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Fostering Failure: How the Smith Test Continues to Burden Free Exercise (2023)

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FOSTERING FAILURE: HOW THE *SMITH* TEST CONTINUES TO BURDEN FREE EXERCISE

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I. INTRODUCTION

"Though the State must treat all religions equally, and not favor one over the other, this obligation is fulfilled by the uniform application of the 'compelling interest test' to all free exercise claims, not by reaching uniform results as to all claims."[1] Over centuries, the Supreme Court has struggled to decide how to deal with freedom of religion, as its constitutional protections have broadened and lessened with time. The stringent test applied to laws burdening religion has been replaced by a more lenient one. Consequently, religious freedom is much more vulnerable today than it was in the past. This vulnerability is apparent in the Supreme Court's analysis in the 2021 case *Fulton v. City of Philadelphia*,[2] which has left both the religious and the LGBTQ[3] communities uneasy. Because this lenient test has created a loophole for the government to burden religion more easily, future litigation is bound

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1. Emp. Div. Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 918 (1990) (Blackmun, J., dissenting).

2. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021).

3. *GLAAD's Mission*, GLAAD, www.glaad.org/about [perma.cc/E6S8-W5QJ] (last visited Feb. 22, 2023) (defining "LGBTQ" as a community of those who identify as Lesbian, Gay, Bisexual, Transgender, and Queer).

to ensue.

Part II focuses on relevant background information in order to understand the Supreme Court's reasoning in the *Fulton* decision. First, it explains the First Amendment, specifically the Free Exercise Clause, and what it entails. Second, it analyzes how the Supreme Court has interpreted the Free Exercise Clause, beginning with its first free exercise case, and how the Court's standard of review has changed over time. Third, it discusses today's standard of review, and the effects of this standard. Finally, it reviews the factual background and procedural history of *Fulton v. City of Philadelphia*.[4]

Part III dives into the Court's opinion. First, it breaks down the Court's analysis according to the current standard of review. Second, it poses a hypothetical to the case at issue and discusses whether the Court's standard of review is inadequate under such circumstances.

Part IV discusses the dangers of the Court's analysis. It suggests that the Court revisit prior case law concerning the Free Exercise Clause and revert to the previous standard of review to level the playing field for free exercise claims.

II. BACKGROUND

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[5] These two clauses are called the "Establishment Clause" and the "Free Exercise Clause."[6] The Free Exercise Clause safeguards individual liberty, whereas the Establishment Clause demands that the government refrain from advancing any religion.[7] Both clauses are applicable to the states through the Due Process Clause of the Fourteenth Amendment,[8] which provides: "[No] State [shall] deprive any person of life, liberty, or property, without due process of law."[9] The framers of the Constitution intended for the two clauses to be complementary, however, in practice this means that many government actions may simultaneously violate both clauses.[10] For example, government measures to encourage free exercise might be challenged as forbidden establishments.[11] Conversely, government measures to avoid establishing religion might be challenged as denying the free exercise of

4. *Id.*

5. U.S. CONST. amend. I, §§ 1-2.

6. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1665 (6th ed. 2020).

7. *Id.* at 1665-66.

8. Fern L. Kletter, Annotation, *Free Exercise Clause of the First Amendment – U.S. Supreme Court Cases*, 37 A.L.R. Fed. 3d Art. 12 § 1 (2018) (explaining that "the government cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.").

9. U.S. CONST. amend. XIV, §1.

10. CHEMERINSKY, *supra* note 6, at 1666.

11. *Id.*

religion.[12] The Court has recognized this tension and has noted the difficulty in finding a "neutral course" between the two clauses.[13]

This Case Note focuses primarily on the Supreme Court's evolving interpretation of the Free Exercise Clause.[14] The Court has said that the freedom to believe is "absolute," but "[c]onduct remains subject to regulation for the protection of society."[15] Although governments do not adopt laws that prohibit or require thoughts, they do create legislation that regulates conduct.[16] For example, in the 1879 case *Reynolds v. United States*, the Court's first case concerning free exercise of religion, a man argued that he should be exempt from a federal statute criminalizing polygamy.[17] The Court distinguished between thoughts and conduct, stating, "[l]aws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices."[18] Additionally, the Court noted that "[t]o permit [an exception] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[19] Thus, the Court's first interpretation of the Free Exercise Clause was narrow.

A. The Sherbert Test

After *Reynolds*, the Court only decided a handful of free exercise cases.[20] Nearly a century later, in the 1963 case *Sherbert v. Verner*, the Court broadened its interpretation of the Free Exercise Clause and its protections.[21] In *Sherbert*, the Court explicitly held that in evaluating laws burdening free exercise of religion, strict scrutiny should be used.[22] There are three levels of review: rational basis, intermediate scrutiny and strict scrutiny.[23]

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12. *Id.*

13. *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)).

14. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (finding that freedom to believe is absolute, but that freedom to act cannot be; conduct remains subject to regulation for the protection of society).

15. *Id.* at 303-04.

16. CHEMERINSKY, *supra* note 6, at 1675.

17. Reynolds v. United States, 98 U.S. 145, 166 (1878).

18. *Id.* "[T]he only question which remains is, whether those who make polygamy a part of their religion are exempted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free." *Id.*

19. *Id.* at 167 (explaining that Government could exist only in name under such circumstances).

20. *The Free Exercise Clause*, LAW SHELF EDUC. MEDIA, www.lawshelf.com/shortvideoscontentview/the-free-exercise-clause/ [perma.cc/4LJF-X5MV] (last visited Dec. 12, 2022).

21. Sherbert v. Verner, 374 U.S. 398, 403 (1963). *See also The Free Exercise Clause*, *supra* note 20 (noting that the Court created a compelling interest test and applied strict scrutiny to laws impacting religious belief and practice).

22. CHEMERINSKY, *supra* note 6, at 1677.

23. *See Rational Basis Test*, LEGAL INFO. INST., www.law.cornell.edu/wex/rational_basis_test [perma.cc/9PXD-25PY] (last visited Dec. 29, 2022) (providing

First, the lowest level of scrutiny is rational basis review.[24] Generally, the rational basis test is the appropriate level of review where no fundamental right[25] or suspect classifications[26] are at issue.[27] Under rational basis review, which is the most deferential form of scrutiny to the states or federal government, the Court rarely invalidates legislation.[28] Legislation survives rational basis review as long as it is rationally related to a legitimate state interest.[29] The challenger bears the burden of proving that there is no conceivable basis which might support the legislation.[30]

Second, the middle level of scrutiny is intermediate scrutiny.[31] Generally, intermediate scrutiny is the appropriate level of review in equal protection[32] challenges to gender classifications, as well as in free speech cases.[33] Under intermediate scrutiny, the legislation must be substantially related to the achievement of an important government interest.[34] The government has the burden of proof.[35]

Lastly, the highest level of scrutiny is strict scrutiny.[36] Generally, strict scrutiny is the appropriate level of review where suspect

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definition of the rational basis test); *Intermediate Scrutiny*, LEGAL INFO. INST., www.law.cornell.edu/wex/intermediate_scrutiny [perma.cc/EGN2-MDHA] (last visited Feb. 22, 2023) (providing definition of intermediate scrutiny); *Strict Scrutiny*, LEGAL INFO. INST., www.law.cornell.edu/wex/strict_scrutiny [perma.cc/ZR59-XGBG] (last visited Feb. 22, 2023) (providing definition of strict scrutiny).

24. *Rational Basis Test*, *supra* note 23.

25. *Fundamental Right*, LEGAL INFO. INST., www.law.cornell.edu/wex/fundamental_right [perma.cc/RE6D-X3LU] (last visited Sep. 26, 2021). "Fundamental rights are a group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment." *Id.* "Examples of fundamental rights not specifically listed in the Constitution include: marriage, privacy, contraception, interstate travel, procreation, custody of one's child[ren], voting." *Id.*

26. *Suspect Classification*, LEGAL INFO. INST., www.law.cornell.edu/wex/suspect_classification [perma.cc/VGB9-VF7X] (last visited Sep. 26, 2021). "Suspect classification refers to a class of individuals that have been historically subject to discrimination." *Id.* "There are four generally agreed-upon suspect classifications: race, religion, national origin, and alienage." *Id.*

27. *Rational Basis Test*, *supra* note 23.

28. Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y. L. REV. 2070, 2071 (2015).

29. *Id.* at 2074.

30. *Id.*

31. Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FIND L. (Jan. 27, 2014), www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/ [perma.cc/5L3T-9RSA].

32. *Intermediate Scrutiny*, *supra* note 23. "Equal Protection refers to the idea that a government body may not deny equal protection of its governing laws." *Equal Protection*, LEGAL INFO. INST., www.law.cornell.edu/wex/equal_protection [perma.cc/V3R2-LZMZ] (last visited Feb. 28, 2023). "The governing body must treat an individual in the same manner as others in similar conditions and circumstances." *Id.*

33. *Let the End be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1408 (2016).

34. *Id.*

35. CHEMERINSKY, *supra* note 6, at 686.

36. Snider, *supra* note 31.

classifications or fundamental rights are at issue.[37] Suspect classifications include race, national origin and alienage.[38] Fundamental rights are those "recognized by the Supreme Court as demanding a high degree of protection from government encroachment."[39] Fundamental rights may be either explicitly mentioned in the Constitution or implicitly found under Due Process.[40] Under strict scrutiny, the legislation must be necessary to promote a compelling governmental interest.[41] The government has the burden of proof, but strict scrutiny is usually fatal to the challenged law.[42]

In *Sherbert*, the Court applied strict scrutiny and found a violation of the Free Exercise Clause, creating what is now known as the *Sherbert* Test.[43] Under this test, if an individual has a claim involving a religious belief and the government imposes any burden on the individual's free exercise, the government must demonstrate a compelling government interest justifying the infringement and that the government has pursued that interest using the least-restrictive means.[44] In *Sherbert*, a member of the Seventh-day Adventist Church was fired by her employer because she refused to work on Saturday, which was her Sabbath Day.[45] Unable to find other employment, she filed for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.[46] The Employment Commission denied her benefits, finding that she "failed, without good cause, to accept suitable work when offered."[47] The Court invalidated the Act because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand."[48] The Court found this burden impermissible, stating, "in

37. Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 63 IND. L.J. 779, 782 (1987).

38. *Id.*

39. *Fundamental Right*, *supra* note 25.

40. *Id.*

41. Pettinga, *supra* note 37, at 781-82.

42. CHEMERINSKY, *supra* note 6, at 685.

43. *Sherbert*, 374 U.S. at 410.

44. Matthew A. Brown, *Masterpiece Cakeshop: A Formula for Legislative Accommodations of Religion*, 53 AKRON L. REV. 177, 187 (2019). "This required the plaintiff to show their exercise of religion was hindered by the government then shifted the burden to the government to show the existence of a compelling state interest." *Id.* "[A]reas of compelling state interests are historically those that 'posed some substantial threat to public safety, peace or order.'" *Id.* (internal citations omitted).

45. *Sherbert*, 374 U.S. at 399.

46. *Id.* at 400.

47. *Id.* at 401. "The State Supreme Court held specifically that [the woman's] ineligibility infringed no constitutional liberties because such a construction of the statute 'places no restriction upon [the woman's] freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience.'" *Id.* (internal citations omitted).

48. *Id.* at 404. "Here not only is it apparent that [the woman's] declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her

this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'"[49] Ultimately, the Act did not survive strict scrutiny because the state merely suggested the possibility that the filing of fraudulent claims would diminish the unemployment compensation fund and impede the scheduling by employers of necessary Saturday work.[50] The state failed to satisfy its burden and, therefore, the Act was deemed unconstitutional.[51]

In the 1972 case *Wisconsin v. Yoder*, the Court applied the *Sherbert* Test, once again finding a violation of the Free Exercise Clause.[52] The Court held that free exercise of religion required that Amish parents be granted an exemption from a compulsory school-attendance law for their fourteen and fifteen-year-old children.[53] The Amish community objected to secondary education because the values taught differed from Amish values and the Amish way of life.[54] The Court recognized the state's interest in basic education, but, similar to *Sherbert*, found that this interest "is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause . . ."[55] The state argued that education is necessary to prepare citizens to be self-sufficient participants in society and in the political system.[56] However, an additional one or two years of formal high school for Amish children would do little to serve those interests, since the Amish live in a separated agrarian community.[57] Thus, the Court concluded that "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[58]

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to forego that practice is unmistakable." *Id.*

49. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice . . ." *Id.*

50. *Id.*

51. *Id.* at 410.

52. Wisconsin v. Yoder, 406 U.S. 205, 211 (1972).

53. CHEMERINSKY, *supra* note 6, at 1678.

54. *Yoder*, 406 U.S. at 211 (explaining that "high school emphasize[s] intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students," whereas "Amish society emphasizes informal learning-through-doing; a life of 'goodness,' . . . wisdom . . . community welfare, . . . and separation from . . . contemporary worldly society . . .").

55. *Id.* at 214. "It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.*

56. *Id.* at 221.

57. *Id.* at 222.

58. *Id.* at 218. "[T]he record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but

The *Sherbert* Test greatly expanded the Free Exercise Clause by balancing the free exercise rights of a citizen against a governmental interest.[59] However, the only laws struck down under the *Sherbert* Test were a few involving unemployment benefits and compulsory school attendance.[60]

B. The Smith Test

In the 1990 case *Employment Division, Department of Human Resources of Oregon v. Smith*,[61] the Court substantially changed the law regarding the Free Exercise Clause and created the test that is used today.[62] The Court "abandoned the *Sherbert* Test and its requirement of a compelling government interest" and instead held that "neutral,[63] generally applicable[64] laws affecting religion do not violate the Free Exercise Clause."[65] This change adheres to the notion that freedom to believe is absolute, but conduct may be regulated for protection of society.[66] In *Smith*, a criminal law prohibiting drug possession was at issue.[67] As a result, the Court once again narrowed its interpretation of the Free Exercise Clause and expanded the range of permissible government interference with religious practices.[68]

In *Smith*, the Court held that the denial of unemployment benefits to two individuals for using the illegal drug peyote in the practice of their

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one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216.

59. *See Sherbert v. Verner: Sherbert Test*, L. JRANK, law.jrank.org/pages/22898/Sherbert-v-Verner-Sherbert-Test.html [perma.cc/H4F3-WZF2] (last visited Dec. 14, 2022) (noting the burden *Sherbert* placed on the state).

60. Brown, *supra* note 44, at 187-88 (explaining that even under strict scrutiny, "the Court was very unwilling to provide judicial accommodations for religion"; for example, "the Court upheld Sunday closing laws, laws restricting conscientious objectors to those who object to all war, the obligation to pay taxes, IRS requirements of racial non-discrimination policies for tax-exempt status, military dress code for forbidding yarmulke on duty, the requirement of listing social security numbers to apply for welfare benefits, and the ability of government to build a road and harvest timber in a national park that contained ancient Indian burial grounds.").

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

62. CHEMERINSKY, *supra* note 6, at 1681.

63. *See Fulton*, 141 S. Ct. at 1876-77. "Government fails to act neutrally when it proceeds in a manner intolerant of religious belief or restricts practices because of their religious nature." *Id.* at 1877 (citing Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1730-32 (2018); Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531-32 (1993)).

64. *See Fulton*, 141 S. Ct. at 1876-77. "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* at 1877 (citing *Smith*, 494 U.S. at 884). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 542-46).

65. Brown, *supra* note 44, at 189.

66. *Cantwell*, 310 U.S. at 304.

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

68. Kletter, *supra* note 8, at § 2.

religion was not a violation of the Free Exercise Clause.[69] In this case, an Oregon law prohibited the knowing or intentional possession of a controlled substance.[70] The respondents, who were members of the Native American Church, were fired from their jobs because they ingested peyote for sacramental purposes.[71] The respondents applied for unemployment compensation, but were deemed ineligible because they had been fired for work-related "misconduct."[72]

In writing for the Court, Justice Scalia distinguished between two types of free exercise cases: hybrid and pure.[73] Hybrid cases involve a constitutional right coupled with another fundamental right, such as in *Yoder*, which involved parental rights plus a First Amendment right.[74] Purely religious cases, like *Smith*, involve only a First Amendment right.[75] Justice Scalia went on to remark that "[t]he only decisions in which [the Court has] held that the First Amendment bars application of generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . ."[76] Therefore, only hybrid cases are subject to strict scrutiny.[77]

Because *Smith* was purely a religious case, Justice Scalia took the position that "if prohibiting the exercise of religion is not the object of the law, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[78] Justice Scalia rejected the *Sherbert* Test, stating that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[79] He further explained that it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,"[80] thus creating anarchy.[81] Under this analysis, the Court held that Oregon's prohibition of peyote was neutral

69. John R. Hermann, *Employment Division, Department of Human Resources of Oregon v. Smith (1990)*, FIRST AMEND. ENCYCL., www.mtsu.edu/first-amendment/article/364/employment-division-department-of-human-resources-of-oregon-v-smith [perma.cc/Q9PE-6UEL] (last visited Dec. 12, 2022).

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

71. *Id.*

72. *Id.*

73. Hermann, *supra* note 69.

74. *Id.* (explaining that the Court held *Smith* was a purely religious case because it only involved violating a criminal statute).

75. *Id.*

76. *Smith*, 494 U.S. at 881.

77. Hermann, *supra* note 69.

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

79. *Id.* at 879.

80. *Id.* at 886 (explaining that the "compelling government interest" requirement is familiar in other fields in which it produces constitutional norms such as equality of treatment on the basis of race and an unrestricted flow of contending speech. Here, however, it would produce a private right to ignore generally applicable laws, which is a constitutional anomaly).

81. *Id.*

and generally applicable.[82] The Court explained that requiring the political process to create accommodations to generally applicable laws is favored over allowing individuals or judges to create exemptions of their own volition.[83]

In concurrence, Justice O'Connor argued that the majority's holding dramatically departed from well-settled First Amendment jurisprudence by adopting a categorical rule.[84] She explained that the Court interpreted the Free Exercise Clause "to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable."[85] In *Yoder*, the Court expressly rejected this interpretation it adopted in *Smith*, stating that "[a] regulation neutral on its face may in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[86]

Justice O'Connor further explained that the Court's interpretation was problematic because the First Amendment "does not distinguish between laws that are generally applicable and laws that target particular religious practices."[87] She concluded that the compelling interest test should be the standard used in all free exercise cases because it "effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests . . ."[88] Accordingly, Justice O'Connor found that the State had a compelling interest in regulating peyote use and that accommodating respondents' religious conduct would interfere with that interest.[89] Although Justice O'Connor ultimately agreed with the result the Court reached, she nonetheless rejected the *Smith* Test.[90]

In dissent, Justice Blackmun also found that the majority mischaracterized leading free exercise cases by concluding that strict scrutiny "is a 'luxury' that a well-ordered society cannot afford."[91] Unlike Justice O'Connor, however, Justice Blackmun explained that, "[i]t is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in

82. Brown, *supra* note 44, at 189.

83. *Id.*

84. *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

85. *Id.* at 893.

86. *Yoder*, 406 U.S. at 219-20. "But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability . . . ." *Id.*

87. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring).

88. *Id.* at 895.

89. *Id.* at 907.

90. *Id.* at 907 (explaining that the Court should adhere to strict scrutiny, but that the law is nevertheless constitutional because the state has a compelling interest in regulating peyote use by its citizens).

91. *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting).

refusing to make an exception for the religious, ceremonial use of peyote."[92] Here, because the State never sought to prosecute respondents or other religious peyote users, its asserted interest is merely the symbolic preservation of an unenforced prohibition.[93] Additionally, the State failed to offer any evidence that the religious use of peyote, unlike recreational use of other unlawful drugs, is harmful.[94] Although the State claimed that granting an exemption for religious peyote would result in a flood of other claims to religious exemptions, Justice Blackmun argued that this was purely speculative.[95] Quoting *Yoder*, he stated, "[a] showing that religious peyote use does not unduly interfere with the State's interests is 'one that probably few other religious groups or sects could make.'"[96] Nevertheless, in Justice Blackmun's view, the majority turned a blind eye to the severe impact the State's restrictions will have on religious peyote users.[97] For these reasons, Justice Blackmun rejected not only the Court's opinion, but also the *Smith* Test.[98]

In *Smith*, the Court narrowed its interpretation of the Free Exercise Clause by holding that it does not protect religious practices that are affected by neutral, generally applicable laws.[99] As a result, free exercise protections had been seriously weakened.[100] However, this is the baseline protection of the Free Exercise Clause.[101]

C. Negating Smith

The reaction to *Smith*'s narrow interpretation was largely negative, and legislative responses followed, seeking to restore strict scrutiny as the appropriate standard when a free exercise exemption was denied.[102]

92. *Id.* at 910 (citing Bowen v. Roy, 476 U.S. 693, 728 (1986)).

93. *Smith*, 494 U.S. at 910 (Blackmun, J., dissenting).

94. *Id.* at 911-13.

95. *Id.* at 917.

96. *Id.* (quoting *Yoder*, 406 U.S. at 236).

97. *Smith*, 494 U.S. at 919 (Blackmun, J., dissenting) (explaining that without peyote, respondents cannot enact the essential ritual of their religion and may be forced to migrate to a more tolerant region).

98. Id. at 921.

99. Brown, *supra* note 44, at 190.

100. *Smith v. Employment Division: Faces of Liberty: Standing Up for Religious Freedom*, ACLU OR., www.aclu-or.org/en/cases/smith-v-employment-division [perma.cc/9W6N-LMG7] (last visited Feb. 28, 2023) (explaining that the Court's decision in *Smith* "galvanized religious leaders of all faiths because it brazenly swept aside the long-held doctrine that government must show a 'compelling state interest' before infringing on religious practices.").

101. Brown, *supra* note 44, at 190 (explaining that Legislatures may adopt religious accommodation laws that provide stricter standards for the protection of religious practices).

102. Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357, 357 (2012). "The Court returned to an older view of the Free Exercise Clause as protecting believers only from government acts that were aimed specifically at beliefs, and that grew out of hostility to the religion rather than a desire to further legitimate secular goals." *Id.* "*Smith* was

In 1993, Congress adopted the Religious Freedom Restoration Act ("RFRA") to negate the *Smith* Test and require strict scrutiny for free exercise claims.[103] Congress found that "[i]n *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws neutral toward religion."[104] The purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to any persons whose religious exercise is substantially burdened by government."[105]

However, in the 1997 case *City of Boerne v. Flores*, the Court declared RFRA unconstitutional as applied to state and local governments, holding that Congress lacked the authority under § 5 of the Fourteenth Amendment[106] to expand the scope of constitutional rights.[107] The Court explained that while Congress's enforcement power is broad, it is not unlimited.[108] Therefore, "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."[109] But nothing in *Boerne* prevented the states from imposing heightened burdens on themselves.[110] In fact, a number of states have adopted their own requirements for heightened scrutiny, similar to RFRA, either by state legislation or constitutional amendment.[111]

In 2000, after RFRA was declared unconstitutional as applied to state and local governments, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Under RLUIPA, "[n]o government shall impose a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person,

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seen as an unfortunate decision reflecting insensitivity to the significance of the free exercise right." *Id.*

103. 42 U.S.C. ch. 21B (1993). *See also* CHEMERINSKY, *supra* note 6, at 1715.

104. 42 U.S.C. § 2000bb(a)(4) (2022) (sharing the findings of Congress in relation to the creation of the RFRA).

105. 42 U.S.C. § 2000bb(b) (2022) (stating the purposes of RFRA based on the findings).

106. U.S. CONST. amend. XIV, § 5. "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *Id.*

107. City of Boerne v. Flores, 521 U.S. 507, 536 (1997). "[RFRA] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534.

108. *Id.* at 536. "The Fourth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause." *Id.* at 520. "RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id.* at 532.

109. *Id.* at 519.

110. W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 3:18 (2d ed. 2022) (explaining that "the states may, but are not required to apply strict scrutiny and accommodate religion when they enact laws of general application that are religiously neutral on their face.").

111. SHARON P. STILLER, 13A N.Y. PRAC, EMPLOYMENT LAW IN NEW YORK § 3:83 (2d ed. 2022). "Approximately 20 states enacted their own Religious Freedom Restoration Acts, many patterned after the federal law." *Id.*

including a religious assembly or institution, unless the government demonstrates that imposition . . . is in furtherance of a compelling governmental interest; and is the least restrictive means . . . ."[112] RLUIPA's essence is that government land use decisions and treatment of institutionalized persons that significantly burden religion must meet strict scrutiny.[113] In enacting RLUIPA, Congress identified a number of specific areas in which it has stronger claims of authority to reintroduce strict scrutiny.[114]

Although Congress enacted RFRA and RLUIPA in an attempt to negate *Smith*, the Court continues to cite to *Smith* when deciding cases involving otherwise valid regulations of general applicability that incidentally burden religious conduct.[115] However, *Smith* remains controversial.[116]

D. Fulton v. City of Philadelphia, Pennsylvania

In 2021, the Supreme Court decided the case of *Fulton v. City of Philadelphia*.[117] Catholic Social Services ("CSS") is a foster care agency created by the Catholic Church that has served the underprivileged children of Pennsylvania for over two centuries.[118] Accordingly, "CSS sees caring for vulnerable children as a core value of the Christian faith and therefore views its foster care work as part of its religious mission and ministry."[119] CSS also believes that "marriage is a sacred bond between man and a woman" and that certification of prospective foster families is "an endorsement of their relationships."[120]

Philadelphia's foster care system relies on the City and private foster care agencies' ability to work together and create annual contracts to

112. 42 U.S.C. § 2000cc(a)(1) (2022).

113. CHEMERINSKY, *supra* note 6, at 1717.

114. DURHAM & SMITH, *supra* note 110 (explaining that RLUIPA applies under three conditions: where a "substantial burden is imposed in a program or activity that receives Federal financial assistance"; where a "substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes"; and where a "substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make individualized assessments of the proposed uses for the property involved.").

115. Kletter, *supra* note 8.

116. *Id.* "As recently stated by Justice Gorsuch, however, *Smith* remains controversial in many quarters, and when the government fails to act neutrally toward the free exercise of religion, the government can prevail only if it satisfies strict scrutiny showing that its restrictions on religion both serve a compelling interest and are narrowly tailored." *Id.* (citing *Masterpiece Cakeshop*, 138 S. Ct. at 1734).

117. *Fulton*, 141 S. Ct. at 1868.

118. *Id.* at 1874. *See also History*, CATHOLIC SOC. SERV. PHILA., cssphiladelphia.org/about/history/ [perma.cc/4Q6A-RLJH] (last visited Feb. 5, 2023) (providing a history of the organization in Philadelphia, dating back to 1797).

119. Fulton v. City of Philadelphia, 922 F.3d 140, 147 (3d Cir. 2019).

120. *Fulton*, 141 S. Ct. at 1875.

place children with foster families.[121] The City contracts with thirty foster care agencies, CSS included.[122] Under Pennsylvania law, state-licensed foster agencies have the authority to certify foster families.[123] Under its contract, CSS was required to certify its foster parents in conformity to state regulations,[124] but the contract "did not otherwise impose conditions on the certification process."[125] The contract did, however, prohibit CSS from discriminating based on race, religion, national origin, "and it incorporated the City's Fair Practice Ordinance, which in part prohibits sexual orientation discrimination in public accommodations."[126]

CSS views the certification of prospective foster families as an endorsement of their relationships; therefore, CSS will not certify unmarried couples or same-sex married couples.[127] A same-sex couple has never sought certification from CSS, but if one had, CSS would refer the couple to one of the other agencies in the City, all of which do certify same-sex couples.[128]

In 2018, CSS's refusal to certify same-sex couples came to the City's attention.[129] A *Philadelphia Inquirer* reporter called the City's Department of Human Services ("DHS") and published an article stating that two agencies, CSS and Bethany Christian Services ("Bethany"),[130] refused to certify same-sex couples as foster parents.[131] The Philadelphia Commission on Human Relations launched an inquiry and, after a meeting with the leadership of CSS and Bethany, confirmed the report.[132] Commissioner Cynthia Figueroa called multiple other foster care agencies and asked whether they had similar policies.[133] None did, and all but one

121. *Id.*

122. *Fulton*, 922 F.3d at 147. *See also Foster Care Licensing Agencies*, OFF. CHILD. FAM. PHILA., www.phila.gov/media/20220915154821/DHS_Philadelphia_Foster_Care_Agencies_091422.pdf [perma.cc/HFW6-VYEE] (last accessed Feb. 5, 2023) (providing a report of contracted and licensed agencies in Philadelphia as of 2022).

123. *Fulton*, 141 S. Ct. at 1875.

124. *Id.* "Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's 'ability to provide care, nurturing and supervision to children,' '[e]xisting family relationships,' and ability 'to work in a partnership with a foster agency.'" *Id.* (quoting 55 PA. CODE § 3700.69 (2020)).

125. *Fulton*, 922 F.3d at 148.

126. *Id.*

127. *Fulton*, 141 S. Ct. at 1875.

128. *Id.*

129. *Fulton*, 922 F.3d at 148.

130. *See infra* note 291 and accompanying text.

131. *Fulton*, 922 F.3d at 148 (stating the initial report to the Department was on March 9, 2018 and the article published on March 13, 2018). *See also* Julia Terruso, *Two foster agencies in Philly won't place kids with LGBTQ people*, PHILA. INQUIRER (Mar. 13, 2018), www.inquirer.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html [perma.cc/PB6A-6NG4]. The second agency named by Terruso did not bring suit. *Fulton*, 922 F.3d at 148.

132. *Fulton*, 922 F.3d at 148.

133. *Id.*

of the other agencies were religiously affiliated.[134] Shortly thereafter, the DHS informed CSS that it would no longer refer children to the agency.[135] The City later announced that unless CSS agreed to certify same-sex couples, it would not enter a full foster care contract with the agency in the future.[136]

In response to the City's decision, CSS, along with three foster parents affiliated with the agency, filed suit against the City, the DHS and the Commission, alleging that the "referral freeze" violated the Free Exercise Clause.[137] The Support Center for Child Advocates and Philadelphia Family Pride intervened as defendants.[138] The District Court "concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable" under *Smith*.[139] The Third Circuit affirmed, finding that under *Smith*, "the First Amendment does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs."[140] The Supreme Court reversed, holding that the City's "refusal to contract with CSS for the provision of foster care services unless it agreed to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates" the Free Exercise Clause.[141]

III. ANALYSIS

In *Fulton*, the Court addressed several issues. First, the Court found that Section 3.21 of the City's standard foster care contract was not generally applicable under the *Smith* test.[142] Second, Chief Justice John Roberts explained that foster family care agencies are not public accommodations, and therefore the City's Fair Practices Ordinance did

134. *Id.*

135. *Id.* at 148-49. "[The Commissioner of the DHS] remarked that 'things have changed since 100 years ago,' and that 'it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church.'" *Fulton*, 141 S. Ct. at 1875.

136. *Fulton*, 141 S. Ct. at 1875-76. *See also Fulton*, 922 F.3d at 147 (noting that foster care contracts are one-year contracts subject to the City's annual renewal).

137. *Fulton*, 141 S. Ct at 1876.

138. *Id. See also* Steve Brandsdorfer, *Fulton v. City of Philadelphia*, SUPPORT CTR. FOR CHILD ADVOCS. (Nov. 3, 2020), sccalaw.org/fulton-v-city-of-philadelphia/ (reasoning that those opposed to LGBTQ equality have sought constitutional permission to discriminate in the name of religion since laws banning LGBTQ people from becoming foster parents have been struck down); *Fulton v. City of Philadelphia*, PHILA. FAM. PRIDE, www.philadelphiafamilypride.org/fulton-v-city-of-phila.html [perma.cc/N2F7-6EBH] (last visited Feb. 23, 2023) (explaining that Philadelphia Family Pride represented same-sex couples that are or hope to be foster parents).

139. *Id.*

140. *Fulton*, 922 F.3d at 165 (explaining that "while CSS may assert that the City's actions were not driven by a sincere commitment to equality but rather by antireligious and anti-Catholic bias," the record shows "the City's good faith in its effort to enforce its laws against discrimination.").

141. *Fulton*, 141 S. Ct. at 1882.

142. *Id.* at 1879.

not apply to CSS.[143] Third, the majority determined that the City did not have a compelling interest in enforcing its non-discrimination policies against CSS, and therefore its conduct could not survive strict scrutiny.[144] Thus, the Court held that the City's refusal to contract with CSS unless it agreed to certify same-sex couples as foster parents violated the First Amendment.[145]

A. General Applicability of Section 3.21

The Court began its analysis by deciding whether to apply the *Smith* test.[146] On behalf of the majority, Chief Justice Roberts stated, "[t]his case falls outside of *Smith* because the City ha[d] burdened the religious exercise of CSS through policies that d[id] not meet the requirement of being neutral and generally applicable."[147] The majority narrowed in on the principle of general applicability, since the lack of general applicability was much more obvious compared to other freedom of religion cases.[148] Section 3.21 of the City's standard foster care contract, titled "Rejection of Referral," states, "[p]rovider shall not reject a child or family, including but not limited to prospective foster or adoptive parents, for Services based upon their sexual orientation unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."[149] Like the good cause provision in *Sherbert*,[150] the Court found that Section 3.21 incorporates a system of individualized exemptions.[151] Section 3.21 is not generally applicable because it "invites the government to consider particular reasons for a person's conduct" and "prohibits religious conduct while permitting secular conduct that

143. *Id.* at 1881.

144. *Id.* at 1882.

145. *Id.*

146. *Id.* at 1887.

147. *Id.* at 1877. "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermined the government's asserted interest in a similar way." *Id.* (citing *Lukumi*, 508 U.S. at 542-46).

148. *Id.* "CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability." *Id.*

149. *Id.* at 1878.

150. *Sherbert*, 374 U.S. at 401. "[The South Carolina Unemployment Compensation Act] provides that . . . a claimant is ineligible for benefits '[i]f . . . he has failed, without good cause . . . to accept suitable work when offered him by the employment office or the employer . . .'" *Id.* (internal citations omitted).

151. *Fulton*, 141 S. Ct. at 1878. "*Smith* later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the 'good cause' standard permitted the government to grant exemptions based on the circumstances underlying each application." *Id.* at 1877 (citing *Smith*, 494 U.S. at 884). "Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner. The City has made clear that the Commissioner 'has no intention of granting an exception' to CSS. But the City may not refuse to extend that exemption system to cases of 'religious hardship' without compelling reason." *Id.* at 1877 (citing *Smith*, 494 U.S. at 884, quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

undermines the government's asserted interests in a similar way."[152]

CSS argued that Section 3.21 lacks general applicability because it allows the Commissioner to make exceptions "in his/her sole discretion."[153] CSS emphasized that Section 3.21 permits exceptions from the requirement "not to reject a child or family" based upon "their actual or perceived race, ethnicity, color, sex, or sexual orientation."[154] Thus, the City could have granted CSS an exemption, but refused to do so.[155] The Court agreed that the City "may not refuse to extend that exemption system to cases of 'religious hardship' without compelling reason."[156] Of course, non-discrimination is a compelling interest, but the City nonetheless permitted discrimination in some instances.[157] Quoting *Smith*, CSS contended that "the point of *Smith*'s individualized exemption language . . . is to apply strict scrutiny in the high-risk circumstance where religious exercise is penalized through 'individualized governmental assessment of the reasons for the relevant conduct' rather than 'an across-the-board criminal prohibition.'"[158] Therefore, CSS argued that the Section 3.21 exemption alone triggered strict scrutiny, and *Smith* did not apply.[159]

Conversely, the City argued that Section 3.21 is generally applicable because it prohibits discrimination, whether for religious or non-religious reasons.[160] First, the City rebutted CSS's argument that DHS allowed other agencies to engage in discrimination against prospective foster parents or foster children.[161] For example, the City stated that what CSS "characterize[d] as discrimination based on disability . . . refer[red] to DHS's practice of ensuring that special-needs children [we]re placed with foster families licensed to care for them."[162] Additionally, DHS

152. *Id.* at 1868.

153. Reply Brief for Petitioners at 5, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123). "Smith applies only to general laws; it is inapplicable 'where the State has in place a system of individualized exemptions.'" *Id.* (quoting *Smith*, 494 U.S. at 884).

154. *Id.*

155. *Id.*

156. *Fulton*, 141 S. Ct. at 1878 (citing *Smith*, 494 U.S. at 884, quoting *Roy*, 476 U.S. at 707).

157. *Id.* at 1882. "The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." *See also* Reply Brief for Petitioners, *supra* note 153, at 5. "Philadelphia insists it can grant such exceptions [based upon race, ethnicity, color, sex, or sexual orientation] but refuses to do so for CSS." *Id.*

158. Reply Brief for Petitioners, *supra* note 153, at 6 (quoting *Smith*, 494 U.S. at 884).

159. *Id.* at 5-6.

160. Brief for City Respondents at 29, *Fulton*, 141 S. Ct. 1868 (No. 19-123). "[T]he District Court and the Third Circuit found [that] there is 'no evidence in the record to show that DHS has granted any secular exemption to the requirement that its foster care agencies provide their services to all comers.'" *Id.* (internal citations omitted).

161. *Id.*

162. *Id.* at 33. "Allowing agencies with such licenses to focus on serving [special-needs] children is not 'discrimination'; on the contrary, it ensures that special-needs children are afforded equal opportunities for a safe and nurturing home." *Id.* at 32.

"consider[ed] race only as one of several factors and pursuant to its duty to protect 'the best interest of the child' and to ensure the child's 'safety' where the child may distrust persons of another race due to abuse suffered in a prior home."[163] For these reasons, the City argued that "this practice d[id] not injure the interests underlying its nondiscrimination requirement to the same degree as a blanket refusal to serve individuals because of a protected characteristic."[164] This argument is weak, however, because Section 3.21 plainly states that no child nor family may be discriminated against, and nothing more.[165] Second, the City denied CSS's argument that the nondiscrimination requirement is not generally applicable solely because DHS could grant individualized exemptions.[166] The City argued that Section 3.21 allows exceptions only from the obligation set forth in the provision itself, but it does not permit DHS to grant exemptions to the non-discrimination requirement nor the Fair Practices Ordinance.[167] The Court was unpersuaded.[168]

The City urged the Court to "apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context."[169] Under the contract, CSS is "to render . . . [s]ervices for the City as an 'independent contractor,' in exchange for millions of dollars in government funds."[170] Therefore, the City argued that "[j]ust as the government would be within its rights in insisting that its employees not engage in discrimination when working for the government, it is within the government's managerial authority to insist that its contractors not do so, either."[171] The City conceded that as a private citizen, "CSS may serve foster families as its faith dictates."[172] However, "when [CSS] voluntarily chooses to perform services for the government, it lacks a right to insist upon exercising government authority and

163. *Id.* at 33. "For instance, if a child, due to severe abuse she suffered in a prior home, has a deep-seated distrust of persons of another race or habitually employs racial slurs, it may be in the best interest of the child to consider race during placement." *Id.* at 34.

164. *Id.* at 34-35.

165. *Fulton*, 141 S. Ct. at 1878. "Provider shall not reject a child or family, including but not limited to . . ." *Id.*

166. Brief for City Respondents, *supra* note 160, at 35.

167. *Id.* at 35-36 (explaining that the Fair Practices Ordinance is binding of its own force, thus, it grants city agencies no authority to make exceptions).

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

169. *Id.*

170. Brief for City Respondents, *supra* note 160, at 24. "[CSS] has insisted that the Constitution entitles it to be offered a government contract that omits the standard non-discrimination requirement, and permits it to wield delegated government power and perform government services – and receive millions of dollars in government funding – while disregarding a contractual obligation that every other foster family care agency must follow." *Id.* at 2.

171. *Id.* at 26.

172. *Id.* at 28. "DHS has not 'penalize[d]' CSS or 'exclude[d] [it] from foster care.' CSS continues to assist foster children through its other social services contracts, is free to assist and support foster parents in its private capacity, and may accept the City's offer to perform certifications for the City without abandoning its religious beliefs or in any way altering its conduct as a private citizen." *Id.* at 3.

spending government funds in a manner the City has deemed contrary to the interests of its residents and the children in its care."[173] Thus, the City argued that it may limit CSS's conduct in its capacity as a government contractor.[174]

The Court disagreed that the City should enjoy greater leeway when setting rules for contractors and that individuals accept certain restrictions on their freedom when entering into government contracts.[175] Chief Justice Roberts explained that the Court "never suggested that the government may discriminate against religion when acting in its managerial role."[176] In fact, "*Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs."[177] Sidestepping the City's argument, the majority stated, "no matter the level of deference . . . extend[ed] to the City, the inclusion of a formal system of entirely discretionary exceptions in Section 3.21 renders the contractual non-discrimination requirement not generally applicable."[178]

The City added that notwithstanding the system of exceptions in Section 3.21, under Section 15.1 of the City's standard foster care contract, a "'[p]rovider shall not discriminate or permit discrimination against any individual on the basis of' any protected characteristic, including 'sexual orientation.'"[179] The Court acknowledged that Section 15.1 "bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions."[180] However, the Court explained that an exception from Section 3.21 must also control the prohibition in Section 15.1, otherwise the City's reservation of the authority to grant such an exception would be void.[181] Therefore, "the contract as a whole contain[ed] no generally applicable non-discrimination requirement."[182]

As a final matter on the topic of general applicability, the Court addressed the City's contention that "the availability of exceptions under Section 3.21 is irrelevant because the Commissioner has never granted

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173. *Id.* at 28.

174. *Id.* at 24.

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

176. *Id.*

177. *Id. See Smith*, 494 U.S. at 883-85 n.2 (citing Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 (1998); *Roy*, 476 U.S. 693).

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

179. Brief for City Respondents, *supra* note 160, at 9. *See also Section 15.1: Foster Care Contract*, PHILA. DEPT. HUM. SERVS., www.phila.gov/media/20200811124050/DHS-Section-15.1-Foster-Care-Contract.pdf [perma.cc/F4QT-XF85] (last visited Jan. 29, 2023) (sharing the language of Section 15.1 that is included in all foster-care agency contracts for the City).

180. *Fulton*, 141 S. Ct. at 1879.

181. *Id.* "[S]tate law makes clear that 'one part of a contract cannot be so interpreted to annul another part.'" *Id.* (citing Shehadi v. Northeastern Nat'l Bank of Pa., 378 A.2d 304, 306 (Pa. 1977)). "Applying that 'fundamental' rule here, an exception from section 3.21 also must govern the prohibition section in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity." *Id.* (quoting *Shehadi*, 378 A.2d at 306).

182. *Id.*

one."[183] According to the majority, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given because it 'invites' the government to decide which reasons for not complying with the policy are worthy of the solitude – here, at the Commissioner's 'sole discretion.'"[184] Thus, the Court found that Section 3.21 of the City's standard foster care contract is not generally applicable as required by *Smith*.[185]

B. Fair Practices Ordinance and Public Accommodation

The Court next addressed whether the Fair Practices Ordinance applies to CSS as a public accommodation.[186] The Ordinance provides, "[i]t shall be unlawful public accommodations practice to deny or interfere with the public accommodations opportunities of an individual or otherwise discriminate based on his or her race, ethnicity, color, sex, sexual orientation . . . disability, marital status, familial status."[187] The City stated that CSS is a public accommodation within the meaning of the Fair Practices Ordinance because it provides services that foster family care agencies ("FFCAs") must "'ma[k]e available to the public.'"[188] Thus, the City argued that FFCAs, including CSS, are "categorically barred from discriminating on the basis of sexual orientation in providing those services."[189] CSS, however, argued that the contract clearly states, "[p]rovider is an independent contractor and shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City."[190]

The Court concluded that the Ordinance does not apply to CSS because FFCAs are not public accommodations.[191] The Ordinance defines a public accommodation as "[a]ny place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public . . ."[192] Accordingly, public accommodations, such as hotels, drug stores, swimming pools, and barbershops, must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire."[193]

Certification as a foster parent is not readily accessible to the

183. *Id.* at 1879.
184. *Id.* (citing *Smith*, 494 U.S. at 884).
185. *Id.* at 1878.
186. *Id.* at 1879. *See also* PHILA. CODE § 9-1100 (2016).
187. PHILA. CODE § 9-1106(1) (2016).
188. Brief for City Respondents, *supra* note 160, at 35 (citing PHILA. CODE § 9-1102(1)(W)).
189. *Id.*
190. Reply Brief for Petitioners, *supra* note 153, at 10.
191. *Fulton*, 141 S. Ct. at 1880.
192. PHILA. CODE § 9-1106(1)(w).
193. Blizzard v. Floyd, 613 A.2d 619, 621 (Pa. Commw. Ct. 1992).

public.[194] The Court explained that certification of a foster parent "involves a customized and selective assessment[,]" in which "[a]pplicants must pass background checks and a medical exam."[195] Additionally, foster agencies must administer home studies in which they evaluate the applicants' "mental and emotional adjustment," "community ties with family, friends, and neighbors," and "existing family relationships."[196] The act of becoming certified as a foster parent involves many obstacles, which falls outside the definition of what the courts have previously deemed "public accommodations."[197] For these reasons, the Court determined that the "one-size-fits-all public accommodations model is a poor match for the foster care system."[198]

In a concurring opinion, Justice Gorsuch disagreed with the majority, stating that the Fair Practices Ordinance was "both generally applicable and applicable to CSS."[199] He stated that the majority made "a curious choice given that the FPO applies only to certain defined entities that qualify as public accommodations while the 'generally applicable law' in *Smith* was 'an across-the-board criminal prohibition' enforceable against anyone."[200] Moreover, Justice Gorsuch believed that the majority ignored the Fair Practices Ordinance's expansive definition of "public accommodations" by looking to a Commonwealth of Pennsylvania public accommodations statute rather than the City's.[201] He pointed out that, in addition to "hotels, restaurants, and swimming pools," Pennsylvania's statute "offers public 'colleges and universities' as examples of public accommodations."[202] Similar to FFCAs, public colleges and universities engage in "customized and selective assessment" of their students and faculty.[203] Thus, it was unclear why public colleges and universities qualify as public accommodations under the Fair Practices Ordinance, but FFCAs do not.[204] For these reasons, Justice Gorsuch disagreed with the majority's conclusion that CSS is not a public accommodation.[205]

Justice Gorsuch made a convincing argument that FFCAs are similar to colleges and universities. Had the Court looked to the FPO's definition of public accommodation, it very well may have found FFCAs to fit within

194. *Fulton*, 141 S. Ct. at 1880. "A Pennsylvania antidiscrimination statute similarly defines a public accommodation as an accommodation that is 'open to, accepts or solicits the patronage of the general public.'" *Id.* (quoting PA. STAT. ANN., TIT. 43, § 954(l)).

195. *Id.*

196. 55 PA. CODE § 3700.64 (describing the assessment process for foster parent capability). *See also* 55 PA. CODE § 3700.38 (describing the orientation process for foster families); 55 PA. CODE § 3700.62 (describing foster parent requirements).

197. *See Blizzard*, 613 A.2d at 621.

198. *Fulton*, 141 S. Ct. at 1880.

199. *Id.* at 1926 (Gorsuch, J., concurring).

200. *Id.* (citing *Smith*, 494 U.S. at 884).

201. *Id.* at 1927. *See also* PHILA. CODE § 9-1102(w) (2016); *but see* PA. STAT. ANN., TIT. 43 § 954(l).

202. *Fulton*, 141 S. Ct. at 1880 (quoting PA. STAT. ANN., TIT. 43 § 954(l)).

203. *Id.*

204. *Id.*

205. *Id.*

this category. Nevertheless, the Court refrained from adopting this expansive definition and agreed with CSS's position that foster care services do not constitute a public accommodation under the Fair Practices Ordinance, and therefore CSS is not bound by it.[206] Thus, the Court had no need to assess whether the ordinance was generally applicable.[207]

C. Compelling Interest

Because the Court found Section 3.21 is not generally applicable and the Fair Practices Ordinance does not apply to FFCAs, the City's actions had to be examined under strict scrutiny regardless of *Smith*.[208] The Court explained that "so long as the government can achieve its interests in a manner that does not burden religion, it must do so."[209]

CSS argued that the City's interests are not compelling.[210] First, CSS contended that its religious exercise did not stop any same-sex couple from fostering.[211] At that time, there were twenty-nine other agencies in Philadelphia that could provide certification.[212] Moreover, the City failed to find a single same-sex couple who approached CSS and "[s]trict scrutiny can be satisfied only with evidence of an 'actual problem' in need of solving."[213] Second, CSS contended that the City's solution – excluding CSS and refusing to place children with its already-certified families – was not the least restrictive means.[214] As a result of the City's referral freeze, 250 children would remain in group homes, rather than be placed in homes that CSS certified families can provide.[215] Thus, CSS argued that the City's actions could not survive strict scrutiny.[216]

The City maintained that even if strict scrutiny applied, CSS would still lose.[217] According to the City, the non-discrimination requirement

206. *Id.* at 1881 (majority opinion).

207. *Id.*

208. *Id.*

209. *Id.* "A government policy can survive strict scrutiny only if it advances interests of the highest order and is narrowly tailored to achieve those interests." (internal quotations omitted) (internal citations omitted).

210. Reply Brief for Petitioners, *supra* note 153, at 21. "[The City] cannot have any compelling interest in avoiding dignitary harms, since its proposed disclaimer would impose (at minimum) the same harm. Nor can its interests be compelling when it is willing to make exceptions from its rules, easily (and correctly) overriding its other concerns to place children in loving homes." *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (citing Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011)).

214. *Id.* at 21-22. "Even intermediate scrutiny is fatal because Philadelphia excluded CSS and its already-certified foster families, leaving homes empty when the City admittedly needed more families – 'hardly a narrowly tailored solution.'" *Id.* at 21 (quoting McCullen v. Coakley, 573 U.S. 464, 493 (2014)).

215. *Id.* at 22.

216. *Id.* at 23. "[The City has] no compelling interest in turning foster care into a zero-sum game from which either the Catholic Church or same-sex couples must be excluded." *Id.* at 21.

217. Brief for City Respondents, *supra* note 160, at 47.

serves three compelling interests: "ensuring equal treatment of City residents, maximizing the pool of available foster parents, and preventing contractors acting on the government's behalf from violating individuals' constitutional rights."[218]

However, the Court clarified that the question "[wa]s not whether the City ha[d] a compelling interest in enforcing its non-discrimination policies generally, but whether it ha[d] such an interest in denying an exception to CSS."[219] The Court explained that while "[m]aximizing the number of foster families and minimizing liability are important goals, the City [failed] to show that granting CSS an exception will put those goals at risk."[220] In fact, the City offered only speculation that it might be sued over CSS's certification practices.[221] As to equal treatment of prospective foster parents and foster children, the Court had no doubt that this interest was a weighty one, but nevertheless, this interest could not justify denying CSS an exception.[222]

The Court concluded that "[t]he creation of a system of exceptions under the contract undermine[d] the City's contention that its non-discrimination policies c[ould] brook no departures."[223] Because "[t]he City offer[ed] no compelling reason why it ha[d] a particular interest in denying an exception to CSS while making them available to others," the City's refusal to contract with CSS could not survive strict scrutiny.[224]

D. Revisit Smith?

1. The Majority Declines to Revisit Smith

The Court quickly determined that it had no reason to revisit *Smith*.[225] As previously mentioned, *Fulton* fell outside of *Smith* because the City's policies were not generally applicable, therefore the City's actions had to be examined under strict scrutiny regardless of *Smith*.[226]

Nevertheless, CSS urged the Court to overrule *Smith* and replace it with "a standard that relies on the text, history and tradition of the Free Exercise Clause."[227] First, CSS rejected the City's argument that "*Smith* is

218. *Id.* (citing *Smith*, 494 U.S. at 905).

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

220. *Id.* at 1882.

221. *Id.* "As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the state, not the City." *Id.* (first citing *Brown*, 564 U.S. at 799-800; then citing 55 PA. CODE § 3700.61).

222. *Id.* "We do not doubt that this interest is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.'" *Id*. (citing *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727).

223. *Id.*

224. *Id.*

225. *Id.* at 1876-77.

226. *Id.* at 1877.

227. Reply Brief for Petitioners, *supra* note 153, at 25.

consistent with early laws allowing 'peace' and 'public safety' concerns to limit religious exercise."[228] CSS argued that the City's view is problematic because "government continues to expand its reach far beyond what would have been understood as 'peace' and 'public safety' in the founding era."[229] Therefore, CSS accused the City of relying on "the Constitution's supposed original meaning only when it suits them – to retain that part of [*Smith*] . . ."[230] Second, CSS rejected the City's argument that *Smith* is "deeply embedded" despite the opportunities presented in RFRA, *Lukumi*,[231] and *Boerne*[232] to overturn *Smith*.[233] Even if *Smith* were overruled, RFRA, *Lukumi*, and *Boerne* would remain.[234] Moreover, CSS explained that Congressional efforts to negate *Smith* hardly support retaining the decision.[235] Finally, CSS rejected the City's claim of reliance interests.[236] CSS argued that "twenty-one state statutes (including Pennsylvania's), the federal government,[237] and eleven state courts partially displaced *Smith*."[238] Therefore, the City's "claim that governments are routinely relying on [*Smith*] proves *Smith*'s deficiencies."[239]

The City argued that *Fulton* "[wa]s an exceptionally poor vehicle to consider the validity of *Smith*."[240] First, the City stated that "under pre-*Smith* case law, individuals lacked a right to object to how the government managed its 'internal affairs.'"[241] CSS failed to offer "any historical

228. *Id.* at 23.

229. *Id.*

230. *Id.* at 24 (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2470 (2018). "Nor does Philadelphia explain how historical evidence comports with its proposed 'managerial authority' expansion of *Smith*." *Id.* "The Court should reject this 'halfway originalism.'" *Id.* (quoting *Janus*, 138 S. Ct. at 2470).

231. *See Lukumi*, 508 U.S. at 547 (holding that a law prohibiting religious animal sacrifice was an unconstitutional mechanism designed to persecute or oppress a religion or its practices). "Neutrality and general applicability are interrelated . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. *Id.* A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

232. *See Boerne*, 521 U.S. at 536 (holding that an ordinance requiring preapproval of construction affecting historic landmarks or buildings in a historic district was unconstitutional). "RFRA prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Id.* at 515-16 (quoting 42 U.S.C. § 2000bb-1).

233. Reply Brief for Petitioners, *supra* note 153, at 24.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 24-25. "RFRA applies to federal law, including such sensitive areas as narcotics and prison administration." *Id.*

238. *Id.*

239. *Id.* at 25.

240. Brief for City Respondents, *supra* note 160, at 47.

241. *Id.* (citing *Bowen*, 476 U.S. at 699). "'[T]he Free Exercise is written in terms of

evidence that the 'free exercise [of religion]' includes a right to wield government power as one's religion dictates."[242] Therefore, overruling *Smith* would not warrant the application of strict scrutiny in this case.[243] Second, the City argued that "[e]ven if th[e] Court were to revisit *Smith*, it should not overturn it" because of stare decisis.[244] Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[245] Therefore, "special justification" is required for the Court to overturn longstanding precedent.[246] Finally, the City explained that CSS neglected to say "what *Smith* should be replaced with, or how that test would work."[247] CSS merely suggested that strict scrutiny would apply.[248] For these reasons, the City claimed that "[o]verturning *Smith* would create a doctrinal mess[.]"[249]

In a concurring opinion, Justice Barrett agreed with the Court's opinion in full.[250] She acknowledged that "[t]he prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise."[251] Yet, Justice Barrett explained that she was "skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime."[252] Similar to the Court's reasoning, She stated that there was no reason to revisit *Smith* "because the same standard applies whether *Smith* stays or goes."[253] Justice Barrett explained that "[a] longstanding tenet of our free exercise jurisprudence . . . is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions."[254] Because the City's standard foster care contract provided for individualized exemptions from its nondiscrimination rule, strict scrutiny was triggered.[255] Therefore, Justice Barrett saw no reason to revisit *Smith*.

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what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Id.* (citing *Lyng*, 485 U.S. at 451).

242. *Id.*

243. *Id.*

244. *Id.* at 48.

245. *Id.* (quoting Gamble v. United States, 139 S. Ct. 1960, 1969 (2019)) (internal quotations omitted). "[Stare decisis] also reflects 'a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday.'" *Id.* (quoting June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020)).

246. *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

247. *Id.* at 51.

248. *Id.*

249. *Id.* at 52.

250. *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

251. *Id.* at 1882-83.

252. *Id.* at 1883. "[T]his Court's resolution between generally applicable laws and other First Amendment rights – like speech and assembly – has been much more nuanced." *Id.*

253. *Id.*

254. *Id.* (citing *Smith*, 494 U.S. at 884).

255. *Id.*

2. Justices Alito and Gorsuch Encourage Revisiting Smith

In a lengthy concurring opinion, Justice Alito explained why *Smith* should be revisited.[256] He began his concurrence by noting that the Court's decision is unlikely to resolve the existing controversy.[257] Justice Alito recognized that "[t]he City has been adamant about pressuring CSS to give in, and if the City wants to get around [the majority's] decision, it can simply eliminate the never-used exemption power . . . and the parties will be back where they started."[258] Moreover, Justice Alito stated, the majority's "decision will be of no help in other cases involving the exclusion of faith-based foster care and adoption agencies unless by some chance the relevant laws contain the same glitch as the Philadelphia contractual provision on which the majority's decision hangs."[259] Justice Alito argued that the Court should reconsider *Smith* and take "a fresh look at what the Free Exercise Clause demands."[260]

Justice Alito stated that in *Smith*, the majority "[paid] little attention to the terms of the Free Exercise Clause" when it displaced decades of precedent to adopt a new rule.[261] The *Smith* Court placed *Sherbert* "in a special category because [it] concerned the award of unemployment compensation . . . and *Yoder* was distinguished on the ground that it involved both a free-exercise claim and a parental-rights claim."[262] According to Justice Alito, the *Smith* Court created these distinctions simply because it "feared that continued adherence to that case law would 'cour[t] anarchy' because 'it would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind.'"[263] Yet, "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship."[264] Therefore, the Free Exercise Clause "does not suggest a distinction between laws that are generally applicable and laws that are targeted."[265] Moreover, Justice Alito explained that "*stare decisis*

256. *Id.* (Alito, J., concurring).

257. *Id.* at 1888.

258. *Id.* at 1887.

259. *Id.* at 1888.

260. *Id.* at 1889. "The correct interpretation of the Free Exercise Clause is a question of great importance, and Smith's interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption." *Id.* at 1888.

261. *Id.* at 1892-93.

262. *Id.* (citing *Smith*, 494 U.S. at 883, 881). "Not only did these distinctions lack support in prior case law, the issue in Smith itself could easily be viewed as falling into both of these special categories. After all, it involved claims for unemployment benefits, and members of the Native American Church who ingest peyote as part of a religious ceremony are surely engaging in expressive conduct that falls within the scope of the Free Speech Clause." *Id.* at 1893.

263. *Id.* (quoting *Smith*, 494 U.S. at 888).

264. *Id.* at 1896.

265. *Id.*

is 'not an inexorable command'" particularly because *Smith* "ignored the 'normal and ordinary' meaning of the constitutional text."[266] He proposed that the Court return to the standard that *Smith* replaced: strict scrutiny.[267] Therefore, Justice Alito maintained that "*Smith* was wrongly decided" and advocated for correction."[268]

In a separate concurring opinion, Justice Gorsuch agreed with Justice Alito that *Smith* should be revisited because it "committed a constitutional error."[269] Justice Gorsuch argued that "*Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice."[270] He explained that the City can escape the Court's decision in two ways. First, it "can revise its FPO to make even plainer still that its law does encompass foster services."[271] Second, "with the flick of a pen, municipal lawyers may rewrite the City's contract to close the [Section] 3.21 loophole."[272] Therefore, unless the Court revisits *Smith*, "CSS will find itself back where it started" because the Court's decision "guarantees that this litigation is only getting started."[273] Justice Gorsuch stated, "[r]ather than adhere to *Smith* until we settle on some 'grand unified theory' of the Free Exercise Clause for all future cases until the end of time, the Court should overrule it now, set us back on the correct course, and address each case as it comes."[274] Therefore, Justice Gorsuch argued that the Court should have held that the City's actions "cannot avoid strict scrutiny even if they qualify as neutral and generally applicable[.]"[275]

While the Court and Justice Barrett emphasized that *Fulton* fell outside of *Smith*, this is an unconvincing argument that the decision should not be reconsidered. The Court chose not to address the problematic test, yet revisiting *Smith* is inevitable. Justice Alito and Justice Gorsuch offered convincing arguments that should not be dismissed.

IV. PERSONAL ANALYSIS

Ultimately, I would affirm the Court's decision, though I agree with Justice Alito and Justice Gorsuch's concurring opinions. First, the Court

266. *Id.* at 1912 (first citing *Janus*, 141 S. Ct. at 2478; then citing District of Columbia v. Heller, 554 U.S. 570, 576 (2008)).

267. *Id.* at 1924.

268. *Id.*

269. *Id.* at 1931 (Gorsuch, J., concurring).

270. *Id.* at 1926.

271. Id. at 1930.

272. *Id.*

273. *Id.* "Nor will CSS bear the costs of the court's indecision alone. Individuals and groups across the country will pay the price – in dollars, in time, and in continued uncertainty about their religious liberties." *Id.*

274. *Id.* at 1931 (citing Am. Legion v. Am. Hum. Ass'n, 139 S. Ct. 2067, 2086-87 (2019)).

275. *Id.* at 1929. "As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law." *Id.* at 1930.

was correct in holding that the City's refusal to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny.[276] Second, the Court failed to consider what would happen if the City revised Section 3.21 of its standard foster care contract to be generally applicable, which would completely change the Court's analysis. Third, the Court should have revisited *Smith* because of its inconsistent application. Thus, while the result itself was correct, I strongly disagree with the Court's analysis. Like Justice Alito and Gorsuch, I too would urge the majority to revisit *Smith*.

A. Affirming the Decision

The Court correctly held that the City's refusal to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster care parents cannot survive strict scrutiny.[277] As the Court stated, "[a] government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests."[278] The City's non-discrimination requirement is not the least restrictive means to achieve its asserted interests.[279]

Although the City claimed that its "non-discrimination requirement is 'essential to accomplish' its objective in ensuring equal treatment of its City residents, maximizing the pool of available foster parents, and preventing contractors acting on the government's behalf from violating individuals' constitutional rights,"[280] it failed to illustrate how those goals would be at risk if CSS were granted an exemption.[281] The City is willing to grant exemptions from its rules, just not for CSS. As CSS argued, "[s]uch '[u]nder-inclusiveness raises serious doubts about whether the government is in fact pursing the interest it invokes, rather than disfavoring a particular speaker or view-point.'"[282] Thus, the Court correctly found that the City has "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[283]

Moreover, the City's interests "cannot justify denying CSS an exception for its religious exercise."[284] First, CSS's participation in Philadelphia's foster care system would increase the number of available foster parents.[285] As the Court emphasized, "the Catholic Church has

276. *Id.* at 1882 (majority opinion).
277. *Id.* at 1882.
278. *Id.* at 1881 (quoting *Lukumi*, 508 U.S. at 546).
279. *Id.*
280. Brief for City Respondents, *supra* note 160, at 47 (quoting *Smith*, 494 U.S. at 905).
281. *Fulton*, 141 S. Ct. at 1881-82.
282. Reply Brief for Petitioners, *supra* note 153, at 21. (quoting NIFLA v. Becerra, 138 S. Ct. 2361, 2376 (2018).
283. *Fulton*, 141 S. Ct. at 1882.
284. *Id.*
285. *Id.*

served the needy children of Philadelphia for over two centuries."[286] The City was refusing to place children in available homes simply because those foster parents chose to partner with CSS, an agency that shares their faith.[287] In fact, "at the time of the referral freeze, there were well over 100 children who were currently being served, and over the years, there had been thousands who had been served by Catholic Social Services."[288] Because faith-based organizations recruit foster parents willing to serve the most disadvantaged children, eliminating faith-based organizations like CSS would jeopardize the interests of foster children.[289] If it were up to the City, these children would remain in group homes rather than be placed in family homes that CSS can provide.[290]

The argument that requiring CSS to certify same-sex couples could potentially expand the pool of available foster parents is weak. For example, when its government contract was similarly threatened, Bethany Christian Services' Philadelphia branch opted to work with same-sex couples, rather than refer them to other agencies.[291] Nevertheless, it remains uncertain whether same-sex couples will choose to partner with Bethany Christian Services over one of the many Philadelphia-based foster care agencies that have long welcomed same-sex foster parents.

One thing is for sure: refusing to contract with CSS would decrease the number of foster parents available. As the Court explained, foster care agencies must administer extensive home studies as part of the certification process.[292] Existing CSS foster parents have already undergone the certification process. If the City refuses to contract with CSS, these foster parents will have two options: (1) undergo the certification process again with another foster care agency, or (2) stop fostering. Thus, many foster parents may choose to stop fostering altogether, rather than find an alternative foster care agency.

Second, CSS's participation in Philadelphia's foster care system will not result in unequal treatment of city residents, nor will it violate

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286. *Id.* at 1874.

287. Transcript of Oral Argument at 5, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2020) (No. 19-123).

288. *Id.* at 14-15.

289. James Campbell, *Philadelphia's Exclusion of Faith-Based Foster Agencies Departs from History and Undermines Interests of Children*, SCOTUS BLOG (Oct. 29, 2020, 11:16 AM), www.scotusblog.com/2020/10/symposium-philadelphias-exclusion-of-faith-based-foster-agency-departs-from-history-and-undermines-interests-of-children/ [perma.cc/9HQU-H9TH] (explaining that 36% of foster parents recruited through a religious group in Arkansas known as The CALL would not have become foster parents without that group's work).

290. Transcript of Oral Argument, *supra* note 287, at 15.

291. Ruth Graham, *Major Evangelical Adoption Agency Will Now Serve Gay Parents Nationwide*, N. Y. TIMES (Mar. 1, 2021), www.nytimes.com/2021/03/01/us/bethany-adoption-agency-lgbtq.html [perma.cc/SFV7-Y2L8] (noting that in 2020, "Bethany's national board passed a resolution granting local boards the authority to comply with state and local contract requirements" and that branches in twelve states are working with LGBTQ families).

292. *Fulton*, 141 S. Ct. at 1880.

individuals' constitutional rights. The Court stated that the LGBTQ community "cannot be treated as social outcasts or as inferior in dignity and worth[,]"[293] but the City "act[s] as if this is a zero-sum game: Either LGBTQ couples can foster, or Fulton and CSS can."[294]

In *Smith*, specifically the dissent, Justice Blackmun wrote that the State provided no evidence that religious peyote use had ever harmed anyone despite its proffered interest in citizen health and safety from the danger of illegal drugs.[295] Likewise, the City produced no evidence that CSS's refusal to certify same-sex couples has ever harmed anyone. CSS's policies may offend the LGBTQ community, but as previously mentioned, "[n]o same-sex couple has ever sought certification from CSS" and "[i]f one did, CSS would direct the couple to one of the more than 20 other agencies in the City[.]"[296] There is a delicate balance between respecting religion and respecting LGBTQ rights. As a result of the Court's decision, same-sex couples may still seek certification to become foster parents and CSS may continue to care for foster children without compromising their religious beliefs.[297]

Clearly, CSS's participation in the Philadelphia foster care system would benefit hundreds of children by placing them in family settings rather than group homes or other facilities. If a same-sex couple were to approach CSS for certification, CSS would merely step aside and refer the couple to one of the many other agencies within the City.[298] For these reasons, the Court correctly held that the City's actions cannot survive strict scrutiny.

B. Issues the Court Ignored

The Court's decision focused almost exclusively on Section 3.21 of the City's standard foster care contract. Because Section 3.21 provides for individualized exemptions, the Court quickly found that the provision is not generally applicable as required by *Smith*.[299] Therefore, strict scrutiny was triggered, and the City's actions were examined accordingly.[300] The Court's entire analysis relied on this provision. But what if the City rewrote its standard foster care contract? That would change the Court's analysis entirely.

As Justice Gorsuch pointed out, "[t]he City has made it clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincere religious beliefs."[301] To circumvent the majority's holding,

293. *Fulton*, 141 S. Ct. at 1882 (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727) (internal quotations omitted).

294. Transcript of Oral Argument, *supra* note 287, at 5.

295. *Smith*, 494 U.S. at 912 (Blackmun, J., dissenting).

296. *Fulton*, 141 S. Ct. at 1875.

297. Campbell, *supra* note 289.

298. Transcript of Oral Argument, *supra* note 287, at 5.

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

300. *Id.* at 1881.

301. *Id.* at 1930 (Gorsuch, J., concurring).

the City could simply rewrite Section 3.21.[302] If the City were to remove the part of the contract that states "unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion," Section 3.21 would become generally applicable.[303] Thus, the Court's decision would vanish[304] and CSS would be forced back into court, wasting time and resources that could be better spent serving children.[305] Justice Alito predicted that "the City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will reject that argument; and CSS will file a new petition challenging *Smith*."[306] The Court's decision ensures that there will be more litigation to come between CSS and the City.

Moreover, the Court's decision "provides no guidance regarding similar controversies in other jurisdictions."[307] Individuals across the country will remain uncertain about their religious liberties and will continue to be subject to the vulnerability of the *Smith* test.[308] Justice Gorsuch explained that lower courts still struggle to apply *Smith*, which has become clear in recent cases involving COVID-19[309] regulations.[310]

For example, in *Calvary Chapel of Bangor v. Mills*, the Governor of Maine issued a "Gathering Order" which prohibited gatherings of more than 10 people, but carved out an exception for businesses deemed "essential."[311] Places of worship were excluded from the list.[312] The District Court determined that the free exercise claim failed under the *Smith* test, finding that the Gathering Orders were neutral and generally applicable because they prohibited *all* non-essential gatherings of more than ten people.[313] The District Court's analysis conflicts with that of the Supreme Court's in *Fulton*. As *Cavalry Chapel* pointed out, there was an exemption from the Gathering Order for liquor stores, warehouse clubs, supercenter stores, and marijuana dispensaries.[314] Although the Gathering Order did not target religious conduct alone, it nonetheless

302. *Id.*

303. *Id.* at 1878 (majority opinion).

304. *Id.* at 1887 (Alito, J., concurring).

305. *Id.* at 1930 (Gorsuch, J., concurring).

306. *Id.* at 1887-88 (Alito, J., concurring).

307. *Id.* at 1888.

308. *Id.* at 1930 (Gorsuch, J., concurring).

309. *Coronavirus disease 2019 (COVID-19)*, MAYO CLINIC, www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes [perma.cc/J6XS-NLE5] (last visited Feb. 24, 2022) (explaining that in 2019 a new coronavirus was identified and the disease it causes is called COVID-19). "Coronaviruses are a family of viruses that can cause illnesses such as the common cold, severe acute respiratory syndrome (SARS) and Middle East respiratory syndrome (MERS)." *Id.* The World Health Organization declared Covid-19 a pandemic in March 2020. *Id.*

310. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring).

311. Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 278-79 (D. Me. 2020) (explaining that "essential businesses" include grocery stores, gas stations, and "home repair, hardware and auto repair stores . . .").

312. *Id.* at 279. "[S]uch a prohibition was mainly aimed at 'social, personal, discretionary events,' including those gatherings that are 'faith-based.'" *Id.*

313. *Id.* at 285.

314. *Id.*

provided an exemption for some secular entities.[315] As such, the exemption should have triggered strict scrutiny. While limiting the spread of COVID-19 is a compelling interest, the District Court should have addressed this issue to determine whether the Governor had a compelling interest in denying an exception to Calvary Church.

As illustrated by *Calvary Chapel*, the *Smith* test has not been easy to apply. On at least a half a dozen occasions, the Court has intervened to clarify how *Smith* works.[316] As a result, "those who cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects."[317]

Because the *Fulton* Court neglected to consider the strong possibility that the City will rewrite its contract to be generally applicable, CSS has hardly "won" as it will soon be back in court. Additionally, in avoiding this issue, the Court failed to clarify *Smith* for the lower courts that will address future free exercise cases under this questionable standard.

C. Overrule Smith

The Court should have revisited *Smith*. Although the Court decided that doing so was unnecessary because *Fulton* fell outside of *Smith*,[318] it is obvious that *Smith*'s interpretation can have startling consequences.[319] Justice Alito was "hope[ful] that legislators and others with rulemaking authority will not go as far as *Smith* allows, but [*Fulton*] shows that the dangers posed by *Smith* are not hypothetical."[320] The City issued an ultimatum to CSS even though it threatened the welfare of children awaiting placement in foster homes.[321]

The Court should reconsider *Smith* because its "interpretation is contrary to our society's deep-rooted commitment to religious liberty."[322] In fact, the Court should return to the *Sherbert* Test. The *Sherbert* Test "was the governing rule for the next 27 years" after it was decided in 1963.[323] In some cases where *Sherbert* was applied, the Court sometimes vindicated free exercise claims.[324] For example, in *Yoder*, the Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it

315. *See* An Order Regarding Essential Businesses and Operations, EXEC. ORDER NO. 19FY19/20 (Mar. 24, 2020) (providing orders for non-essential businesses to limit activities in response to the pandemic).

316. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring). *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020).

317. *Id.*

318. *Id.* at 1881 (majority opinion).

319. *Id.* at 1883 (Alito, J., concurring) (providing examples where a categorical ban would be allowed by *Smith*, even if it burdened religion).

320. *Id.* at 1884.

321. *Id.* at 1884-86.

322. *Id.* at 1889.

323. *Id.* at 1890.

324. *Id.*

unduly burdens the free exercise of religion."[325] Other cases where *Sherbert* was applied, however, found no violation.[326] In *Gillette v. United States*, the Court found that denying conscientious-objector status to men whose opposition to war was limited to one particular conflict was "strictly justified by substantial governmental interests."[327] These decisions illustrate that *Sherbert* is a clear-cut rule that can be easily applied by the courts.

Additionally, the Court should replace *Smith* with *Sherbert* because RFRA and RLUIPA prove that the courts are well "up to the task" of applying that test.[328] RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, whereas *Smith* completely ignores legislative intent.[329] Reverting to the *Sherbert* Test would create overlap among the judicial and legislative branches, eliminating confusion related to free exercise cases.

If the Court were to overrule *Smith* and replace it with *Sherbert*, it would put an end to future litigation between CSS and the City. As Justice Alito noted, "CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future."[330] Because CSS's policy expresses the idea that same-sex couples should not be foster parents because only a man and woman should marry, "[m]any people . . . find the policy not only objectionable but hurtful."[331] However, this perceived harm does not equate to an interest that warrants a Free Exercise Clause violation.[332] Undoubtedly, same-sex couples should be permitted to foster, but CSS should not be forced to certify them. Justice Alito explained that "[i]n an open, pluralistic, self-

325. *Yoder*, 406 U.S. at 220 (internal emphasis omitted).

326. *Fulton*, 141 S. Ct. at 1891 (Alito, J., concurring).

327. Gillette v. United States, 401 U.S. 437, 462 (1971).

328. *Fulton*, 141 S. Ct. at 1922 (Alito, J., concurring) *See* Cutter v. Wilkinson, 544 U.S. 709, 722 (2005). "We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way . . . While the Act adopts a 'compelling governmental interest' standard, '[c]ontext matters' in the application of that standard." *Id.* (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)). *See also* Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006). "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" *Id.*

329. *Id. See* 42 U.S.C. § 2000bb-4 (1993) "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b). Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id. See also* 42 U.S.C. § 2000cc (2000) (stating "[n]o government shall impose or implement a land use regulation a manner than imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means or furthering that compelling governmental interest." *Id.*

330. *Fulton*, 141 S. Ct. at 1924.

331. *Id.*

332. *Id.*

governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding."[333] Religious freedom relies on this principle because "[m]any core religious beliefs are perceived as hateful by members of other religions or nonbelievers."[334]

The Court made a grave mistake in avoiding *Smith*. As long as *Smith* remains, it threatens a fundamental freedom.[335] Until the Court corrects *Smith*'s constitutional error, free exercise cases will continue to come before the Court on a factual basis and undergo inconsistent application.[336]

V. CONCLUSION

In *Fulton*, the Court ultimately found that the City's refusal to contract with CSS for the provision of foster care services violated the Free Exercise Clause of the First Amendment. The City's standard foster care contract was not generally applicable as required by *Smith*, and therefore, the City's actions were examined under strict scrutiny. Because the City could not offer a compelling interest for excluding CSS from Philadelphia's foster care program, the City's actions were deemed unconstitutional.

However, the Court's opinion is not as clear cut as it seems. In fact, it illustrates the problematic results that the *Smith* test yields. The Court avoided *Smith* and failed to acknowledge that the City will likely revise its standard foster care contract to exclude the exemption language, forcing CSS to either comply with its non-discrimination requirement or surrender its contract. As a result, the Court's decision will vanish, and CSS will find itself back in court. The Court should have addressed the issues that *Smith* raises, not only to protect the religious beliefs of CSS, but to ensure that the fundamental right to free exercise is not threatened in future free exercise cases.

Clearly, religious liberty is better safeguarded by uniform application of the compelling interest test than by uniform results on all claims. The compelling interest test allows the government to take actions that may burden religion, but ultimately serve the public good. Conversely, the government must use the least-restrictive means, ensuring that religious liberty is only impinged upon in seeking those interests, no more and no less. Returning to the *Sherbert* Test is the solution.

333. *Id.* (citing Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).
334. *Id.* at 1925.
335. *Id.* at 1924.
336. *Id.* at 1931. (Gorsuch, J., concurring).