2021

Fulton v. City of Philadelphia and Its Implications for First Amendment Jurisprudence and LGBTQ Civil Rights

Jonathan E. Kohut

I. Introduction

The United States has a well-noted history of systemic oppression of minority groups which has, at times, been exacerbated by our system of law. The Lesbian-Gay-Bisexual-Transsexual-Queer (hereinafter referred to as "LGBTQ") community is no exception. One of the key issues for the LGBTQ community, as it relates to the law, is that its lifestyles are often at odds with the sincerely held religious beliefs of other individuals throughout the country and across the religious spectrum. In this paper, I will look at the history of the civil rights battle for LGBTQ individuals, the victories and defeats that community has experienced in the judicial system, and how the Supreme Court's upcoming decision in Fulton v. City of Philadelphia[1] could have dire consequences for the civil rights of LGBTQ individuals moving forward.

Section I of this paper will look at the history of LGBTQ civil rights in the United States and the relevant legal precedents shaping First Amendment jurisprudence. Section II will look more closely at those precedents, and the narrowing of same over the past several decades. Section III will look at the possible fallout from the Court's upcoming decision in Fulton along with the consequences it could have on LGBTQ civil rights.

a. A Brief History of Civil Rights for Minorities of Sexual Orientation

"I know that you cannot live on hope alone, but without it, life is not worth living. And you … and you … and you … have got to give them hope."[2] When Harvey Milk uttered these words in 1978, he had just become the first openly-gay individual to be elected to public office in the United States.[3] Though an ever-present source of inspiration, the fate of Harvey Milk, who was assassinated shortly after delivering his "You Cannot Live On Hope Alone" speech in 1978,

[1] 922 F.3d 140 (3d Cir. 2019), cert. granted 140 S.Ct. 1104 (2020).
[2] Harvey Milk, YOU CANNOT LIVE ON HOPE ALONE (1978).
[3] The Official HARVEY MILK Biography. Official Biography of Harvey Milk, MilkFoundation.org (Oct. 19, 2020). http://milkfoundation.org/about/harvey-milk-biography/.

remains a stark reminder of the prejudices and outright dangers faced by the LGBTQ community in the United States.[4] The struggle and fight for equality and recognized civil rights has been a staple of LGBTQ culture in the United States since before Harvey Milk who, through his campaign and election to the San Francisco Board of Supervisors, elevated the struggles of LGBTQ individuals to the public discourse in the 1970s.[5]

Prior to the rise-and-fall of Harvey Milk, the United States was forced to face the reality of what it means to be an LGBTQ individual in this country thanks to the Stonewall Riots of 1969. This event precipitated when members of the New York Police Department raided the Stonewall Inn, a popular meeting place for LGBTQ individuals living in New York City, primarily gay men. This use of police force ignited a riot amongst New York's LGBTQ community, where "for the first time, the gay community rose up to protest being targeted by law enforcement and society for its lifestyle."[6] Since the era of Milk and Stonewall, the fight for equality by and for the LGBTQ community has steadily continued, as has the marginalization of the group through events like the HIV/AIDS epidemic of the 1980s/90s and the United States military's implementation of the "Don't Ask, Don't Tell" policy in 1993.

Along with societal events like the Stonewall Riots, the LGBTQ community's fight was also spurred on by judicial opinions tending to restrict the civil rights of LGBTQ individuals. One glaring example is the Supreme Court's opinion in Bowers v. Hardwick.[7] At issue in Bowers was a Georgia statute which criminalized the sexual practice of sodomy.[8] A homosexual man challenged the law in the district court after he was charged with violating same when he was

[4] Id.
[5] Id.
[6] Heritage of Pride, Inc. v. Matinee NYC, Inc., No. 14 Civ. 4165 (CM), 2014 WL 12783866, *1 (S.D.N.Y. June 20, 2014).
[7] 478 U.S. 186 (1986).
[8] Id. at 187-88.

caught committing the act of sodomy with another man in his own bedroom.[9] Plaintiff argued that the law put him in imminent danger of arrest as a practicing homosexual, and was violative of the Due Process Clause under both the Fifth and Fourteenth Amendments of the federal Constitution.[10] The Court disagreed, holding that there is no fundamental right to engage in homosexual sodomy imbedded in the Constitution, nor is homosexual sodomy a protectable act when done in the privacy of one's own home.[11]

Congress dealt another blow to LGBTQ rights with the passage of the Defense of Marriage Act ("DOMA")[12] in 1996. The initial bill, which was signed into law by Democratic President Bill Clinton, affirmed the rights of states to refuse to acknowledge the marriage of same-sex couples, regardless of the validity of that union in any other state or territory.[13] Around the same time Congress passed DOMA, states took steps to codify marriage laws in line with same. Following a decision by the Supreme Court of Hawaii holding that the State's refusal to grant marriage licenses to same-sex couples was discriminatory[14], Hawaiians voted to approve a constitutional amendment granting the Hawaiian Legislature the power to reserve marriage for opposite-sex couples.[15]

Not all developments in the arena of LGBTQ legal rights were negative, though. Despite Hawaiian voters outlawing same-sex marriage through a constitutional amendment, Hawaii also became one of the first states to officially recognize limited legal same-sex unions, or civil

---

[9] Id. at 186.
[10] Id. at 188, 192.
[11] Id. at 192-96. The Court distinguished this case from Stanley v. Georgia, 394 U.S. 557, 565 (1969), "where the Court held that the First Amendment prevents conviction for possessing or reading obscene material in the privacy of one's home." Bowers, 478 U.S. at 195. The Bowers Court noted that the Stanley decision specifically pointed out that it was not meant to offer protection for all illegal activities done in one's home. Id., citing Stanley, 394 U.S. at 568, n.11. The Court then, as a sign of the times, compares extending the Stanley holding to consensual homosexual conduct would be analogous to expanding it to actions like incest "and other sexual crimes". Id. at 195-96.
[12] 28 U.S.C. § 1738C.
[13] Id.
[14] See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
[15] Mark Niesse. Hawaii is latest civil unions battleground, Feb. 22, 2009, ASSOCIATED PRESS. https://www.southcoasttoday.com/article/20090223/NEWS/902230346.

unions.[16] In total, five states passed laws recognizing civil unions between same-sex couples, including Colorado, Illinois, Vermont, and New Jersey.[17]

b. A Growing Trend Towards the Expansion of Civil Rights for LGBTQ Individuals

In 2003, it appeared that the proverbial tide was continuing to turn in favor of expanding the civil rights of LGBTQ individuals when the United States Supreme Court handed down its landmark decision in Lawrence v. Texas[18], wherein the Court held that a Texas statute criminalizing certain consensual sexual activities between same-sex partners was a violation of the Due Process Clause of the Fourteenth Amendment, thus overruling the Court's previous decision in Bowers.[19] Following the Lawrence decision, the Court took up the issue of DOMA's constitutionality in U.S. v. Windsor.[20] Interpreting DOMA under both due process and equal protection principles[21], the Court held that DOMA's definition of marriage was unconstitutional.[22]

Then, in 2015, arguably the single most prominent event in the fight for LGBTQ equality occurred when the Supreme Court decided Obergefell v. Hodges.[23] At issue in Obergefell were challenges to several state statutes prohibiting same-sex marriage.[24] The Court ultimately found those laws to be unconstitutional, holding that, as Justice Kennedy so elegantly and succinctly put it in the majority opinion, "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment

---

[16] Haw. Rev. Stat. § 572B-2.
[17] "Civil Unions and Domestic Partnership Statutes," National Conference of State Legislatures, Mar. 10, 2020, https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx.
[18] 539 U.S. 558, 564 (2003).
[19] Id. at 578 ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.")
[20] 570 U.S. 744 (2013).
[21] Id. at 769-70 ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.") (citations omitted).
[22] Id. at 775 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").
[23] 576 U.S. 644 (2015).
[24] Id.

couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them."[25] For the first time in American history, State governments could no longer prohibit marriage between two consenting adults, regardless of their genders.

With the momentous majority opinion came a scathing dissent penned by Chief Justice John Roberts, who was joined by Justices Antonin Scalia and Clarence Thomas.[26] Roberts acknowledges the growing popularity of acknowledging same-sex marriages, as well as the social policy and considerations of fairness supporting the majority opinion.[27] Roberts follows that acknowledgment by making clear that "[w]hether same-sex marriage is a good idea should be of no concern to [the Court]."[28] The dissent goes on to criticize the majority's decision as "an act of will, not legal judgement[,]"[29] before tying the issue back to issues of religious liberty and free exercise under the First Amendment. Roberts argues that the majority's opinion infringes on the free exercise rights of some religious individuals, and then he plays the role of soothsayer, predicting that there may a situation where "a religious adoption agency declines to place children with same-sex married couples[,]" comes before the Court in the future.[30]

Just this year, the Supreme Court handed down another momentous decision as it pertains

---

[25] Id. at 675. Prior to the Court's decision in Obergefell, 17 states had passed laws legalizing marriage between members of the same sex. In addition, same-sex marriage was legal in 21 states pursuant to a federal court ruling. Bill Chappel. Supreme Court Declares Same-Sex Marriage Legal In All 50 States, National Public Radio, June 26, 2015, https://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages. Prior to Obergefell, there were also issues with states refusing to give full faith and credit to same-sex marriages performed outside of the state pursuant to the Full Faith and Credit Clause, U.S. Const. art. IV § 1. In an article written for the Stanford Journal of Civil Rights & Civil Liberties, Joseph William Singer argues that DOMA is unconstitutional insomuch as it effectively allowed Congress to reverse the principles of the Full Faith and Credit Clause through statute.

[26] 576 U.S. at 686 (Roberts, C.J. dissenting).

[27] Id.

[28] Id.

[29] Id. at 687.

[30] Id. at 711-12.

to the civil rights of LGBTQ individuals in Bostock v. Clayton County, Ga.[31] In Bostock, plaintiff Gerald Bostock brought suit against the county for which he was a child welfare advocate when he was terminated after his employer became aware of the fact that he joined a gay-men's recreational softball league.[32] In a 6-3 decision, written by conservative Justice Neil Gorsuch, the Court held that Title VII prohibits an employer from terminating someone based solely on the fact that that person is gay or transgender.[33] According to the Majority, Title VII's "message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[34] On the heels of Obergefell, the LGBTQ community won another major victory in the area of civil rights. What's more, the decision was a resounding one (6-3) in an era where narrow 5-4 decisions have become increasingly common.[35]

However, along with another victory for the LGBTQ community in Bostock came another scathing dissent from a conservative Justice, indicating the desire from that wing of the Court to snuff out the growing trend away from religious liberty and towards expanding civil rights for LGBTQ Americans. In dissent, Justice Samuel Alito stated:

> Briefs filed by a wide range of religious groups—Christian, Jewish, and Muslim—express deep concern that the positions now adopted by the Court 'will trigger open conflict with faith-based employment practices of numerous churches, synagogues,

---

[31] 140 S.Ct. 1731 (2020).
[32] Id. at 1734.
[33] Id.
[34] Id. at 1741.
[35] After the death of Justice Antonin Scalia, and the Senate's confirmation of Neil Gorsuch to the Court, one-vote decisions increased from roughly 5% of Supreme Court decisions during the 2016-2017 term, to roughly 20% during the 2017-2018 term. See Fu, Yiqin. "What Percentage of U.S. Supreme Court Cases are Decided 5-4, and Which Justices Vote Together Most Often? A Review of Historical and 2017-2018 Term Data" (July 10, 2018). https://yiqinfu.github.io/posts/supreme-court-kennedy-retirement-ot2017/. But see, Bostock, 140 S.Ct. at 1778 (Alito, J. dissenting) ("As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.").

> mosques, and other religious institutions.' They argue that '[r]eligious organizations need employees who actually live the faith,' and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization's faith forces the group to communicate an objectionable message.[36]

The strong words of Justice Alito's dissent succinctly encapsulate the issue underlying all of the aforementioned case law which expanded civil rights for LGBTQ individuals. While a strong argument can be made for expanding the rights of the LGBTQ community, and equally convincing constitutional argument can be made for the religious liberties of those in opposition to the LGBTQ lifestyle. This juxtaposition in views continues to drive this kind of First Amendment jurisprudence.

c. LGBTQ Rights Take a Hit With the Court's Decision in *Masterpiece Cakeshop*

Though the Court's decisions in both Obergefell and Bostock represented major victories for the LGBTQ community in the realm of civil rights and personal liberties, not all recent decisions by the Court have been positive advancements like the two aforementioned opinions. Just three short years after the Court's landmark decision in Obergefell, the Court dealt a blow to LGBTQ individuals and advocates through its decision in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.[37] The Court's Masterpiece Cakeshop decision is perhaps even more relevant to this thesis, as that case dealt squarely with the rights of LGBTQ individuals versus the First Amendment rights granted to religious individuals through the Free Exercise Clause.[38]

While the Court in Masterpiece Cakeshop did reaffirm the fact that LGBTQ individuals are afforded civil rights protections under the United States Constitution, the case also stood for the proposition that the Free Exercise Clause remains a relevant consideration for the Court when

[36] Id. at 1780.
[37] 138 S.Ct. 1719 (2018).
[38] This is, admittedly, hyperbolic. The issue in Masterpiece Cakeshop was really between the First Amendment rights of religious business owners and the right of a State to pass laws prohibiting private businesses from denying their services to LGBTQ individuals. See Masterpiece Cakeshop, 138 S.Ct. at 1720.

interpreting the constitutional rights of the LGBTQ community, even with the recent gains in employment and marriage rights through Bostock and Obergefell. In Masterpiece Cakeshop, the Court had to analyze the Colorado Anti-Discrimination Act (hereinafter referred to as the "Act"), which prohibits, as relevant here, discrimination based on sexual orientation in a place providing public accommodation.[39] The Act defines "public accommodation" to include any "place of business engaged in any sales to the public and any place offerings services … to the public," while expressly excluding from this definition "a church, synagogue, mosque, or other place that is principally used *for religious purposes*."[40] Despite the State's attempt to, presumably, make the law more neutrally applicable by specifically excluding religious houses of worship from the definition of "public accommodation", the statute was challenged on religious grounds by Jack Phillips, an expert baker who became the subject of legal scrutiny under the law when he refused to bake a cake for the wedding of a gay couple, Charlie Craig and Dave Mullins, citing his religious opposition to same-sex marriage.[41] Because the validity of the Colorado law was being challenged under the Free Exercise Clause, the Court had to determine whether it was appropriate to rule on the law under the standard espoused by the Court in its landmark 1990 decision, Employment Div., Dept. of Human Resources of Oregon v. Smith.[42]

d. The Standards of Review: Deciding *Masterpiece Cakeshop* and Setting the Stage for *Fulton*

1. The Smith Standard of Review

Respondents in Masterpiece Cakeshop, which included the Colorado Civil Rights Commission, argued that the Act should be judged under the standard of review laid out by the

[39] Id. at 1725.
[40] Id., quoting Colo. Rev. Stat. § 24-34-601(1) (emphasis added).
[41] Id. at 1725-26.
[42] 494 U.S. 872, 872-73 (1990).

Court in Smith, which an Administrative Law Judge in Colorado relied on to rule that the Act did not violate the First Amendment rights of Petitioner Phillips.[43] The Court in Masterpiece Cakeshop ultimately held that the Civil Rights Commission failed to act in a neutral manner towards Phillips when it determined probable cause for a violation of the Act and referred the case to an Administrative Law Judge.[44]

In Smith, the Court, through an opinion authored by the late-Justice Antonin Scalia, held that one's right to free exercise of religion does not relieve that individual from complying with neutral laws of general applicability, so long as the law in question does not violate some other Constitutional protections.[45] In holding that a free exercise argument cannot overcome neutral laws of general applicability barring some other encroachment on Constitutional rights, the Smith Court rejected the strict scrutiny standard it adopted in Sherbert v. Verner.[46] Under Sherbert, any law or governmental action that substantially burdens a religious practice must be justified by a compelling government interest, which is accomplished through the least restrictive means.[47] Before the Court's decision in Smith, the strict scrutiny test developed in Sherbert was the standard whenever a governmental action was challenged on free exercise grounds, and many legal scholars and even casual observers probably assumed it would be the standard used by the Court in Smith, especially considering that the two cases had analogous sets of facts: both cases dealt with challenges to State unemployment compensation rules brought under the Free Exercise Clause.[48]

---

[43] Masterpiece Cakeshop, 138 S.Ct. at 1726-27.
[44] Id. at 1731.
[45] Smith, 494 U.S. at 881-83.
[46] 374 U.S. 398 (1963).
[47] Id. at 402-03.
[48] See id. at 399-400 (challenging the validity of a South Carolina unemployment rule which effectively required appellant to accept work on a Saturday against her religion). See also Smith, 494 U.S. at 874 (challenging an Oregon decision permitting the State to deny unemployment benefits to persons dismissed from their employment for religious use of peyote). Another reason why the Smith decision was so unexpected is that neither side briefed the Supreme Court on the prospect of abandoning the compelling interest test in favor of a new test applicable to neutral laws of

The Court in Smith admitted that its Sherbert holding meant that the State "could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion."[49] The Court distinguished the facts of Sherbert, though, observing that the "conduct at issue in [Sherbert] was not prohibited by law."[50] The Oregon Supreme Court confirmed that the State generally prohibits the religious use of peyote (i.e. not just in the context of unemployment benefits).[51] As such, the Court focused its Free Exercise inquiry on Oregon's prohibition of peyote for religious purposes, and not on its unemployment rules.[52]

The Court used this opportunity, brought about by its clever legal maneuvering, to explain that the "Sherbert Test" had never been used to invalidate a governmental action in any context outside of unemployment rules which conditioned eligibility on an "applicant's willingness to work under conditions forbidden by his religion."[53] The Court did not, however, decide to overturn Sherbert. Rather, the Court found that Sherbert and its progeny Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div.,[54] and Hobbie v. Unemp. Appeals Comm'n of Fla.,[55] were limited to a narrow set of cases, including when the government has a discretionary system of "individualized … assessment." Smith.[56] In fact, the "Sherbert Test" is still used by courts today when interpreting such claims.[57] Regardless, Smith was, and still is, the standard for analyzing Free Exercise

---

general applicability. See Michael P. Farris & Jordan W. Lawrence, Employment Division v. Smith and the Need for the Religious Freedom Restoration Act, 6 Regent U. L. Rev. 65, 72 n. 27 (1995).

[49] Id. at 876.

[50] Id.

[51] Id.

[52] Id.

[53] Id. at 883.

[54] 450 U.S. 707 (1981).

[55] 480 U.S. 136 (1987).

[56] 494 U.S. at 873. The Court reasoned that applying Sherbert to a broad array of cases beyond this set of cases where the government has a discretionary system of "individualized … assessment[]" would "make the professed doctrines of religious belief superior to the law of the land, and in effect … permit every citizen to become a law unto himself." Smith, 494 U.S. at 879, quoting Reynolds v. U.S., 98 U.S. 145, 166-67 (1878).

[57] Just this year, the Eastern District of Washington relied on Sherbert's strict scrutiny standard to determine whether a decision by the Washington Department of Children, Youth, and Families to deny a foster care license to a child's great-grandparents violated their rights under the Free Exercise Clause. See Blais v. Hunter, No. 2:20-cv-00187-SMJ,

challenges to neutral laws of general applicability. Further, the Court retains strict scrutiny where the facts of a case raise issues relating to the Free Exercise Clause and some other constitutional right.[58] Put differently, so long as a law does not specifically target a religion/religious practice, does not involve an individualized assessment, and it does infringe upon any other Constitutional rights, that law will pass First Amendment muster.

The Court in Masterpiece Cakeshop veered away from applying Smith, and instead found that the Colorado law unfairly targeted religious people like Jack Phillips, the baker behind the initial controversy. The Court stated that "[t]he neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection [to making the cake]."[59] Pursuant to this finding, the Court applied the standard set forth by it in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah [60] where the Court held that, where a law is not neutral, that law "is invalid unless it is justified by a

2020 WL 5960687 (E.D. Wash. Oct. 8, 2020). Ironically, plaintiffs in that case were Seventh-day Adventists, like the plaintiff in Sherbert, and were challenging the State's decision to deny their foster license based on an answer they provided regarding how they would react if their great-granddaughter came out to them as transexual. Id. at *1. The State denied plaintiff's application, citing the State's "policy to support LGBTQ+ children." Id. Under the "Sherbert Test", the court held that the State could not show "that it lacks other ways to achieve its desired goal without imposing a substantial burden on the [plaintiffs'] exercise of religion." Id. at *11. Ultimately, while plaintiffs met the burden to be granted a preliminary injunction in the matter, the court refused to "enjoin the [State] from taking LGBTQ+ considerations into account when reviewing foster care license applications" so long as answers to such "hypotheticals" are not the "*sole* determining factor when an applicant expresses sincerely held religious beliefs." Id. at *12.

[58] See Smith, 494 U.S. at 881 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940) as an example of such a case involving "the Free Exercise Clause in conjunction with … freedom of speech" where the strict scrutiny standard should still apply).

[59] Id. at 1729.

[60] 508 U.S. 520 (1993). In Lukumi, the plaintiff was a church which practiced the Afro-Caribbean religion Santeria. The church challenged several local ordinances enacted in the city council of Hialeah, Florida, which addressed the killing of animals for religious sacrifices, a practice adhered to by the church. The Court held that the Hialeah ordinances were neither neutral nor generally applicable, as they unfairly targeted the Santerían church. Because the laws were not neutral or generally applicable, the city had to show that it had a compelling interest, and that the laws were narrowly tailored to meet that end. The Court held that Hialeah could not meet this burden, so the laws prohibiting animal sacrifice did not pass muster under a strict scrutiny standard. See id.

compelling interest and is narrowly tailored to advance that interest."[61] This lack of neutrality pulled the actions of Colorado in Masterpiece Cakeshop out of the realm of the Smith doctrine.[62]

2. The Religious Freedom Restoration Act of 1993

Smith was seen as a devastating blow to religious freedom of exercise in the United States, and in the decades since the decision it has come under harsh scrutiny from judges and legal scholars on both sides of the ideological aisle, a topic which will be discussed at length below. Though members of Congress were upset about the Court's decision as well, Congress was not without some recourse. In 1993, just three years after the Smith decision was handed down, Congress passed the Religious Freedom Restoration Act of 1993 (hereinafter referred to as "RFRA").[63] By and through RFRA, Congress codified the review standard espoused by the Court in Sherbert. The statute states that the "Government shall not *substantially burden* a person's exercise of religion *even if the burden results from a rule of general applicability*. . . ."[64] A substantial burden legally imposed by the Government is only allowed if the Government can show that the law in question "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[65] Based on the plain language of the statute, it was clear that Congress' intent was to skirt the Supreme Court's decision in Smith, and restore the freedom of religion enjoyed under Sherbert.[66]

---

[61] Id. at 533.

[62] See Masterpiece Cakeshop, 138 S.Ct. at 1729 ("On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.")

[63] 42 U.S.C. §§ 2000bb et seq.

[64] Id. at § 2000bb-1(a) (emphasis added).

[65] Id. at § 2000bb-1(b)(1)-(2).

[66] The intent of Congress was explicitly stated in S.Rep. No. 103-111 (1993). In that Report, the Committee on the Judiciary wrote in favor the passage of the RFRA, citing the issues it saw with the Smith decision, which it acknowledged "dramatically weakened the constitutional protection for freedom of religion." Id. at 5. The Report went on to hyperbolically claim that "[s]ince Smith was decided, governments throughout the U.S. have run roughshod over religious convictions." Id. at 8. The Committee then addressed the Court's decisions in Sherbert and Wisconsin v. Yoder, 406 U.S. 205 (1972), both of which supported the strict scrutiny standard for Free Exercise claims, definitively stating that it was "necessary to restore th[e] [Sherbert] test to preserve religious freedom." S.Rep. No. 103-111 at 14.

Though Congress attempted to create legislation totally abrogating Smith and restoring the strict scrutiny standard for Free Exercise claims, the Supreme Court handed them another blow in City of Boerne v. Flores.[67] Flores concerned the City of Boerne's decision to deny a church a building permit, which the church challenged under RFRA.[68] The issue before the Court, however, was not a substantive one under the strict scrutiny test. Rather, the Court had to determine whether Congress had the power to apply RFRA to the States through its Fourteenth Amendment enforcement power.[69] The Court found that RFRA is a piece of remedial, preventative legislation, which may be appropriate under the enforcement clause when there is "a congruence between the means used and the ends to be achieved."[70] RFRA, the Court held, "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."[71] Based on what the Court perceived as the "[s]weeping coverage" of RFRA, the Court held that RFRA exceeds Congress' enforcement power under the Fourteenth Amendment, "contradict[ing] vital principles necessary to maintain separation of powers and the federal balance."[72]

The Flores holding meant that Smith was back, though in a more limited way. Flores did not stand for the proposition that RFRA is unconstitutional; but that it is unconstitutional as applied to state and local governments.[73] While the revival of Smith was another loss for religious rights under the First Amendment, it is by no means the last word on the subject. Spurred by the Court's

[67] 521 U.S. 507 (1997).
[68] Id. at 511.
[69] Id. at 516-17.
[70] Id. at 530.
[71] Id. at 532.
[72] Id. at 532, 534-36.
[73] Courts still apply RFRA to federal laws and law enforcement. See e.g., Gonzalez v. O Centro Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (holding that the federal government failed to demonstrate a "compelling interest in barring" a religious group's sacramental use of psychedelic hoasca as required under 42 U.S.C. 2000bb-1(b)(1)).

decision in Flores, 21 states have since passed into law their own version of RFRA.[74] At first, these state RFRAs were embraced by a bi-partisan coalition who praised these laws for providing increased protections for religious individuals.[75] As more states began proposing RFRAs, however, the bi-partisan coalition began to shrink, and in its place grew a deep divide between conservative and liberal politicians, with many Democratic politicians reconceiving these laws as a shield for religiously motivated discrimination against members of the LGBTQ community.[76] As the partisan divide grows within states legislatures, however, state courts have taken up the task of expanding protections for religious individuals in the absence legislation geared towards that aim.[77]

3. Introducing Fulton and the (Possible) Abrogation of Smith

The proliferation of state RFRAs aside, the Smith standard is now the standard of review for claims of Free Exercise infringement brought pursuant to neutral state laws of general applicability. However, regardless of what the Court has said regarding the doctrine of *stare decisis* in the past, the Smith standard is not set in stone. In fact, the Court will be faced with an opportunity to revisit and possibly overturn its Smith decision when it hears arguments in Fulton v. City of Philadelphia.[78] Fulton, both for the Court and for this thesis, may represent the "perfect storm" of facts: a Free Exercise challenge to a neutral law of general applicability, with the direct benefactors of the law being LGBTQ individuals.

---

[74] "State Religious Freedom Restoration Acts," National Conference of State Legislatures, May 4, 2017, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[75] See Nicholas P. Miller & Nathan Sheers, Religious Free Exercise Under State Constitutions, 34 J. Church & St. 303, n. 101 (1992).

[76] See Paul Baumgardner & Brian K. Miller, Moving From Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections, 82 Alb. L. Rev. 1385, 1407 (2019).

[77] See e.g. Mitchell Cty. V. Zimmerman, 810 N.W.2d 1 (Iowa 2012) (In Iowa, the rare Midwest state that does not have its own version of RFRA, the Supreme Court expanded protections for religious individuals by finding that Smith does not define the parameters of what is a neutral law of general applicability, and holding that "the Free Exercise Clause … forbid[s] the situation where the government accommodates secular interests while denying accommodation for comparable religious interests." The Court used this interpretation of Smith to strike down a seemingly neutral law of general applicability which did not contain accommodations for members of the local Mennonite community); see also Baumgardner at 1403-04.

[78] 922 F.3d 140 (3d Cir. 2019), cert. granted 140 S.Ct. 1104 (2020).

The facts giving rise to Fulton are uncomplicated. The City of Philadelphia's Department of Human Services works with independent foster care agencies, to which the City refers foster children.[79] When the City learned that two agencies it worked with refused to work with same-sex couples as foster parents, the City determined this was a violation of its anti-discrimination laws.[80] In turn, the City stopped referring foster children to those agencies.[81] One of those agencies, Catholic Social Services (hereinafter referred to as "CSS"), brought suit against the City, alleging, in part, that the City violated its Free Exercise rights under the First Amendment.[82] CSS motioned for a preliminary injunction.[83]

Like the facts of the case, the Third Circuit's analysis of the First Amendment issue was also straightforward and uncomplicated. Relying on Smith, the Third Circuit set out to determine whether Philadelphia's anti-discrimination laws did violate CSS' Free Exercise rights. Applying the Smith framework, the court held that "[t]he City's nondiscrimination policy is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exception from that policy."[84] CSS relied on Masterpiece Cakeshop and Lukumi arguing that an "ostensibly neutral government action" may be unconstitutional where that action "is motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct."[85] While the Third Circuit acknowledged that these cases do correctly stand for such a proposition[86], the

[79] Fulton, 922 F.3d at 146.
[80] Id.
[81] Id.
[82] Id.
[83] Id.
[84] Id. at 147, citing Smith, 494 U.S. at 877-78.
[85] Fulton, 922 F.3d at 153-54.
[86] The Third Circuit focused this discussion primarily on Lukumi, where the court acknowledged that "[t]he focus on different treatment of religious and secular conduct [was] clear. . . ." Fulton, 922 F.3d at 154. In Lukumi, the City of Hialeah, Florida adopted a city ordinance prohibiting the slaughtering of animals except in certain circumstances. The history surrounding the ordinance, however, made it clear that the law was not meant to protect animal welfare, but rather was an attempt to suppress the practice of Santeria, a religion which began to pop up in the City due to Cuban immigration to the area. Lukumi, 508 U.S. at 524. Emergency sessions leading to the ordinance were rife with hostility

circumstances presented to the Third Circuit in Fulton were distinguishable. At the end of the day, the court determined that Philadelphia's antidiscrimination policies were neutral laws of general applicability, "[a]nd while CSS [asserts] that the City's actions were not driven by a sincere commitment to equality but rather by antireligious and anti-Catholic bias … the current record does not show religious prosecution or bias."[87]

The decision in Fulton seems, in light of Smith, as well as more recent cases like Masterpiece Cakeshop and Lukumi, rather unsurprising. So why, then, has the Supreme Court granted *certiorari* to review the Third Circuit's decision?[88] In short, because Smith is ripe for revisitation, and Fulton may the opportunity the Court has been waiting for to do just that.

In this paper, I will look at how the Supreme Court will likely decide the First Amendment issue in Fulton as it pertains to the Court's decision in Smith, as well as what a decision overturning Smith in favor of the strict scrutiny standard embraced by RFRA could mean for the civil rights of the LGBTQ community.

II. The Supreme Court's Narrowing of the Smith Doctrine

When taking all relevant factors into account, it is probable that the Supreme Court will use its decision in Fulton to overturn Smith and apply the strict scrutiny standard championed by RFRA to neutral laws of general applicability in all cases implicating the Free Exercise Clause. This theory is based on several factors, including the disfavor of Smith among conservative Justices and legal scholars, the Court's current ideological balance, and the facts in Fulton giving rise to a prime opportunity to create new precedent in line with those ideologies.

---

towards the religion. Id. Moreover, the ordinance itself prohibited animal slaughter only for "sacrifice" in the limited context of "a public or private ceremony." Id. at 527.

[87] Id. at 165.

[88] See 140 S.Ct. at 1104.

a. The *Smith* Framework Has Been Disfavored By Conservative Justices Since It Was Handed Down In 1990

Perhaps one of the most oxymoronic things a person with even a shred of knowledge about Supreme Court jurisprudence can hear is the fact that a Supreme Court decision, written by the late-Justice Antonin Scalia, is highly disfavored amongst conservative jurists and legal thinkers. However, that is exactly the case with Smith. While Justice Scalia was a well-established conservative on the Court[89], the decision he authored in Smith has long been the ire of conservative thinkers; a major reason why the Supreme Court, with its modern-day heavy conservative leaning, will likely overturn the Smith precedent in the coming months.

Before discussing the opinion of our current Justices as it pertains to Smith, it is worth noting that the Smith decision has been experiencing pushback since it was handed down in 1990, from both the liberal-wing of the Court and, perhaps more surprisingly, the conservative-wing. Within the Smith decision itself, Justice Harry Blackmun[90] penned a scathing dissent wherein Blackmun advocated for the compelling interest standard to apply to the Oregon law at issue[91] Blackmun also went on to acknowledge that, based on his legal calculations, Oregon could not have met such a burden in Smith.[92] Justice Blackmun goes even further, accusing the State of

[89] See Adam Liptak, Antonin Scalia, Justice of the Supreme Court, Dies at 79, New York Times, Feb. 13, 2016. https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html. In the Times obituary, Justice Scalia is described as "a leader of the conservative intellectual renaissance" and a man with "well known" conservative views, though journalist Adam Liptak acknowledges that political conservatives were "not always" pleased with the judicial outcomes flowing from Scalia's adherence to originalism. However, Liptak mainly focuses on the decisions Scalia was involved in in the realm of Fourth Amendment criminal procedure, which effectively gave more rights to criminal defendants. Liptak goes on to discuss Scalia's ties to conservative power brokers like Charles Koch and conservative legal groups like the Federalist Society.

[90] While Justice Blackmun was appointed to the Court by Republican President Richard Nixon, Blackmun is one of the most well-established liberals in the Court's history, writing for the majority in arguably the most liberal opinion ever handed down by the Court, Roe v. Wade, 410 U.S. 113 (1973).

[91] Smith, 494 U.S. at 907-08 (Blackmun, J. dissenting) ("Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means. Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence.").

[92] Id. at 909-19.

Oregon of being religiously intolerant, warning that if Oregon continues to be hostile towards religions, as Blackmun saw the law at issue was, those religions may "migrate to some other and more tolerant region."[93]

Certainly, a liberal Justice dissenting to an Antonin Scalia majority opinion should come as no surprise to those who understand the politics inherent in Supreme Court jurisprudence. Perhaps the more surprising opinion comes from Justice Sandra Day O'Connor's concurrence in Smith, wherein the infamous conservative Justice disagreed with the new framework established by the majority opinion. Justice O'Connor, in agreement with Justice Blackmun, argued that even neutral laws of general applicability can impose a burden on an individual's practice of religion if the law prevents a person from engaging in religiously motivated conduct or requires a person to engage in conduct forbidden by his or her religion.[94] Unlike Blackmun, though, O'Connor concurred in the opinion because she would have held that Oregon could meet the strict scrutiny standard, showing a compelling governmental interest that was narrowly tailored to meet its ends.[95]

Justice O'Connor, through her Smith concurrence, laid the groundwork for conservative disfavor of the Smith decision. Justice O'Connor again reinforced her aversion for Smith through her dissenting opinion in the aforementioned Flores case. In clear terms, Justice O'Connor stated that the sudden transformation of the Free Exercise Clause, as represented by the Court's decision in Smith, "harmed religious liberty[.]"[96]

While the opinions of Justices Blackmun and O'Connor provide important background for this topic, as they show that Smith was a controversial decision from the time it was handed down in 1990, those opinions admittedly have little bearing on the Court today. However, there is no

[93] Id. at 919-20, quoting Yoder, 406 U.S. at 218.
[94] Id. at 893-95 (O'Connor, J. concurring).
[95] Id. at 905-06.
[96] Flores, 521 U.S. at 547 (O'Connor, J. dissenting).

shortage of disdain for Smith amongst the current members of the Court. The best noted dissatisfaction with Smith may come from the Court's most tenured conservative voice, Justice Samuel Alito. In his majority opinion in Holt v Hobbs, a challenge to a State prison's denial of religious accommodation for Muslim inmates, Justice Alito acknowledged that "Smith largely repudiated the method of analysis used in prior free exercise cases[,]" and that RFRA was a direct answer to Smith, "to provide greater protection for religious exercise. . . ."[97] Justice Alito, prior to Holt, ruled in favor of such expansive religious freedoms in Burwell v. Hobby Lobby Stores, Inc.[98], where Alito characterized RFRA as "striking [a] sensible balance[] between religious liberty and competing prior governmental interests." In so finding, the Court held that a decision by the Department of Health and Human Services to mandate contraception coverage under an employer-sponsored health plan was unlawful under RFRA.[99]

It is also worth noting that, aside from the conservative voices on the Court, conservative legal scholars have also shown their dismay at Justice Scalia's holding in Smith. Former Circuit Judge Michael W. McConnell[100] has expressed his disappointment with the Smith decision, even going as far as to say that the Smith decision has no logical basis in First Amendment jurisprudence. The very same year the Smith decision came down, McConnell authored Free Exercise Revisionism and the Smith Decision, published in the University of Chicago Law Review.[101] In the article, McConnell discusses what he believes is a bipartisan consensus that Smith was decided inappropriately, stating that:

The Smith decision is undoubtedly the most important development in the law of

[97] 574 U.S. 352, 357 (2015).
[98] 573 U.S. 682, 735-36 (2014).
[99] Id. at 736.
[100] McConnell is the Professor and Director of the Constitutional Law Center at Stanford Law School. McConnell also served as a Circuit Judge on the Tenth Circuit Court of Appeals for a decade after being appointed by Republican President George W. Bush. McConnell specializes in issues related to religion and the First Amendment. See "Michael W. McConnell: Biography". https://law.stanford.edu/directory/michael-w-mcconnell/#slsnav-policy-practicum.
[101] 57 U. Chi. L. Rev. 1109 (1990).

> religious freedom in decades. Already is has stimulated a petition for rehearing joined by an unusually broadbased coalition of religious and civil liberties groups from right to left and over a hundred constitutional law scholars, among them myself, which proved futile, as well as a drive for legislative correction, which is presently under consideration in Congress. Free exercise is no longer wanting for controversy.[102]

McConnell goes on to accuse the majority opinion in Smith of failing to present any argument to back its claim that free exercise exemptions "contradict[] both constitutional tradition and common sense[,]"[103] and instead the Court "substitutes a bare requirement for formal neutrality" not strictly advanced by the plain language of the Constitution.[104]

The most recent conservative voices to join the Court prior to the appointment of Justice Amy Coney Barrett by President Trump this October, Justices Neil Gorsuch and Brett Kavanaugh, have also shown a disfavoring of Smith through some of their first decisions on the Court. In Masterpiece Cakeshop, Justice Gorsuch acknowledged in his concurring opinion that "Smith remains controversial in many quarters."[105] In another recent signal by the conservative-wing of the Court that Smith's days may be numbered, Justice Alito penned a concurrence to the Court's decision to deny *certiorari* in Kennedy v. Bremerton Sch. Dist.,[106] where a high school football coach brought suit alleging retaliation by the School District for his exercise of his First Amendment rights by engaging in demonstrative prayer on the football field in the presence of students immediately after games.[107] Justice Alito wrote the concurrence in Kennedy, and was joined by the other prominent conservative voices on the Court, Justices Gorsuch, Kavanaugh, and Thomas. In what is perhaps Alito's most scathing show of aversion to Smith, he wrote that "[i]n

[102] Id. at 1111.
[103] Id. at 1152.
[104] Id.
[105] Masterpiece Cakeshop, 138 S.Ct. at 1734 (Gorsuch, J. concurring).
[106] 139 S.Ct. 634 (2019).
[107] See Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 815-19 (9th Cir. 2017).

[Smith], the Court drastically cut back on the protection provided by the Free Exercise Clause…. In this case, however, we have not been asked to revisit that decision."[108]

Just this year, in denying *certiorari* in the case of Davis v. Ermold,[109] Justice Thomas, joined by Justice Alito, signaled that both Obergefell and Smith are ripe for revisitation. In a footnote, Thomas wrote that "[a]s a result of Smith, accommodations for those with sincerely held religious beliefs have generally been viewed as the domain of positive state and federal law[,]"[110] to seemingly lament the fact that the Court has chosen in recent years to expand protections for those whose lifestyles do not comport with religious ones, while ignoring the rights of those religious individuals under the First Amendment.

In a not-so-veiled manner, Justice Alito's concurrence signals what conservative jurists and scholars have been hinting at for decades: Smith is ripe to be overturned, the Court is just waiting for the opportunity to do just that. Fulton, however, presents the Court with that opportunity.

b. The Stage Is Set For *Fulton*

In light of the ideological leaning of the Supreme Court, coupled with the signals flares that have already been fired by at least three Justices currently presiding on the Court, the stage is set for the Court to overturn its Smith framework through its upcoming decision in Fulton. As previously discussed, Fulton presents a challenge by a religious group to a Philadelphia city rule which, on its face, appears to be a neutral law of general applicability. As recognized by the Third Circuit Court of Appeals, Petitioners CSS rely on the Court's holding in Masterpiece Cakeshop, arguing that the Philadelphia law was not, in fact, a neutral law, but rather one that was motivated by ill-will towards a religious group, or that it impermissibly targeted Petitioners based on their

[108] Kennedy, 139 S.Ct. at 637 (Alito, J. concurring).
[109] No. 19-926, 2020 WL 5881537 (Oct. 5, 2020).
[110] Id. at *2 n. *.

religious views.[111] As the Third Circuit recognized:

> CSS's theme devolves to this: the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. It runs directly counter to the premise of Smith that, while religious belief is always protected, religiously motivated conduct enjoys no special protections of exemption from general, neutrally applied legal requirements. That CSS's conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs.[112]

The strong language employed by the Third Circuit is a valid interpretation of this issue under Smith. However, the Supreme Court need not give any deference to the Third Circuit, as it will review the decision not to grant a preliminary injunction, and the court's interpretation of Smith, *de novo*.[113]

For the following three reasons, the Court will probably use Fulton as an opportunity to overrule the Smith Free Exercise framework:

1. The Court's Make-Up

It is no secret that, following the death of the late Justice Ruth Bader Ginsburg and the appointment of Justice Amy Coney Barrett to the Court, the Supreme Court ideologically leans substantially to the right. While an argument can be made that the Court was evenly balanced prior to the death of Justice Ginsburg, with Chief Justice John Roberts being the "moderate" swing vote, same is no longer the case with the appointment of Justice Barrett. Joining Justices Thomas, Alito, Gorsuch, and Kavanaugh as another conservative voice on the Court[114], the conservative wing of

---

[111] See Fulton, 922 F.3d at 153-54.
[112] Id. at 159.
[113] See id. at 152 (in a case implicating the First Amendment, the appeals court does not rely on the normal clear-error standard for factual findings, but instead conducts an independent examination of the record as a whole, deferring to the district court's findings only insofar as they concern witness credibility).
[114] Aside from the fact that Justice Barrett was appointed by a Republican President and confirmed by the Senate without the vote of a single Democratic Senator, Justice Barrett has also been described as "a favorite of Christian conservatives," and notably drew criticism from Democratic Senators after sidestepping questions on liberal issues, such as abortion, presidential powers, climate change, voting rights, and the Affordable Care Act, during her

the Court now has a clear 5-3 majority, assuming Chief Justice Roberts is still considered the "moderate" voice on the Court given its new make-up.[115]

While Smith was written by the notoriously conservative Antonin Scalia, the decision has met nothing but blowback from conservative jurists and scholars since its publishing in April, 1990. While there is no clear and convincing evidence that the aforementioned Justices will hold that Smith's interpretation of the Free Exercise Clause is incorrect under the standard of the First Amendment, circumstantial evidence points towards that being the safest bet you can make. Moreover, several Justices on the Court have already implied that this is the way they will rule.

2. The Disfavor of Smith Among Current Justices

As previously mentioned, the Court's conservatives have been openly hostile towards the Smith framework, as clearly evidenced by Justice Alito's concurrence in the Court's decision to deny *certiorari* in Kennedy and Justice Thomas' opinion respecting the denial of *certiorari* in Davis. Justice Alito did not mince words in that concurrence, stating that Smith "drastically cut back" on the protections afforded to the religious under the Free Exercise Clause, and then openly acknowledging that Kennedy did not present a case where the Court was asked to revisit that precedent.[116] Justices Thomas, Gorsuch, and Kavanaugh joining Alito in that concurrence is effectively a co-signing of those sentiments. Kennedy did not present the issue to the Court, nor did it present an idea factual scenario for directly targeting Smith; Fulton, on the other hand, does.

---

confirmation hearing. See Richard Cowan, Trump plans second White House event for Barrett as Senate vote looms, Oct. 26, 2020. Reuters. https://www.reuters.com/article/uk-usa-court-barrett/senate-likely-to-confirm-barrett-to-u-s-supreme-court-cementing-conservative-majority-idUKKBN27B139.

[115] This assumption is admittedly tenuous considering Chief Justice Roberts' scathing dissent in Obergefell, where he criticized the majority opinion for ignoring the rights of religious individuals under the Free Exercise Clause and ominously predicted that the merits of both Obergefell and Smith would be before the Court again in the near future in an example highly analogous to the facts presented in Fulton. See Obergefell, 576 U.S. at 711-12 (Roberts, C.J. dissenting).

[116] Kennedy, 139 S.Ct. at 637.

3. A Chance For New Precedent

Regardless of the disfavor of Smith among conservatives or the ideological leaning of the Court, the Court cannot make new precedent on its own volition. Rather, it needs the operative set of facts along with the relevant issue to be presented to it in a given case. Fulton provides the Court that opportunity. Fulton deals with a Free Exercise challenge to a statute which, on its face, is a neutral law of general applicability. The Circuit Court used the Smith framework to find that no exception exists for the Petitioner. The opportunity for the conservative majority to finally abandon the Smith framework is here, and a potential Fulton decision overruling Smith would be a major win for religious freedom under the First Amendment. However, with a win for religious freedom comes a potential loss for the LGBTQ community.

On November 4, 2020, the Court heard oral arguments from the parties in Fulton. In what may seem like a positive development for both the City of Philadelphia and the LGBTQ community, Chief Justice Roberts seemed to imply that the City should have the leeway to strike a balance between the rights of religious groups and LGBTQ couples in enacting its adoption ordinances.[117] However, that hope should be tempered by the fact that Justice Alito (and Justice Thomas to a lesser extent) seemed very sympathetic towards CSS, even going so far as to state to City attorney Neal Katyal, "if we are honest about what's really going on here,' the case is 'not about ensuring that same-sex couples in Philadelphia have the opportunity to be foster parents.' Rather, Alito contended, Philadelphia "can't stand the message that Catholic Social Services and the archdiocese are sending by continuing to adhere to the old-fashioned view about marriage.'"[118]

Regardless of the signaling by Roberts during oral arguments, Alito's words likely give a

[117] See Amy Howe, Argument analysis: Justices sympathetic to faith-based foster-care agency in anti-discrimination dispute, SCOTUSblog, Nov. 4, 2020, https://www.scotusblog.com/2020/11/argument-analysis-justices-sympathetic-to-faith-based-foster-care-agency-in-anti-discrimination-dispute/.
[118] Id.

more accurate depiction of how the Court leans as a whole in the case of Fulton. Even if Roberts shies away from the strong language used in his Obergefell dissent, and rules in favor the City, it will still not be enough to defeat the probable five-vote conservative majority that will come down on the side of CSS.

III. The Possible Fallout from the Court's Upcoming Fulton Decision

While Fulton is not a direct battle between the rights of the religious and the rights of LGBTQ individuals, the case does implicate both. The Court's potential abrogation of Smith would certainly have wide-ranging consequences that go beyond the rights of LGBTQ individuals, as evidenced by the Smith decision itself. An overruling of Smith would significantly restrain the ability for States to enforce neutral laws of general applicability against claims brought under the Free Exercise Clause, barring the showing of a compelling state interest and a narrowly tailored law, a difficult burden to meet.[119] The burden on the State, and the expanded potential for religious exemption from neutrally applicable laws, could mean a restricting of rights for LGBTQ individuals.

a. The Potential Constraint On LGBTQ Rights

As evidenced by Fulton, the overruling of Smith could have negative consequences for the LGBTQ community.[120] However, the field of adoption and foster care is not the only area where LGBTQ individuals may experience a restriction on rights. For an expansive list of the areas where this *might* affect LGBTQ individuals, one can look at the First Amendment Defense Act (hereinafter referred to as "FADA"). FADA is a bill[121] that was introduced into the United States

[119] See Burson v. Freeman, 504 U.S. 191, 226 (1992) (Stevens, J. dissenting) (stating the "core premises of strict scrutiny" is "that the *heavy burden* of justification is on the State") (emphasis added).
[120] A finding for Petitioner CSS would mean that Respondent Philadelphia can no longer require adoption agencies to adopt on an "all-comers" basis, thus narrowing the avenues from which LGBTQ couples have the ability to adopt children.
[121] First Amendment Defense Act, S. 2525, 115th Cong. (2018).

Senate in 2018. According to the bill, FADA's purpose is:

> [t]o ensure that the Federal Government shall not take any discriminatory action against a person, wholly or partially on the basis that such person speaks, or acts, in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as a union of one man and one woman, or two individuals as recognized under Federal law, or that sexual relations outside marriage are improper.[122]

FADA goes on to list several situations wherein religious freedom may be implicated and, under the law, exemption would be required. Specifically, the bill states that government may not discriminate against individuals fitting into the aforementioned definition in the following ways: (1) federal tax treatment; (2) deductions for charitable giving; (3) withholding federal grants; (4) withholding federal benefit programs; and (5) withholding entitlement to Federal property.[123]FADA also requires Government to recognize the accredited, licensed, or certified status of individuals so recognized currently under Federal law.[124]

Like RFRA, FADA would be a major victory for religious individuals, namely those who do not agree with the lifestyles of the LGBTQ community. FADA ensures public funding for organizations and individuals who are openly opposed to the rights of LGBTQ individuals to marry within their own sex. In other words, FADA gives organizations similar to Catholic Social Services the assurance that they will not lose Federal funding if they act in a manner which evinces their sincerely held religious belief that marriage is exclusively between one man and one woman.

b. The Court May Feel Emboldened To Revisit Its Decision In *Obergefell*.

Though not directly related, the Court's decision to overturn Smith and strengthen the free exercise of religion under the First Amendment may be the first domino to fall in a line of decisions expanding religious rights. Considering the Court's ideological make-up, the upcoming Fulton

[122] S. 2525, 115th Cong. (2018).
[123] Id. at § 3(b)(1)-(5).
[124] Id. at § 3(c).

decision could embolden the Court to revisit its landmark ruling in Obergefell, thus giving States the right to deny same-sex couples from getting married. Though the potential revisitation is speculative, the Court has signaled that the speculation is justified. Like Justice Alito's concurrence in Kennedy may signal the intent to overturn Smith, Justice Clarence Thomas recently wrote a concurring opinion in the Court's decision to deny *certiorari* in Davis.[125]

The Petitioner Kim Davis gained national notoriety when she, as a county clerk in Kentucky, denied a marriage license to a same-sex couple based on her sincerely held religious belief that marriage is between a man and a woman.[126] Davis was sued for her refusal, and lost a motion to dismiss based on qualified immunity at the Sixth Circuit.[127] In rejecting the qualified immunity defense, the court cited the fact that same-sex marriage is now a clearly established right under Obergefell.[128] In his concurrence respecting the Court's denial of *certiorari* Justice Thomas acknowledged that this was the right decision, but also took umbrage with the fact that Obergefell effectively constrains the Free Exercise rights of religious individuals who oppose same-sex marriage.[129] Thomas then stated that "[t]his petition [by Kim Davis] implicates important questions about the scope of our decision in Obergefell, but it does not cleanly present them."[130] Like Justice Alito in Kennedy, the language utilized by Justice Thomas indicates that Obergefell may be ripe for revisiting, but the Court is willing to wait for the right set of circumstances to do so.

[125] No. 19-926, 2020 WL 5881537 (Oct. 5, 2020).
[126] Id. at *1.
[127] See Ermold v. Davis, 936 F.3d 429 (6th Cir. 2019).
[128] Id. at 437.
[129] Davis, 2020 WL 5881537 at *2.
[130] Id.