FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TONYA LEWIS-WILLIAMS; RAYMOND LOCKETT; ROSALIND PARKER; BRADFORD MITCHELL; RYAN RIVERA; SZU-CHENG SUN, *Plaintiffs - Appellees*, v. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, *Defendant - Appellant*.	No. 25-618 D.C. Nos. 3:22-cv-06119-WHA; 3:22-cv-09193-WHA 3:22-cv-07720-WHA OPINION
TONYA LEWIS-WILLIAMS; RAYMOND LOCKETT; ROSALIND PARKER; BRADFORD MITCHELL; RYAN RIVERA; SZU-CHENG SUN, *Plaintiffs - Appellees*, v. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, *Defendant - Appellant*.	No. 25-619 D.C. Nos. 3:22-cv-06119-WHA; 3:22-cv-09193-WHA; 3:22-cv-07720-WHA

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Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted April 15, 2026
San Francisco, California

Filed September 11, 2026

Before: Johnnie B. Rawlinson, Ryan D. Nelson, and
Bridget S. Bade, Circuit Judges.

Opinion by Judge R. Nelson;
Concurrence by Judge R. Nelson

SUMMARY*

Employment Discrimination

The panel affirmed the district court's judgment after a jury trial against San Francisco Bay Area Rapid Transit (BART) in an employment discrimination action brought under Title VII and the California Fair Employment and Housing Act by six former employees who alleged failure to accommodate their sincere religious objections to a COVID-19 vaccine mandate.

The panel held that BART was not entitled to judgment as a matter of law or a new trial. It was undisputed that the former employees carried their burden of showing a prima facie case that BART failed to accommodate their religious objections to the vaccination requirement. The panel concluded that BART did not carry its burden of showing that the employees' religious objections could not be accommodated without undue hardship. To prevail on its "undue hardship" defense, BART had to show that the alternatives to vaccination would be not only less safe, but less safe by a substantial, excessive, or unjustifiable margin. Thus, even if BART established that the vaccine was the most effective way of preventing COVID-19 transmission in the workplace, that did not mean that less effective preventive measures were per se unreasonable. BART's reliance on guidance from public health authorities was not dispositive for purposes of showing undue hardship. In addition, BART did not show

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that in the context of its transportation business, in-person alternatives to vaccination would have caused undue hardship. The panel held that the district court did not err in denying BART's motion for judgment as a matter of law because the panel could not conclude that the trial evidence only supported BART.

The panel held that BART was not entitled to a new trial because the jury's verdict was not against the clear weight of the evidence. In addition, plaintiffs' counsel's violation of an order in limine excluding certain evidence of requests for religious exemptions did not require a new trial.

The panel further held that it was not plain error for the district court to order front pay for one plaintiff.

The panel found moot, and did not address, a cross-appeal from the district court's grant of summary judgment for BART on the employees' free exercise claims.

Concurring, Judge R. Nelson wrote that the district court's analysis of the free exercise claims, which the majority did not reach, was troubling. The district court concluded that BART's review process did not violate general applicability because it did not allow unfettered discretion in the treatment of religion. This court, however, has rejected the "unfettered discretion" test.

COUNSEL

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OPINION

R. NELSON, Circuit Judge:

San Francisco Bay Area Rapid Transit District seeks to overturn a jury verdict of $7,824,580 to six former employees for Title VII violations for failure to accommodate their sincere religious objections to a COVID-19 vaccine mandate. Because sufficient evidence supports the jury's verdict, we affirm.

I

A

This case arose as a challenge to San Francisco Bay Area Rapid Transit's (BART) mandatory COVID-19 vaccination policy by employees who sought to opt out of vaccination, citing religious objections. From October 2021 through early 2022, COVID-19 presented a serious public health emergency—resulting in many hospitalizations and infections both nationwide and in California. In response, BART issued a COVID-19 vaccination policy in October 2021. Under that policy, employees had to be fully vaccinated by December 13, 2021, unless they qualified for a medical or religious exemption guaranteed to them by state and federal anti-discrimination law.

To determine whether an employee was entitled to an accommodation based on a religious objection to the vaccine mandate, BART's Leave Management Department prepared forms to collect information from employees concerning the beliefs that prevented them from being vaccinated and what accommodation each employee sought. If more information was required, the Leave Management Department interviewed individual employees to evaluate whether they had a sincerely held religious belief against vaccination.

After reviewing these requests, the Leave Management Department concluded that 70 employees qualified for a potential accommodation. BART then considered whether it could reasonably accommodate the religious beliefs of those 70 employees. BART concluded that it could not accommodate any of those employees without suffering an undue hardship.

BART provided those employees with an ultimatum to either take the vaccine or lose their job. After receiving this ultimatum, nearly half of the 70 employees chose the vaccine; the other 37 employees resigned, retired, or were terminated. Altogether, 73 employees who requested a religious exemption lost their jobs—36 were denied an exemption, and 37 received an exemption but were told by BART that they could not be accommodated.

B

In 2023, 35 former BART employees who had lost their jobs because of BART's vaccine mandate and religious accommodation process filed suit. Plaintiffs asserted claims for: (1) failure to provide religious accommodation in violation of Title VII of the Civil Rights Act of 1964; (2) deprivation of their right to the free exercise of religion, a right secured by the First and Fourteenth Amendments, under color of state law; and (3) failure to provide religious accommodation under the California Fair Employment and Housing Act (FEHA). *See* 42 U.S.C. § 2000e-2(a); U.S. Const. amends. I, XIV; 42 U.S.C. § 1983; Cal. Gov. Code § 12940(a).

The parties cross-moved for summary judgment. Plaintiffs moved on all three of their claims. BART separately moved against plaintiffs' Free Exercise claim under § 1983. The district court granted BART summary judgment on the § 1983 claim and denied plaintiffs summary judgment on their three claims. After the district court's order, 18 plaintiffs dismissed their claims and 17 remained. The lawsuits of the remaining plaintiffs were then consolidated and scheduled for sequential trials in manageable groups.

In July 2024, the district court conducted a two-phase trial for the first group of plaintiffs—with the first phase to determine whether seven plaintiffs had established a prima facie case under Title VII and FEHA, and the second phase to determine whether BART could successfully assert the affirmative defense of undue hardship. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *see also Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990) ("Federal precedent applies to provisions of the

California Fair Employment and Housing Act analogous to Title VII.").

On the first phase, a jury unanimously concluded that the first group of plaintiffs had established a prima facie case on their remaining claims. But the jury deadlocked on the second phase on BART's affirmative defense of undue hardship. Accordingly, the district court took the verdict with respect to the first phase and declared a mistrial on the affirmative defense. After the mistrial, all but six plaintiffs—Tonya Lewis-Williams, Raymond Lockett, Rosalind Parker, Bradford Mitchell, Ryan Rivera, and Szu-Cheng Sun (collectively, the Six Former Employees)—settled and dismissed their claims against BART.

In October 2024, the district court held a new two-phase trial for the Six Former Employees, with the first phase now addressing BART's undue hardship defense, and the second phase addressing all other issues. At the end of the first phase, BART moved for judgment as a matter of law (JMOL) under Federal Rule of Civil Procedure 50(a). The district court took the motion under submission, and the jury later returned a verdict finding BART had not established its affirmative defense. In the second phase, the same jury returned a verdict for the Six Former Employees and an award collectively totaling $7,824,580.

BART renewed its request for JMOL under Rule 50(b) and alternatively sought a new trial under Rule 59. The district court denied both motions. BART timely appealed. The Six Former Employees cross appealed the order granting summary judgment on their § 1983 Free Exercise claim. One of the former employees, Ryan Rivera, also appealed the district court's failure to order his reinstatement.

II

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367(a) and 42 U.S.C. § 2000-e5(f)(3). We have jurisdiction under 28 U.S.C. § 1291 over both the appeal and the cross appeal.

We review a district court's denial of JMOL de novo. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000). For a Rule 50(b) motion, we consider whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion—one contrary to the jury's verdict. *Est. of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016). The panel must draw all reasonable inferences for the nonmoving party. *EEOC v. GoDaddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009).

We review a district court's denial of a Rule 59 motion for a new trial for abuse of discretion. *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1189 (9th Cir. 2002).

III

We conclude that BART is neither entitled to JMOL nor a new jury trial.

A

BART argues that the district court erred in denying JMOL because BART proved its affirmative defense of undue hardship on the Title VII and FEHA claims. BART bears a heavy burden. On a Rule 50(b) motion, "[a] jury's verdict must be upheld if it is supported by substantial evidence that is adequate to support the jury's findings, even if contrary findings are also possible." *Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) (quoting

Escriba v. Foster Poultry Farms, *Inc.*, 743 F.3d 1236, 1242 (9th Cir. 2014)). We ask whether the "*only* conclusion that a reasonable jury could draw" is contrary to the jury's verdict. *Harper v. City of Los Angeles*, 533 F.3d 1010, 1022–23 (9th Cir. 2008); *see also Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944) ("Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.").

"Title VII makes it an unlawful employment practice for an employer . . . to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's . . . religion." *Petersen v. Snohomish Reg'l Fire & Rescue*, 150 F.4th 1211, 1216 (9th Cir. 2025) (quoting 42 U.S.C. § 2000e-2(a)). We analyze such claims under a two-step framework. First, a plaintiff must set forth a prima facie case that "(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement." *Id.* (quoting *Hewlett-Packard*, 358 F.3d at 606). Once a plaintiff makes out a prima facie failure-to-accommodate case, the burden shifts to the employer to show that it initiated good faith efforts to accommodate the employee's religious practices or that it could not do so reasonably without undue hardship. *Id.*

It is undisputed that the Six Former Employees carried their burden of showing a prima facie case that BART failed to accommodate their religious objections to the vaccination requirement. The propriety of JMOL therefore turns on whether BART carried its burden of showing that Plaintiffs' religious objections could not be accommodated without undue hardship.

BART's argument for JMOL proceeds in two steps. First, BART argues that unrebutted testimony established that (1) public health guidance at the time advised that vaccination was the most effective measure for preventing the spread of COVID-19, (2) BART relied on this guidance in determining that it would be unacceptable from a safety and operational standpoint for unvaccinated employees to perform in-person work, and (3) its reliance on such guidance is dispositive for purposes of the undue-hardship determination because a religious accommodation that imposes an increased safety risk for others constitutes an undue hardship as a matter of law. Second, BART argues that remote work and unpaid leave—the only accommodations as safe as vaccination—were not reasonable accommodations as a matter of law because the only rational conclusion based on the evidence introduced at trial was that Plaintiffs could not perform the essential duties of their jobs remotely and any unpaid leave would have been indefinite.

For reasons explained below, we conclude that BART is not entitled to JMOL. To prevail on its "undue hardship" defense, BART had to show that the alternatives to vaccination would be not only less safe, but less safe by a "substantial," "excessive," or "unjustifiable" margin. *Groff v. DeJoy*, 600 U.S. 447, 468–73 (2023) (cleaned up). Thus, even if BART established that the vaccine was the most effective way of preventing COVID transmission in the workplace, that does not mean that less effective preventive measures are per se unreasonable accommodations. And although BART is correct that "the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health are of special weight and authority . . . [t]he views of these organizations are not conclusive." *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998). BART also introduced no evidence of the public health guidance it relied on, and the jury was not required to infer that BART's non-percipient expert witnesses accurately described the scientific information that supported BART's accommodation decisions. *See Backus v. Owe Sam Goon*, 235 F. 847, 853 (9th Cir. 1916); *Sec.-First Nat'l Bank of L.A. v. Lutz*, 322 F.2d 348, 355 (9th Cir. 1963). Given that BART is not in the health and safety business, that the Six Former Employees all had roles that required minimal close-quarters interaction with other individuals, and that no evidence suggests that the Six Former Employees were unable or unwilling to wear a mask or take similar precautions, substantial evidence supports the jury's verdict.

1

We start with BART's contention that its reliance on guidance from public health authorities is dispositive for purposes of showing an undue hardship. The problems begin with the baseline premise of BART's argument—that an accommodation to its vaccination requirement would be reasonable "only if it provided the same level of safety as vaccination." In other words, BART argues that *any* increase in safety risk resulting from an accommodation is an undue hardship. This argument conflicts with the Supreme Court's holding in *Groff* that an accommodation does not impose an "undue hardship" unless the burdens would be "substantial," "excessive," or "unjustifiable." 600 U.S. at 468–73 (cleaned up). Common sense dictates that safety risks, like any other category of risk, are capable of justification. *Cf. Bragdon*, 524 U.S. at 649 ("Because few, if any, activities in life are risk free, [we] do not ask whether a risk exists, but whether it is significant."); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 664 (1980) (Burger, C.J., concurring) ("Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible."). Accordingly, an employer is not absolved of its burden of proving that an accommodation is unreasonable by merely showing that the accommodation has safety implications. Rather, employers are ordinarily entitled to rely on the views of public health authorities, along with the best "objective, scientific information available" at the time, when making accommodation decisions, *Petersen*, 150 F.4th at 1223 (quoting *Rodrique v. Hearst Commc'ns, Inc.*, 126 F.4th 85, 91 (1st Cir. 2025)). *See Williams v. Legacy Health*, 174 F.4th 1201, 1207 (9th Cir. 2026) (explaining that the accommodation decision is assessed based on the information available at the time of the decision, not hindsight).

That brings us to the next problem with BART's argument: the public health guidance that BART relied on is not in the record. BART likewise did not call any of the infectious disease experts or public health officials with whom BART's pandemic task force consulted when formulating its vaccination policy. Instead, BART put forward the testimony of two after-the-fact litigation experts—Dr. Joseph Lewnard, an infectious disease epidemiologist, and Dr. Nancy McClellan, an industrial hygienist—to establish the state of the public health guidance and the risks BART would be taking by allowing unvaccinated employees to work in person.

Contrary to BART's contentions, the jury was not required to accept BART's expert, non-percipient witness testimony as conclusive evidence of the scientific information that drove BART's decision-making.

Moreover, "[e]xpert testimony . . . is not conclusive upon the trier of fact, even though unimpeached and uncontradicted, since the trier may apply his own experience or knowledge in determining how far to follow the expressed opinion." *Lutz*, 322 F.2d at 355. The expert testimony thus did not establish that in-person alternatives to BART's vaccine requirement—masking, social distancing, and other such measures—would be unreasonable accommodations as a matter of law.

2

The above conclusion, however, is not necessarily fatal to BART's argument. Even if in-person alternatives to vaccination are not per se unreasonable accommodations in the context of BART's business, they may still impose an undue hardship considering either the nature of that business, the religious objector's work duties, or some other factor (or combination of factors). *See Groff*, 600 U.S. at 468–73.

Our decisions in *Petersen* and *Williams* are illustrative. In *Petersen*, eight firefighters sued their employer for denying them religious accommodations for a COVID-19 vaccine mandate. 150 F.4th at 1213–14. Because the fire department's business was to provide the public with "emergency, even life-saving, services" and undisputed evidence established that "firefighters work in group settings, interfacing constantly with coworkers and the public, both inside and outdoors" and that the plaintiffs often did not abide by masking and social distancing guidelines, we held that "testing, masking, and social distancing in lieu of vaccination" was not a reasonable accommodation in light of the substantial burdens that would be imposed on the fire department. *Id.* at 1218–20.

Defendants in *Petersen* also risked serious financial and operational hardships likely to be incurred had they accommodated the firefighters (including potentially losing almost a quarter of their firefighting force to illness and losing a $400,000 annual contract). *See id.* at 1218–23.[1]

In *Williams*, nine healthcare professionals sued their employer, "a regional healthcare system that operates eight hospitals throughout the Willamette Valley," on the same basis—failure to provide accommodations for a COVID-19 vaccine mandate. 174 F.4th at 1204. And in holding that alternative measures to vaccination would impose an "undue hardship" on the conduct of the defendant's business, we highlighted that the defendant was in the "business of providing safe and effective medical care to the public," that unvaccinated "frontline [hospital] workers" such as the plaintiffs "faced a unique risk of infection," and that the nature of the plaintiffs' work duties "necessitated close contact with either patients or staff" and therefore created an outsized risk of causing staffing issues and undermining the efficacy of patient care. *Id.* at 1204, 1206–07.

Those factors are not present here. Unlike the defendants in *Petersen* and *Williams*, the focus of BART's business is not health and safety, but transportation. And unlike the plaintiffs in those cases, the roles occupied by the Six Former Employees before their termination did not require

[1] By contrast, BART had received millions of dollars in federal COVID-19 relief funds. The jury could reasonably infer that BART used those funds to ensure that it did not engage in mass layoffs during the pandemic. The employees who lost their jobs were the religious dissenters BART failed to accommodate. Thus, a reasonable jury could also have inferred that BART had the resources and excess workforce to accommodate the Six Former Employees without suffering an undue hardship. *See Groff*, 600 U.S. at 468.

them to be in close, frequent contact with the public or most coworkers:

- Tonya Lewis-Williams was a "utility worker," responsible for "clean[ing] up the debris off the platform, the trains, some offices," and other such places. Lewis-Williams testified that "[m]ost of the time" she was by herself and not in contact with passengers or her co-workers.
- Bradford Mitchell was a "rolling stock component maintenance superintendent," responsible for supervising the maintenance of train cars at the Richmond shop. He testified that he had no contact with the public and minimal contact with other BART employees—any necessary in-person meetings with shop employees were conducted in "a large open bay area" with a 40-foot-high ceiling and floor space sufficient to fit eight train cars, and after the pandemic began, meetings took place "[v]ery seldom[ly]."
- Rosalind Parker was a "customer service clerk," responsible for selling tickets, bike locker rentals, and company store items, among other things. In her job, she worked alongside four co-workers and interacted with the public from behind a bullet-proof window. Her job required no

"direct contact" with customers—money, tickets, and other such items were collected through a slot, and communication with the customers occurred through a microphone. After the pandemic started, BART installed large polyglass partitions that separated her workspace from the other three clerks.

- Szu-Cheng Sun was a "computer electronic technician," responsible for "install[ing], maintain[ing], and repair[ing] computer-related equipment." Sun testified that "90 percent of [his] work could be done alone or remotely," that he had "no interaction with patrons or riders at all," and that only in "rare instances" presenting "[s]afety concerns" would he have to work alongside a coworker.

- Raymond Lockett was an "operations supervisor liaison," responsible for meeting and escorting contractors around BART facilities (as well as BART employees who needed access to a facility they did not ordinarily have access to) and ensuring that such individuals did not create any safety concerns or other liabilities for BART. Lockett testified that his work was "primarily outside" and generally at a safe distance from other individuals.

- Ryan Rivera was a "[s]torekeeper," responsible for making requisitions and keeping inventory, among other duties. Rivera testified that, as a "senior lead," he was relieved of all "physical duties" associated with his position and could have worked alone in his isolated office, which had "its own ventilation system with windows and filters."

Nor does BART point to any trial evidence suggesting that the Six Former Employees would have been unable or unwilling to wear a mask or take other appropriate measures aimed at preventing transmission. Accordingly, the jury could have reasonably concluded that the burdens imposed by accommodating the Six Former Employees' religious objections would not have been substantial, excessive, or unjustifiable. *Groff*, 600 U.S. at 468–73; *Harper*, 533 F.3d at 1022–23.

We are especially hesitant to upend a jury verdict that rests on an "undue hardship" determination. The "undue hardship" determination is a "fact-specific inquiry" that "takes into account all relevant factors in the case at hand." *Groff*, 600 U.S. at 468, 470. Fact-specific determinations are generally best suited for jury resolution. *Cf. In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) ("The 'materiality' of an omission is a fact-specific determination that should ordinarily be assessed by a jury."). "The jury, after all, represents the conscience of the community." *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003).

Given these features of the "undue hardship" determination, only in cases—like *Petersen* and *Williams*—where the excessiveness of the burden imposed "is so obvious that reasonable minds could not differ" is this question "appropriately resolved as a matter of law." *Stac Elecs.*, 89 F.3d at 1405 (quoting *Fecht v. The Price Co.*, 70 F.3d 1078, 1081 (9th Cir. 1995)). This is not one of those cases. And the jury resolved those factual disputes reasonably, rendering a verdict for the Six Former Employees. Accordingly, we cannot conclude that the trial evidence only supports BART—so the district court did not err in denying BART's motion for JMOL under Rule 50(b).

B

Alternatively, BART argues that it is entitled to a new trial under Rule 59. The above analysis disposes of BART's challenge to the district court's conclusion that the jury's verdict was not against the clear weight of the evidence. "[W]here the basis of a Rule 59 ruling is that the verdict is not against the weight of the evidence, the district court's denial of a Rule 59 motion is virtually unassailable." *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (cleaned up). "In such cases, we reverse . . . only where there is an *absolute absence of evidence* to support the jury's verdict." *Id.* (citation omitted).

BART also argues that it is entitled to a new trial because counsel for the Six Former Employees violated the order in limine excluding "evidence of requests for religious exemptions from employees who are not [or are no longer] plaintiffs in this action." The district court excluded this evidence under Rule 403 because the probative value was minimal and "introduction of this evidence will either unfairly prejudice BART or waste time and cause delay," as it was clear that the evidence would be used "to support the inference that BART did not give genuine consideration to any of the exemption or accommodation decisions at issue."

Though the district court did not view that evidence as unfairly prejudicial, it concluded that "BART cannot combat that inference absent significant delay and waste of trial time."

Plaintiffs' counsel violated the order in limine three times during the second phase of trial: once in cross-examination of Rodney Maplestone, the head of BART's Leave Management Team, and twice in closing argument rebuttal. BART's counsel contemporaneously objected to each violation, and the district court sustained all three objections. After the second violation, the district court explained to the jury why the objection was being sustained; after the third, the district court instructed the jury to "disregard this argument." No violations of the order occurred during the first phase of trial, when "undue hardship" was being adjudicated.

A violation of an order in limine is only a basis for a mistrial when the violation "produced some effect on the jury's verdict" or otherwise prejudiced the losing party. *Black v. Shultz*, 530 F.3d 702, 706 (8th Cir. 2008) (quoting *Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762 (8th Cir. 2001)); *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1115 & n.13 (9th Cir. 2005); *see also* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

And the district court did not abuse its discretion in concluding that the violations of the order in limine did not prejudice BART. Given that the first phase of trial had occurred, these violations could not have affected the jury's determination of "undue hardship." Nor did BART suffer any apparent prejudice from the time wasted by these violations. And to the extent that these violations had the potential to inflame the passions of the jury, we must presume, absent a clear indication to the contrary, that the district court's explanation and instruction to the jury cured the prejudicial effects of counsel's improper comments. *See United States v. Randall*, 162 F.3d 557, 559 (9th Cir. 1998) ("Ordinarily, cautionary instructions or other prompt and effective actions by the trial court are sufficient to cure the effects of improper comments, because juries are presumed to follow such cautionary instructions."). Accordingly, the district court did not abuse its discretion by denying a new trial.

IV

Because we affirm the jury's verdict on the Six Former Employees' Title VII and FEHA claims, we need not address the now-moot conditional cross-appeal of the order granting summary judgment for BART on their Free Exercise claim. That claim "ar[o]se from the same operative facts and s[ought] relief for the same harm" as their successful claims, and they may not recover any amount beyond what is necessary to compensate for the harm suffered. *Teutscher v. Woodson*, 835 F.3d 936, 954 (9th Cir. 2016); *see also* 21 *Moore's Federal Practice* § 328.1.03 (3d ed. 2026) ("[A]n appellee who prevailed in the district court and received all the relief sought may not cross-appeal from the favorable judgment, even to secure review of unfavorable findings."). And the parties do not dispute that if we affirm the jury's verdict, any potential error the district court might have committed by granting summary judgment for BART on this issue would have been harmless error at best.

The only aspect of the cross-appeal ostensibly not moot is Rivera's remedy of reinstatement. Under both Title VII and FEHA, "courts are vested with broad equitable discretion in fashioning and applying an appropriate remedy." *Dyer v. Workers' Comp. Appeals Bd.*, 28 Cal. Rptr. 2d 30, 33 (Ct. App. 1994); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). Because Rivera failed to make this objection below, we review the district court's remedial decision for plain error and will only grant relief "to prevent a miscarriage of justice." *C.B. v. City of Sonora*, 769 F.3d 1005, 1019 (9th Cir. 2014) (en banc) (quoting *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 36 (1st Cir. 2006)).

It was not plain error for the district court to order front pay. At oral argument, Rivera's counsel conceded that he elected front pay below, meaning that getting reinstatement as well without surrendering the money award would result in an impermissible double recovery. Rivera received his elected remedy, and the record does not plainly indicate that Rivera's reinstatement would even be feasible. *See Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1156 (9th Cir. 1999). None of the other Plaintiffs received reinstatement; all six each received a monetary award of over $1 million. It is not a miscarriage of justice for similarly situated litigants to be given a similar remedy. *Cf. Walter v. United States*, 969 F.2d 814, 817 (9th Cir. 1992) ("Fundamental fairness requires that like cases be treated alike."). Accordingly, we affirm the district court's exercise of remedial discretion in the narrow circumstances of this case.

V

Title VII serves as a bulwark to protect the rights of conscience. A jury reasonably concluded that the Six Former Employees carried their burden under Title VII and FEHA, and that BART would not have suffered an undue hardship from accommodating those employees. We will not disturb that verdict.

AFFIRMED.

R. NELSON, Circuit Judge, concurring:

The majority does not reach the free exercise cross appeal given our resolution for Appellees. Because this issue is recurring in our circuit and elsewhere, I explain why the district court's analysis on the free exercise claims is troubling. The district court concluded that BART's review process did not violate general applicability under *Employment Division v. Smith*, 494 U.S. 872 (1990), because the review process did not allow "unfettered discretion permitting discretionary treatment of religion discussed in *Fulton*, *Sherbert*, and *Smith*." *See generally Fulton v. City of Phila.*, 593 U.S. 522 (2021).

But we expressly rejected the district court's "unfettered discretion" test. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 687–88 (9th Cir. 2023) (en banc). And the Supreme Court may soon clarify this issue further. *See St. Mary Cath. Par. v. Roy*, No. 25-581, 2026 WL 1052111 (U.S. Apr. 20, 2026) (granting the petition for writ of certiorari). Still, the district court's decision highlights that *Smith* and its progeny have resulted in a doctrinal hodgepodge. And lower courts—wrongly—

find a neutral and generally applicable law without properly applying our precedent.

The real problem is that *Smith* is demonstrably erroneous. *Gamble v. United States*, 587 U.S. 678, 710–11, 718 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."). While we as lower court judges are bound to follow *Smith*, we need not expand it. *Cf. Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 954 (9th Cir. 2021) (R. Nelson, J., dissenting from the denial of rehearing en banc).

Smith is inconsistent with history and tradition. The Free Exercise Clause represented a powerful promise in 1791: the federal government would not interfere with the *exercise* of Americans' religious faith. *See* U.S. Const. amend. I. That promise was strengthened when "this nation, under God," had "a new birth of Freedom" that transformed the Free Exercise Clause from a limited guarantee against the federal government into a vibrant privilege or immunity incorporated against the states. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863); U.S. Const. amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."). Sadly, *Smith* shirked relevant history and tossed the fullness of the Constitution's free-exercise protections to the wayside for its regime of neutral and general applicability.

This constitutional guarantee should one day be vindicated, and *Smith* should be relegated to the annals of history alongside other demonstrably erroneous precedents. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("The decision of this Court in *Minersville*

School District v. Gobitis and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled”); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022) (“We hold that *Roe* and *Casey* must be overruled.”). Until then, we as lower courts can and should do much to bring the Free Exercise Clause in line with historical understanding as we apply *Smith*.

I

A

First, let’s discuss BART’s process for determining religious objections. In October 2021, BART’s Board of Directors passed a COVID-19 vaccination requirement. Under that mandate, employees had to be vaccinated by December 13. But both Title VII and FEHA required BART to offer an exemption and accommodation process for religious objectors—which BART implemented and administered by February 2022.

Under that process, religious objectors completed and submitted a standardized questionnaire to BART’s Leave Management Team. The form asked applicants to provide: (1) their religion or belief system; (2) length of belief; (3) tenets of the belief which require abstention; (4) the beliefs system’s views about other vaccines; (5) reasonable accommodations the applicant would request if granted an exemption; and (6) a written statement or other document from a religious leader or other person describing the belief system and the applicant’s adherence to it.

The Leave Management Team reviewed each request for completeness, requested additions or clarifications if needed, and interviewed some objectors. A three-person panel at BART reviewed each application and granted or denied a religious exemption. Of 181 religious exemption requests, fewer than half—70—were found eligible for exemptions. Little explanation was given as to why those 70 were eligible compared with those rejected.

The 70 employees granted an exemption were then considered for accommodation. The accommodation process was run by BART's Manager of Leave Programs and its HR manager. Under that process, BART allowed objectors to propose accommodations and then answered those requests in letter responses, assessing the reasonableness of the accommodations for each objector. BART failed to identify reasonable accommodations for any of those 70 exempted employees and sent a denial letter to each stating they must either comply with the mandate, retire, resign voluntarily, or be terminated. Not one of the 181 religious objectors received an accommodation—with each being denied in either the first or second parts of the agency's discretionary review process.[1] BART sent a clear message: take the jab or lose your job.

[1] To expand upon the majority's analysis, BART over-relied on public health authorities to guide its decision-making. Reliance on guidance from public health authorities is permissible; over-reliance is not. That is particularly true where evidence suggested BART did not follow public health guidance consistently. For example, shortly after firing the Six Former Employees, BART never required the booster vaccine recommended by the CDC—despite public health guidance showing that the efficacy of the initial vaccine doses was waning. A reasonable jury could have concluded that BART's failure to accommodate was not rooted in an undue hardship caused to its operations based on the lack of efficacious vaccination.

Contrary to what BART suggests, the Court has not said that reliance on public health guidance is dispositive. *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998). Rather, in assessing whether an entity reasonably

B

The district court need not have revisited history to avoid its error. The district court's conclusion that BART was entitled to summary judgment on the § 1983 claim flouted circuit precedent. Relying largely on out-of-circuit precedent, the district court concluded that BART's vaccine mandate policy was neutral and generally applicable. The district court explained that the vaccine mandate policy generally applied because it did not establish a "regime[] of unfettered discretion [permitting] discretionary treatment of religion."

The district court explained that "BART considered (1) whether the applicant's reason for objection was based on a religious, rather than a secular belief, and (2) determined the availability of reasonable accommodation." The district court added that this exemption process—though discretionary—did not allow secularly motivated conduct to be favored over religiously

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determined that a person's condition posed "a significant risk to the health or safety of others," 42 U.S.C. § 12182(b)(3), the views of public health authorities hold "special," but "not conclusive," weight, *Bragdon*, 524 U.S. at 650. As the Court explained, public health guidelines the lower court relied on were not "conclusive of the point to be decided" because they only "set out CDC's recommendation that the universal precautions are the best way to combat the [the public health issue]," but made no assessment of "the level of risk." *Id.* at 651–52 (emphasis added).

That line of reasoning is particularly relevant. General guidance issued by public health authorities is just that—general guidance. Given the fact-sensitive nature of the "undue hardship" inquiry, public health guidance will rarely, if ever, be conclusive of the ultimate issue: whether a particular accommodation would result in a "substantial" increase in risk to the health and safety of others. *Groff v. DeJoy*, 600 U.S. 447, 468–73 (2023).

motivated conduct, and as such did not amount to the type of unfettered discretion seen in *Fulton*, 593 U.S. 522, and cases that preceded it.

But we already rejected en banc the district court's reading of *Fulton*. *See generally Fellowship of Christian Athletes*, 82 F.4th 664. We explained that characterizing *Fulton* as "only concerned with 'unfettered' discretion, is overly narrow," and "*Fulton* counsels that the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable, regardless of the actual exercise." *Id.* at 687–88. And we explained that judges have a duty to check the record to see if the government agency has granted exemptions in a "viewpoint-discriminatory" manner. *Id.* at 688. In other words, "the very fact that [a policy] require[s] a case-by-case analysis is antithetical to a generally applicable policy." *Id.*

True, "regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). But a law is also not generally applicable any time it "permit[s] the government to grant exemptions based on the circumstances underlying each application." *Fulton*, 593 U.S. at 534. The discretionary mechanisms in BART's vaccine policy in which it interviewed employees, analyzed their religious beliefs, and made individualized determinations on exemptions rendered the policy not generally applicable and thus triggered strict scrutiny.

This conclusion is not diminished just because the "exemption and accommodation process was mandated by Title VII and FEHA." And to comply with those statutes, "employers like BART must undertake some degree of individualized review." That review does not mean that the vaccine exemption process adopted is neutral and generally applicable. BART cannot point to the strictures of Title VII and FEHA and conclude that because those statutes prevented it from adopting a truly neutral and generally applicable vaccine mandate, the exemption process imposed was therefore neutral and generally applicable.

Thus, strict scrutiny should have been applied. *See Fellowship of Christian Athletes*, 82 F.4th at 687–88. District courts should not minimize the scope of the free exercise right as only protecting against policies that give agencies unfettered discretion over exemptions. Circuit precedent squarely forecloses that approach. *Id.*

C

Underlying the district court's conclusion is a deep circuit split. The Third, Sixth, and Eleventh Circuits agree with our view that discretion—rather than unfettered discretion—can suffice to render a government policy not generally applicable. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–11 (3d Cir. 2004) (Alito, J.); *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 481–82 (6th Cir. 2020); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234–1235 (11th Cir. 2004). On the other side, the Second and Tenth Circuits hold that if exemption policies do not grant "unfettered" discretion and exemptions are "objectively defined," those policies remain generally applicable. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288–89 (2d Cir. 2021); *St. Mary Cath. Par. in Littleton v. Roy*, 154 F.4th 752, 770–71 (10th Cir. 2025); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015) (adopting a similar standard before our en banc decision in *Fellowship of Christian Athletes*).

Our decision in *Fellowship of Christian Athletes* is not only binding—it is also eminently correct. The better reading is to assume prophylactically that any government policy that provides individual discretionary exemptions prima facie qualifies as not generally applicable. As then-Judge Alito explained, "a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk*, 381 F.3d at 209. In other words, the existence of a discretionary mechanism within a government policy can trigger strict scrutiny even if it does not seem to treat secular conduct differently on its face. *Id.*

The district court explained that if we view any individualized inquiry as triggering strict scrutiny, it will lead to a topsy-turvy outcome where a vaccine mandate allowing for no exemptions (including religious exemptions) would result in rational basis review while one with a discretionary exemption process would be subject to strict scrutiny. But this analysis ignores two important considerations—first, the inherent biases against religion a policy adopts when it grants agency administrators this type of discretion, and second, what it means for a policy to generally apply.

In part, the reason discretionary mechanisms in government policies trigger strict scrutiny under the Free Exercise Clause is because of the inherent hostility the administrative state has historically demonstrated against religion. "Religious discrimination is structurally embedded within administrative power"—even if unintentionally—because agency administrators, like those at BART, necessarily predicate their operations on an ethos of rationalism and secularism. *See* Philip Hamburger, *Our Anti-Catholic Administrative State*, First Things (Oct. 30, 2020), [https://perma.cc/7UDR-FHPU]. Unlike lawmakers, whom Americans can vote out of office when they promulgate facially neutral laws that offend religious sensibilities, agency policymakers can impose facially neutral policies that burden religion with no effective democratic check on their actions. *Id.* And historically, giving agency policymakers this sort of discretion resulted in dominant secularist orthodoxy imposing burdens on Catholic and other minority religious beliefs. *Id.*

Thus, "the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable, regardless of the actual exercise," *Fellowship of Christian Athletes*, 82 F.4th at 687–88, because our doctrine prophylactically distrusts administrative power in areas of faith and conscience. That distrust of state and federal administrators in this area is well earned. Much evidence supports that when agencies adjudicate, they engage in "an unhealthy and biased institutional process" wherein ordinary Americans "stand little or no chance of success." Neil Gorsuch & Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 78–79 (2024).

The free exercise of religion—our first freedom—is therefore at risk when agency discretion over exemptions is permitted. And luckily, both our doctrine and Supreme Court doctrine recognize that fact. *Fellowship of Christian Athletes*, 82 F.4th at 687–88; *Fulton*, 593 U.S. at 537. The Free Exercise Clause simply does not trust "the government to decide which reasons for not complying with [a] policy are worthy of solicitude." *Fulton*, 593 U.S. at 537.

D

In fact, governmental discretion serves as the hallmark of non-general applicability. The *Smith* test does not track the original meaning of the Free Exercise Clause. *See infra* II. But even if some history supports *Smith*, at the Founding those who adopted the anti-exemption view of the Free Exercise Clause only understood it to "permit[] government to deny religious freedom . . . upon the occurrence of illegal actions" that applied generally to all citizens with no exceptions. *City of Boerne v. Flores*, 521 U.S. 507, 540 (1997) (Scalia, J., concurring) (quoting Philip Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 918–19 (1992)).

A policy that allows state or federal agency officials to individually evaluate religious beliefs and grant or deny exemptions empowers those officials with a prerogative to dispense otherwise generally applicable laws. The Founders were aware of British practices involving the suspending or dispensing of the laws and explicitly rejected that practice in America.

The Founders were influenced by the history of the British Constitution when designing our Constitution. *See* The Federalist No. 47 (Madison) ("The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry."). And that history pertains to how generally applicable laws operate.

The Stuart monarchs in England claimed that they possessed the prerogative power to suspend (i.e., cease the enforcement of otherwise generally applicable law) and to dispense (i.e., waive the enforcement of laws for particular persons) with the law. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 65 (2014). And King

Charles II used the dispensing power to favor England's Catholic minority over its Protestant majority's objections. *Id.* at 67–68.

The Crown's prerogative of granting dispensations to benefit certain religious sects was one of the reasons the Stuart monarchs were eventually displaced in the Glorious Revolution of 1688. *Id.* at 69. And the English Bill of Rights of 1689 rejected any power the Crown had to dispense or suspend otherwise generally applicable laws without consent of Parliament. *Id.*; *see also* An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M., sess. 2, c. 2 (Eng.) ("That the pretended power of suspending the laws or the executions of laws by regal authority without consent of Parliament is illegal; That the pretended power of dispensing with laws or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.").

Building on this history, the American model went further. The early colonies not only denied the dispensing power to their state executives but concluded that doing so went above "the legislature's ordinary and lawful power to make law." Hamburger at 75–76. "In other words . . . if the legislature was constitutionally limited, it could not exercise the dispensing power." *Id.* at 76.

Laws at the Founding tended to be generally applied—proscribing conduct for the entire citizenry—and the executive branch could not carve out exceptions to the laws through its discretion alone. This principle was best laid out by Chief Justice John Marshall in *Little v. Barreme*, 6 U.S. 170, 179 (1804), where he explained that executive power cannot "legalize an act which without [executive] instructions would have been a plain trespass." When

Congress proscribes behavior generally, "the law must take its course," and the executive may not "excuse an act not otherwise excusable." *Id.* at 178. In the strictest sense, a law that proscribed certain conduct, but seldom applied to all who engaged in that conduct, could not be considered generally applicable. *Cf.* Hamburger at 81–82.

And in the context of free exercise specifically, a policy that grants agency decisionmakers discretion to individually adjudicate belief and grant or deny exemptions is therefore not generally applicable. After all, the plain text of the Free Exercise Clause states: "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I (emphasis added). The phrase "Congress shall make no law," at the start of the amendment is a signal that any law Congress passes that "prohibit[s]" the "free exercise" of religion was originally understood as void ab initio.[2] *Id; see also* Akil Amar, *The Bill of Rights: Creation and Reconstruction* 42 (1998) ("These laws simply lay outside of Congress's legitimate province.") Therefore, a law that grants agency administrators even minimal discretion in evaluating religious belief is unconstitutional when enacted.

Even if the Free Exercise Clause contains no right of exemption from neutral and generally applicable laws as *Smith* held, such a principle as originally understood could only extend to laws that generally applied to all persons with no room for executives to carve out individualized exceptions. Such discretion is far too close to the dispensing

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[2] As explored below, the same principle extends to state legislatures and state agencies, thus rendering the principles discussed here applicable to BART. *See generally Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause against the states).

power the Stuarts exercised to aid their favored religious sect and cuts against early American attitudes abhorring dispensations. It also demonstrates that the district court's myopic focus on whether the application of BART's vaccine mandate policy treated secular conduct better than religious conduct missed the mark. The policy gave BART administrators discretion to inject their biases—whether by favoring some religious beliefs over others, or by favoring secularism over faith—into the exemption process. And the text of the First Amendment prophylactically bars such discretion. U.S. Const. amend. I.

Thus, while courts can examine whether a law that is facially neutral and generally applicable is not actually so in practice, *see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), the reverse is not true. A mechanism that allows agency administrators to exercise discretion, individually judge the religious beliefs of dissenters, and grant exemptions necessarily means such a policy is not generally applicable. The district court disregarded Ninth Circuit precedent by not applying strict scrutiny. *See Fellowship of Christian Athletes*, 82 F.4th at 687–88; *see also Fulton*, 593 U.S. at 544 (Barrett, J., concurring) ("A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions."). And Ninth Circuit precedent better reflects the understanding of what constituted generally applicable laws during the Founding—more faithfully carrying out the doctrine outlined in *Smith* than other circuits which have split with us on this issue.

II

My reservations about the district court's application of *Smith* elide a more fundamental tension. Courts are bound by *Smith* and thus have been forced to apply a doctrine that has proved unworkable. *Smith* does not follow the original meaning of the Free Exercise Clause as it was understood either in 1791 or 1868. And despite reasonable doctrinal reservations about what would replace *Smith*, *see Fulton*, 593 U.S. at 543–44 (Barrett, J., concurring), America would be better if *Smith* were overruled.

A

At ratification in 1791, the Free Exercise Clause likely included a limited right of exemption from neutral and generally applicable laws. *Smith* "paid shockingly little attention to the text of the Free Exercise Clause," and instead of "examining what readers would have understood its words to mean when adopted . . . merely asked whether it was 'permissible' to read the text to have the meaning that the majority favored." *Fulton*, 593 U.S. at 564 (Alito, J., concurring in the judgment) (quoting *Smith*, 494 U.S. at 878).

The First Amendment prevents the government from "prohibiting the free exercise" of religion. U.S. Const. amend. I. The term "free exercise" in the Constitution had a definite meaning in 1791, drawing both from early state constitutions and early state practice. And in reaching that formulation, the Founders used "free exercise" over an earlier proposal in the drafting process that referred only to "the rights of conscience." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488–89 (1990).

This word choice is material, as free exercise of religion denoted more than just protection for religious beliefs, but a protection for religious acts (i.e., "exercise"). *See id.* Such a formulation was not novel. The Georgia Charter of 1732, for example, stated, "that there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said province, and that all such persons, except papists, shall have the free exercise of religion." *Id.* at 1489 (cleaned up).

Free exercise was understood to denote a "broader freedom of action to all believers," and the Founding generation understood that it would "generate conflicts with, and claims for exemption from, general laws and social mores." *Id.* at 1490. Early American judicial practice supported this idea. In *People v. Philips* (N.Y. Ct. of Gen. Sess. 1813), *reprinted in* 1 W. L.J. 109 (1843), for example, the New York state court—interpreting the meaning of "free exercise" in its constitution—held that despite imposing a neutral and generally applicable subpoena requirement on a Catholic priest, the state could not constitutionally compel him to disclose what a penitent told him under the seal of confession. *See* McConnell at 1504.

James Madison also credited a right of exemption in his Memorial and Remonstrance against Religious Assessments: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." 2 *The Writings of James Madison* 183, 184 (G. Hunt ed. 1901). Madison explained that "This duty is precedent, both in the order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe." *Id.* And since "Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and viceregents of the former." *Id.*

This was not to say that a free exercise right of exemption was absolute. During the Founding Era, First Amendment rights were circumscribed by ideas of communal collective interest (which meant enactments like many sedition and libel laws presented no constitutional concerns). *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 273, 278 (2017). But in the context of free exercise, this only meant that acts of religious exercise "repugnant to the peace and safety of the State," and that were proscribed by law, could not be challenged by asserting a right of religious exemption. McConnell at 1457 (quoting Ga. Const. of 1777, art. LVI) (cleaned up).

Different state constitutions phrased these "peace and safety" provisos differently, but the upshot was that while exemption was part of the original meaning of "free exercise," an exemption would yield if it "disturb[ed] the 'peace' or 'safety' of the state," or amounted to "acts of licentiousness or immorality" as commonly understood at the Founding. *Id.* at 1461 (cleaned up). And while the federal Free Exercise Clause did not include an explicit peace and safety proviso, background understandings of the interplay between the common good and First Amendment rights suggest a right of exemption bounded by notions of peace and safety was inherent to the original meaning of "free exercise" by 1791. *Cf.* Campbell at 273.

Smith rejected this conclusion by concluding that every breach of a neutral and generally applicable law breached the peace. *City of Boerne*, 521 U.S. at 538–39 (Scalia, J., concurring). But such a reading would have rendered language in early state Constitutions superfluous (e.g., the New York Constitution enumerated that rights of conscience should not excuse acts of licentiousness, suggesting that not all acts proscribed by positive law constituted licentious acts). *See id.* at 554–55 (O'Connor, J., dissenting).

The best original meaning reading of "free exercise" in 1791 is that it did include a right of exemption, but that right was bounded. The First Amendment could not allow a person to engage in proscribed acts that infringed the peace and safety of the state. And not all acts proscribed by positive law constituted breaches of peace and safety. This reading raises questions for this case, such as whether a vaccine mandate would have fallen within the scope of peace and safety provisos during the Founding. But ultimately, under *Smith* the judiciary is left impotent to probe these important questions and instead is forced to apply a doctrine inconsistent with the free exercise right originally enshrined in the Constitution.

B

In considering the propriety of *Smith*, history and tradition surrounding the First Amendment in 1791 shows the existence of a right of exemption. The history of the Fourteenth Amendment, however, reflects an even broader right of exemption incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment.[3] And that

[3] As the Supreme Court has recognized, "there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)" or whether 1791 provides the relevant referent. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 37 (2022). The answer to this question likely varies based on the

history suggests that *Smith* was not only erroneous, but demonstrably so. *Gamble*, 587 U.S. at 710–11, 718 (Thomas, J., concurring).

1

Framing free exercise in 1868 requires a brief discussion of the Fourteenth Amendment more broadly. That Amendment serves as the ultimate realization of President Washington's vision of America as "An indissoluble Union of the States under one federal Head." Letter From George Washington to The States (June 8, 1783), *reprinted by Founders Online*, National Archives, [https://perma.cc/3KX9-CVNC]. It represents the "fruits of Union victory" achieved by "the deaths of thousands of martyrs, White and Black, from Lincoln on down," who "gave their lives that this nation might live." Akhil Amar, *Born Equal: Remaking America's Constitution, 1840–1920* 588 (2025); Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

Section 1 of the Fourteenth Amendment therefore made a solemn pledge. *See* U.S. Const. amend. XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). In 1791, none of the rights listed in the Bill of

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specific provision of the Bill of Rights at issue—giving due consideration to each provision's history and tradition in both 1791 and 1868. In the case of the Free Exercise Clause right of exemption, the history supports that the Framers of the Fourteenth Amendment designed that amendment to codify a right of exemption broader than contemplated in 1791. *See* Amar at 43–44, 255–56. Thus, the Free Exercise right of exemption as understood in 1868 provides the best referent for relevant originalist analysis. Even so, *Smith* does not follow from either a 1791- or 1868-based originalist analysis.

Rights were incorporated against state governments. *See Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833) (opinion of Marshall, C.J.) ("We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."); *see also* Amar at 141 ("Close inspection of the original Constitution confirms the soundness of the Hamilton-Marshall rule of construction.").

Still, the states were not unbounded under the original Constitution to disparage fundamental civil rights. The Comity Clause of Article IV of the Constitution provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." As explained by Justice Bushrod Washington, the Comity Clause ensured that states could not deny to citizens of other states "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).[4] But the Comity Clause

[4] These fundamental rights included "Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind[;] . . . [t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal;

merely served as a non-discrimination provision. It prevented states from denying fundamental rights that it extended to its own citizens to citizens of other states. *See* U.S. Const. art. IV, § 2, cl. 1.

The Fourteenth Amendment went a step further in protecting the fundamental rights of citizens by declaring that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." As explained (and widely publicized in newspapers) by Senator Jacob Howard, this portion of the Fourteenth Amendment encompassed both the civil rights secured by the Civil Rights Act of 1866 and *Corfield*'s fundamental rights as they were understood in 1868.[5] *See* Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit* 125 (2021).

But more importantly, the Privileges or Immunities Clause secured "the personal rights guaranteed and secured by the first eight amendments of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (remarks of Sen. Jacob Howard); *McDonald v. City of Chicago, Ill.*, 561 U.S.

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and an exemption from higher taxes or impositions than are paid by the other citizens of the state; . . ." *Corfield*, 6 F. Cas. at 551.

[5] The qualification "as they were understood in 1868," matters because the Reconstruction Framers likely incorporated *Corfield* into the Privileges or Immunities Clause, *as they understood it* in 1868—and that understanding differed from 1791. For example, when *Corfield* was decided, Justice Washington listed "the elective franchise" as a fundamental right. 6 F. Cas. at 552. But the published remarks of Reconstruction Framers specifically disclaimed the elective franchise as a *Corfield* right secured by either the Civil Rights Act of 1866 or the Privileges or Immunities Clause, thus requiring the eventual need for the Fifteenth Amendment. U.S. Const. amend. XV.

742, 829–33 (2010) (Thomas, J., concurring in part and in the judgment) (discussing the history of the Privileges or Immunities Clause, and how it incorporated the Bill of Rights against the states). And of relevance here, this meant that the guarantee of free exercise of religion enshrined in the First Amendment was now a privilege enforceable against the states through the Privileges or Immunities Clause, subsuming the old rule of *Barron*.[6] *See Amar* 254–56.

The Privileges or Immunities Clause veered away from its original meaning in the *Slaughter-House Cases*, 83 U.S. 36 (1872), over dissents by Justices Field, Chase, Swayne, and Bradley who attempted in vain to defend its original Lincolnian vision. But in *Cantwell*, 310 U.S. at 303, the Supreme Court held that the Free Exercise Clause applied to the states through the Due Process Clause of the Fourteenth Amendment. The Due Process Clause is not the proper vehicle for incorporation under an originalist or textualist methodology. *See McDonald*, 561 U.S. at 811 (Thomas, J., concurring in part and concurring in the judgment) ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or

[6] Conceiving of a Free Exercise right as a "privilege" has clear textual implications. While the original First Amendment textually focused on Congress's ability to make laws prohibiting the Free Exercise of religion, *see* U.S. Const. amend. I, the Fourteenth Amendment textually focuses on the Free Exercise right as an individually held "privilege," vindicating the natural right of American citizens to practice their religion. This textual change strongly supports broad construction of doctrines like the ministerial exception that operate against neutral and generally applicable laws. *See* Amar at 256; *Biel v. St. James Sch.*, 926 F.3d 1238, 1240 (9th Cir. 2019) (R. Nelson, J., dissenting from the denial of rehearing en banc); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738 (2020); *id.* at 764–65 (Thomas, J., concurring).

property could define the substance of those rights strains credulity for even the most casual user of words.”). Still, modern substantive due process doctrine’s approach—asking whether a fundamental right is deeply rooted in the nation’s history and tradition for purposes of incorporation—is largely akin to asking whether a right enforceable against a state is in fact a privilege or immunity. *See Dobbs*, 597 U.S. at 240 n.22.

Thus, the core question is whether a Free Exercise Clause right of exemption was a privilege or immunity incorporated against the states through the Fourteenth Amendment. As discussed below, the Fourteenth Amendment incorporated a robust right of exemption against the states—even broader than in 1791.

2

The Fourteenth Amendment framed Free Exercise as a right that allowed for exemptions to neutral and generally applicable laws. In doing so, the Radical Republicans sought to allow freedom of religion to extend to areas where such rights were sidelined for ostensibly neutral and generally applicable laws.

The Reconstruction Framers sought to combat generally applicable laws in the antebellum South that made it a crime to disseminate anti-slavery religious ideas and teach African Americans how to read. *See* Amar at 256; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1133 n.125 (1994). In many southern states, it was a crime punishable by death to “write, print, publish or distribute” literature promoting abolition. Lash at 1134 (cleaned up). Under these statutes, those who engaged in religious sermons condemning slavery risked death either through the law or by proslavery mobs. *Id.* And these laws generally applied. *Id.* They did not regulate religion qua religion. *Id.* But Radical Republicans nonetheless saw these laws as grave infringements on the free exercise of religion.

Religious exercise by slaves was also regulated. In many states, slaves could not have their own ministers, were required to have the presence of a white man if they were to have religious gatherings, and were required to conform the contents of their sermons to proslavery ideology. *Id.* at 1134–35.

The Reconstruction Framers were explicit that the Civil Rights Act of 1866 and the Fourteenth Amendment aimed to combat these laws. For example, Lyman Trumbull, one of the sponsors of the 1866 Civil Rights Act, stated that the Act aimed to secure "the immortal declaration 'that all men are created equal,'" and "that they are endowed by their Creator with certain inalienable rights," not just on parchment but by guaranteeing to the freedmen and the abolitionists "the privileges and immunities" denied them by southern states. Cong. Globe, 39th Cong., 1st Sess. 474 (1865). And among the aims of the Civil Rights Act of 1866—and the Fourteenth Amendment which constitutionalized that Act—was to ensure that citizens could serve as "a minister of the Gospel [to the freedmen]," and no longer allow the states to "make it a highly penal offense for any person . . . to teach slaves" how to read the Gospel. *Id.* In other words, the Civil Rights Act of 1866 and the Privileges or Immunities Clause aimed to grant a broad right of exemption against generally applicable laws that prevented abolitionists and freedmen from pursuing their religious exercise.

This conclusion is bolstered by religiously motivated resistance against the 1850 Fugitive Slave Act (the 1850

Act). *See* Kurt T. Lash and Stephanie Hall Barclay, *A Crust of Bread: Religious Resistance and the Fourteenth Amendment*, 78 Vand. L. Rev. 1203, 1222–23 (2025). The 1850 Act authorized federal commissioners to grant certificates of removal to a claimant of a fugitive slave, rather than allowing African Americans a normal jury trial, the ability to testify on their own behalf, or rights of habeas corpus. *See* Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462 (repealed 1864). Moreover, the Act declared any person who "shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant" shall "be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months." *Id.*

This language caused a religious firestorm in the abolitionist North because its generally applicable language about "indirect" aid criminalized even providing food, water, or shelter to fugitives in the direst of circumstances. As explained by Representative Bingham, the 1850 Act "forbade [them] to give shelter to the homeless—a bill which made [them] violate the command of [their] divine Master when he says 'Give a cup of water to him who is ready to perish.'" John Bingham, Speech During Johnson Impeachment Proceedings (May 4, 1868), *reported in* Weekly Rescue (Sacramento), May 9, 1868, at 2.

Religious northern abolitionists saw this Act as criminalizing their ability to practice Jesus's teachings in the Gospel of Matthew. *See* Barclay at 1224; *see also Matthew* 25:35 (King James) ("For I was an hungred, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in"). Accordingly, both pastors and politicians throughout the North insisted that Christians should not comply with the unjust law. Barclay at 1225.

This opposition eventually turned to constitutional argumentation. For example, in the 1859 case *Ex Parte Bushnell*, the Supreme Court of Ohio recognized (though it did not credit) the constitutional argument "that the amendment to the constitution, which secures freedom of religious belief, makes the provision in relation to the reclamation of slaves subordinate to it, and by implication, *of no obligation upon those who believe slavery a sin*." 9 Ohio St. 77, 187 (1859) (emphasis added). Abolitionist lawyer (and later Lincoln's Treasury Secretary, and Sixth Chief Justice of the United States) Salmon Chase argued that fugitive slave acts should be equitably construed to allow for a right of exemption to ensure that religiously motivated charity for fleeing slaves was not criminalized. *See Jones v. Van Zandt*, 13 F. Cas. 1040, 1043 (C.C.D. Ohio 1843); *see also* Barclay at 1221–23 (detailing Chase's heroic efforts to challenge the Act). And Justice McLean, riding circuit in Ohio, agreed with Chase that the Act could not preclude basic acts of charity for the fleeing slave (yet ruled against the defendant on other grounds). *See* Barclay at 1221–22.

Senator Charles Sumner made the same argument on the floor of the Senate, arguing that "[t]he Constitution expressly secures the 'free exercise of religion'; but this act visits with unrelenting penalties the faithful men and women, who may render to the fugitive that countenance, succor and shelter, which in their conscience 'religion' may require." Daily Globe (D.C.), Sept. 11, 1852, at 5 (reporting Sumner's speech of Aug. 26, 1852). William H. Seward, later Lincoln's Secretary of State, echoed this line of thought, arguing that Christians opposed to slavery could not "be either true Christians or real freemen, if [they] impose on another a chain that we defy all human power to fasten on ourselves," and that "there is a higher law than the

Constitution . . . bestowed upon them by the Creator of the universe." William H. Seward, Speech of Mar. 11, 1850, *in* Walter Stahr, *Seward: Lincoln's Indispensable Man* 124 (2012).

The religiously motivated resistance of the 1850s cannot be separated from the free exercise right the Privileges or Immunities Clause sought to incorporate against the states. Before the ratification of the Fourteenth Amendment "a State . . . could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our Divine Master, to help save a slave who was ready to perish to give him shelter, or break with him his crust of bread." Cong. Globe, 42d Cong., 1st Sess. app. at 84 (1871) (statement of Rep. Bingham). But "by force of the fourteenth amendment, no State hereafter" could punish a man for such charity or for teaching another "to read the lessons of the New Testament." *Id.* In other words, religiously neutral and generally applicable laws passed by states could not override the Fourteenth Amendment's guarantee of free exercise for religiously motivated acts. *See* Barclay at 1258–64.

Creating judicial doctrine that applies the religious right of exemption recognized against the states in the Privileges or Immunities Clause in the context of modern cases and controversies presents a distinct challenge. But *Smith*, which did not consider this history of incorporation and simply concluded that neutral and generally applicable laws always trump burdens on religious exercise, does not begin to grapple with the task. *Smith*'s holding breaks from the history and tradition surrounding free exercise and the Fourteenth Amendment.

III

Smith has created problems for our jurisprudence. Because lower courts misunderstand how agency discretion systematically disfavors religious freedom, they apply *Smith* to deteriorate religious liberty. This disserves Americans by not vindicating their religious rights against policies not truly neutral and generally applicable. Worse, *Smith* does not track the original meaning of the Constitution. It is high time we return to the principles recognized by the Founding generation and vindicated by Lincoln's. *Smith* was a mistake. And our jurisprudence will be better once it is corrected. In the meantime, lower courts should not extend *Smith*. We recognized as much in *Fellowship of Christian Athletes*. 82 F.4th at 685–86. District courts in our circuit should hew more closely to our precedent.