description of the necessity defense. However, *this* defense asserts that it is unconstitutional to grant an exemption for the secular activity (turning off a valve to stop an emergency at the pipeline) but not the religious activity (turning off the valves to stop climate change).

175. *See* Fulton v. City of Philadelphia, 593 U.S. 522, 542 (2021); *supra* Section I.C.

176. Actions and conduct are, of course, "subject to regulation for the protection of society." *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

177. Minn. Stat. § 609.595, subdiv. 3 (2023) (emphasis added).

sentence,[178] so perhaps a different court would go the other way and decide that the statute was unnecessarily broad in restricting this environmental protest. This is a close case, where the motivations and actions were certainly religious, but the statute prohibiting the conduct seems to be somewhat narrowly tailored towards furthering the state's compelling interest. It is a close call because the infraction in this scenario was relatively minor, but this pro-environmental conduct likely falls outside the protection offered by the Free Exercise Clause.

D. PIPELINES INTO PLOWSHARES

It is unlikely that a court would read the Free Exercise Clause so broadly as to protect dangerous, violent conduct that destroys property and causes widespread damage, even if such actions are taken because of sincerely held religious beliefs. With the goal of preventing water supplies across the country from being contaminated by the Dakota Access Pipeline (the Pipeline), Ruby Montoya and Jessica Reznicek attended hearings, marched, engaged in hunger strikes, and "even locked themselves to the backhoes" used to excavate the Pipeline in an attempt to delay or stop construction.[179] Believing that stopping the Pipeline required more, the two set out on Election Night, in 2016, and set fire to four excavators, a bulldozer, and a large crane.[180] Over the following months, "the women used oxyacetylene torches, tires and gasoline-soaked rags to burn equipment and damage pipeline valves along the line from Iowa to South Dakota," reportedly causing "several millions of dollars' worth of damage and delay[ing] construction for weeks."[181] They pled guilty to "conspiracy to damage an energy facility," and in addition to an eight-year prison sentence, Reznicek must serve three years of supervised probation and pay $3.2 million in restitution.[182] If Reznicek and Montoya had raised the Free Exercise Clause defense described in this Note, would they have had a chance at avoiding prison?

As with the Four Necessity Valve Turners,[183] the defendants here saw themselves as working within the Catholic Worker Movement.[184] They were also associated with the Plowshares movement.[185] While the Catholic Worker Movement

178. They were fined $75 and given a stayed sentence of fifteen days minus time served. *Day 3: Verdict*, *supra* note 164.

179. Julia Shipley, *You Strike a Match: Why Two Women Sacrificed Everything to Stop the Dakota Access Pipeline*, ROLLING STONE (May 26, 2021, 6:45 AM), https://www.rollingstone.com/culture/culture-features/dakota-access-pipeline-eco-sabotage-jessica-reznicek-ruby-montoya-1173735/ [https://perma.cc/82RA-MT4W].

180. *Id.*

181. Claire Schaeffer-Duffy, *Catholic Activist Sentenced for Dakota Access Pipeline Vandalism*, NAT'L CATH. REP. (July 9, 2021), https://www.ncronline.org/earthbeat/justice/catholic-activist-sentenced-dakota-access-pipeline-vandalism [https://perma.cc/8855-4H9A].

182. *Id.*

183. *See supra* Section III.C.

184. *See* Cornell, *supra* note 110; Forest, *supra* note 110.

185. Shipley, *supra* note 179. The Plowshares Movement—named after a passage from the book of Isaiah which references turning "swords into plowshares"—is a Christian pacifist movement focused on nuclear disarmament and using "non-violent direct action and civil disobedience to draw attention to its goals." *The Plowshares Movement*, DEFENDING RTS. & DISSENT, https://www.rightsanddissent.org/

is "firmly within the tradition of nonviolent protest," Plowshares activists, such as the Berrigan brothers, have arguably gone further, physically and symbolically destroying physical property as acts of protest.[186] While their actions may be questionable, and arson is antithetical to the goals of many nonviolent protesters,[187] their actions arguably have a religious or spiritual motivation. Even in terms of the threshold requirement that the beliefs be religious rather than secular in nature,[188] this would be a tougher case than the prior hypotheticals. Was this a violent, secular protest cloaked in religious garb, or was it genuine religious belief that led Montoya and Reznicek to sabotage the Pipeline? The precedent that religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others" to merit protection helps the defendants, but they would still have an uphill climb to defend these actions as protected religious exercise.[189]

Although the federal law under which Montoya and Reznicek were indicted has been "embraced . . . as a way to target environmental activists who engage in property destruction,"[190] it would be incredibly hard to argue that it is not facially neutral or generally applicable as applied to them. The issues discussed in Section III.C apply here as well: there is not a viable secular alternative to the ostensibly religious act of blowing up several pieces of heavy machinery. There is also not an obvious "hypothetical" secular exemption that the defendants could rely on as in *Fulton*. The correct outcome here would be that strict scrutiny does not apply, under *Smith*, and no balancing test need be done.[191] Simply put, where laws are generally applicable and facially neutral, the government can regulate actions "for the protection of society."[192]

Moreover, even if a court were to apply strict scrutiny, it would likely find the law constitutional because there is a compelling governmental interest in preventing arson and the wholesale destruction of critical infrastructure. Could the defendants argue that the law is not narrowly tailored? Perhaps, but the terms of the provision seem sufficiently narrow to accomplish the government's compelling interest in protecting critical infrastructure.[193] The provision prohibits "knowingly and willfully damag[ing] the property of an energy facility," and

news/the-plowshares-movement/ [https://perma.cc/KW8A-XQ3L] (last visited Sept. 6, 2024). The movement began in 1980 after eight activists, including the Berrigan brothers, entered a General Electric plant, beat the nosecones of nuclear missiles with hammers, and poured their own "blood on the nosecones, blueprints and work orders in the facility." *Id.*

186. Shipley, *supra* note 179.

187. *See id.* (describing the Catholic Worker community's internal debates on whether actual destruction of property violates principles of nonviolence).

188. *See* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

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

190. Shipley, *supra* note 179 (noting that the defendants were indicted under a provision of the Patriot Act).

191. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'").

192. *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

193. *See* Federal Anti-Tampering Act, 18 U.S.C. § 1366.

causing more than $100,000 in damages allows for imprisonment of up to twenty years.[194] It is unlikely that a court would find that this statute was not narrowly tailored to meet the government's compelling interest—the government simply must be able to regulate conduct to prevent firebombing private property and the sabotage of critical infrastructure. While the defendants' actions may have been morally understandable to some, they are not legally defensible under the Free Exercise Clause.

CONCLUSION: NOT JUST A HAIL MARY PLAN FOR ENVIRONMENTAL PROTESTERS

Over the last thirty years, two things have dramatically increased: the strength of the Free Exercise Clause and the Earth's temperature. This Note has suggested a means of harnessing the former to make progress towards stopping the latter. Faced with one of the most conservative and religious Courts in America's history, advocates, activists, and environmentalists should use every tool in their arsenal to further their goals. It is this Author's hope that the Free Exercise Clause defense may gain traction alongside the necessity defense and other affirmative defenses for environmental activists who risk prosecution by acting against one of the greatest challenges facing humanity today.

Hypothetical cases based on dramatically changing First Amendment jurisprudence can hardly draw an accurate line for which protests will and will not be protected under the Free Exercise Clause, but this Note has attempted to draw one. Based on Pope Francis's second encyclical, *Laudato Si'*, Catholic environmentalists could plausibly take certain actions and defend them under the Free Exercise Clause. They could assist other nonviolent protesters by leaving supplies and supporting those who may be peacefully assembling, even if this involves trespassing and "abandoning" property. It is likely that they could peacefully assemble and pray that America's leaders work to solve climate change, even if they may be technically obstructing access within public buildings. They likely *cannot* trespass onto private property and cut a lock or chain fence to do so. And they almost certainly cannot destroy so-called critical infrastructure, causing millions of dollars' worth of damage, under the guise of protected religious exercise. Wherever the line separating protected religious conduct from unprotected activities lies, it seems clear that violent, destructive actions are on the unprotected side. On the other hand, religious environmental protesters who peacefully speak out, pray, or assemble to protest for environmental causes have a colorable argument that their actions fall under the aegis of the First Amendment, especially where free speech interests are implicated.

While the analysis in Part III attempted to predict the doctrinally correct outcome based on past Free Exercise Clause cases, that does not mean that the Court would come out the same way in the real world. Sections III.A and III.D represent obvious examples of potentially permissible protests on the one hand and clearly unacceptable and illegal ones on the other, and the Court would probably reach

194. *Id.* § 1366(a).

conclusions similar to those in this Note. On the border is Section III.C, where the infractions were minor but the penalties were too. It seems unlikely that the Court would overturn the conviction—or even agree to hear the case—due to the risk such a precedent might create. If protesters cannot be convicted for trespassing and cutting a lock because they had underlying religious motivations, where does the Court draw the line? Perhaps paradoxically, the more effective a protest is, the less constitutional protection it may receive—mere trespassers who cause minor inconvenience can be protected and ignored, but those who destroy property, however minor, will not be protected. Section III.B presents similar problems, but is perhaps a closer call because the protest was purely nonviolent and the situation implicated other First Amendment concerns, namely freedom of speech, that the Court may want to protect. Even the precedent of *Smith* may call for strict scrutiny in this case, so the Court could plausibly side with the defendants there, albeit on a narrower, "hybrid" freedom of speech and free exercise basis. With a historically pro-religion yet anti-environmental Court, perhaps arguments based on religion would convince the Justices to support climate change and environmental protests. With the protection of the Free Exercise Clause, religion-based environmental protests may have more than a prayer.