
**TARGETING RELIGION:
ANALYZING APPALACHIAN PROSCRIPTIONS ON
RELIGIOUS SNAKE HANDLING**

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INTRODUCTION	1425
I. THE PRACTICE OF SNAKE HANDLING FOR RELIGIOUS PURPOSES	1427
II. STATE APPROACHES TO SNAKE HANDLING	1429
A. <i>Direct Approach</i>	1430
B. <i>Public Endangerment Approach</i>	1431
C. <i>Common Law Approach</i>	1434
III. SNAKE HANDLING AND THE CONSTITUTION	1436
A. <i>Direct Approach</i>	1437
B. <i>Public Endangerment Approach</i>	1443
C. <i>Common Law Approach</i>	1449
CONCLUSION.....	1450

“And these signs shall follow them that believe; In my name shall they cast out devils; they shall speak with new tongues; They shall take up serpents; and if they drink any deadly thing, it shall not hurt them”

Mark 16:17-18 (KJV)

INTRODUCTION

The Free Exercise Clause of the First Amendment prohibits the federal government, and state and local governments by application of the Fourteenth Amendment, from requiring or restricting religious beliefs or practices.¹ Historically, the Supreme Court imposed a high burden on government action that imposed a substantial burden on practices motivated by religious beliefs, even when that action was “neutral” with respect to religion. To be constitutional, the Court traditionally required that the government action further a “compelling interest” in the least restrictive manner possible.² The legal shorthand for this form of heightened judicial review is known as “strict

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¹ See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (emphasis added)); *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1971).

² See *Yoder*, 406 U.S. at 215; *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

scrutiny.” Then, in 1990, the Supreme Court dramatically departed from this historical standard of review in *Employment Division v. Smith*.³ There, the Court held 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.”⁴ The decision was not a popular one, and Congress briefly managed to reinstate the Court’s historic strict scrutiny test by enacting the Religious Freedom Restoration Act (“RFRA”),⁵ which the Court quickly struck down as an unconstitutional usurpation of its ultimate authority to interpret the Constitution.⁶ Thus, per the current state of federal jurisprudence, religiously neutral and generally applicable laws are not subject to heightened judicial review. In the subsequent case of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,⁷ however, the Court made clear that strict scrutiny is still to be applied when a law is neither religiously neutral nor generally applicable.⁸

After the Court struck down key provisions of RFRA, several states enacted their own RFRA analogues, employing the language of strict scrutiny as a *statutory* check on state action that substantially burdens religious practice, regardless of whether that action is neutral and generally applicable. Thus, a facially neutral and generally applicable law that substantially burdens practices motivated by religious beliefs can be both constitutional at the federal level and illegal (by statute) at the state level.

This complex legal framework has significant implications for the legality of state prohibitions on religious snake handling. As this Note explains, states have employed a variety of approaches when proscribing the practice, triggering different forms of judicial review. At least one state raises obvious constitutional concerns by targeting religion directly, while others attempt to avoid those concerns through the use of generalized public endangerment statutes. Some states follow a third approach by not proscribing the practice at all, in some instances relying on common law injunctions and local proscriptions instead.⁹ Part I of this Note provides a brief introduction to the practice of handling poisonous snakes for religious purposes. Part II

³ 494 U.S. 872 (1990).

⁴ *Id.* at 886 n.3.

⁵ See Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb (2012).

⁶ See *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997); *infra* note 169 and accompanying text.

⁷ 508 U.S. 520 (1993).

⁸ *Id.* at 533 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.” (citations omitted)); *infra* notes 110-118 and accompanying text.

⁹ “Local proscriptions” principally refers to those proscriptions by cities, towns, and counties. See *infra* Part III.C (exploring these proscriptions).

summarizes the various approaches that Appalachian states use to proscribe the practice. Part III discusses the legality of these approaches under both the Free Exercise Clause of the Constitution and the relevant state statutory frameworks. This Note ultimately argues that Kentucky's prohibition overtly targets religious snake handling, is not a "generally applicable, religion neutral [law]" under *Smith*, and therefore ought to be subject to the traditional strict scrutiny standards.¹⁰ Taking this further, Kentucky fails to provide an interest so compelling, and a means so narrowly tailored, as to satisfy its constitutional burden.¹¹ Similarly, Virginia's and Tennessee's facially neutral proscriptions belie impermissible attempts to target a religious practice and, accordingly, fails to meet *Smith*'s heightened constitutional burden for the same reasons as Kentucky.¹² Further, applying *state* law,¹³ Virginia's and Tennessee's adoption of state RFRA statutes requires them to advance compelling interests in the face of challenges to their proscriptions' applications, which this Note argues each state cannot advance. Finally, constitutional questions arise on a case-by-case basis when states without statutory prohibitions employ common law remedies and local laws to enjoin religious snake handling.

In sum, the existing state statutory prohibitions against snake handling run afoul of *either* the federal Constitution or the state RFRA statutes, while the legality of common law and local law measures remains too fact sensitive to allow generalities. But before analyzing the legality embodied in these approaches, however, it is first necessary to understand snake handling, and the histories and structures of its proscriptions.

I. THE PRACTICE OF SNAKE HANDLING FOR RELIGIOUS PURPOSES

On November 7, 2013, the Tennessee Wildlife Resources Agency seized fifty-three poisonous snakes from the Tabernacle Church of God located in LaFollette, Tennessee.¹⁴ Andrew Hamblin, pastor of the Church and star of National Geographic's reality television show *Snake Salvation*, was charged

¹⁰ See *Hialeah* at 531-32, ("[A] law that is neutral and of general applicability need not be justified by a compelling interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.") (citations omitted).

¹¹ See *id.* (applying strict scrutiny to laws that infringe upon religious freedom).

¹² See *infra* Part III.

¹³ Even if Virginia's and Tennessee's laws are constitutional, they must still be legal under state law. It is important to keep these two inquiries separate. Were the Court to say a type of state action is constitutional, nothing prohibits a state from voluntarily making that action illegal under state law.

¹⁴ Julia Duin, *Serpents, God and the Law Clash in 'Snake Salvation' Case*, WALL ST. J. (Nov. 16, 2013, 11:23 AM), <http://blogs.wsj.com/speakeasy/2013/11/16/snakes-god-and-the-law-clash-in-tennessee/>, archived at <http://perma.cc/78WE-BUHS>.

with illegal possession of wildlife.¹⁵ The courthouse brimmed with supporters and onlookers as Hamblin pled not guilty,¹⁶ and the story received significant nationwide attention.¹⁷ The television show and Hamblin's resulting criminal charges shed light on the previously obscure and secretive practice of handling venomous snakes for religious purposes—a practice that has been taking place in southern Appalachia for over a century.¹⁸

It began in the summer of 1909 in Sale Creek, Tennessee.¹⁹ There, a thirty-year-old preacher named George Went Hensley, loosely associated with the Pentecostal Holiness sects, began a biblical literalism movement to take Jesus's last words to his disciples as a binding injunction on all believers.²⁰ The gospel attributed to Mark recounts a post-resurrection Jesus directing his disciples to go into the world and preach the gospel.²¹ Jesus tells them, "And these signs shall follow them that believe; In my name shall they cast out devils; they shall speak with new tongues; They shall take up serpents; and if they drink any deadly thing, it shall not hurt them . . ." ²² As Hensley would later tell it, he found this passage in Mark so troublesome that he retreated to a mountain to pray for interpretive guidance.²³ While praying, a rattlesnake appeared, and Hensley picked it up without being bitten.²⁴ Understanding this as an answer to his prayer, he began directing his followers to handle venomous snakes and consume strychnine as the Holy Spirit led them.²⁵

¹⁵ *Id.*; see *Snake Salvation* (National Geographic television broadcast 2013).

¹⁶ Duin, *supra* note 14.

¹⁷ See, e.g., *id.*; Alan Blinder, *Asserting a God-Given Right to Snakes*, N.Y. TIMES, Nov. 16, 2013, at A10; Anugrah Kumar, 'Snake Salvation' Star Pastor Andrew Hamblin Pleads Not Guilty; Continues to Handle Snakes, CHRISTIAN POST (Nov. 16, 2013, 8:43 AM), <http://www.christianpost.com/news/snake-salvation-star-pastor-andrew-hamblin-pleads-not-guilty-continues-to-handle-snakes-108909/>, archived at <http://perma.cc/72GP-FT43>; *Pastor Pleads Not Guilty in Snake Case*, WBBJ EYE WITNESS NEWS (Nov. 15, 2013, 8:42 PM), <http://www.wbbjtv.com/news/regional/Pastor-pleads-not-guilty-in-snake-case-232142511.html?m=y&smobile=y>, archived at <http://perma.cc/9YRB-HDEM>.

¹⁸ The last time religious snake handling gained significant media attention was in 1991, when an Alabaman snake-handling preacher was convicted of attempting to murder his wife by forcing her, at gunpoint, to place her hand inside a cage with a canebrake rattlesnake. See DENNIS COVINGTON, *SALVATION ON SAND MOUNTAIN* 27-44 (1995).

¹⁹ Steven M. Kane, *Holy Ghost People: The Snake-Handlers of Southern Appalachia*, 1 APPALACHIAN J. 255, 258 (1974).

²⁰ See *id.* at 255-58.

²¹ "And he said unto them, Go ye into all the world, and preach the gospel to every creature. He that believeth and is baptized shall be saved; but he that believeth not shall be damned." *Mark* 16:15-16 (King James).

²² *Mark* 16:17-18 (King James).

²³ THOMAS BURTON, *SERPENT-HANDLING BELIEVERS* 33-34 (1993) (describing George Hensley's first experience of snake handling and its influence on his faith).

²⁴ *Id.*

²⁵ *Id.* at 31; see also *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 105 (Tenn. 1975)

Hensley started holding open-air snake-handling spectacles that drew crowds by the thousands.²⁶ Over the next century, the practice spread across southern Appalachia, prompting some local governments to condemn its practice.²⁷ As a result, snake-handling churches have generally kept a low profile so as not to run afoul of the law, drawing attention to themselves only when something goes wrong.²⁸

In the face of seemingly obvious public safety concerns presented by handling poisonous snakes, some Appalachian state legislatures have banned the practice.²⁹ One such legislature went so far as to make snake handling a felony—although it later downgraded the act to a misdemeanor.³⁰ Inherent in these prohibitions are tensions between the states' interest in public safety and the citizenry's interest in practicing religion without governmental intrusion. The Free Exercise Clause of the First Amendment largely prohibits states from directly targeting religious practices,³¹ but affords them more latitude when passing generally applicable laws that only incidentally restrict religious practices.³² These varying standards of review are important, as not all states approach snake handling in the same way.

II. STATE APPROACHES TO SNAKE HANDLING

Appalachian states with histories of religious snake handling have responded to the practice in three distinct ways. The first approach, followed by Kentucky, is to target religion directly, making it illegal to handle snakes in a religious service or gathering.³³ The second approach, followed by Tennessee and Virginia, is to adopt a more general prohibition on handling snakes in a manner that endangers the life or health of another person.³⁴ The third

(discussing the origins of religious snake handling); Kane, *supra* note 19, at 256.

²⁶ See *Rattlers Fail to Bite 'Faith-Cure' Preacher: 1,000 See Virginia Revivalist and Five Followers Handle the Snakes Without Harm*, N.Y. TIMES, June 3, 1935, at 9.

²⁷ See Kane, *supra* note 19, at 258; *infra* Part II (discussing state approaches to religious snake handling).

²⁸ See Kane, *supra* note 19, at 258-59 (detailing the effects of state regulation on religious snake handling).

²⁹ Robert W. Kerns, Jr., *Protecting the Faithful from Their Faith: A Proposal for Snake-Handling Laws in West Virginia*, 116 W. VA. L. REV. 561, 570 (2013).

³⁰ *Id.* (stating that Georgia made religious snake handling a felony).

³¹ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

³² See *infra* Part III (discussing varying constitutional constraints on states that burden religious practices).

³³ See KY. REV. STAT. ANN. § 437.060 (LexisNexis 2010) (“[A]ny person who displays, handles or uses any kind of reptile in connection with any religious service or gathering shall be fined [no more than \$100] . . .”).

³⁴ See TENN. CODE ANN. § 39-17-101 (2011) (making it a misdemeanor to “display, handle, exhibit, or use a poisonous snake or reptile in a manner that endangers the life or health any person”); VA. CODE ANN. § 18.2-313 (2012) (making it a misdemeanor to

approach, followed by West Virginia, Alabama, Georgia, and North Carolina, is to not have any statutory prohibitions against the practice, but to instead rely on common law injunctions and local proscriptions to protect against real and perceived dangers resulting from the practice. Each approach is addressed in turn.

A. *Direct Approach*

In 1940, Kentucky became the first state to legislatively proscribe snake handling, making it a misdemeanor offense.³⁵ Of all the states that would eventually prohibit the practice, Kentucky was and remains the only one to directly target its religious context.³⁶ The statute reads, “Any person who displays, handles or uses any kind of reptile in connection with any religious service or gathering shall be fined not less than fifty dollars nor more than one hundred dollars.”³⁷ The “in connection with any religious service or gathering” language is what principally separates Kentucky’s approach from other states’ approaches, and what ultimately makes this the simplest case to resolve on constitutional grounds. Notably, the statute also neglects to make a distinction between poisonous and non-poisonous reptiles.

Only one serious legal challenge to the Kentucky statute found its way to the courts, just two years after its enactment. In *Lawson v. Commonwealth*,³⁸ Tom Lawson, a snake handler convicted under the statute, challenged the proscription’s state and federal constitutionality.³⁹ Lawson alleged handling snakes was a test of faith, based in scripture, and vital to his religious practice.⁴⁰ Relying on the U.S. Supreme Court’s opinion in *Cantwell v. Connecticut*,⁴¹ the Kentucky Court of Appeals upheld the statute,⁴² stating that penalizing “acts which are calculated to endanger the safety and lives” of church members is a valid exercise of the state’s police power.⁴³ *Lawson* has never been overturned and, in 2012, the Kentucky Supreme Court re-

“display, exhibit, handle or use any poisonous or dangerous snake or reptile in such a manner as to endanger the life or health of any person.”).

³⁵ RALPH W. HOOD & WILLIAM PAUL WILLIAMSON, THEM THAT BELIEVE: THE POWER AND MEANING OF THE CHRISTIAN SERPENT-HANDLING 210 (2008); *see also* KY. REV. STAT. ANN. § 437.060 (LexisNexis 2010).

³⁶ *See* KY. REV. STAT. ANN. § 437.060 (LexisNexis 2010).

³⁷ *Id.*

³⁸ 164 S.W.2d 972 (Ky. 1942).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 310 U.S. 296 (1940) (holding that the Free Exercise Clause of the First Amendment embraces an absolute freedom to believe and a more limited freedom to act, subject to general societal welfare).

⁴² Prior to 1976, the Kentucky Court of Appeals was the state’s highest court.

⁴³ *Lawson*, 164 S.W.2d at 976.

characterized *Lawson* as applying strict scrutiny review, necessitated by the statute's direct targeting of a religious practice.⁴⁴ The 2012 court stated:

In *Lawson*, the Court focused primarily on public safety through prohibiting exposing citizens to venomous snake bites, clearly a compelling governmental interest, and because of the potential for death, there really was no other alternative to the governmental regulation. Though *Lawson* does not use the words, this meant the law was narrowly tailored. Thus *Lawson* is perceived as a strict scrutiny case, and since the statute actually prohibited a particular religious practice, that is the appropriate standard of review.⁴⁵

This ex post self-analysis seemingly contradicts its own analysis from an earlier case in which it stated, "The display or use of reptiles in religious services is not very likely to effect [sic] the health or safety of the public, especially if the preacher keeps a tight grip on the snake."⁴⁶

B. *Public Endangerment Approach*

Tennessee and Virginia each take a less direct approach to proscribing the practice. Rather than targeting snake handling in its religious context, they each adopted a generalized public endangerment approach, forbidding handling snakes in a manner that endangers others. Thus, the context of the proscription is facially neutral with respect to religion.

After a string of high-profile snake-inflicted fatalities in the early 1940s, Virginia's Governor Colgate Darden vowed to put an end to the practice.⁴⁷ In July 1945, Darden met with the state's attorney general to devise a solution, of which he refused to speak publicly.⁴⁸ Right from the start, religious faithful protested, alleging any ban would impede their religious freedom.⁴⁹ Nevertheless, Darden ordered Virginia law enforcement to begin seizing snakes from Pentecostal Holiness churches, despite the absence of any statutory prohibition on snake handling.⁵⁰ Still, the snake-inflicted deaths of preachers and congregants continued to make national headlines.⁵¹ In January

⁴⁴ See *Gingerich v. Kentucky*, 382 S.W.3d 835, 843 (Ky. 2012).

⁴⁵ *Id.* (citations omitted).

⁴⁶ *Kentucky v. Coffman*, 453 S.W.2d 759, 762 (Ky. Ct. App. 1970).

⁴⁷ Virginius Dabney, *Faith Healers Defy Governor on Snake Handling*, N.Y. TIMES, July 29, 1945, at F8.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *Take Sect's Snake Alive: Virginia Police Return Reptile to Governor for Examination*, N.Y. TIMES, Aug. 6, 1945, at 17. One practical effect of the absence of a statutory prohibition meant a higher burden of proof for prosecutors seeking involuntary manslaughter convictions resulting from snakebite fatalities. See *Kirk v. Virginia*, 44 S.E.2d 409, 413-14 (Va. 1947) (indicating that per se negligence was not available prior to the enactment of the statutory prohibition).

⁵¹ See *Tennessee Preacher, Virginia Woman Die of Snake Bites in Rites of Religious*

1947, the Virginia General Assembly finally proscribed the practice, making Virginia the first state to adopt the public endangerment approach to snake handling.⁵² The text of the statute, in its present form, reads:

It shall be unlawful for any person, or persons, to display, exhibit, handle or use any poisonous snake or reptile in such a manner as to endanger the life or health of any person. Any person violating the provisions of this section shall be guilty of a Class 4 misdemeanor.⁵³

The very next month, the Tennessee legislature enacted a nearly identical statute,⁵⁴ which reads, in its present form: “It is an offense for a person to display, exhibit, handle, or use a poisonous or dangerous snake or reptile in a manner that endangers the life or health of any person. An offense under this section is a Class C misdemeanor.”⁵⁵

Note that, unlike Kentucky, Virginia does not prohibit all snake handling, but only the handling of poisonous snakes.⁵⁶ Similarly, Tennessee only prohibits handling poisonous or otherwise “dangerous” snakes.⁵⁷ Both statutes are devoid of any mention of religion.

On July 1, 1973, various snake-handling sects held a national convention in Tennessee’s Cocke County.⁵⁸ The District Attorney General feared that Cocke County would “become the snake-handling capital of the world,” and charged a local preacher and elders of his church with violating Tennessee’s statutory prohibition.⁵⁹ The trial court permanently enjoined the defendants from handling poisonous snakes in such a manner that would endanger the life or health of another.⁶⁰ The defendants appealed, and the Court of Appeals held that the injunction was overbroad.⁶¹ The court revised the injunction to read, “[Respondents] are permanently enjoined from handling, displaying or exhibiting dangerous and poisonous snakes in such a manner as will endanger the life or health of persons *who do not consent to exposure to such danger*.”⁶² In *State ex rel. Swann v. Pack*,⁶³ the Supreme Court of Tennessee reversed this

Sect., N.Y. TIMES, Sept. 5, 1945, at 25 (describing the death of a 32-year-old preacher from a rattlesnake bite).

⁵² See Act of Jan. 29, 1947, ch. 23, 1947 Va. Acts 63 (codified as amended at VA. CODE ANN. § 18.2-313 (2012)).

⁵³ VA. CODE ANN. § 18.2-313 (2012).

⁵⁴ See Act of Feb. 28, 1947, ch. 89, 1947 TEN. PUB. ACTS 395 (codified as amended at TENN. CODE ANN. § 39-17-101 (2011)).

⁵⁵ TENN. CODE ANN. § 39-17-101 (2011).

⁵⁶ VA. CODE ANN. § 18.2-313 (2012).

⁵⁷ TENN. CODE ANN. § 39-17-101 (2011).

⁵⁸ *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 104 (Tenn. 1975).

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *See id.* at 103.

⁶² *Id.* at 102 (emphasis added).

⁶³ 527 S.W.2d 99, 105 (Tenn. 1975).

consent requirement and permanently enjoined the appellants from handling poisonous or dangerous snakes within the state.⁶⁴ The court acknowledged that “[there] is . . . no requirement under our State or Federal Constitution that any religious group be conventional or that it be numerically strong in order that its activities be protected.”⁶⁵ Nevertheless, the court relied on *Cantwell* for the proposition that the First Amendment absolutely protects the freedom to believe, but cannot provide absolute protection for the freedom to act on those beliefs:

They may believe without fear of any punishment that it is right to handle poisonous snakes while conducting religious services. But the right to practice that belief ‘is limited by other recognized powers, equally precious to mankind.’ One of those equally as precious rights is that of society’s protection from a practice, religious or otherwise, which is dangerous to life and health.⁶⁶

The court dismissed the consent requirement articulated by the court of appeals, as well as its contention that the injunction—which modeled itself after the statutory prohibition—was overbroad.⁶⁷ The court held:

The handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of ‘anointment’, we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so.⁶⁸

Complicating the court’s opinion was its reliance on public nuisance doctrine rather than the newly minted statutory prohibition.⁶⁹ *Swann* established the precedent that, under common law, a court could permanently enjoin persons from handling poisonous or dangerous snakes, regardless of consent, thereby rendering the need for the statute, arguably, moot.⁷⁰

In *Harden v. State*,⁷¹ the Supreme Court of Tennessee had already weighed in on the statute itself in an earlier challenge to its constitutionality.⁷² The

⁶⁴ *Id.* at 112.

⁶⁵ *Id.* at 107.

⁶⁶ *Id.* at 109 (citation omitted).

⁶⁷ *Id.* at 113.

⁶⁸ *Id.*

⁶⁹ *Id.* (“This holding is in no sense dependent upon the way or manner in which snakes are handled since it is not based upon the snake handling statute. Irrespective of its import, we hold that those who publicly handle snakes in the presence of other persons and those who are present aiding and abetting are guilty of creating a public nuisance. Yes, the state has a right to protect a person from himself and to demand that he protect his own life.”).

⁷⁰ *Id.*

⁷¹ 216 S.W.2d 708 (Tenn. 1948).

inadequacy of specific safeguards intended to prevent congregants from contact with the rattlesnakes was “apparent without proof,”⁷³ and the court upheld the prohibition’s constitutionality, citing the practice’s “grave and immediate” danger.⁷⁴ The *Harden* court remained silent as to whether, in the event more stringent safeguards were put in place, the “grave and immediate” danger associated with snake handling might be so lessened as to not endanger life or health.

C. Common Law Approach

West Virginia, Georgia, Alabama, and North Carolina all lack any statutory prohibitions on snake handling. Yet, as Tennessee’s reliance on public nuisance demonstrates, this does not necessarily foreclose the opportunity to proscribe the practice. For example, cities are free to enact their own ordinances barring the practice. Durham, North Carolina, did exactly this. Modeled after Virginia’s and Tennessee’s legislation, Durham enacted an ordinance criminalizing “the handling of venomous and poisonous reptiles in such manner as to endanger the public health, safety and welfare”⁷⁵ After members of the Zion Tabernacle church were convicted under the ordinance and fined \$50 each, they challenged its constitutionality.⁷⁶ The Supreme Court of North Carolina held that snake handlers were entitled to handle snakes in public, provided that they are not a danger to the public.⁷⁷ In the event that they endangered the public, however, they would constitute a public nuisance, as public safety is “superior” to religious practice.⁷⁸

Public nuisance remains a theoretical possibility in seeking to enjoin the practice, even in states that lack a statutory prohibition. However, “state action” taken by a court when enjoining the practice would ultimately be subject to the same level of judicial scrutiny imposed on state legislatures when they infringe on the free exercise of sincerely held religious beliefs. No such challenge has been made to Tennessee’s application of common law public nuisance doctrine to snake handling,⁷⁹ and no court has yet to consider a challenge of this sort elsewhere. Undoubtedly, this can be attributed to a lack of prosecutions, possibly reflecting a conscious decision by prosecutors not to charge snake handlers for public nuisance when legislatures—having had the

⁷² See *id.* at 711.

⁷³ *Id.* at 710. The specific safeguards in this case included a rope strung across the stage to prevent congregants from reaching the snakes. Members of the church were stationed along the rope to turn back any snakes that headed toward the audience. *Id.* at 709.

⁷⁴ *Id.* at 710.

⁷⁵ *State v. Massey*, 51 S.E.2d 179, 179 (N.C. 1949).

⁷⁶ *Id.* at 735.

⁷⁷ *Id.* (“[Defendants] are at liberty to handle reptiles in public, if they so desire; provided the reptiles are harmless to human safety, health and welfare.”).

⁷⁸ *Id.* at 180.

⁷⁹ See, e.g., *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 104 (Tenn. 1975).

opportunity to follow neighboring states' examples—chose instead to leave the practice alone. Alternative rationales for limited prosecution could be the obscurity of the practice, its surprisingly innocuous character,⁸⁰ or the constitutional concerns discussed in this Note. Likely, all these considerations play some role.

Presently, Georgia and Alabama have no statutory prohibitions against snake handling. However, this has not always been the case. During the 1950s, both states prohibited the practice, going so far as to make it a felony offense.⁸¹ Each state followed Tennessee and Virginia's public endangerment approach, although they imposed much harsher penalties.⁸² A conviction in Alabama resulted in a prison sentence of one to five years.⁸³ Despite this severe penalty, the practice continued.⁸⁴ One leading researcher postulated a reason for this: "As with all states, despite laws against handling, the practice continued. Often in states where handling has had strong subcultural support, local authorities have refused to press charges and juries have refused to convict when cases were taken to court."⁸⁵

In 1956, the Alabama Court of Appeals considered a challenge to the statute's federal and state constitutionality.⁸⁶ Relying on *Cantwell, Reynolds v. United States*,⁸⁷ *Lawson*, and *Harden*, the court upheld the statute, citing the state's police power to enact laws that infringe upon religious practices when enacted for the purpose of promoting the general welfare.⁸⁸ Nevertheless, Alabama repealed the statutory prohibition in 1975.⁸⁹

Alabamian snake handlers have still been prosecuted in the absence of a statutory prohibition. For example, menace and recklessness laws have been applied to snake handling, and appellate courts have sustained convictions under both.⁹⁰

⁸⁰ See *infra* note 136 and accompanying text.

⁸¹ HOOD & WILLIAMSON, *supra* note 35, at 215-16 (discussing Georgia's and Alabama's treatment of snake handling as a felony).

⁸² See *id.* (discussing the penalties associated with committing the felony of snake handling in Alabama and Georgia).

⁸³ *Id.* at 216.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *Hill v. State*, 88 So.2d 880, 883 (Ala. Ct. App. 1956).

⁸⁷ 98 U.S. 145, 166 (1878). An oft quoted passage from *Reynolds* by courts upholding snake-handling proscriptions reads: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?" *Id.*

⁸⁸ See *Hill*, 88 So.2d at 885 ("Without violating the constitutional guaranties, the state, under the police power, may enact laws in order to promote the general welfare, public health, public safety and order, public morals, and to prevent fraud." (quoting 16 C.J.S. CONSTITUTIONAL LAW § 206(b))).

⁸⁹ See HOOD & WILLIAMSON, *supra* note 35, at 216.

⁹⁰ *Id.* Alabama's menace law reads: "A person commits of crime of menacing if, by

Three conclusions follow from this survey of the Appalachian states' approaches to snake handling. First, with the sole exception of the Tennessee Court of Appeals, which was reversed by the Tennessee Supreme Court, no court has ever held that a state approach to proscribing the practice was illegal. Second, the majority of challenges to the statutes took place within the opening decade of their enactment—mostly during the 1940s and the 1950s. Third, no court has attempted to resolve constitutional concerns post-*Smith* and the subsequent developments it prompted.⁹¹ This Note attempts to address the legality of the foregoing approaches in the wake of *Smith*.

III. SNAKE HANDLING AND THE CONSTITUTION

The First Amendment to the Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”⁹² Embodied within these sixteen words are two clauses that shape the federal government's approach to an overwhelmingly religious citizenry.⁹³ Some scholars and judges believe the Establishment Clause reflects the view that true religion does not need the support of law⁹⁴ and implicates Jefferson's wall of separation between church and state.⁹⁵ Alternatively, others believe the Clause prohibits governmental preference of some religions over others.⁹⁶ Working in tandem, the Free Exercise Clause forbids the government from requiring or restricting religious beliefs or practices.⁹⁷ It often applies to situations where the government compels behavior that contradicts a sincerely held religious belief, or where the government effectively forbids a religious practice.⁹⁸ Both clauses apply to state government actions via the Fourteenth Amendment.⁹⁹

physical action, he intentionally places or attempts to place another person in fear of imminent serious injury.” *Id.* Alabama's recklessness law prohibits “conduct which creates a substantial risk of serious physical injury to another person.” *Id.*

⁹¹ See *infra* Part III (discussing the post-*Smith* landscape of snake-handling law).

⁹² U.S. CONST. amend. I.

⁹³ See TOM W. SMITH, BELIEFS ABOUT GOD ACROSS TIME AND COUNTRIES 8 (2012), available at http://www.norc.org/PDFs/Beliefs_about_God_Report.pdf, archived at <http://perma.cc/UZ3M-WZW6> (finding that over 80.8% of Americans believe in a god).

⁹⁴ *Everson v. Board of Education*, 330 U.S. 1, 12 (1947) (recounting that James Madison “argued that a true religion did not need the support of law”).

⁹⁵ See *id.* at 16.

⁹⁶ See *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring) (arguing “that the Framers saw the Establishment Clause simply as a prohibition on governmental preferences for some religious faiths over others”).

⁹⁷ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1246 (Vicki Breen et al. eds., 3d ed. 2006) (“The Supreme Court repeatedly has stated that the government may not compel or punish religious beliefs; people may think and believe anything that they want.”).

⁹⁸ See *id.* at 1247.

⁹⁹ *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (holding the establishment clause applied to the states); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding the free

The Free Exercise Clause largely prohibits directly targeting religious snake handling, much the same way as it forbids targeting Santeria religious rituals¹⁰⁰ or the Muslim practice of maintaining a beard.¹⁰¹ And while Supreme Court precedent post-1990 gives states latitude in framing their prohibitions as ones of general applicability in order to bypass constitutional concerns, state RFRA analogues impose a nearly insurmountable burden on those states that proscribe snake handling.¹⁰² Thus, regardless of their form, state statutory prohibitions against snake handling run afoul of either the federal constitution or the state RFRA statutes.

A. *Direct Approach*

Since the Supreme Court dramatically revamped its approach to the Free Exercise Clause in *Smith*, the Court has only once held that a state had violated the Free Exercise Clause. The parallels between the facts of that case—*Hialeah*—and Kentucky’s snake-handling statute are striking. In 1987, the Church of the Lukumi Babalu Aye leased land in the Miami suburb of Hialeah to establish a Santeria house of worship.¹⁰³ Santeria is a syncretic religion, combining elements of traditional African religion with Roman Catholicism.¹⁰⁴ A core component of the practice of Santeria is the ritualistic sacrifice of animals, sometimes involving cutting the animal’s carotid artery, cooking the animal, and eating it.¹⁰⁵

In response to the Church’s plan to establish a house of worship, the Hialeah City Council passed a number of measures designed to curtail the ritual sacrifice. First, the council adopted a resolution expressing concern “that certain religions may propose to engage in practices which are inconsistent with public morals, peace, or safety.”¹⁰⁶ It next passed an ordinance that made it “unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the [city].”¹⁰⁷ The council defined “sacrifice” as “to unnecessarily kill, torment, torture, or mutilate an animal in a

exercise clause applied to the states).

¹⁰⁰ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (holding that a city ordinance targeting Santeria practices violated the First Amendment).

¹⁰¹ See *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (applying heightened scrutiny to a policy of denying religious exemptions to a no-beard policy when secular exemptions were granted).

¹⁰² See *infra* notes 172-180 and accompanying text (discussing various state RFRA laws).

¹⁰³ See *Hialeah*, 508 U.S. at 525-26.

¹⁰⁴ *Id.* at 524.

¹⁰⁵ *Id.* at 525.

¹⁰⁶ *Id.* at 526.

¹⁰⁷ *Id.* at 528.

public or private ritual or ceremony not for the primary purpose of food consumption.”¹⁰⁸

The Church filed a 42 U.S.C. § 1983 action against the city, alleging a deprivation of their rights under the Free Exercise Clause of the First Amendment.¹⁰⁹ In delivering the opinion for the Court, Justice Kennedy reiterated the Free Exercise framework formulated in *Smith*:¹¹⁰

[A] law that is neutral and of general applicability need not be justified by a compelling interest even if the law has the incidental effect of burdening a particular religious practice. Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.¹¹¹

The Supreme Court held that the prohibition on animal sacrifice violated the Church’s rights under the Free Exercise clause because it was neither neutral nor generally applicable, and Hialeah’s asserted interests were neither compelling nor narrowly tailored.¹¹² It is important to understand precisely how the *Hialeah* court interpreted *Smith*. According to the Court, merely targeting religion is *not* enough to invalidate a statute.¹¹³ Rather, direct targeting moves the inquiry into the realm of strict scrutiny, which requires a compelling governmental interest and means narrowly tailored to accomplishment of that interest.¹¹⁴ But the Court in *Hialeah* cautioned, “A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”¹¹⁵

Thus, the Court left open the possibility that such a law that directly targets religion can survive strict scrutiny, though “only in rare cases.”¹¹⁶ The first inquiry, however, is whether a law lacks neutrality and general applicability so as to warrant strict scrutiny at all.

A law lacks neutrality if its restriction of a practice is motivated by the practitioner’s religion.¹¹⁷ In *Hialeah*, Justice Kennedy devised a useful shorthand for cases that fall on the most egregious end of this inquiry: at a bare

¹⁰⁸ *Id.* at 527.

¹⁰⁹ *Id.*

¹¹⁰ 494 U.S. 872 (1990).

¹¹¹ *Hialeah*, 508 U.S. at 531-32 (citation omitted).

¹¹² *Id.* at 532-47.

¹¹³ *See id.* at 546 (holding that laws that target religion can survive strict scrutiny in rare cases).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 546.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 533 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”).

minimum, a law must be facially neutral; and “[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.”¹¹⁸ Recall that Kentucky’s prohibition on snake handling states, “[a]ny person who displays, handles or uses any kind of reptile in connection with any religious service or gathering shall be fined not less than fifty dollars nor more than one hundred dollars.”¹¹⁹ Like the ordinance at issue in *Hialeah*, the Kentucky statute is proscribing a practice solely on the basis of its religious character. Where the Court in *Hialeah* logically inferred that “sacrifice” carried a religious connotation and thus determined the ordinance lacked facial neutrality,¹²⁰ the Kentucky statute overtly refers to the “religious” practice it prohibits, without any mention of other contexts in which the proscription applies. Thus, Kentucky’s statute is not facially neutral and fails the bare minimum test required in *Hialeah*.¹²¹

The next inquiry under the *Smith-Hialeah* framework is whether the statute is of general applicability. Neutrality and general applicability are interrelated, and a law lacking one requirement suggests it lacks the other.¹²² A law is not of general applicability when it “in a selective manner impose[s] burdens only on conduct motivated by religious belief. . . .”¹²³ In *Hialeah*, the measures adopted by the city council lacked general applicability because the asserted interests were underinclusive, meaning the measures only pursued religiously motivated conduct.¹²⁴ Although the City stated interests in public health and the humane

¹¹⁸ *Id.*

¹¹⁹ KY. REV. STAT. ANN. § 437.060 (LexisNexis 2010).

¹²⁰ *See Hialeah*, 508 U.S. at 533-34.

¹²¹ While the natural reading of the phrase “religious service or gathering” is as a single unit, with “religious” qualifying “service or gathering,” it is possible to make a textual argument that “gathering” should be read independent of “religious.” Therefore, the argument goes, “gathering” is an all-encompassing term that includes secular gatherings, rendering the statute facially neutral. Two problems significantly weaken this argument. First, were “gathering” an all-encompassing term, it would render “religious service” superfluous. If “religious service” were to retain any meaning at all, “gathering” would need to refer only to secular gatherings, leading to the absurd result that the legislature intended to permit snake handling in religious gatherings, but not religious services or secular gatherings. Second, such a reading ignores the circumstances surrounding the passage of the statute. Snake handling was not confined to indoor pews and pulpits, but rather performed at open-air spectacles that drew crowds by the thousands. *See Rattlers Fail to Bite ‘Faith-Cure’ Preacher*, *supra* note 26. The Kentucky legislature sought to restrict these gatherings as much as the goings-on of traditional religious services.

¹²² *Hialeah*, 508 U.S. at 531-32 (“Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied.”).

¹²³ *Id.* at 543.

¹²⁴ *Id.* at 542-43 (“The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential.”).

treatment of animals, the ordinances effectively targeted Santeria animal sacrifices.¹²⁵ Killing animals for non-religious reasons was not prohibited.¹²⁶

In *Gingerich v. Commonwealth*,¹²⁷ the Kentucky Supreme Court construed the state's interest in passing the snake-handling statute as advancing public safety.¹²⁸ The court cited the potential for death resulting from venomous snakebites and a lack of alternatives other than governmental regulation as the impetus behind the law's passage.¹²⁹ Like *Hialeah*, these interests are underinclusive, and pursued only against conduct motivated by religion, evident from the text of the statute itself; the statute indicates that the state's interest in preventing death from venomous snakes is only advanced in religious services and gatherings. Nowhere in the statute is there any reference to secular contexts.¹³⁰ Were a citizen to display, handle, or use a reptile for his own, secular enjoyment, Kentucky would affirm that citizen's legal right to do so. Yet add to that citizen's action a religious motivation and the state prohibits it. This is precisely the "unequal treatment" that the Free Exercise Clause protects against.¹³¹ Thus, the Kentucky snake-handling statute lacks both neutrality and general applicability. As such, the constitutionality of the law hinges on whether the interests that it advances are compelling, and whether the means chosen to advance those interests are narrowly tailored.¹³² Laws triggering this strict scrutiny will be upheld by courts "only in rare cases,"¹³³ and, as will become apparent, it is unlikely that Kentucky's statute can withstand such review.

Legislatures intuitively understand that handling poisonous snakes is not a perfectly safe practice, but empirical data suggests it is not as unsafe as one might think. While snake handling, even among the faithful, has certainly resulted in deaths,¹³⁴ it leads to far fewer bites and even fewer deaths than one might expect.¹³⁵ Of the estimated 7000 to 8000 venomous snakebites that occur in the United States every year, only five are fatal.¹³⁶ This figure

¹²⁵ *Id.* at 543-44.

¹²⁶ *Id.* at 546 ("The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.").

¹²⁷ 382 S.W. 3d 835 (Ky. 2012).

¹²⁸ *Id.* at 843.

¹²⁹ *Id.*

¹³⁰ See KY. REV. STAT. ANN. § 437.060 (LexisNexis 2010).

¹³¹ See *Hialeah*, 508 U.S. at 542.

¹³² See *id.* at 546.

¹³³ *Id.*

¹³⁴ See Kane, *supra* note 19, at 260 (citing thirty-five reported deaths from snakebites incurred during religious services from 1936 to 1973, including George Hensley's).

¹³⁵ *Id.* at 260-61 ("[O]nly a very small percentage of those who are bitten suffer death as a consequence."); Nat'l Inst. for Occupational Safety & Health, *supra* note 80.

¹³⁶ Nat'l Inst. for Occupational Safety & Health, *supra* note 80.

encompasses the entire population, of which religious snake handlers are only a small subset.¹³⁷ Even courts upholding constitutional challenges to statutes proscribing the practice have acknowledged that fatalities resulting from snakebites occur infrequently.¹³⁸ Several theories offer insight into why this is the case. Herpetologists have suggested that snakes, when kept in captivity and surrounded by humans, become “tame” and therefore bite less often.¹³⁹ Even when they do bite, copperheads, commonly used in religious snake-handling practices, have weak toxicity in their venom and thus rarely kill humans.¹⁴⁰ Rattlesnakes, while possessing more lethal venom, often withhold injecting venom when biting.¹⁴¹ Finally, snakes kept in captivity by snake handlers tend to be malnourished, dehydrated, and sick, causing them to be more passive than healthy, wild snakes.¹⁴² All of these factors might help explain the relatively few number of snakebites and resulting deaths of religious snake handlers.

Unfortunately, the legislative record surrounding the passage of Kentucky’s snake-handling statute is lost to history.¹⁴³ As such, it is difficult to discern the interests the legislature intended to advance. Yet, in 2012, the Kentucky Supreme Court stated that the interest was public safety, accomplished “through prohibiting exposing citizens to venomous snake bites.”¹⁴⁴ The court stressed that the “potential for death” rendered governmental regulation the only possible alternative.¹⁴⁵

Yet, as demonstrated above, the potential for death is surprisingly miniscule, which suggests that the government’s interest in proscribing the practice is not compelling. Snake handling results in an extremely low number of fatalities. Even the Kentucky Court of Appeals observed that “[t]he display or use of

¹³⁷ See Daniel Burke, *A Faithful Death: Why a Snake Handler Refused Treatment*, CNN (Feb. 17, 2014), <http://religion.blogs.cnn.com/2014/02/17/was-snake-handlers-death-preventable/>, archived at <http://perma.cc/LME7-A5RF> (“Williamson estimates there are at most 2,000 people who belong to the few hundred churches, centered in Appalachia, that practice serpent handling.”).

¹³⁸ See, e.g., *Commonwealth v. Coffman*, 453 S.W.2d 759, 762 (Ky. Ct. App. 1970) (“The display or use of reptiles in religious services is not very likely to effect the health or safety of the public, especially if the preacher keeps a tight grip on the snake.”).

¹³⁹ See Kane, *supra* note 19, at 261.

¹⁴⁰ *Id.* at 259, 261.

¹⁴¹ *Id.*

¹⁴² John Burnett, *Serpent Experts Try to Demystify Pentecostal Snake Handling*, NPR (Oct. 18, 2013, 4:12 PM), <http://www.npr.org/2013/10/18/236997513/serpent-experts-try-to-demystify-pentecostal-snake-handling>, archived at <http://perma.cc/RN3S-4LDT>.

¹⁴³ Kentucky House and Senate Journals date back to 1944, while § 437.060 was passed four years earlier in 1940. See generally Peggy King *Legislative Reference Library, KENTUCKY LEGISLATURE*, <http://www.lrc.ky.gov/lrc/library.htm>, archived at <http://perma.cc/6SRA-MPGT> (last visited Apr. 4, 2015).

¹⁴⁴ *Gingerich v. Commonwealth*, 382 S.W.3d 835, 843 (Ky. 2012).

¹⁴⁵ *Id.*

reptiles in religious services is not very likely to effect [*sic*] the health or safety of the public, especially if the preacher keeps a tight grip on the snake.”¹⁴⁶ Yet it is undeniable that religious snake handling does pose a public safety risk, however small, that includes a risk of death. However, the Court in *Hialeah* rendered this risk a moot point when it stated, “Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.”¹⁴⁷ The only conduct being regulated here is *religious* snake handling. As such, Kentucky cannot offer the necessary compelling interest to survive heightened scrutiny.

Assume *arguendo* that Kentucky were to revise its statutory regime to equally restrict secular snake handling. The Kentucky snake-handling statute would still fail to survive heightened scrutiny because the statute could impose a significantly lesser burden on snake handlers in its pursuit of public safety. Recall that strict scrutiny requires a law to be narrowly tailored to the government’s asserted interests.¹⁴⁸ Accordingly, in *Hialeah*, the Court held that the city ordinances’ overbroad and underinclusive character was sufficient to render them invalid.¹⁴⁹ Similarly, not only is Kentucky’s statute underinclusive in that it targets snake handling solely on the basis of religious motivation, but it is also overbroad.¹⁵⁰

A statute is overbroad if it could achieve its objectives by a narrower means—i.e., one “that burdened religion to a far lesser degree.”¹⁵¹ Recall that the Kentucky legislature sought to accomplish its aim of increasing public safety “through prohibiting exposing citizens to venomous snake bites.”¹⁵² Yet the statute goes well beyond protecting citizens from venomous snakes. Most glaringly, the statute applies to “any kind of reptile,” as opposed to only venomous snakes.¹⁵³ Were a Sunday school teacher to keep a harmless green snake as a class pet, she would run afoul of the statute which the Kentucky Supreme Court claims is narrowly tailored to advancing public safety. Such a restriction has an exceptionally tenuous relation to preventing the harmful effects of venomous snakebites. Furthermore, the use of the term “reptile” instead of “snake” compounds this problem. Were a child to bring her pet turtle to *God’s Creatures Day* in her Sunday school class, she would unwittingly commit a crime. To claim that this statute is narrowly tailored to

¹⁴⁶ Commonwealth v. Coffman, 453 S.W.2d 759, 762 (Ky. Ct. App. 1970).

¹⁴⁷ Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993).

¹⁴⁸ *Id.* at 546.

¹⁴⁹ *See id.* at 546.

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² *See* Gingerich v. Commonwealth, 382 S.W.3d 835, 843 (Ky. 2012).

¹⁵³ KY. REV. STAT. ANN. § 437.060 (LexisNexis 2010).

the advancement of public safety, particularly the avoidance of death, is to take an extremely lax view of the tailoring requirement.

A narrowly tailored statute might be one that applies only to poisonous snakes. Further, instead of an outright prohibition, a narrowly tailored statute might require medical personnel, snakebite anti-venom, or at least a snakebite kit to be present during snake-handling services.¹⁵⁴ Admittedly, some snake handlers who are bitten will undoubtedly refuse medical treatment in favor of their own brand of faith healing; but that in itself cannot be sufficient to permit a legislature from outlawing the practice. Otherwise, a state would be permitted to forbid faith-healing devotees from partaking in other constitutionally protected activities like owning a gun, no matter how small the associated risk of death, out of fear that they would refuse medical treatment if injured. Such a policy would undoubtedly run afoul of the Fourteenth Amendment's Equal Protection Clause.¹⁵⁵ Finally, a narrowly tailored statute might include safeguards beyond access to medical care. For example, requiring barriers or buffer zones between handlers and worshippers might serve the interest of public safety while still allowing snake handlers to practice their religious beliefs.

Kentucky's statute does not do any of these things. In sum, the statute is neither neutral nor of general applicability, and its asserted interest is not compelling, nor is it narrowly tailored to the advancement of that interest. As such, the statute violates the Free Exercise Clause of the First Amendment.

B. *Public Endangerment Approach*

Tennessee and Virginia, the two states that adopt the public endangerment approach to proscribing snake handling, seem to invoke the flipside of *Hialeah*—that is, their approach runs parallel to that employed by Oregon in *Smith*. These states all passed facially neutral proscriptions that, in effect, burden religious practices.

The statute at issue in *Smith* involved a general prohibition on possession of a “controlled substance” without a prescription.¹⁵⁶ Included within the definition of “controlled substance” was peyote, a hallucinogen sometimes used in Native American religious ceremonies.¹⁵⁷ In a dramatic departure from its historic application of strict scrutiny,¹⁵⁸ the Supreme Court held that

¹⁵⁴ Snakebite kits are readily available over-the-counter at minimal cost. *See, e.g.*, Coghlan's 7925 Snake Bite Kit, WALMART, <http://www.walmart.com/ip/Coghlan's-7925-Snake-Bite-Kit/21799528>, archived at <http://perma.cc/R54D-92W5> (last visited Apr. 4, 2015) (selling a snakebite kit for less than \$10.00).

¹⁵⁵ *See* U.S. CONST. amend. XIV, § 1 (prohibiting a state from “deny[ing] to any person within its jurisdiction the equal protection of the laws”).

¹⁵⁶ *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990).

¹⁵⁷ *Id.*

¹⁵⁸ *See* *Wisconsin v. Yoder*, 406 U.S. 205 (1971); *Sherbert v. Verner*, 374 U.S. 398 (1963).

“generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest”¹⁵⁹

The *Smith* decision meant that legislatures were free to enact laws that restricted religious practices, so long as those laws were neutral and generally applicable.¹⁶⁰ Whether a religious exemption should be granted was a matter for the legislatures, not the courts, to decide.¹⁶¹ Applying the *Smith* framework to the Virginia and Tennessee statutes, we need only determine whether these laws are neutral and generally applicable in order to vindicate their constitutionality. Both statutes meet the bare minimum requirement of facial neutrality because neither overtly proscribes conduct solely on the basis of religious motivation.¹⁶² However, a law can be facially neutral and still fail to meet the neutrality and general applicability requirements.¹⁶³ In *Hialeah*, for example, the Court found that the city council had engaged in “religious gerrymander[ing].”¹⁶⁴ In other words, while the ordinances appeared neutral, the city council carved out so many secular exceptions that the only practical and legal effect of the ordinances was to proscribe animal sacrifice. Similarly, while the snake-handling ordinances in Virginia and Tennessee are facially neutral, there is a strong argument that their only practical effect is to proscribe religious snake handling. The Supreme Court of Tennessee indicated as much, stating:

Obviously, [the statute] was not intended to prevent zoologists or herpetologists from handling snakes or reptiles as a part of their professional pursuits, nor to preclude handling by those who do so as a

¹⁵⁹ See *Smith*, 494 U.S. at 886 n.3.

¹⁶⁰ This concerned Justice O’Connor who wrote in her concurrence in *Smith*: “There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.” *Smith*, 494 U.S. at 901 (O’Connor, J., concurring).

¹⁶¹ See *id.* at 890 (majority opinion) (“But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself”).

¹⁶² See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (“A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.”).

¹⁶³ See *id.* at 534 (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”).

¹⁶⁴ *Id.* at 535 (quoting *Walz v. Tax Comm’n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

hobby, nor those who are engaged in scientific or medical pursuits requiring the handling of snakes.¹⁶⁵

In interpreting the statute to carve out these exceptions, most damningly that of handling poisonous snakes *as a hobby*, it is evident that the remaining prohibition applies only to religiously motivated behavior.

Not surprisingly, the circumstances surrounding the passage of the statutes confirm the legislatures' intent to burden religious snake handling specifically. Recall Virginia Governor Darden's raids on Pentecostal Holiness churches in the years leading up to the statute's passage, and his public vow to put a stop to the practice. Tennessee's adoption of its own snake-handling proscription, just one month after Virginia passed a proscription with nearly identical language, suggests it too was motivated by similar concerns.

All these factors strongly suggest that the public endangerment statutes of Virginia and Tennessee are neither neutral nor generally applicable, as their sole aim was to target religious snake handling. As such, they ought to fail the same heightened scrutiny test implicated in Kentucky's direct approach, and for nearly identical reasons. This analysis notwithstanding, further developments in both federal and state law rendered the *Smith* requirements of neutrality and general applicability largely a moot point as applied to Virginia and Tennessee.

In 1993, Congress responded to the Supreme Court's decision in *Smith* by enacting RFRA, which sought to counter the Court's "eliminat[ion of] the requirement that the government justify burdens on religious exercise imposed by laws neutral towards religion."¹⁶⁶ The stated purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."¹⁶⁷ Thus, for the next four years, even neutral laws that incidentally burdened religion were, in theory, subject to strict scrutiny.

In 1997, the Supreme Court decided *City of Boerne v. Flores*,¹⁶⁸ in which the Court struck down RFRA as an unconstitutional usurpation of its ultimate authority to interpret the Constitution.¹⁶⁹ Specifically, it held that RFRA, as applied to the states, was an impermissible expansion of Congress's enforcement power under the Fourteenth Amendment.¹⁷⁰ While Congress has

¹⁶⁵ State *ex rel.* *Swann v. Pack*, 527 S.W.2d 99, 112 (Tenn. 1975).

¹⁶⁶ 42 U.S.C. § 2000bb(a)(4) (2012).

¹⁶⁷ *Id.* § 2000bb(b)(1).

¹⁶⁸ 521 U.S. 507 (1997).

¹⁶⁹ *Id.* at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning . . . [i]t would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

¹⁷⁰ *Id.* at 508; *see also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to

the power to enforce the Fourteenth Amendment, it lacks the “power to decree the substance of the Amendment’s restrictions on the States. Legislation which alters the Free Exercise Clause’s meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.”¹⁷¹

Thus, with RFRA held unconstitutional as applied to the states, *Smith* has resurfaced as the law of the land. No longer must a state law that incidentally burdens religious practice serve a compelling interest by the least restrictive means possible. But the rabbit trail does not end there, and an analysis of the legality of Virginia and Tennessee’s snake-handling statutes requires an understanding of yet another historical development.

A state is free to give more rights to its citizens than the federal Constitution requires.¹⁷² In the years following *City of Boerne*, approximately a dozen states enacted their own RFRA statutes to reclaim some of the religious liberty protections they lost to the Supreme Court.¹⁷³ Each state RFRA analogue adopted language nearly identical to the now defunct federal version, requiring heightened scrutiny to be applied to state measures that even incidentally infringe on the free exercise of religion.¹⁷⁴ The statutes provide private rights of action for individuals whose religious practices have been burdened by state government.¹⁷⁵ These state RFRA statutes provide statutory rights, not federal or state constitutional rights.¹⁷⁶

Virginia and Tennessee each adopted their own RFRA analogues. Virginia’s statute reads, in relevant part:

No government entity shall substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability unless it demonstrates that application of the burden to the person is (i)

enforce, by appropriate legislation, the provisions of this article.”).

¹⁷¹ *City of Boerne*, 521 U.S. at 508.

¹⁷² See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (finding that a state may adopt rights “more expansive than those conferred by the Federal Constitution”).

¹⁷³ See SIDLEY AUSTIN BROWN & WOOD LLP, QUESTIONS AND ANSWERS ABOUT STATE RELIGIOUS FREEDOM RESTORATION ACTS 1 (4th ed.), available at <http://www.nevadahomeschoolnetwork.com/pdfs/ReligiousFreedomQA.pdf>, archived at <http://perma.cc/2ZYY-C85T>.

¹⁷⁴ *Id.* at 10.

¹⁷⁵ See, e.g., TENN. CODE ANN. § 4-1-407(e) (2011) (“A person whose religious exercise has been burdened by government in violation of this section may assert that violation as a claim or defense in any judicial or administrative proceeding . . .”); VA. CODE ANN. § 57-2.02(D) (2012) (“A person whose religious exercise has been burdened by government in violation of this section may assert that violation as a claim or defense in any judicial or administrative proceeding . . .”).

¹⁷⁶ See, e.g., TENN. CODE ANN. § 4-1-407(d)(1)(B) (2011) (indicating that nothing in the section will “[a]ffect, interpret or in any way address” the Tennessee or United States Constitution); VA. CODE ANN. § 57-2.02(C) (2012) (same).

essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest.¹⁷⁷

Tennessee's statute is nearly identical, reading, in relevant part:

Except as provided in subsection (c), no government entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability. (c) No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is: (1) Essential to further a compelling governmental interest; and (2) The least restrictive means of furthering that compelling governmental interest.¹⁷⁸

Both states define "substantially burden" as "to inhibit or curtail religiously motivated practice."¹⁷⁹

It is undeniable that Virginia and Tennessee's snake-handling statutes each inhibit the religiously motivated practice of handling snakes. Thus, both laws substantially burden practitioners' free exercise of religion. As such, both states must provide a compelling governmental interest in order to not run afoul of state law.

While neither state statute defines "compelling governmental interest," recall that they each lifted their language almost verbatim from the federal RFRA, itself adopting longstanding terminology crafted over decades by the Supreme Court. Notice too that the Supreme Court's holding in *Smith* explicitly used the phrase "compelling governmental interest." As Virginia and Tennessee's RFRA statutes trace their lineage directly to this holding, it follows that their enactors intended the phrase to mirror its federal meaning. Moreover, both Virginia and Tennessee courts have, on numerous occasions, explicitly deferred to federal case law when interpreting the phrase "compelling governmental interest."¹⁸⁰ Thus, an analysis of whether the snake-handling statutes further compelling governmental interests tracks the federal jurisprudence on what constitutes such an interest.

The traditional compelling governmental interest test states, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest

¹⁷⁷ VA. CODE ANN. § 57-2.02(B) (2012).

¹⁷⁸ TENN. CODE ANN. § 4-1-407(b)-(c) (2011).

¹⁷⁹ TENN. CODE ANN. § 4-1-407(a)(7) (2011); VA. CODE ANN. § 57-2.02(A) (2012).

¹⁸⁰ *See, e.g.,* Horen v. Commonwealth, 479 S.E.2d 553, 559 (Va. Ct. App. 1997) ("[T]he RFRA incorporates the compelling interest test applied under the Free Exercise Clause and as articulated in *Sherbert*."); Johnson v. Levy, No. M2009-02596-COA-R3-CV, 2010 WL 119288, at *5 (Tenn. Ct. App.) ("The legislative history of Tennessee's religious freedom statute reveals that the purpose in enacting the statute was to mirror [the federal] RFRA for the purpose of restoring heightened free exercise protections. This is abundantly evident from the fact that RFRA and Tenn. Code Ann. § 4-1-407 are substantially similar.").

abuses, endangering paramount interests, give occasion for permissible limitation.”¹⁸¹

The empirically low risk of death associated with snake handling does not rise to this level. While, admittedly, the language of Virginia and Tennessee’s statutes only prohibit snake handling in cases endangering the life or health of any person, it is self-evident that almost all handling of poisonous animals is dangerous. The degree of danger, however, is miniscule, and neither the legislatures nor state courts have specified a degree of endangerment threshold. Indeed, on their face, both statutes seem to proscribe all religious snake handling. Yet the avoidance of the extremely rare deaths resulting from snake handling can hardly be so paramount an interest as to justify a near blanket prohibition on its practice. Some may argue that the possibility of death itself, however unlikely, is so severe and irreversible a consequence as to render its avoidance a compelling interest. Following that logic, practically every activity in modern life could be proscribed based on the “compelling interest” in avoiding the slightest likelihood that the activity might result in death. Riding lawnmowers, household furniture, owning a dog, and skydiving all kill more Americans per year than venomous snakes; vending machines kill nearly half as many.¹⁸² To label the avoidance of preventable deaths, however unlikely, as a compelling interest for the sole reason that death is severe and irreversible would allow all manner of activity to be proscribed by the state. This result stands in sharp contrast to the Court’s “gravest abuses, endangering paramount interests” language.¹⁸³

Aside from the dangers posed by venomous snakebites themselves, there may arguably be a social disruption danger embodied in the practice. Take, for instance, the unusual conviction of Cuba Amburgey for the murder of a fellow church-goer.¹⁸⁴ Amburgey’s nephew, who was also the preacher’s son, became violently ill after being bitten by a snake.¹⁸⁵ Despite this, the preacher continued the service as if nothing was wrong.¹⁸⁶ This enraged Amburgey, and he charged the aisle with the purpose of “killing the G[od] D[amn] snakes.”¹⁸⁷ When thwarted, he returned with a pistol and blindly shot into the crowd, killing a congregant.¹⁸⁸ While avoiding this type of social disruption may be a

¹⁸¹ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

¹⁸² Micah Zenko, *There’s Nothing in the Water*, FOREIGN POLICY (Aug. 10, 2012), <http://foreignpolicy.com/2012/08/10/theres-nothing-in-the-water/>, archived at <http://perma.cc/PU8V-LL2C> (reporting riding lawnmowers kills an average of 5.22 people a year, household furniture 26.64, dogs 16, skydiving 21.2, and vending machines 2.06).

¹⁸³ See *Sherbert*, 374 U.S. at 406 (quoting *Thomas*, 323 U.S. at 530).

¹⁸⁴ See *Amburgey v. Commonwealth*, 153 S.W.2d 918, 918 (Ky. Ct. App. 1941).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (citations omitted).

¹⁸⁸ *Id.* at 920.

legitimate interest, its rarity and spectacular character hardly rises to the level of those paramount interests required by *Sherbert*.

Further, neither statute embodies the least restrictive means to advance the states' interest in public safety. There are less restrictive alternatives, as discussed above in relation to Kentucky's statute. For example, the statutes might require medical personnel, snakebite anti-venom, or snakebite kits to be present during snake-handling services. They might impose barrier or distance requirements between the handler and the congregation. The Tennessee Supreme Court itself seemed to acknowledge that safeguards were capable of mitigating the "grave and immediate" danger associated with snake handling.¹⁸⁹ In *Harden*, the Court discussed the inadequacy of specific safeguards preventing congregants from contact with the rattlesnakes, thereby suggesting the possibility that other, more stringent safeguards might be adequate.¹⁹⁰

As Virginia and Tennessee each fail to advance a compelling interest by the least restrictive means at their disposal, neither proscription can survive a challenge to its application under its respective state RFRA analogue. Thus, while this fact does not speak to whether the statutes run afoul of the federal Constitution, it does speak to their legality at the state level. A private challenge to these laws via Virginia or Tennessee's RFRA statutes, with counsel armed with empirical research on the practice of snake handling, should lead to a judicial invalidation of the prohibitions as applied.

Further, were a court to find that the legislatures had engaged in the same sort of religious gerrymandering at issue in *Hialeah* (which the Supreme Court of Tennessee all but made clear Tennessee had done in *Swann*), the issue of federal constitutionality would resurface. Religious gerrymandering triggers the same heightened scrutiny required of Kentucky's direct approach at the federal constitutional level, and as mandated by the state RFRA analogues. As these statutes do not serve a compelling interest and otherwise do not employ the least restrictive means of furthering an interest, a court should find that they violate the federal Constitution's Free Exercise Clause.

C. *Common Law Approach*

Recall that Tennessee poses a wrinkle in its public nuisance approach to proscribing religious snake handling. In *Swann*, the Supreme Court of Tennessee permanently enjoined defendant snake handlers from "handling, displaying or exhibiting dangerous and poisonous snakes . . . within the confines of the State."¹⁹¹ The court held "that the handling of snakes as a part of a religious ritual is a common law nuisance, wholly independent of any state statute."¹⁹²

¹⁸⁹ See *Harden v. State*, 216 S.W.2d 708, 708 (Tenn. 1948).

¹⁹⁰ *Id.* at 709.

¹⁹¹ *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 100 (Tenn. 1975).

¹⁹² *Id.* at 113.

Tennessee's judicial proscription of religious snake handling cannot escape the reach of its RFRA statute. Judicial action is state action, and the court is a "governmental entity" under Tennessee's RFRA statute.¹⁹³ Thus, the judicial decree is subject to heightened scrutiny at the state level. Moreover, a decree that all handling of snakes "as part of a religious ritual" is per se a public nuisance indisputably targets conduct on the basis of its religious motivation, and is therefore subject to heightened scrutiny at the federal constitutional level. For all of the foregoing reasons, this judicial decree is both inconsistent with Tennessee's RFRA statute and unconstitutional under the First Amendment's Free Exercise Clause.

Other common law approaches are so fact specific as to defy general categorization. For example, the constitutionality of the Supreme Court of North Carolina's allowance of public snake handling so long as the practice does not pose a danger to the public would depend, in part, on what the court deemed a "danger." Were a subsequent judicial decision to adopt the Tennessee approach and declare that all religious snake handling is dangerous and thus always a common law nuisance, then it would run into the same problems that Tennessee faces. However, the absence of a RFRA analogue in North Carolina complicates the inquiry. Were the court to announce a facially neutral interpretation that all snake handling, regardless of religious motivation, is a per se danger, its legality would be more difficult to challenge. Similarly, local governments' approaches to snake handling can and do vary, and factors relevant to their legality include whether they target religiously motivated conduct directly, whether a facially neutral law is a mere pretext for the targeting of religious conduct, and whether the state they are located in has a RFRA analogue.

CONCLUSION

Kentucky, the sole state that overtly targets religious snake handling, fails to provide an interest so compelling, and a means so narrowly tailored, as to satisfy its constitutional burden. Similarly, even if Virginia and Tennessee's public endangerment statutes are not subject to strict scrutiny at the federal level, which I argue they are, their RFRA analogues each require them to withstand heightened scrutiny under state law, which they cannot. Finally, constitutional questions arise on a case-by-case basis when states with or without statutory prohibitions apply common law remedies to enjoin the practice. In sum, the existing state statutory prohibitions against snake handling run afoul of either the federal constitution or state RFRA statutes, while the legality of common law measures remains so fact specific as to defy generalities.

¹⁹³ TENN. CODE ANN. § 4-1-407(a)(5) (2011) (defining "government entity" as "any branch, department, agency, commission or instrumentality of state government, any official or other person acting under color of state law or any political subdivision of the state").