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The Intersection Between Animal-Protection Efforts and the Free Exercise Clause

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— Comment —

THE INTERSECTION BETWEEN ANIMAL-PROTECTION EFFORTS AND THE FREE EXERCISE CLAUSE

> "There is something so very dreadful, so Satanic, in tormenting those who have never harmed us, who cannot defend themselves, who are utterly in our power."[1]

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INTRODUCTION

Deep in the largely untouched Siberian wilderness, a wild sable bounds through the snow under cover of cedar and fir trees. The small creature, barely a foot long, has just emerged from its den buried within the forest floor.[2] Its fur, glistening in patches of sunlight through the trees, is highly sought after in the fur market and considered a "luxury

1. MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 15 (2002) (quoting 7 JOHN HENRY NEWMAN, PAROCHIAL AND PLAIN SERMONS 76 (Outlook Verlag 2018) (1839)).

2. *See* Katie Critchfield, *Sable Facts - Animals of Asia*, WORLDATLAS (Apr. 25, 2017), https://www.worldatlas.com/articles/sable-facts-animals-of-asia.html [https://perma.cc/PW3V-3H3L].

item."[3] For this, the small animal has been called a "jewel, . . . superlative in every respect."[4]

At the sudden sight of hunting dogs, the sable freezes in fear. Within moments, the frozen animal is shot, with a hunter aiming intentionally—not necessarily to minimize the sable's pain, but rather to avoid damaging the animal's pelt. In life highly energetic and quick, the sable now lies lifeless on the forest floor. It will soon be skinned of its pelt,[5] and the pelt exported internationally for use in various garments, including the shtreimel, worn by Hasidic Jewish men.[6]

The welfare of religiously used animals in the United States is sorely unprotected as a result of First Amendment limitations. Further, the current progression of Free Exercise Clause jurisprudence does not bode well for broadening these protections—protections which are already received by secularly exploited animals but which are not extended to their religiously exploited counterparts. This Comment will discuss examples of religious uses of animals and animal products in the United States. It will then discuss some animal-protection legislative efforts and how those efforts are forced to coexist with the limitations of the Free Exercise Clause. The result of this—animal-protection legislation with exemptions for religious and spiritual uses of animals—leaves animals severely unprotected from exploitation that would, if secular, be more stringently regulated. Animals used for religious purposes are, consequently, among the most vulnerable groups of animals in the United States.

This Comment will discuss the progression of what it has meant to discriminate against religious exercise and the current state of Free Exercise jurisprudence, focusing on *Employment Division v. Smith*[7] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[8] Attention will then be paid to more recent free-exercise developments, including the enactments of the Religious Freedom Restoration Act of 1993

3. Elena Agarkova, *Preserving the Symbol of Siberia, Moving On: Sobol' and the Barguzinsky Zapovednik (Part I)*, INST. OF CURRENT WORLD AFFS., July 2009, at 1, 1–2, http://www.icwa.org/wp-content/uploads/2015/09/EA-13.pdf [https://perma.cc/XB35-C52T].

4. *Id.* at 2.

5. *Id.* at 3 ("Russian sable is mostly skinned over the mouth, without any incision being made in the body, and the feet and tail are left as part of the fur . . . .").

6. *Id.* at 2 ("[Russia] exported every type of fur available, including sable, fox, squirrel, ermine, beaver and muskrat."); *see infra* notes 73–81 and accompanying text.

7. 494 U.S. 872 (1990).

8. 508 U.S. 520 (1993).

(RFRA)[9] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[10] and the decisions of *Roman Catholic Diocese v. Cuomo*,[11] *Tandon v. Newsom*,[12] *Fulton v. City of Philadelphia*,[13] and others. Finally, this Comment will address the question of what impact, if any, those recent free-exercise developments will have on continued animal-protection-legislation efforts within the context of religious uses of animals and animal products.

I. RELIGIOUS USE OF ANIMALS AND ANIMAL PRODUCTS

Throughout the United States and for centuries, various religious groups have exploited animals and animal products for ceremonies and rituals, sacrifices, garments, and religious practice generally. Judaism and Islam practice specific slaughter methods—kosher[14] and halal,[15] respectively—which differ from conventional, secular slaughter both in terms of process and in terms of the degree of scrutiny they receive under the law. Some religious groups, such as Santería, practice ritual or ceremonial animal sacrifice.[16] A minority of Pentecostal Christians practice snake handling as a means of demonstrating their faith, opening themselves up fully to the risk of venomous snake bites in small congregations in Appalachia.[17] Some orthodox religious groups utilize animal fur in headwear and other traditional religious garments.[18] These are just some of the various forms of animal exploitation in religion. This Comment will address those given examples because of their prominence and prevalence, but of course this list is not exhaustive.

This Comment will begin its discussion of the various religious uses of animals in the United States with that of kosher slaughter, which is perhaps one of the more well-known examples of religious practice involving animals. Kosher slaughter is a fitting place to begin to demonstrate the widespread religious use of animals, since "[t]he modern

9. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb–4), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

10. Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to 2000cc–5).

11. 141 S. Ct. 63 (2020).

12. 141 S. Ct. 1294 (2021).

13. 141 S. Ct. 1868 (2021).

14. *See infra* notes 19–25 and accompanying text.

15. *See infra* notes 40–44 and accompanying text.

16. *See infra* notes 50–55 and accompanying text.

17. *See infra* notes 58–72 and accompanying text.

18. *See infra* notes 73–81 and accompanying text.

American kosher industry represents one of the most visible traditional religious systems of dietary practice in the West."[19]

According to the Jewish faith, keeping kosher "produce[s] a heightened sensitivity to *Hashem's* [God's] creations" and "remind[s] the Jew of some of the ideals of *'kedusha'* [holiness] . . . ."[20] The word "kosher" itself means "untainted, . . . fit, approved, or valid" in Hebrew.[21] Kosher restrictions affect not only slaughter, but rather all stages of food production and consumption.[22] However, for purposes of this discussion, this Comment will focus on the kosher slaughter process. The process of kosher slaughter—or "shechita" in biblical Hebrew[23]—generally involves a quick incision to sever the major structures and vessels of the animal's throat—specifically, the trachea, esophagus, carotid arteries, and jugular veins.[24] The process is performed by a trained slaughterer called a "shochet."[25]

However, kosher-slaughter methods are not entirely uniform. For example, some shochets do perform pre-slaughter stunning of animals, while others refuse to do so, out of concern that the practice may not comply with kashrut (the Jewish dietary laws).[26] Some rabbis have expressly prohibited such pre-slaughter stunning, believing that the stunned animals would not meet Jewish slaughter requirements.[27] It is said by some that pre-slaughter stunning renders the animal non-kosher

19. AARON S. GROSS, THE QUESTION OF THE ANIMAL *AND* RELIGION: THEORETICAL STAKES, PRACTICAL IMPLICATIONS 17 (2015).

20. *Id.* at 22 (quoting Zachary (Rachamim Avraham) Rosenberg, Bar Mitzvah Speech (Shabbos Mevorchim, Parshas Shemini, 5760), *in Dietary Laws in Parshas Shemini*, KOF-K, *archived in* https://web.archive.org/web/20040228173447/http://www.kof-k.org/dietary.htm (archived Feb. 28, 2004) [https://perma.cc/X9NC-UTUX])) (alterations and emphasis in original).

21. Jonathan Cohen, *Kosher Slaughter, State Regulation of Religious Organizations, and the European Court of Human Rights*, 4 INTERCULTURAL HUM. RTS. L. REV. 355, 360 (2009).

22. *Id.* at 360–61.

23. Michelle Hodkin, *When Ritual Slaughter Isn't Kosher: An Examination of Shechita and the Humane Methods of Slaughter Act*, 1 J. ANIMAL L. 129, 129 (2005).

24. *Id.* at 138 (citing SHECHITA UK, A GUIDE TO SHECHITA 5 (2009), https://www.shechitauk.org/wp-content/uploads/2016/02/A_Guide_to_Shechita_2009___01.pdf [https://perma.cc/9EGV-KJW2]).

25. *Id.* at 137.

26. *See* Judy Siegel-Itzkovich, *Pre-slaughter Stun Less Humane than Shechita*, JERUSALEM POST (Jan. 25, 2012, 02:02), https://www.jpost.com/jewish-world/jewish-news/pre-slaughter-stun-less-humane-than-shechita [https://perma.cc/MW7Z-MM9L] (discussing the controversy of shechita methods dictated by law that require pre-slaughter stunning).

27. Cohen, *supra* note 21, at 359.

because "an animal intended for food must be healthy and uninjured at the time of slaughter" in order to be kosher.[28] Ideally, and according to proponents of kosher slaughter, the incision procedure is meant to result in immediate loss of consciousness in the animal.[29] It is based on this assumption and principle that the kosher slaughter method is considered "humane" under federal slaughter legislation.[30] But the reality is that immediate loss of consciousness is not always achieved.[31]

In 2004, controversy arose after a People for the Ethical Treatment of Animals (PETA) investigator exposed particularly inhumane slaughter methods in an Agriprocessors plant in Iowa.[32] The plant was formerly the largest kosher meatpacking plant in the United States.[33] Footage from inside the plant revealed slaughter involving the cutting and tearing of animals' tracheas whilst the animals were inverted, after which the procedure was followed by extended periods of consciousness.[34] Agriprocessors' methods consistently left animals conscious for up to three minutes following the slitting of their throats.[35] As if that were not enough, video also showed these animals subsequently being prodded in the faces with electric rods.[36] The last several minutes of these animals' lives were spent in an unspeakable, harrowing state—

28. Hodkin, *supra* note 23, at 139 (citing SHECHITA UK, *supra* note 24).

29. *Id.* at 138 (citing SHECHITA UK, *supra* note 24).

30. *See infra* Part II.

31. *See infra* notes 35–37 and accompanying text.

32. Cohen, *supra* note 21, at 366.

33. *Id.*

34. *Id.*; GROSS, *supra* note 19, at 31–34. (noting that the element of inverting the animal for slaughter raises welfare concerns not only because of the distress it causes the animal, but also because the act of inversion tends to prolong consciousness after the slaughter procedure).

35. GROSS, *supra* note 19, at 32–34; Donald McNeil, Jr., *Inquiry Finds Lax Federal Inspections at Kosher Meat Plant*, N.Y. TIMES (Mar. 10, 2006), https://www.nytimes.com/2006/03/10/us/inquiry-finds-lax-federal-inspections-at-kosher-meat-plant.html [https://perma.cc/7YYG-NAEQ]. As McNeil described,

> [A]fter steers were cut by a ritual slaughterer, other workers pulled out the animals' tracheas with a hook to speed bleeding. . . . [A]nimals were shown staggering around the killing pen with their windpipes dangling out, slamming their heads against walls and soundlessly trying to bellow. One animal took three minutes to stop moving.

Id.

36. JONATHAN SAFRAN FOER, EATING ANIMALS 69 (2009).

throats slit, still alive, still conscious, still feeling—until they finally succumbed to death.[37]

Based on various witnesses' testimony, it is believed that Agriprocessors had maintained this process of cutting the tracheas and esophagi out of conscious animals for at least six years.[38] Despite this, the U.S. Department of Agriculture (USDA) ultimately never prosecuted Agriprocessors for what it conceded constituted violation of federal slaughter law.[39]

Islam, like Judaism, involves specific slaughter practices. This is a part of the overall practice of halal. Similar to kosher practice, Islamic law dictates how halal animals are to be cared for and eventually slaughtered.[40] Halal means "permissible" in Arabic.[41] Islamic law "requires [that] the animal be dispatched of quickly with a single cut to the neck . . . ."[42] The incision severs the jugular vein, carotid artery, and windpipe, and all blood is then drained from the animal.[43] As

37. *See* Collin Allen & Michael Trestman, *Animal Consciousness*, STAN. ENCYC. OF PHIL., https://plato.stanford.edu/archives/win2020/entries/consciousness-animal/ [https://perma.cc/S3XX-E3EA] (Oct. 24, 2016) ("[T]he position that all mammals are conscious is widely agreed upon among scientists who express views on the distribution of consciousness."); GROSS, *supra* note 19, at 31 ("The procedure at AgriProcessors that attracted the most extreme negative attention was the further cutting and partial removal of the tracheas and esophagi of cattle immediately after shechita and, in at least 20 percent of the cases, while the animals were still sensible and often in visible agony.").

38. GROSS, *supra* note 19, at 33.

39. *Id.* ("While the USDA never chose to prosecute, they did conclude that the Humane Methods of Slaughter Act, a federal law that applies to the slaughter of cattle and pigs, was violated . . . ."). This failure to prosecute could perhaps be explained in part by concern for the "sensitivity of regulating religious rituals" and a desire to avoid the appearance of antisemitism. *See* Alan Cooperman, *USDA Investigating Kosher Meat Plant*, WASH. POST (Dec. 31, 2004), https://www.washingtonpost.com/archive/politics/2004/12/31/usda-investigating-kosher-meat-plant/26e6ae03-7040-4b76-8a2e-52a359e2d531/ [https://perma.cc/72NC-BQHR].

40. Axl Campos Kaminski, *The "Stunning" Reality Behind Halal Meat Production*, 9 ENV'T & EARTH L.J. 32, 34 (2019).

41. James Meikle, *What Exactly Does the Halal Method of Animal Slaughter Involve?*, GUARDIAN (May 8, 2014, 4:55 PM), https://www.theguardian.com/lifeandstyle/2014/may/08/what-does-halal-method-animal-slaughter-involve [https://perma.cc/N7XA-LSXM].

42. Kaminski, *supra* note 40, at 35.

43. Nick Eardley, *What is Halal Meat?*, BBC NEWS (May 12, 2014), https://www.bbc.com/news/uk-27324224 [https://perma.cc/FG9Z-2ZDG].

required for kosher slaughter, the "[a]nimals must be alive and healthy at the time of the slaughter" in order to be halal compliant.[44]

In modern-day halal-slaughter practice, pre-slaughter stunning is utilized in most American halal slaughterhouses.[45] However, as is the case with kosher slaughter, this practice of pre-slaughter stunning is accepted by some Islamic schools of thought and forbidden by others.[46] Unlike kosher slaughter, however, halal slaughter is not performed by extensively trained designated religious slaughterers.[47]

On the whole, animals slaughtered pursuant to kosher and halal methods have significantly less protection under slaughter law than secularly slaughtered animals.[48] The slaughter of these animals exists in a sort of bubble; a darker, more covert space on which the eyes of the law do not linger.[49]

Some religious groups also practice ritual or ceremonial animal sacrifice. Among them is Santería, the religious group at issue in *Church of the Lukumi Babalu Aye v. City of Hialeah*,[50] a case this Comment discusses further in Part IV. Santería is a religion fused from African, Cuban, and Roman Catholic influences.[51] "[O]ne of the principal forms of devotion [in Santería] is animal sacrifice."[52] Sacrifices are performed

44. *Id.*; *Kosher Slaughter Laws and an End to "Shackle-and-Hoist" Restraint*, ANIMAL LEGAL DEF. FUND (Jan. 24, 2015), https://aldf.org/article/kosher-slaughter-laws-and-an-end-to-shackle-and-hoist-restraint/ [https://perma.cc/9K3Q-D7HZ].

45. Kaminski, *supra* note 40, at 36; *see also* Meikle, *supra* note 41 ("[M]ost animals killed by halal methods are stunned before slaughter.").

46. *See supra* note 26 and accompanying text; Kaminski, *supra* note 40, at 36; *but see* Tom Levitt, *What is Non-Stun Slaughter and How is it Treated in UK Law?*, THE GUARDIAN (Oct. 12, 2021), https://www.theguardian.com/world/2021/oct/12/what-is-non-stun-slaughter-and-how-is-it-treated-in-uk-law [https://perma.cc/VNW6-NZA3] ("Figures from the Food Standards Agency (FSA) indicate that in 2018 58% of all halal meat in England was pre-stunned. Shechita, which is the Jewish religious humane method of animal slaughter for food, does not accept pre-stunning.").

47. *See supra* note 25 and accompanying text; Kaminski, *supra* note 40, at 37.; *but see* Eardley, *supra* note 43 ("There are similarities in the method of slaughter in that both [kosher and halal slaughter] require use of a surgically sharp knife and specially-trained slaughtermen."). However, halal slaughterers do need to be Muslim. Meikle, *supra* note 41.

48. Kaminski, *supra* note 40, at 40.

49. *See infra* notes 103–15 and accompanying text.

50. 508 U.S. 520 (1993).

51. *Id.* at 524.

52. *Id.* (citing 13 THE ENCYCLOPEDIA OF RELIGION 66 (Mircea Eliade et al. eds., 1987) (providing details of Santería)).

on various occasions, including births, marriages, and deaths.[53] "Animals sacrificed . . . include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles," and the animals are sacrificed by a severing of the carotid arteries in the neck.[54] The sacrifices are performed by Santerían priests, "apprenticed in the art of sacrifice under other trained priests."[55]

Santería is not alone in involving ritual animal sacrifice,[56] although it certainly seems to be the most prominent modern example of religious animal sacrifice in the United States. This is perhaps due to the Supreme Court bringing this practice to light in *Lukumi.* Still, open and exposed practice of Santería, and of its accompanying animal sacrifice, is not common.[57]

Snake handling is another example of religious practice involving animals.[58] Practiced by some Pentecostal Christians, venomous snake handling is a means of proving followers' absolute faith in God.[59] The practice stems from Mark 16:18, which reads: "They shall take up serpents; and if they drink any deadly thing, it shall not hurt them; they shall lay hands on the sick, and they shall recover."[60] Also considered

53. *Id.* at 525.

54. *Id.*

55. Shannon L. Doheny, *Free Exercise Does Not Protect Animal Sacrifice: The Misconception of* Church of the Lukumi Babalu Aye v. City of Hialeah *and Constitutional Solutions for Stopping Animal Sacrifice*, 2 J. ANIMAL L. 121, 125 (2006).

56. For example, animal sacrifice is mentioned throughout the Old Testament and was present in historical Judaism. *Church of the Lukumi Babalu Aye*, 508 U.S. at 524–25. Cases also demonstrate that "many immigrants continue to practice the animal sacrifices central to the religions of their homelands." Tina S. Boradiansky, Comment, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT'L RES. J. 709, 711 (1990) (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991) (mem.), *rev'd*, 508 U.S. 520).

57. *Church of the Lukumi Babalu Aye*, 508 U.S. at 525; *see also* Doheny, *supra* note 55, at 124 ("Santería is a secretive religion . . . [and] factual certainty regarding most aspects of Santería animal sacrifice is difficult, due to the clandestine nature of the rituals.").

58. Admittedly, this example of religious use of animals differs from the aforementioned examples in the sense that oftentimes it is the humans, rather than the animals, who end up injured (despite many congregants' belief that their "[a]bsolute faith in God . . . protects them from harm."). *See* Julia Duin, *Appalachian Snake Handlers Put Their Faith in God—and Increasingly, Doctors*, NAT'L GEOGRAPHIC (Feb. 1, 2021), https://www.nationalgeographic.com/animals/article/snake-handlers-appalachia-changing-practices [https://perma.cc/N2VY-DYHM].

59. *Id.*

60. *Mark* 16:18 (King James).

relevant to the practice is the passage of Luke 10:19: "I give unto you power to tread on serpents and scorpions, and over all the power of the enemy: and nothing shall by any means hurt you."[61] Those who practice religious snake handling take these passages literally, believing "Jesus's last words to his disciples [to be] a binding injunction on all believers."[62]

Proponents of snake handling regularly accompany the practice with the speaking of tongues, consumption of poison, and handling fire.[63] Religious snake handling is practiced primarily in the Appalachian states, several of which have outlawed the practice.[64] Most modern Pentecostal populations in the United States have denounced snake handling, so the practice today is limited to roughly 125 churches, most of which are rural and remote.[65] The snakes used include local timber and canebrake rattlesnakes, diamondback rattlesnakes, cottonmouths, and copperheads.[66] Exotic snakes are also occasionally purchased at reptile shows for religious serpent-handling purposes.[67]

Particularly traditional followers intentionally reject medical care following serpent bites, believing that seeking medical care "shows a lack of faith in God."[68] But because no Bible verse specifically prohibits seeking medical care following serpent handling, some proponents see no issue with it.[69]

The snakes used in religious snake handling are commonly taken locally from the wild, and when they are occasionally confiscated from Pentecostal churches by animal welfare groups, they are oftentimes "weak" from poor treatment, which may increase their likelihood to bite handlers.[70] These snakes are commonly underfed, dehydrated, confined

61. *Luke* 10:19 (King James).

62. Matthew M. Ball, Note, *Targeting Religion: Analyzing Appalachian Proscriptions on Religious Snake Handling*, 95 B.U. L. REV. 1425, 1428 (2015). Another relevant passage (although not in the sense of supporting the practice of snake handling, but rather in condemning its improper care and handling of snakes) is "[f]or that which befalleth the sons of men befalleth beasts; even one thing befalleth them: as the one dieth, so dieth the other; yea, they have all one breath; so that a man hath no preeminence above a beast: for all is vanity. All go unto one place; all are of the dust, and all turn to dust again." *Ecclesiastes* 3:19-20 (King James).

63. Duin, *supra* note 58.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id. But see* Ball, *supra* note 62, at 1441 ("Herpetologists have suggested that snakes, when kept in captivity and surrounded by humans, become 'tame' and therefore bite less often.").

in inadequate spaces ("snake box[es]"), and experience shorter life spans than is expected for properly cared-for snakes.[71] Those snakes that cannot be brought back to health upon confiscation—dehydrated beyond the point of recovery—are euthanized.[72]

Some orthodox religious groups also utilize animal fur in religious headwear and other religious garments. Hasidic Jewish men, for example, traditionally wear large, circular fur hats called "shtreimels."[73] Similar to the shtreimel is the spodik, another form of Jewish headwear.[74] It is said that those who trace their roots to Poland wear the spodik, while those with roots in Galicia, Hungary, or Romania wear the shtreimel.[75]

In some communities, shtreimels are worn only by married men, whereas in others they are worn following the point of bar mitzvah.[76] For those communities in which the shtreimel is worn following marriage, the shtreimel serves as a "public relationship status update," since Hasidic men don't wear wedding bands.[77] While there are "no official rules as to when the shtreimel is to be worn," it is commonly worn on Shabbat (the Jewish day of rest), on holidays, and at one's wedding.[78] Such hats are typically made from the fur of Canadian or Russian sable, stone marten, pine marten, or American gray fox.[79] It is said that the shtreimel is a means for Hasidic Jews to distinguish

71. Duin, *supra* note 58; *accord* John Burnett, *Serpent Experts Try to Demystify Pentecostal Snake Handling*, NPR (Oct. 18, 2013, 4:12 PM), https://www.npr.org/2013/10/18/236997513/serpent-experts-try-to-demystify-pentecostal-snake-handling [https://perma.cc/Z4P5-GYCG].

72. Duin, *supra* note 58.

73. Vanessa Friedman, *The California Fur Ban and What It Means for You*, N.Y. TIMES (Oct. 14, 2019), https://www.nytimes.com/2019/10/14/style/fur-ban-california.html [https://perma.cc/985T-WCJA]; Danna Lorch, *Shtreimel Styles Are Ruled by Trends as Much As Tradition — Even for Hasidim*, FORWARD, (May 17, 2018), https://forward.com/schmooze/401441/shtreimel-styles-are-ruled-by-trends-as-much-as-tradition-even-for-hasidim/ [https://perma.cc/XQ3J-SRT5].

74. Levi Cooper, *Of 'Spodiks' and 'Shtreimels': The Most Conspicuous Hassidic Garment Is the Fur Hats Sported by the Men*, JERUSALEM POST (July 17, 2014, 13:46), https://www.jpost.com/jewish-world/judaism/of-spodiks-and-shtreimels-363183 [https://perma.cc/ZED7-9V6H].

75. *Id.*

76. *Jewish Concepts: Shtreimel*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/shtreimel (last visited March 22, 2022) [https://perma.cc/V6VP-9T4D].

77. Lorch, *supra* note 73.

78. *Jewish Concepts*, *supra* note 76; Lorch, *supra* note 73.

79. *Jewish Concepts*, *supra* note 76.

themselves from other sects of Judaism.[80] Regardless of when worn, the shtreimel is a sign of connection to God.[81]

How is the genuine animal fur used for these hats acquired? Today, most consumer-use fur comes from farms around the world, exporting fur internationally, rather than from the wild.[82] Mink and fox comprise approximately 80% of this farmed fur.[83] Fur farming involves the practice of breeding and raising certain fur-bearing species in captivity solely for the purpose of utilizing their fur.[84]

In July of 2020, Humane Society International conducted an undercover investigation revealing horrific scenes of an Asian fur farm in which arctic foxes were skinned alive after being beaten with metal rods into semi-consciousness.[85] Even if not subject to such horrific treatment as in that case, animals farmed for their fur live miserable lives. Methods of slaughter in different countries for fur farming varies from anal electrocution to gassing to neck breaking, after which the animals are skinned of their fur.[86] During the animals' lives, they are confined to small, filthy wire cages, with little ventilation or sunlight, and no opportunity to follow their natural behavioral instincts, such as for movement.[87] Mink, for example, which are among the most farmed animals for fur, are "highly territorial, solitary in the wild except during mating time . . . [and] spend their days roaming and swimming."[88] When bred in captivity for their fur, these animals are forced to exist in an environment completely at odds with their natural instincts and behaviors.

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80. *Id.*

81. Cooper, *supra* note 74.

82. *Fur Types in Brief*, FUR COMM'N USA, https://furcommission.com/fur-types-in-brief/ [https://perma.cc/Q37C-NU7Q] (last visited Feb. 21, 2022).

83. *Id.*

84. *Mink Farming Fuels Rural Economies*, FUR COMM'N USA, https://furcommission.com/mink-farming-2/ [https://perma.cc/JP2P-N4VX] (last visited Feb. 21, 2022).

85. Karen E. Lange, *EXPOSED: Undercover Investigation at Fur Farm Shows the Lives Behind the Label*, HUMANE SOC'Y OF THE U.S. (Aug. 31, 2020), https://www.humanesociety.org/news/exposed-undercover-investigation-fur-farm-shows-lives-behind-label [https://perma.cc/JHQ8-8STR].

86. *Id.*; *The Fur Trade*, HUMANE SOC'Y INT'L, https://www.hsi.org/news-media/fur-trade/ [https://perma.cc/F6F8-2TRN] (last visited Feb. 21, 2022).

87. Lange, *supra* note 85; Rachael Bale, *Fur Farms Still Unfashionably Cruel, Critics Say*, NAT'L GEOGRAPHIC (Aug. 17, 2016), https://www.nationalgeographic.com/animals/article/wildlife-china-fur-farming-welfare?loggedin=true [https://perma.cc/QV8W-RSD2].

88. Bale, *supra* note 87.

At sable fur farms, the animals are kept in small sheds in cages, unable to move around for warmth as is their instinct in the wild.[89] As previously mentioned, the fur of sable, or marten, is commonly used for shtreimel production.[90] Although sable is commonly farmed for its fur, the most "exquisite specimens of sable are still found only in the Russian wild."[91] These wild sable pelts are the most sought after in the world.[92] A cousin of the weasel and the mink, sable fur is silkier than its relatives and historically was only worn by royalty.[93] Their fur has been highly coveted since the Middle Ages.[94]

During the hunting season, roughly a quarter of a million sable are killed in the wild, "along with millions of squirrel, mink and a host of other fur-bearing species."[95] This represents approximately a quarter of the total wild Russian sable population—with roughly 75% left as "breeding stock in the wild."[96] In modern times, wild sable occupy only half of their natural geographical range due to overexploitation of the creature in the 17th century.[97] While Russia is considered to have the monopoly on sable, fur production generally is also dominated by Denmark, the United States, Holland, Finland, and China.[98]

One prominent rabbi stated publicly that shtreimels should no longer be made with genuine animal fur and advocated instead for synthetic versions.[99] He claimed that the use of animal fur for shtreimels violated Jewish law, which prohibited causing animals unnecessary pain.[100] Few seem to share his opinion, however. "People continue to

89. Chloe Pantazi, *A BBC Reporter Got a Startling Look Inside a Russian Fur Farm*, BUS. INSIDER (Apr. 27, 2016, 12:23 PM), https://www.businessinsider.com/russias-wild-sable-fur-farms-2016-4 [https://perma.cc/A2KB-4CRA].

90. *Jewish Concepts*, *supra* note 76.

91. Patrick E. Tyler, *Behind the $100,000 Sable Coat, a Siberian Hunter*, N.Y. TIMES, Dec. 27, 2000, at A8, https://www.nytimes.com/2000/12/27/world/behind-the-100000-sable-coat-a-siberian-hunter.html [https://perma.cc/9FYP-VLCA].

92. *Id.*

93. *Id.*

94. Agarkova, *supra* note 3, at 2.

95. Tyler, *supra* note 91.

96. *Id.*

97. Agarkova, *supra* note 3, at 3.

98. Tyler, *supra* note 91.

99. *Rabbi Shlomo Pappenheim Says Traditional Shtreimel Fur Hats Desecrate God's Name Due to Animal Cruelty*, HUFFPOST (Aug. 23, 2013, 7:10 AM), https://www.huffpost.com/entry/rabbi-schlomo-pappenheim-fur-hats-shtreimel-chilul-hashem_n_3799438 [https://perma.cc/5LKY-BRUX].

100. *Id.*

wear shtreimels, even though the cost starts at $1,600 per hat. A law banning the sale of fur is the last thing that will stop us . . . ."[101]

II. FEDERAL ANIMAL-WELFARE LEGISLATION

Although most animal-protection legislation occurs at the state level, various pieces of federal law function together to ensure the maintenance of animal welfare—or at least, to minimize harm against certain categories of animals in some circumstances.[102] One such piece of legislation is the Humane Methods of Slaughter Act of 1978 (HMSA).[103] HMSA provides for two acceptable methods of slaughter: 1) conventional slaughter, "whereby the animal is rendered insensible to pain before death"; and 2) ritual slaughter, "where the animal loses consciousness from hypoxia brought on by loss of blood."[104]

Specifically, HMSA provides that in order to be considered humane slaughter, animals must either be "rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, *before* being shackled, hoisted, thrown, cast, or cut"; or the slaughter must accord with the requirements of a "religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument . . . ."[105] In other words, religious ritual slaughter whereby the animal goes unconscious and bleeds out is not considered an exception to humane-slaughter requirements, but rather is itself considered a humane-slaughter method.[106] Both kosher and halal prescribed methods

101. Mordechai Goldman, *Why Israel's Ultra-Orthodox Are Fighting Fur Ban*, AL-MONITOR (Feb. 21, 2017), https://www.al-monitor.com/originals/2017/02/israel-us-ultra-orthodox-hassidic-fur-hat-knesset-law.html [https://perma.cc/2B2E-ML4G].

102. *Laws that Protect Animals*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/laws-that-protect-animals/ [https://perma.cc/4CCZ-PJFK] (last visited Jan. 7, 2022).

103. Pub. L. 95-445, 92 Stat. 1069, 1069 (amending various sections of U.S. Code titles 7 and 21).

104. Kaminski, *supra* note 40, at 32 (citing 7 U.S.C. § 1906, which cites to 7 U.S.C. § 1902).

105. 7 U.S.C. § 1902(a)–(b) (emphasis added).

106. *See* 7 U.S.C. § 1902 note 2 (LEXIS through Pub. L. No. 117-80) (Notes to Decisions) ("7 USCS § 1902(b) is not exception to § 1902(a); since it is phrased in the disjunctive, statute makes neither (a) nor (b) exception to other; described methods are alternative methods . . . and each one is supported by . . . determination that stated method of slaughter is humane." (citing Jones v. Butz, 374 F. Supp. 1284, 1286–88 (1974), *aff'd*, 419 U.S. 806 (1974) (mem.))).

of slaughter would, ostensibly, comport with this ritual-slaughter definition.[107] This is so despite the fact that cutting off the blood flow to an animal's brain will kill it, but not instantly. It is precisely for this reason that HMSA includes a pre-slaughter stunning mandate for secularly slaughtered animals in the first place.[108]

Furthermore, the conventional-slaughter provision is expressly limited to "cattle, calves, horses, mules, sheep, swine, and other livestock,"[109] which has been found to not include poultry.[110] In other words, despite chickens', turkeys', and other birds' ability to feel pain just like the non-exempted animals, and despite their being among the most-farmed animals in the United States,[111] this federal humane-slaughter legislation provides them no protection whatsoever.[112]

As with poultry, slaughter of fish is also not regulated by HMSA. In fact, no federal law exists to ensure humane slaughter of fish.[113] As astutely written by George Orwell, "all animals are equal but some animals are more equal than others."[114] A review of federal slaughter law suggests that the "mo[st] equal" animals are secularly-exploited swine, cattle, sheep, and other livestock; followed by, interestingly enough, religiously-exploited swine, cattle, sheep, and other livestock; and lastly, least equal of them all, poultry and fish.

HMSA goes on to specify that "in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter."[115] In other words, animals used in the process of ritual slaughter or religious sacrifice receive no protection whatsoever under HMSA, existing in an unregulated bubble, with no federal safeguards to ensure their welfare.

While some animal-science experts believe that properly administered religious slaughter can be "humane," others assert that it is impossible for such slaughter, even if executed precisely, to be as "humane

107. *See* text accompanying *supra* notes 40–49.

108. *See* SAFRAN FOER, *supra* note 36, at 232.

109. 7 U.S.C. § 1902.

110. 7 U.S.C. § 1902 note 2 (LEXIS through Pub. L. No. 117-80) (Notes to Decisions) (citing Levine v. Conner, 540 F. Supp. 2d 1113, 1116–17 (2008), *vacated and remanded on other grounds sub nom.* Levine v. Vilsack, 587 F.3d 986 (9th Cir. 2009)).

111. *Laws that Protect Animals*, *supra* note 102.

112. *See Humane Methods of Slaughter Act*, U.S. DEP'T. AGRIC.: NAT'L AGRIC. LIBR., https://www.nal.usda.gov/legacy/awic/humane-methods-slaughter-act [https://perma.cc/62ZQ-MBVL] (last visited Jan. 7, 2022); *Levine*, 540 F. Supp. at 1116–17.

113. SAFRAN FOER, *supra* note 36, at 190.

114. GEORGE ORWELL, ANIMAL FARM 112 (1946).

115. 7 U.S.C. § 1906.

as well-conducted conventional slaughter."[116] Author Peter Singer wrote that, while "[a]t the time this [religious] method of slaughter was laid down in Jewish law it was probably more humane than any alternative; now, however, it is less humane, under the best circumstances, than, for example, the use of the captive-bolt pistol to render an animal instantly insensible."[117]

Congress enacted the Animal Welfare Act (AWA) in 1966.[118] AWA is considered the "primary federal animal protection law"[119] and applies in far broader circumstances than HMSA, as it sets "standards for the humane care and treatment for certain animals that are exhibited to the public, sold for use as pets, used in research, or transported commercially."[120] AWA directs the Secretary of the USDA to set minimum standards regarding animal "handling, care, treatment, and transportation."[121]

However, despite its broader application, AWA still contains significant gaps. The following animals are not covered by AWA: farm animals used for food or fiber (such as fur); coldblooded species; fish; invertebrates; and certain birds, rats, and mice bred for use in research.[122] "Animal" is defined instead as including "any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet."[123]

One section of AWA, for example, prohibits the exhibition of an animal in an "animal fighting venture," as well as the knowing sale, possession, training, transportation, delivery, or receipt of any animal for purposes of having it participate in an animal-fighting venture.[124] Section 2160, entitled "Prohibition on slaughter of dogs and cats for human consumption" makes illegal the knowing slaughter of a cat or

116. Kaminski, *supra* note 40, at 36; *see also* Levitt, *supra* note 46 ("In general, there is consensus among vets that non-stun methods of slaughtering livestock are worse for welfare.").

117. PETER SINGER, ANIMAL LIBERATION 153–54 (updated ed. 2009).

118. Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (1966) (codified as amended at 7 U.S.C. §§ 2131–2156).

119. *Laws that Protect Animals*, *supra* note 102.

120. *Animal Welfare Act*, U.S. DEP'T OF AGRIC.: ANIMAL & PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa [https://perma.cc/P6D6-2MLB] (last modified Jan. 12, 2022).

121. *Laws that Protect Animals, supra* note 102 (quoting Animal Welfare Act § 13, 80 Stat. at 352 (codified at as amended at 7 U.S.C. § 2143)).

122. *Animal Welfare Act*, *supra* note 120.

123. 7 U.S.C. § 2132(g).

124. *Id.* § 2156(a)–(b).

dog for human consumption, as well as the knowing shipping, transporting, delivering, possessing, purchase, or sale of a dog or cat for human consumption.[125] That section explicitly creates an exception for American Indian tribes, however, in "carrying out any activity [prohibited by this section] for the purpose of a religious ceremony."[126]

Another example of federal legislation which protects animals is the Endangered Species Act of 1973 (ESA).[127] The ESA obligates the Secretary of the Interior to classify species as "endangered species or a threatened species,"[128] and to further "issue such regulations as [s]he deems necessary and advisable to provide for the conservation of such species."[129] The ESA prohibits the taking of endangered species, except under narrow statutory exemptions, and orders "all persons and federal agencies to act in the interest of preserving endangered species."[130] One commentator described the ESA as embodying the idea that a "listed nonhuman resident of the United States is guaranteed, in a special sense, life and liberty."[131] This commentator did not, apparently, contemplate those "listed nonhuman resident[s]" exploited for religious purposes, for those animals are certainly not guaranteed life nor liberty.[132] Interestingly, legislative history for the ESA shows consideration, but ultimately rejection, of an explicit religious-use exemption for Native Americans in the continental United States[133]

Similar to but more limited than the ESA is the Migratory Bird Treaty Act (MBTA).[134] It prohibits the taking (including killing, hunting, and capturing) of protected migratory bird species, "by any means or in any manner," unless such taking has been authorized by

125. *Id.* § 2160(a).

126. *Id.* § 2160(c).

127. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544).

128. 16 U.S.C. § 1533(a)(1).

129. *Id.* § 1533(d).

130. Boradiansky, *supra* note 56, at 723.

131. Boradinasky, *supra* note 56, at 722 (quoting JOSEPH M. PETULLA, AMERICAN ENVIRONMENTALISM: VALUES, TACTICS, PRIORITIES 51 (1980)).

132. *See generally* Part IV (discussing the vulnerability of religiously exploited animals due to the First Amendment).

133. Boradiansky, *supra* note 56, at 724 & n.132.

134. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–711).

the Department of the Interior.[135] The Act protects not only the bird itself, but also "any part" thereof, as well as the bird's eggs.[136]

In 2004, the Migratory Bird Treaty Reform Act[137] amended the MBTA to clarify that its protection extended only to migratory bird species that are native to the United States or its territories.[138] Despite that limitation, the Act still applies to a multitude of species. Most recently, the list was extended to include 1,093 different species.[139] However, despite its application to such a wide range of bird species, the MBTA's protection is lessened somewhat by its delegation of authority to the Secretary of the Interior to determine periodically when the taking of protected animals could be undertaken.[140] Furthermore, the Act explicitly does not "prevent the breeding [and sale] of migratory game birds on farms" for food.[141]

Another recent example of federal animal-protection legislation is the Preventing Animal Cruelty and Torture Act (PACT).[142] PACT was enacted to address some of the most egregious forms of animal cruelty—animal crushing, drowning, suffocation, or sexual exploitation—in circumstances affecting interstate commerce.[143] PACT defines "animal crushing" broadly to include conduct in which a non-human mammal,

135. § 2, 40 Stat. 755, 755 (codified as amended at 16 U.S.C. § 703(a)); *see Migratory Bird Treaty Act*, U.S. FISH AND WILDLIFE SERV., https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php [https://perma.cc/5LTG-NXSV] (last visited Feb. 15, 2022).

136. 16 U.S.C. § 703(a).

137. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809.

138. Sec. 143(b)(2), § 2(b)(1), 118 Stat. at 3071 (codified at 16 U.S.C. § 703(b)(1)).

139. *Interior Department Ensures Migratory Bird Treaty Act Works for Birds and People*, U.S. DEP'T OF THE INTERIOR (Sept. 29, 2021), https://www.doi.gov/pressreleases/interior-department-ensures-migratory-bird-treaty-act-works-birds-and-people [https://perma.cc/T3R5-TZTF]; *see* 50 C.F.R. § 10.13 (2020) (listing the covered species).

140. 16 U.S.C. § 704. A further amendment, through the Fish and Wildlife Improvement Act of 1978, authorized the Secretary of the Interior to issue regulations ("in accordance with the various migratory bird treaties") to allow Alaskan natives to take migratory birds "for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds"—a taking which otherwise would have been prohibited. Pub. L. No. 95-616, § 3(h)(2), 92 Stat. 3110, 3112 (codified at 16 U.S.C. § 712(1)).

141. 16 U.S.C. § 711 (2019).

142. Pub. L. No. 116-72, 133 Stat. 1151 (2019) (amending 18 U.S.C. § 48).

143. *Laws that Protect Animals*, *supra* note 102.

bird, reptile, or amphibian is "purposely crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury. . . ."[144]

Like other federal animal-protection statutes, PACT only goes so far, leaving animals in various contexts unprotected. For example, exemptions for its animal crushing prohibition include "customary and normal" agricultural and veterinary practices; animal slaughter for food; "hunting, trapping, fishing, . . . or pest control;" medical or scientific research; and that which is necessary to protect a person's life or property.[145]

These federal enactments are written to apply in limited circumstances, excluding from their protection various animals in various contexts. In some instances, they explicitly exempt religiously used animals from their protection. But regardless of whether they explicitly address animals used for religious purposes, these enactments are all subject to the constraints of the First Amendment, resulting in even thinner protection for religiously used animals, as this Comment discusses further in Part IV.

III. ANIMAL PROTECTION EFFORTS

Animal-welfare and animal-rights groups petition vigorously for bans on practices—both religious and secular—which unnecessarily exploit animals and for extensions of animal-protection legislation. But their efforts, particularly efforts by lobbyists for broader animal-protection legislation, are severely constrained in the context of religious use of animals.

PETA petitioned vigorously, and ultimately unsuccessfully, for prosecution of Agriprocessors in the previously discussed reveal of illegal kosher slaughter, which left animals conscious for several minutes following the slitting of their throats.[146] Of course, secular meat processing facilities have experienced more than their fair share of such scandals as well.[147] This Comment certainly does not intend to suggest that religious slaughter facilities like Agriprocessors are alone in this controversy.[148] For every instance of religious exploitation of animals, there

144. Sec. 2, § 48(f)(1), 133 Stat. at 1152 (codified at 18 U.S.C. § 48(f)(1)).

145. Sec. 2, § 48(d)(1), 133 Stat. at 1152 (codified at 18 U.S.C. § 48(d)(1)).

146. Kaminski, *supra* note 40, at 33–34, 49–50 (detailing the precise factual descriptions in PETA's brief of recorded kosher slaughter practice at Agriprocessors); *see supra* notes 32–39 and accompanying text.

147. SAFRAN FOER, *supra* note 36, at 180, 231.

148. That said, there are likely additional instances of similar conduct at other religious slaughterhouses, on which light has not yet been shed. Author Safran Foer wrote that there is "no reason to believe that the kind of cruelty that was documented at Agriprocessors has been eliminated from the kosher industry." *Id.* at 69. And in advocating for the exercise of scrutiny over

are a myriad of such instances in a secular context. But what this Comment *does* intend to emphasize is that at least there is legislation in place to protect secularly exploited animals (in at least some contexts). That protection is not extended to religiously slaughtered animals. As discussed in the previous section, religious slaughter of animals is explicitly exempted from the scrutiny of HMSA.[149] The degree of legal oversight which is afforded to animals in secular contexts is simply not afforded to animals used for religious purposes. That latter group of animals simply has the misfortune of being used for religious purposes and the accompanying misfortune of not receiving the same degree of protection as their counterparts in secular contexts.

The practice of kosher slaughter, or shechita, has itself been banned or at least faced potential prohibition in some countries out of concern for animal welfare by groups contending that animal slaughter without pre-stunning causes unnecessary animal suffering.[150] The same is true in various countries for Halal slaughter—without pre-slaughter stunning, several countries have forbade the practice.[151] These prohibitions are based on evidence that animals that are not stunned before slaughter feel the full, unqualified pain of the cut to their throats; experience delayed losses in consciousness; and suffer intense distress and bleeding following the cuts.[152]

As mentioned regarding snake handling, many of the states in which the practice occurs most frequently have banned the practice.[153] They have generally done so on grounds of public safety, asserting that the keeping of venomous snakes by those "unfamiliar with best practices for keeping dangerous animals" represents a threat to the community.[154]

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religious slaughterhouses, author Peter Singer wrote: "[O]bviously one does not have to be anti-Semitic or anti-[Muslim] to oppose what is done to animals in the name of religion." SINGER, *supra* note 117, at 155.

149. *See supra* note 115 and accompanying text.

150. Hodkin, *supra* note 23, at 139.

151. Azeezah Kanji, Opinion, *Kosher and Halal Bans: Fur-Washing Factory Farming's Brutality*, ALJAZEERA (Nov. 3, 2021), https://www.aljazeera.com/opinions/2021/11/3/kosher-and-halal-bans-fur-washing-factory-farmings-brutality [https://perma.cc/HQ8K-9QTH].

152. *Non-stun Slaughter,* BRIT. VETERINARY ASS'N, https://www.bva.co.uk/take-action/our-policies/non-stun-slaughter/ [https://perma.cc/T778-RW32] (last visited Feb. 14, 2022); *see also* SINGER, *supra* note 117, at 154; *supra* note 117 and accompanying text.

153. *See* Duin, *supra* note 58; *supra* note 64 and accompanying text.

154. Tamara Tabo, *Snakes in a Church: Should the Law Protect the Religious Liberty of Serpent-Handlers?*, ABOVE THE L. (Nov. 14, 2013, 10:28 AM), https://abovethelaw.com/2013/11/snakes-in-a-church-should-the-law-protect-the-religious-liberty-of-serpent-handlers/ [https://perma.cc/2RHN-3CLE].

Tennessee Wildlife Resources Agency officials seized over fifty poisonous snakes from a Pentecostal pastor in one instance, citing him for illegally possessing dangerous animals.[155] The pastor argued that in so doing, the state was violating his right to free exercise of religion, but the case was eventually dismissed.[156] No case involving religious snake handling—and specifically, the banning of such practice by several states—has ever reached the Supreme Court,[157] although numerous cases involving snake handling have been heard in lower courts,[158] as well as in some states' highest courts.[159] It is not clear, however, that similar cases would turn out the same way if decided today.[160]

Additionally, fur bans have been proposed and implemented around the world, as larger portions of modern society come to recognize that "[f]or centuries, we have used and abused animals to satisfy our own vanity."[161] In 2019, California became the first U.S. state to ban fur sales.[162] The state, starting in 2023, will prohibit the manufacture for sale of fur products within the state.[163] It will also prohibit the sale,

155. *Id.*

156. *Id.*

157. *Id.*

158. *See, e.g.*, State ex rel. Swann v. Pack, 527 S.W.2d 99, 114 (Tenn. 1975) (remanding to trial court with instructions to permanently enjoin all parties from handling dangerous or poisonous snakes within the confines of Tennessee); Hill v. State, 88 So. 2d 880, 883, 885 (Ala. Ct. App. 1956) (conviction of defendant under law prohibiting handling poisonous or dangerous snakes in such manner as to endanger life and health of various persons did not violate the First Amendment); Lawson v. Commonwealth, 164 S.W.2d 972, 976 (Ky. 1942) (affirming conviction of appellants under law prohibiting the use of snakes in connection with religious services).

159. *See* Tabo, *supra* note 154 (discussing *Swann*, 527 S.W.2d 99, in which the Tennessee Supreme Court upheld the state's ban on snake handling on grounds of public safety).

160. *Id.* ("Since the law is one of general applicability, not singling out religious believers, it likely does not violate the First Amendment, at least under the U.S. Supreme Court's ruling in *Employment Division v. Smith*[, 494 U.S. 872 (1990)].").

161. SCULLY, *supra* note 1, at 40 (quoting House of Commons Debate, 5 March 1999, UK PARLIAMENT, https://publications.parliament.uk/pa/cm199899/cmhansrd/vo990305/debtext/90305-09.htm [https://perma.cc/A65Q-3X87] (last visited May 24, 2022)).

162. *California Becomes First US State to Ban Animal Fur Products*, GUARDIAN (Oct. 12, 2019, 23:37), https://www.theguardian.com/world/2019/oct/13/fur-ban-california-outlaws-making-and-selling-new-products [https://perma.cc/97QK-ZPKD] (discussing Act effective Jan. 1, 2023, ch. 764, sec. 1, § 2023(b)(1), 2019 Cal. Stat. 6381, 6383 (codified at CAL. FISH & GAME CODE § 2023(b)(1))).

163. Sec. 1, § 2023(b)(2) (to be codified at CAL. FISH & GAME CODE § 2023(b)(2)).

trade, or display for sale of a fur product within the state (excluding used fur products and some other exceptions).[164] Notably, the prohibitions explicitly do not apply to "[a] fur product used for religious purposes" nor to that "used for traditional tribal, cultural, or spiritual purposes by a member of a federally recognized Native American tribe."[165]

Despite the vigor of modern animal-protection efforts, such efforts are severely limited when it comes to the religious use of animals and animal products. The question is posed: Why should the federal government or the states be required to tolerate rampant animal welfare abuses in the name of religion?[166] The source and history of such limitation follows.

IV. HISTORICAL PROGRESSION OF FREE-EXERCISE JURISPRUDENCE

The First Amendment reads, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[167] The latter portion is known as the Free Exercise Clause. The concept of free religious exercise in the United States—or rather, what would become the United States—dates back to the 1600s.[168] Maryland "passed a statute containing the first 'free exercise' clause on the continent" in 1649,[169] well before the First Amendment of the U.S. Constitution was ever contemplated.

A. Employment Division v. Smith

For over three decades, modern free-exercise jurisprudence has revolved around the Supreme Court's decision in *Employment Division v. Smith*[170] and its holding that "neutral and generally applicable" restrictions incidentally burdening religious practice do not violate the First Amendment.[171] *Smith* involved the religious use of peyote, which state law criminalized regardless of whether its use was secular or

164. Sec. 1, § 2023(b)(1), (c) (to be codified at CAL. FISH & GAME CODE § 2023(b)(2), (c)).

165. Sec. 1, § 2023(c) (to be codified at CAL. FISH & GAME CODE § 2023(c)).

166. Henry Mark Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 ANIMAL L. 83, 102 (1995).

167. U.S. CONST. amend. I.

168. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990).

169. *Id.*

170. 494 U.S. 872 (1990).

171. Doheny, *supra* note 55, at 131; *see Smith*, 494 U.S. at 878.

religious.[172] The respondents had been fired from their jobs because they "ingested peyote for sacramental purposes at a ceremony of the Native American Church."[173] They were subsequently deemed ineligible for unemployment benefits because of that "misconduct."[174] They claimed that this denial of benefits violated their free-exercise rights, but the Supreme Court disagreed.[175]

In an opinion by Justice Scalia, the Court held that "[a] law . . . violates the Free Exercise Clause only if [that law] is 'specifically directed' at a particular religious practice."[176] Therefore, if a law involves only "neutral and generally applicable" prohibition against conduct generally, and religious conduct just so happens to fall within that general prohibition, the law is not violative of the Free Exercise Clause.[177] The Court wrote "that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[178]

Such a law—of neutral and general motive and application—need not be justified by a *compelling* governmental interest, even though the law may have the incidental effect of burdening a particular religious practice.[179] It need only be supported by a "legitimate public interest."[180] This test enunciated in *Smith* made it far easier for governments to burden religious practices without violating the First Amendment, and hindered an individual's ability to successfully challenge such burdening laws.[181] "The meaning of *Smith* was clear: there need not be legal accommodation for conduct simply because it was religious."[182]

This would seem to suggest, then, that laws and regulations prohibiting animal cruelty, prohibitions on use of animal fur, and similar animal protection legislation and regulation could prohibit all such instances—both religious and secular—so long as those prohibitions

172. *Smith*, 494 U.S. at 874, 884–85, *discussed in* James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65, 65 (1997).

173. *Smith*, 494 U.S. at 874.

174. *Id.*

175. *Id.* at 874–85, 890.

176. Gordon III, *supra* note 172, at 65 (quoting *Smith*, 494 U.S. at 878).

177. Doheny, *supra* note 55, at 131.

178. *Smith*, 494 U.S. at 878.

179. *Id.* at 886 n.3 ("Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with . . . precedent[].").

180. Doheny, *supra* note 55, at 131.

181. *Id.*

182. *Id.*

were not pretexts for religious persecution. Under *Smith*, no carve outs nor exemptions for religious and spiritual practices would seem to be necessary for First Amendment compliance.[183] For advocates of animal welfare and animal rights, this is as favorable an outcome as could realistically be hoped for. But as we will see in Part IV(C), *Smith*—as contemplated by the Court in 1990—would not remain undisturbed for long.

B. Church of the Lukumi Babalu Aye v. City of Hialeah

Just three years after the decision in *Smith*, another significant free-exercise case reached the Supreme Court, the decision of which made clear that prohibitions purporting to be neutral but which were actually pretexts for religious persecution ran afoul of the Free Exercise Clause.[184] That case was *Church of the Lukumi Babalu Aye v. City of Hialeah*,[185] the holding of which has been largely misunderstood since then.[186] As mentioned briefly above, *Lukumi* involved the city of Hialeah's prohibition against ritual animal sacrifice.[187] Instead of being a prohibition of truly "general applicability," as the Court had found to be the case in *Smith*, the prohibition enacted by the City of Hialeah had "an impermissible object."[188]

The ordinance had been enacted with a clear underlying hostility towards the Santería religion and its practices.[189] This hostility was not merely implicit and contextual. It is true that the ordinance was enacted shortly after news broke that a Santería church had planned to establish itself—and its practice of animal sacrifice—in a church in Hialeah, and that the news prompted an emergency public session by the city council.[190] But the evidence of hostility towards Santería was far clearer than just that. The ordinance explicitly acknowledged the

183. However, "in circumstances in which individualized exemptions from a general requirement *are* available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" Church of the Lukumi Babalu Aye v. City of Haileah, 508 U.S. 520, 537 (1998) (emphasis added) (quoting *Smith*, 494 U.S. at 884).

184. *See infra* notes 196–97 and accompanying text.

185. 508 U.S. at 520.

186. Doheny, *supra* note 55, at 121, 136–37 (asserting that *Lukumi* "may be the most misunderstood legal precedent in recent history" and that the case was not decided on the merits of animal sacrifice).

187. *Church of the Lukumi Babalu Aye*, 508 U.S. at 527 ("The resolution declared the city policy 'to oppose the ritual sacrifices of animals' within Hialeah and announced that any person or organization practicing animal sacrifice 'will be prosecuted.'").

188. *Id.* at 524.

189. *Id.* at 541–42.

190. *Id.* at 525–26.

concern of some Hialeah residents "that certain religions may propose to engage in practices which are inconsistent with public morals."[191] Even more damning was the fact that the prohibitions explicitly excluded kosher slaughter, showing that "Santeria alone was the exclusive legislative concern."[192] The prohibitions as a whole, in their purportedly wide application, were merely a pretext, intended to target Santería's practice of animal sacrifice specifically, in the name of preventing animal cruelty generally.

Lukumi differed from *Smith* in an extremely important respect. Although the case, like *Smith*, was decided on the merits, the specific merits on which it was decided have been commonly misunderstood, arguably to the detriment of the progression of animal-protection law and its intersection with the Free Exercise Clause. *Lukumi* was not decided on the basis of ratifying animal sacrifice as a religious practice under the Free Exercise Clause.[193] And yet it seems commonly to be misunderstood as having done just that.[194] Whether the practice of religious animal sacrifice was protected under the Free Exercise Clause was not actually the question at issue, and it was not answered in that case.

Instead, *Lukumi* was decided on the basis of the underlying hostility towards the Santería religion by the City of Hialeah.[195] The fact that animal sacrifice was the specific religious practice at issue was ultimately immaterial. What mattered for purposes of the Court's decision was the city's vaguely-masked persecution of Santería practices and the fact that the city had essentially "devise[d] mechanisms . . . to persecute or oppress a religion or its practices."[196] The Court reasserted that the Free Exercise Clause prohibited "covert suppression of particular religious beliefs" and that the Court "must [therefore] survey meticulously the circumstances" to determine the true motive of the prohibitions.[197]

The case was therefore unlike *Smith*, which determined that the prohibition at issue was neutral and generally applicable to all.[198] It is important, for the progression of animal-protection law in the context

191. *Id.* at 526.

192. *Id.* at 536.

193. *See supra* note 167 and accompanying text.

194. *See supra* note 167 and accompanying text.

195. *Church of the Lukumi Babalu Aye*, 508 U.S. at 541–42 (focusing on the hostility—both covert and overt—expressed by the Hialeah-city-council members towards Santería and its practice of animal sacrifice).

196. *Id.* at 547. Such mechanisms, whether "overt or disguised," are violative of the First Amendment. *Id.*

197. *Id.* at 534 (first quoting Bowen v. Roy, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.); and then quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

198. *See supra* notes 170–71 and accompanying text.

of the Free Exercise Clause, to emphasize that the Court's condemnation of Hialeah's prohibitions did not necessarily constitute a ratification of Santería's practice of animal sacrifice.

Because Hialeah's prohibitions impermissibly targeted the conduct of a specific religion, the Court evaluated them under strict scrutiny.[199] To survive scrutiny, the prohibitions—as burdening a specific religious practice—needed to be justified by a compelling governmental interest and narrowly tailored to achieve that interest.[200] The city's prohibitions failed the narrow-tailoring test. The prohibitions were underinclusive in the sense that "although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."[201] Further, the Court noted that "[t]he legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice."[202] The prohibitions reached Santería sacrifices even when such sacrifices would not threaten public health, evidencing improper tailoring as it related to that proffered governmental interest.[203]

C. Challenging Smith*—RFRA and RLUIPA*

The Court's decision in *Smith*—sharply limiting First Amendment protection for religious practices—was subject to prompt criticism and attack.[204] Judicially, the case has had a somewhat tumultuous lifespan. Three Justices dissented in *Smith* itself, claiming that the decision rested entirely on mischaracterization of free-exercise precedent.[205] Three years later, criticism of the decision continued in *Lukumi*, and Justice Souter (concurring in part and concurring in the judgment)

199. *Church of the Lukumi Babalu Aye*, 508 U.S. at 546. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533 (citation omitted). "[A] law that is neutral and of general applicability need not" meet this rigorous test and "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531.

200. *Id.* at 533.

201. *Id.* at 536. The Court elaborated: "The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests [of protecting public health and preventing animal cruelty] in a similar or greater degree than Santeria sacrifice does." *Id.* at 543.

202. *Id.* at 538.

203. *Id.* at 538–39.

204. Doheny, *supra* note 55, at 131.

205. Emp. Div. v. Smith, 494 U.S. 872, 908 (Blackmun, J., dissenting).

wrote that he had "doubts about whether the *Smith* rule merits adherence" and advocated for the Court to reexamine *Smith*.[206] Justices Blackmun and O'Connor (concurring in the judgment) similarly asserted that *Smith* had been wrongly decided.[207] Further calls for *Smith*'s overruling were renewed in 2021 in *Fulton*, and although the case did not ultimately require such a decision to be made, several Justices nevertheless shared criticism of *Smith*.[208]

Legislatively, action was quickly taken to negate the effects of *Smith*.[209] In 1993, three years after the decision of *Smith* and within the same year as *Church of the Lukui Babalu Aye*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).[210] RFRA operated to override the new free-exercise test that had narrowly garnered a majority in *Smith*.[211] Now, instead of requiring only a legitimate public interest in cases of generally applicable and neutral laws incidentally burdening religion, RFRA "mandated that a government could not substantially burden a person's religious conduct without a '*compelling* government[al] interest,'"[212] regardless of whether the burden on religion resulted from a neutral rule of general applicability.[213] To survive under RFRA, the governmental burden on religion needed to be the "least restrictive means of furthering that compelling governmental interest."[214] As far as Congress was concerned, *Smith*'s free-exercise standard—favorable for animal-protection proponents seeking to limit both secular and religious exploitation of animals—was no more, lasting only three years.

However, RFRA—as fully contemplated by Congress—was also short lived. Four years after its passage, the Supreme Court limited RFRA's application to only the federal sphere, holding that RFRA was

206. *Church of the Lukumi Babalu Aye*, 508 U.S. at 559 (Souter, J., concurring in part and concurring in the judgment).

207. *Id.* at 578 (Blackmun, J., concurring in the judgment).

208. *See infra* notes 248–63 and accompanying text; Fulton v. City of Phila., 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring in the judgment); *id.* at 1926 (Gorsuch, J., concurring in the judgment).

209. Doheny, *supra* note 55, at 131.

210. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb–4), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), *discussed in* Doheny, *supra* note 55, at 131.

211. Doheny, *supra* note 55, at 131 (citing 42 U.S.C. § 2000bb, *invalidated by Boerne*, 521 U.S. 507).

212. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000bb-1, *invalidated by Boerne*, 521 U.S. 507).

213. *Boerne*, 521 U.S. at 515–16 (emphasis added).

214. Holt v. Hobbs, 574 U.S. 352, 357 (2015) (quoting 42 U.S.C. §§ 2000bb–1(a), (b))).

invalid as it applied to state law.[215] In other words, *Smith*'s more lenient free-exercise test would still be applicable to state law burdening religious practice, while RFRA would override *Smith* as it applied to federal law burdening religious practice. However, *Smith* would continue to apply to state law only in those states that did not opt to take matters into their own hands by passing their own religious freedom-restoration legislation.[216]

In a further attempt at extension of free exercise following the above judicially imposed limitation, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[217] RLUIPA, unlike the judicially constrained version of RFRA, was to apply to the states and their subdivisions.[218] RLUIPA, as reflected in its name, has a limited application—it concerns only government land-use regulation, and religious exercise by institutionalized persons.[219] RLUIPA has little, if any, potential application to protection of religiously used animals, but its passage nonetheless demonstrates a growing prioritization of protecting religious practice over competing interests.

Like RFRA, RLUIPA imposed a more stringent standard than *Smith*, for the purpose of broadening the religious protection that *Smith* had circumscribed. In keeping with RFRA, RLUIPA implemented a narrow-tailoring requirement for governmental burdening of religious practice in the contexts of land use and institutionalized persons.[220] Even beyond this heightened standard, Congress further extended protection of religious freedom by defining "religious exercise" broadly as "any exercise of religion, whether or not compelled by, or central to,

215. *Boerne*, 521 U.S. at 534 (discussing how application of RFRA to the states represents a significant congressional intrusion into States' authority and discretion in regulating the health and welfare of their citizens); *see also Holt*, 574 U.S. at 357 ("In making RFRA applicable to the States and their subdivisions, Congress relied on Section 5 of the Fourteenth Amendment, but in *City of Boerne v. Flores* this Court held that RFRA exceeded Congress' powers under that provision." (citation omitted)).

216. *See generally* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998); *State Religious Freedom Restoration Acts*, NAT'L CONF. STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/59F4-MNC4].

217. Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to 2000cc–5), *discussed in Holt*, 574 U.S. at 356 ("Congress enacted RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), 'in order to provide very broad protection for religious liberty.'" (citation omitted) (quoting Burwell v. Hobby Lobby Stores, 573 U.S. 682, 693 (2014))).

218. *Holt*, 574 U.S. at 357.

219. *Id.*

220. *Id.* at 357–58.

a system of religious belief."[221] Congress further mandated that this concept of religious exercise be construed broadly and liberally in favor of protecting religious exercise.[222]

V. RECENT DEVELOPMENTS IN FREE-EXERCISE JURISPRUDENCE

At the time that the Supreme Court decided *Smith* in 1990, the decision was considered to have constructed "a new Free Exercise Clause."[223] But the realm of free-exercise jurisprudence since that time has been a complex web of back-and-forth, and *Smith*'s "new Free Exercise Clause"[224] would only crumble from that point forward. *Smith* ultimately represents a contentious—yet remarkably persistent—case in the overall span of free-exercise jurisprudence. In the decades that followed *Smith*, numerous calls were made to override it, and Congress and the Supreme Court engaged in a decade-long tug-of-war on religious freedom,[225] demonstrated through the passages of RFRA and RLUIPA.

On the judicial front, additional recent cases before the Supreme Court have called into question the remaining applicability of *Smith*. The new composition of the Court, unlike that present for *Smith*, has demonstrated greater concordance with Congress in strengthening protection of religious exercise.

In *Roman Catholic Diocese v. Cuomo*,[226] three decades after *Smith*, the Court decided in favor of protection of religious exercise in the time of COVID-19.[227] The case involved challenges to New York executive orders limiting attendance at religious services in geographic areas designated as having higher COVID infection rates.[228] The petitioners claimed that the executive orders treated religious "houses of worship much more harshly than comparable secular facilities," thereby violating their Free Exercise rights.[229] Per the executive order, a house of

221. 42 U.S.C. § 2000cc–5(7)(A).

222. *Holt*, 574 U.S. at 358 (quoting 42 U.S.C. § 2000cc–3(g)).

223. Gordon III, *supra* note 172, at 65.

224. *Id.* at 65–66.

225. *See supra* Part IV.

226. 141 S. Ct. 63 (2020) (per curiam).

227. *Id.* at 69. This case was decided by a differently composed Court, after Justice Amy Coney Barrett replaced the late Justice Ruth Bader Ginsberg. Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 646 (2021). This development prompted a change in course in the direction of free-exercise protection. *Id.* at 700.

228. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65–66; *see id.* at 76 (Breyer, J., dissenting) (recognizing these hot spot zones as those in which infection rates had spiked).

229. *Id.* at 66 (majority opinion).

worship located within a "red zone" could admit no more than ten persons, while businesses categorized as "essential" within the same zone could admit an unlimited number of people.[230] The Court determined that since these regulations were neither neutral nor of general applicability, they had to survive strict scrutiny—that is, the regulations had to be narrowly tailored to serve a compelling governmental interest.[231] In an astonishingly brief discussion, the Court determined that the restrictions were not narrowly tailored because they were "far more severe than ha[d] been shown to be required to prevent the spread of the virus at the [houses of worship]."[232] The brevity of the discussion can be attributed at least in part to the fact that the decision was not made on the merits, but rather was merely a request for a stay of the district-court ruling pending appeal.[233]

Earlier that year, the Court had addressed similar free-exercise cases complicated by COVID-19. In *South Bay United Pentecostal Church v. Newsom*[234] and *Calvary Chapel Dayton Valley v. Sisolak*,[235] the Court had determined that state officials could "restrict attendance at houses of worship so long as comparable secular institutions face[d] restrictions that are at least equally as strict" without running afoul of the Constitution.[236] Dissenting in *Roman Catholic Diocese*, Justice Sotomayor asserted that such precedent should have controlled in *Roman Catholic Diocese*, and wrote that she saw "no justification for

230. *Id.* at 65–66.

231. *Id.* at 67. The restrictions were not considered neutral by the Court because they "single[d] out houses of worship for especially harsh treatment." *Id.* at 66. Interestingly, in *Church of the Lukumi Babalu Aye*, which the Court cites in *Roman Catholic Diocese of Brooklyn* as support for its determination that the restrictions there were not neutral, Hialeah's ordinances failed not because they singled out religious entities for worse treatment than secular entities, but because they singled out a *specific* religious entity over other religious entities. Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 542 (1993), *cited in Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66; Blackman, *supra* note 227 at 655, 713, 718. For example, recall that kosher slaughter was explicitly exempted from the ordinance's reach. *See supra* text accompanying note 192. It could be argued, then, that strict scrutiny was not the standard to apply in *Roman Catholic Diocese of Brooklyn.*

232. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67.

233. *Id.* at 65–66.

234. 140 S. Ct. 1613 (2020).

235. 140 S. Ct. 2603 (2020).

236. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 79 (Sotomayor, J., dissenting) (citing S. Bay United Pentecostal v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)).

the Court's change of heart."[237] From the point of *Roman Catholic Diocese* forward, the Court and its new 5–4 split consistently ruled in favor of protecting free exercise of religion.[238]

The following spring in *Tandon v. Newsom*,[239] the Court continued to stray from its still-recent decisions in *South Bay Pentecostal Church* and *Calvary Chapel Dayton Valley.* The Court wrote that government regulations "trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise" and that it was irrelevant that a "State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[240] The issue in *Tandon*, as the Court put it, was that "California treat[ed] some comparable secular activities more favorably than at-home religious exercise . . . ."[241]

In another fairly brief discussion, the Court asserted that "California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny."[242] Following that assertion, the Court made no analysis of whether the state's restrictions were narrowly tailored.[243]

Tandon employed a "most-favored" framework, echoing a principle asserted by a dissenting judge on the Ninth Circuit's panel below.[244] That principle was that "regulations must place religious activities on par with the *most favored class* of comparable secular activities, or face

237. *Id.* Although the Court never explicitly overruled the standards enunciated in *South Bay United Pentecostal Church* and *Calvary Chapel*, the circuits below understood that to have been the practical result of the Court's decision in *Roman Catholic Diocese of Brooklyn. See* Agudath Isr. of Am. v. Cuomo, 983 F.3d 620, 635 n.20 (2nd Cir. 2020), *quoted in* Blackman, *supra* note 227 at 728–29 ("[T]he Second Circuit . . . panel observed [that] *Roman Catholic Diocese* 'has supplanted' the 'Chief Justice's concurring opinion in *South Bay.*'").

238. Blackman, *supra* note 227, at 638 ("The new Roberts Court would turn the tide on COVID-19 cases in *Roman Catholic Diocese of Brooklyn v. Cuomo* . . . . Over the course of five months, the Court consistently ruled in favor of the free exercise of religion.").

239. 141 S. Ct. 1294 (2021) (per curiam).

240. *Id.* at 1296.

241. *Id.* at 1297.

242. *Id.* at 1298.

243. The Court cited *Church of the Lukumi Babalu Aye* for this narrow tailoring standard, but followed that citation with no analysis or application, merely asserting that the standard "is not watered down" and it "really means what it says." *Id.* at 1298 (quoting Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 546 (1993)).

244. Blackman, *supra* note 227, at 740–42.

strict scrutiny."[245] Indeed, the Court concluded that the Ninth Circuit had erred in denying relief from the state's regulation[246] and held that "[i]f '*any* comparable secular activity' is given some special status, then the free exercise of religion must also be afforded that 'most-favored' status."[247]

The Court decided *Fulton v. City of Philadelphia*[248] just two months after *Tandon*. Unlike the previous COVID cases addressed above, *Fulton* received plenary consideration and full briefing and argument.[249] The case involved Philadelphia's refusal to refer children to Catholic Social Services (CSS) upon discovering that CSS would not, per its claimed religious beliefs about marriage, certify same-sex couples for foster parentship.[250] CSS filed suit, claiming this conduct by the city violated its free-exercise rights.[251] Both the District Court and the Court of Appeals for the Third Circuit rejected CSS's free-exercise claim, holding that the city's non-discrimination requirements were neutral and generally applicable under *Smith*.[252] Upon seeking review by the Supreme Court, CSS urged the Court to overrule *Smith*.[253]

While five justices criticized *Smith*, the Court did not ultimately accede to petitioners' request to overrule *Smith*, claiming instead that the case fell outside the scope of *Smith* because the city's policies were not truly neutral and generally applicable.[254] The Court asserted that a government did not act neutrally, and therefore fell outside *Smith*'s more lenient scope, when it "proceeds in a manner intolerant of religious

245. Tandon v. Newsom, 992 F.3d 916, 932 (9th Cir. 2021) (Bumatay, J., dissenting in part and concurring in part) (emphasis added) (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020)), *quoted in* Blackman, *supra* note 227, at 742.

246. *Tandon*, 141 S. Ct. at 1296 ("The Ninth Circuit's failure to grant an injunction pending appeal was erroneous."), *discussed in* Blackman, *supra* note 227, at 744.

247. Blackman, *supra* note 227, at 745 (first quoting *Tandon*, 141 S. Ct. at 1296; and then quoting *Tandon*, 992 F.3d at 932 (Bumatay, J., dissenting in part and concurring in part)).

248. 141 S. Ct. 1868 (2021).

249. Blackman, *supra* note 227, at 742–44; *Fulton v. City of Philadelphia, Pennsylvania, Proceedings and Orders*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ [https://perma.cc/PFG5-S6NA] (last visited Mar. 5, 2022) (showing briefing by the parties and amici from August 2019 to September 2020, with oral arguments in November 2020).

250. Fulton v. City of Phila., 141 S. Ct. 1868, 1874 (2021).

251. *Id.* at 1876.

252. *Id.*

253. *Id.*

254. *Id.* at 1876–77.

beliefs or restricts practices because of their religious nature."[255] Further, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'"[256]

As outside the scope of *Smith*, the Court evaluated the government policy under strict scrutiny, writing that "so long as the government can achieve its interests in a manner that does not burden religion, it must do so."[257] In determining whether the government's actions were in furtherance of a compelling governmental interest, the Court clarified that the question was "not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS."[258] The Court determined that the city's asserted interests in maximizing the number of foster parents and ensuring equal treatment of prospective foster parents and children were insufficient in that narrowed context.[259] "If anything," the Court wrote, "including CSS in the program seems likely to increase, not reduce, the number of available foster parents."[260]

Although declining to overrule *Smith* in *Fulton*, individual justices—over three decades after *Smith* and its enunciation of a lenient free-exercise-burdening standard—did not decline the opportunity to criticize *Smith* through several concurrences. Justice Barrett, concurring, wrote that "it is difficult to see why the Free Exercise Clause" would offer only protection from discrimination and not active accommodation.[261] Notably, Justice Alito even highlighted slaughter regulations as what he considered a potential "startling consequence[]" of *Smith*.[262] "[S]uppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter."[263]

255. *Id.* at 1877.

256. *Id.* (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)). The relevant context from *Smith* held that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.)).

257. *Fulton*, 141 S. Ct. at 1881.

258. *Id.*

259. *Id.* at 1881–82.

260. *Id.* at 1882.

261. *Id.* at 1882 (Barrett, J., concurring).

262. *Id.* at 1883–84 (Alito, J., concurring).

263. *Id.* at 1884 (footnote omitted).

VI. New Free-Exercise Jurisprudence's Influence on Animal-Protection Legislative Efforts

What influence, if any, do these more recent developments in free-exercise jurisprudence have on animal-protection legislative efforts in the specific context of religious use of animals and animal products? How does this recent progression in free-exercise jurisprudence from the time of COVID-19 forward bode for the ability of animal-protection legislation to effectively protect animals in both secular and religious contexts? To put it simply, it does not bode well. From *Roman Catholic Diocese* forward, the Court has shifted towards prioritizing protection of religious exercise over competing interests.[264] There is little reason to think that the interest in protecting sentient, non-human creatures would supersede the interest in protection of religious practice.

It is unclear how the COVID-19 free-exercise cases and their enunciated standards will apply in other contexts. It is clear that the general attitude of the majority of today's Court towards liberalization of free-religious exercise does not lend itself to protection of animal welfare in the religious-exploitation context. But the standards enunciated in the free-exercise COVID cases arguably do not necessarily pose a prohibitive issue to broadening protection of animals to the religious-exercise context.

The Court concluded in *Tandon* that if any comparable secular activity is given some special status, then the religious practice must also be given special status.[265] But what "special status" is provided to secular restrictions on the exploitation of animals? It is *religious* use of animals that is given explicit special status—through codified exemptions—in animal-protection legislation. Were those exemptions removed, and both secular and religious uses of animals treated the same, the situation would not offend *Tandon* and would not trigger strict scrutiny. However, the statement that "[i]t is no answer that a State treats some comparable secular . . . . activities as poorly as or even less favorably than the religious exercise at issue" may be problematic.[266] For example, is restricting religious slaughter of animals to the same degree as secular slaughter of animals "treat[ing] . . . comparable secular . . . activities as poorly as . . . . the religious exercise[?]"

In *Fulton*, the Court asserted that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices *because of their religious nature.*"[267] The second half of that quote, referencing restriction of a practice due to its religious nature, can be understood through both *Smith* and *Lukumi,* recalling

264. *See supra* note 238 and accompanying text.

265. *See supra* notes 244–47 and accompanying text.

266. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

267. *Fulton*, 141 S. Ct. at 1877 (emphasis added).

from *Lukumi* that the ordinance was not truly of general applicability because it was enacted due to hostility against Santería.[268] The first half of the quote is somewhat more difficult to reconcile—that to be merely "intolerant" of religion is a failure to act neutrally and therefore warrants strict scrutiny.[269] Does "intolerant" simply mean a refusal to prevent discrimination against religious practice? Or does it extend to a refusal to provide special accommodation for religious practice? If refusing to afford accommodation for religious practices (the secular counterpart of which receives no such accommodation) is "intolerant," then *Smith*, after *Fulton*, would be essentially null.

It is debatable whether extending restrictions on use of animals to cover not only secular instances, but also religious such instances, would therefore constitute "proceed[ing] in a manner intolerant of religious beliefs," although today's Court would likely find such conduct intolerant of religion. But this Comment argues such restriction would clearly not be "because of their religious nature." It would be motivated by the same reasoning that motivates secular restrictions on animal use: the protection of animal welfare.

CONCLUSION

Animals across the United States are used and mistreated in religious practices that exist farther beyond the eyes of the law than secular uses of animals. This is a topic meriting unique attention because, unlike many other religious practices, each instance here involves the ending of a life—or at the very least, the degradation of a life.[270]

Religiously slaughtered animals are regularly killed without the pre-slaughter stunning that is mandated by federal law to occur to the same species in secular slaughterhouses. As a result, these animals live the last moments (or sometimes, minutes) of their lives feeling the full pain of having their throats slit. Fur-bearing animals are slaughtered and skinned for their precious pelts, to be used in expensive religious headwear. Most of these fur-bearing animals, prior to meeting this fate, spend the entirety of their lives confined to small cages, unable to live by their natural instincts. Animals are also sacrificed in religious ceremonies and rituals, the specifics of which are somewhat uncertain due to the clandestine nature of these practices. Various species of snakes are held captive in unsuitable conditions, all to be held in the air and draped around a practitioner's arms in a risky demonstration of faith. All of these practices, due to their religious nature, are subject to far

268. *See supra* notes 189–92 and accompanying text.

269. *Fulton*, 141 S. Ct. at 1877.

270. *See* Boradiansky, *supra* note 56, at 753 ("Taking the life of another living creature is unique among religious practices. Unlike most religious rituals, it necessarily involves extinguishing another life to further one's own spiritual growth.").

less legal scrutiny than secular practices involving animals. They exist farther beyond the reach of the government, at least compared to the scrutiny exercised over secular practices involving animals. As a result, the animals involved in religious practices exist largely at the mercy of the practitioners, utterly vulnerable to the dogma imposed on them by those practitioners.

Smith's free-exercise standard, enabling governments to burden religious practice through neutral and generally applicable laws supported only by a legitimate governmental interest, was and remains today, undoubtedly contested by huge segments of the American population, as well as by a majority of today's Court.[271] But *Smith* was also undoubtedly a more favorable standard for imposing animal-protection legislation on religious exploitation of animals than the United States has seen before. Its standard enabled animal-protection laws, such as animal-cruelty laws and regulation of slaughter, to impose the same general and neutral level of protection for animals regardless of whether those animals were to be exploited for religious or secular purposes. As long as such animal-protection laws were not facades for religious persecution, and not motivated in actuality by animosity towards religious practices and applied for such end, *Smith* would not require those laws to include any sort of religious- or spiritual-practice exemption. This Comment argues that this broad opportunity for animal-welfare protection is normatively highly desirable.

But the passages of RFRA and RLUIPA, changes in composition of the Court, and subsequent shifts in free-exercise jurisprudence from the start of COVID-19 and onward have starkly changed legislatures' ability to burden religious practice not only in the name of animal welfare, but in the name of countless competing interests. Free Exercise Clause jurisprudence is shifting to a more aggressive, pro-accommodation stance. It may no longer be enough, to avoid running afoul of the First Amendment, to merely refrain from discriminating against religious practice by imposing standards generally applicable to both secular and religious activity. As a result, countless competing interests may be subjugated, including the interest in protecting the sentient lives of countless animals who receive little to no federal protection due solely to their being used in a religious context.

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271. *See supra* notes 254, 261–63 and accompanying text.

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