FULTON V. CITY OF PHILADELPHIA: RELIGIOUS OBJECTORS, HISTORICALLY MARGINALIZED COMMUNITIES, AND A MISSED OPPORTUNITY

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INTRODUCTION

In 2015, the Supreme Court recognized marriage equality for same-sex couples in *Obergefell v. Hodges*.[1] Although that decision was revolutionary, opponents of same-sex marriage have unfortunately seized upon language from the Court's reasoning and used it to seek religious exceptions from anti-discrimination policies and laws.[2] These opponents object to same-sex marriage on religious grounds.[3] These objectors usually make what Professors Douglas Nejaime and Reva B. Siegel call "complicity-based conscience claims."[4] The objector claims that anti-discrimination laws ensuring equality for same-sex couples make them complicit in the sinful conduct of others.[5] Since the *Obergefell* decision, judicial dockets have seen a rise in these complicity-based conscience claims.[6] This increase in claims can result in what United Nations Independent Expert on Sexual Orientation and Gender Identity Victor Madrigal-Borloz calls "indirect discrimination."[7] This concept describes "situations in which a seemingly neutral norm, criterion, or practice nonetheless triggers a disadvantage that is deemed unacceptable under international human rights provisions because of its connection with a protected category."[8]

Recently, the Supreme Court faced a complicity-based conscience claim in *Fulton v. City of Philadelphia*. Coming on the heels of the Court's decision in *Masterpiece Cakeshop v. Colorado Commission of Civil Rights*, the *Fulton* decision provides the

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1. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

2. *Id. See also* Brief for Petitioners at 32, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (noting that *Obergefell* encouraged religious organizations to continue to advocate against same-sex marriage).

3. Brief for Petitioners, *supra* note 2, at 32.

4. Douglas Nejaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015).

5. *Id.* (detailing these kinds of claims and describing what religious objectors call a "culture war" being waged against the religious right).

6. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018); *Fulton*, 141 S. Ct. at 1875.

7. Victor Madrigal-Borloz, *The Theory of Indirect Discrimination: Application to the Lived Realities of Lesbian, Gay, Bisexual, Trans, and Other Gender Diverse (LGBT) Persons*, 34 HARV. HUM. RTS. J. 295, 296-301 (2021) (outlining the history of the clash between religious exceptions and anti-discrimination policy and noting the resulting discrimination the LGBTQ+ community has experienced in certain cases when religious objectors win legal battles).

8. *Id.* at 295 (outlining the connection between religious objections and the indirect and sometimes direct discrimination they cause to the LGBTQ+ community).

three ingredients Madrigal-Borloz requires for indirect discrimination: "detriment of impact, connection with the protected category, and neutrality of intent."[9]

In *Fulton*, a Catholic organization sought a religious exception from the City of Philadelphia in response to the City's anti-discrimination policies, claiming that compliance with the policies would make the organization endorse same-sex relationships.[10] Relying on *Employment Division, Department of Human Resources v. Smith*, which held that a state can refuse to grant religious exceptions to laws that are both generally applicable and neutral, the Court showed its modus operandi in refusing to resolve the apparent tension between religious freedom and anti-discrimination policies.[11]

This Casenote illustrates the need for the Court to overrule its current precedent from *Employment Division Department of Human Resources v. Smith* and shows the possible increase in stigmatization that a decision like *Fulton* creates. Had the *Fulton* Court overruled the *Smith* analysis and reverted to the previous test found in *Sherbert v. Verner*,[12] while also holding that the protection of the LGBTQ+ community from stigma is a compelling state interest, the City would have prevailed. Furthermore, the resulting test for the future would be clearer and easier to apply.

Part I of this Casenote provides the facts and holding from *Fulton*, while Part II gives a legal background to the issues presented in *Fulton* and focuses on the most influential cases that the *Fulton* Court discussed in its opinion, including *Smith*. Part III details the opinions of the *Fulton* majority and two of the three

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9. *See generally Masterpiece Cakeshop*, 138 S. Ct. 1719 (holding that Colorado's Civil Rights Commission's actions requiring a baker to comply with anti-discrimination policies violated the baker's freedom to exercise religion). Madrigal-Borloz, *supra* note 7, at 295. In an effort to provide UN officers and policymakers a standard and manner for finding such issues in their constituency, Madrigal-Borloz provides these three ingredients for indirect discrimination: the possible detriment of impact for a religious objection, its connection to a protected category of people, and the neutrality of the intent behind the objection. *Id.*

10. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875-76 (2021).

11. Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990); *see Fulton*, 141 S. Ct. at 1876-78 (detailing the majority's sidestepping of *Smith* and its hesitancy to address the tension between religious objectors and anti-discrimination policies).

12. Sherbert v. Verner, 374 U.S. 398 (1963) (holding that government actions that burden religious exercise must serve a compelling state interest and required compliance with the action must serve that interest).

concurring justices. Part IV analyzes the decision and explains why the Court should have overruled *Smith* and reverted to the test that preceded it in *Sherbert*. Part V concludes by describing the indirect discrimination that *Fulton* is likely to cause.

I. FACTS AND HOLDING

In 2018, a Philadelphia newspaper ran a story in which a spokesperson for the Archdiocese of Philadelphia stated that Catholic Social Services (CSS) would not certify otherwise-qualified same-sex couples for foster parenting.[13] Because CSS believes that "marriage is a sacred bond between a man and a woman," CSS contended that the certification of prospective foster families is an endorsement of the couple's relationship.[14] The Philadelphia City Council called for an investigation, stating that the City "had laws in place to protect its people from discrimination that occurs under the guise of religious freedom."[15] The Commissioner of the Department of Human Services met with CSS[16] and requested that the agency conform to the changes of the last "100 years" and the "teachings of Pope Francis, the voice of the Catholic Church."[17] The Department informed CSS that unless they agreed to certify same-sex couples, they would no longer refer children to CSS or enter into foster care contracts with them.[18] The City argued that CSS's refusal to certify same-sex couples violated non-discrimination provisions in their contract and in city-wide ordinances.[19]

The conversation resulted in CSS and three foster parents affiliated with the agency filing suit against the City, the Department, and the Commissioner of DHS.[20] The Support Center for Child Advocates and Philadelphia Family Pride intervened as

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13. CSS is a private foster care agency founded by the Archdiocese of Philadelphia. *See Fulton*, 141 S. Ct. at 1874-75.

14. *Id.* at 1875 (quoting J.A. to Petition for Writ of Certiorari at 171, *Fulton*, 141 S. Ct. 1868 (No. 19-123)).

15. *Id.* (quoting J.A. to Petition for Writ of Certiorari at 147, *Fulton*, 141 S. Ct. 1868 (No. 19-123)).

16. Roughly fifty years prior to *Fulton*, the City took a more active role in the foster care system and placed DHS in charge of all foster children. *Id.* at 1875.

17. *Id.* (quoting J.A. to Petition for Writ of Certiorari at 366, *Fulton*, 141 S. Ct. 1868 (No. 19-123)).

18. *Id.* at 1875-76.

19. *Id.* at 1875.

20. *Id.* at 1876.

defendants.[21] According to CSS, the City's threat to quit referring children to the agency violated the Free Exercise Clause of the First Amendment.[22] The agency sought a temporary restraining order and preliminary injunction directing the Department to continue referring the children to CSS without the agency certifying same-sex couples.[23]

The District Court for the Eastern District of Pennsylvania denied CSS preliminary relief, ruling that the plaintiff's Free Exercise claim was unlikely to succeed.[24] That court concluded that the contractual non-discrimination requirement and the city-wide Fair Practices Ordinance were neutral and generally applicable under the precedential test in *Employment Division, Department of Human Resources v. Smith*.[25] The Court of Appeals for the Third Circuit affirmed, concluding that the proposed contractual terms were neutral and generally applicable.[26] CSS and the foster parents sought review from the Supreme Court, challenging the Third Circuit's determination that the City's actions were permissible under *Smith* and also asking the Court to reconsider that precedent.[27]

The Supreme Court granted certiorari to decide whether Philadelphia's actions violated the First Amendment and whether

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21. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021). The Support Center for Child Advocates is a private agency that helps at-risk children find social services and alternative homes. *See About Us*, Support Ctr. for Child Advocs., https://sccalaw.org/about-child-advocates/. Philadelphia Family Pride is a non-profit organization helping support members of the LGBTQ+ community in their journey to become families. *See About – Philadelphia Family Pride*, Philadelphia Family Pride, https://www.philadelphiafamilypride.org/about.html.

22. The First Amendment of the United States Constitution provides for the freedom to exercise religion and the freedom of speech, both of which CSS claimed Philadelphia violated. CSS claimed that it would not be able to exercise its religious belief that marriage is between a man and a woman if the charity was compelled to certify same-sex couples for foster care. The charity also claimed that forcing it to certify such couples would be tantamount to endorsing such relationships, violating their freedom of speech, as well. The Court did not address CSS's Free Speech violation claim. *See* Brief for Petitioners, *supra* note 2, at 19-33.

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

24. *Id.*

25. *Id.* The *Smith* case provides a two-pronged test for situations involving religious objections to governmental policies and claims of religious exercise violations. Laws that are neutral and generally applicable do not substantially burden the freedom to exercise religion. *See* Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990).

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

27. *Id.*

the Court should overturn its ruling in *Smith*.[28] According to the majority opinion, authored by Chief Justice Roberts, the City's policies failed one prong of the *Smith* test: general applicability.[29] Ultimately, the Court held that the City's actions violated the Free Exercise Clause.[30] The Court reversed and remanded the case back to the Third Circuit.[31]

II. LEGAL BACKGROUND: THE TENSION BETWEEN FREE EXERCISE AND ANTI-DISCRIMINATION AND ITS ORIGINS

The Court's decision in *Fulton* involves a confluence of several areas of law and precedent. The majority opinion and the three concurring opinions focus on two areas: (1) the intersection of government contracts and employment with constitutional rights, and (2) the intersection of the Free Exercise Clause with government actions aimed at protecting the LGBTBQ+ community.[32] Section A provides an overview of the Free Exercise Clause and the origin of religious exceptions; Section B discusses the precedential cases that the Court used to outline the standards for assessing whether a government's policy violates First Amendment rights; and Section C focuses on the caselaw that the Court typically applies when faced with weighing the protection of the LGBTQ+ community against the rights guaranteed by the Free Exercise Clause.

A. THE FREE EXERCISE CLAUSE AND ITS COLLISION WITH ANTI-DISCRIMINATION POLICIES

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[33] The second part of that statement, "prohibiting the free exercise thereof," is called the Free Exercise Clause and is central to the *Fulton* case.[34] The Clause prohibits "punish[ing] the expression of religious doctrines [the government] believes to be false, . . . impos[ing] special disabilities on the basis of religious views or religious status, . . . or lend[ing]

28. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021).
29. *Id.* at 1879.
30. *Id.* at 1882.
31. *Id.*
32. *See id.* at 1876-82.
33. U.S. Const. amend. I.
34. *Id.*; Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021).

[the government's] power to one or the other side in controversies over religious authority or dogma."[35] Additionally, "the freedom to hold religious beliefs and exercise those beliefs is absolute."[36]

In 1878, the Supreme Court was first presented with religious objectors seeking an exception in *Reynolds v. United States*.[37] The petitioner, Reynolds, sought an exception from an anti-bigamy law on the grounds of his religious beliefs.[38] The petitioner claimed that as a member of the Mormon Church, it was his duty to practice polygamy.[39] The Court rejected his assertion that the anti-bigamy law violated his freedom to exercise Mormonism and reasoned that a decision granting him an exception would create precedent that would protect a plethora of other practices such as bride burning and human sacrifice.[40] The Court also stated that its ruling, while prohibiting certain practices, did not interfere with Reynolds's religious beliefs.[41] The prohibitions, according to the Court, were rationally based, which provided the Court's guiding analysis in the time between *Reynolds* and *Sherbert*.[42] In the near 150 years since *Reynolds*, the Court has faced countless religious objectors seeking exceptions and has developed multiple analyses to resolve those cases.[43] The following section explains the Court's contemporary analysis to determine whether a religious exception should apply and how that analysis has developed over the past sixty years.

B. THE INTERSECTION OF FIRST AMENDMENT RIGHTS AND GOVERNMENT ORDINANCES

Although the *Fulton* majority and concurring opinions cite and discuss many precedential cases, each emphasizes the importance of (1) *Sherbert v. Verner*, (2) *Employment Division, De-*

35. Cent. Rabbinical Cong. v. N.Y.C. Dep't of Health and Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014).

36. Braunfeld v. Brown, 366 U.S. 599, 603 (1961).

37. *See generally* Reynolds v. United States, 98 U.S. 145 (1878).

38. *See id.* at 162.

39. *Id.* at 161.

40. *Id.* at 166.

41. *Id.* at 166-67.

42. *Id.* The Court's most significant decision regarding free exercise between *Reynolds* and *Sherbert* was *Davis v. Beason*. In *Davis*, the Court was faced with another polygamy case and continued with the precedent from *Reynolds*, noting that the free exercise clause is "subordinate" to criminal law. *See generally* Davis v. Beason, 133 U.S. 333, 342-43 (1890).

43. *See, e.g.*, *id.*

partment of Human Resources v. Smith, and (3) *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.[44] These cases involve the conflict that occurs at the crossroads of a religious objector and a government ordinance, highlighting the Court's struggle to uphold both the sovereignty of the government and a citizen's right to exercise religion.

1. *SHERBERT V. VERNER*

Sherbert provides the bedrock of the Court's strict scrutiny test: when a government policy burdens a religious practice, that policy must be justified by a compelling governmental interest.[45] The plaintiff in *Sherbert* was a member of the Seventh-day Adventist Church and was fired by her employer for refusing to work on Saturdays, the day she considered the Sabbath.[46] The plaintiff sought unemployment benefits under the South Carolina Unemployment Compensation Act. The South Carolina Employment Security Commission denied her application because her unavailability to work on Saturdays violated the Act's requirement that claimants "be able to work" and be "available for work."[47] Therefore, the Commission concluded that the plaintiff was ineligible because she had failed to accept suitable work when offered.[48]

Although limited in its reach now, *Sherbert*'s influence on the Court cannot be denied, and it is particularly useful for outlining the Court's foundation for Free Exercise analysis.[49] The test in *Sherbert* first asks whether the government policy in controversy places any burden on religious practice.[50] The Court

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44. *See generally* Sherbert v. Verner, 374 U.S. 398 (1963); Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

45. *See Sherbert*, 374 U.S. at 407-08.

46. *Id.* at 399.

47. *Id.* at 400-01.

48. *Id.*

49. Although not directly applying the *Sherbert* test, the Court has discussed *Sherbert*'s influence on Freedom of Exercise issues in contemporary cases. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693-94 (2014). The Court also discussed the test in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* in determining whether the government had demonstrated a compelling interest in prohibiting a religious group from consuming a controlled substance during religious exercise. Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 431-32 (2006).

50. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

concluded that the challenged policy did in fact burden the petitioner's religious exercise.[51] The Court stated that if the effect of a law is to "impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[52] This standard requires courts to examine a policy's effects on religious practices, specifically whether the policy forces religious objectors to decide between following the precepts of their faith or adhering to a government ordinance.[53] With regard to the plaintiff in *Sherbert*, the Court stated that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[54]

Upon determining whether a policy substantially burdens free exercise, the analysis in *Sherbert* then asks whether that substantial burden is justified by a compelling state interest.[55] Compelling state interests, according to the Court, are those interests in avoiding "the gravest abuses, endangering paramount interests."[56] In *Sherbert*, the Employment Commission was worried about fraudulent claims made on the grounds of religious exceptions.[57] The Court stated that, in cases of that nature, the Commission would have to demonstrate that the law in question served a compelling state interest.[58] The Commission would also need to show that no alternative forms of regulation could "combat such abuses without infringing First Amendment rights."[59] If the Commission could not prove both prongs, it would fail to demonstrate a compelling interest that justified its violation of the plaintiff's First Amendment rights.[60]

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51. *Sherbert*, 374 U.S. at 403.
52. *Id.* at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).
53. *Id.*
54. *Id.* at 406.
55. *Id.*
56. *Id.*
57. *Id.*
58. *See id.* at 406-07.
59. *Id.* at 407.
60. *See id.* at 410-11.

2. *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH*

In *Smith*, the Court held that the *Sherbert* test does not apply in cases involving neutral and generally applicable laws.[61] The Court concluded that government actions incidentally burdening religious practices are not ordinarily subject to strict scrutiny[62] as long as the actions are both neutral and generally applicable.[63] Like the plaintiff in *Sherbert*, the respondents in *Smith* were denied unemployment benefits because they had engaged in certain activities associated with the practice of their religion.[64] Specifically, they had ingested peyote during a religious ceremony at the Native American Church and were fired from their jobs at a private drug rehabilitation center as a result.[65] The Employment Division denied their unemployment benefits application because they had been fired for misconduct.[66] The Oregon state courts ruled in the Employment Division's favor.[67] Upon reaching the Supreme Court for the first time, the case was remanded to determine whether sacramental peyote use was proscribed by Oregon's controlled substance law.[68] The Oregon Supreme Court held that although the Oregon statute regarding drug use did not make exceptions for religious use, the State could not deny the respondents their unemployment benefits.[69] The Employment Division then appealed to the Supreme Court, and the Court granted certiorari.[70]

The Court's ruling in *Smith* is more expansive than that in *Sherbert* because it ruled that government policies do not offend the First Amendment when they incidentally offend the exercise

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61. *See* Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 888-89 (1990).

62. Strict scrutiny is the highest standard that courts use to determine whether certain laws are constitutional. The test is often used when plaintiffs sue government entities for discrimination. *Strict Scrutiny*, Legal Information Institute Cornell Law School, https://www.law.cornell.edu/wex/strict_ scrutiny (last visited Nov. 23, 2021). To pass the strict scrutiny test, "the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest." *Id.*

63. *Smith*, 494 U.S. at 879.

64. *Id.* at 874.

65. *Id.*

66. *Id.*

67. *Id.* at 872.

68. *Id.*

69. *Id. at* 875.

70. *Id.*

of religion.[71] Instead, a government policy burdening a religious activity violates the First Amendment only if the object of the policy is to target the religious activity.[72] The *Smith* Court clarified this principle by providing what this Casenote calls "the neutral and generally applicable" test, stating that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law" infringes on the individual's right to exercise religion.[73] A law is neutral when it does not target a specific religious belief, and it is generally applicable when the government does not have to consider the reasons for a person's conduct by providing "a mechanism for individualized exceptions."[74]

The *Smith* Court also concluded that the *Sherbert* test should not apply to cases involving exceptions from generally applicable laws because *Sherbert* dealt with an individual religious objector.[75] The Court rejected the idea that an individual needs to comply with a generally applicable law only when that law is not incongruous with their religious beliefs, absent some compelling governmental interest.[76] Because the drug laws in Oregon were generally applicable, the incidental burden placed on the respondents of losing their jobs and being denied unemployment benefits was merely an "unavoidable consequence of democratic government."[77] The reasoning provided in the *Smith* opinion is the Court's most expansive precedent limiting the Free Exercise Clause, and as the concurring opinions in *Fulton* show, *Smith* is highly criticized for its breadth and its alleged difficulty to apply.

3. *CHURCH OF THE LUKUMI BABALU AYE, INC. V. CITY OF HIALEAH*

The Court's decision in *Lukumi* expounds on the definitions of "neutral" and "generally applicable" from *Smith*, and it also provides standards for strict scrutiny when laws fail the *Smith*

71. Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878 (1990).
72. *Id.*
73. *Id.* at 879 (citation and internal quotations omitted).
74. *Id.* at 884.
75. *Id.* at 884-85.
76. *See id.*
77. *Id.* at 890.

test.[78] To determine whether a law is neutral, the *Lukumi* Court created a subjective test using circumstantial evidence to illustrate whether the government targeted specific religious practices.[79] To determine whether a law is generally applicable, the Court reviewed the challenged policies and gauged whether the policies were underinclusive, thereby creating implicit exceptions for secular activities.[80]

The petitioners in *Lukumi* practiced the religion of Santeria, which requires animal sacrifice.[81] After the church leased land in Hialeah, Florida, the city council held an emergency session and passed four ordinances restricting the "unnecessar[y]" killing of an animal during a "ritual," while making exceptions for "small numbers of hogs and/or cattle," as well as for euthanasia.[82] The church filed suit alleging violations of its Free Exercise rights.[83] The district court acknowledged the infringement of the church's rights but decided that the government had a compelling interest in promoting public safety and preventing animal cruelty.[84] The Court of Appeals for the Eleventh Circuit affirmed, and the Supreme Court granted certiorari.[85]

In *Lukumi*, the Court applied principles from both *Sherbert* and *Smith.*[86] The Court stated that it must use a "mode" similar to an equal protection analysis to determine whether a law is neutral.[87] The Court used both direct and circumstantial evidence, listing the following factors as relevant to determining neutrality: "[1] the historical background of the decision under challenge, [2] the specific series of events leading to the enact-

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

79. *Id.* at 521.

80. *Id.* at 521-22.

81. *Id.* at 523.

82. *Id.* at 526-28.

83. *Id.* at 530.

84. *Id.*

85. *Id.*

86. *Id.* at 531, 533, 546. While the majority opinion does not cite to *Sherbert*, the opinion does state that when laws fail the *Smith* test, they are subject to the compelling interest test. The Court in *Sherbert* essentially applied that heightened level of judicial scrutiny, which requires the government to demonstrate a compelling interest when it burdens religious exercise. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

87. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993).

ment or official policy in question, and [3] the legislative or administrative history, including contemporaneous statements made by members of the decision-making body."[88] Once a law fails the neutral and generally applicable test, strict scrutiny must be applied, and the law must be shown to "advance 'interests of the highest order.'"[89] Notably, a law targeting a religious practice "will survive strict scrutiny only in rare cases."[90]

The *Lukumi* Court held that the City's ordinances were not neutral because they specifically targeted religiously motivated animal sacrifice.[91] The Court also held that the ordinances were not generally applicable because they allowed for certain types of unnecessary animal killing, like hunting, while prohibiting the same activity when done for religious purposes.[92] Regarding neutrality, the Court applied each of the three neutrality factors and decided that the City had implemented its ordinances to specifically target the church's practices.[93] The City did argue that its ordinances served the compelling state interest of public health and safety by prohibiting an unsanitary activity.[94] The Court still concluded that it could not consider those interests as compelling because the City itself had not treated the interests as compelling: it had prohibited religious activities but allowed for similar secular activities.[95] The Court reasoned that the City could accomplish its goal of serving the interest of public health and safety in a way that would not unduly burden religious activities.[96] The *Lukumi* decision is important regarding *Fulton* because the majority applied the three factors from *Lukumi* in deciding whether Philadelphia's policies were neutral.[97]

88. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 545-46.
89. *Id.* at 546 (citation omitted).
90. *Id.*
91. *Id.* at 542.
92. *Id.* at 545.
93. *Id.* at 534-36.
94. *Id.* at 527-28.
95. *Id.* at 545-46.
96. *Id.* at 546.
97. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).

C. THE INTERSECTION OF RELIGION AND LGBTQ+ RIGHTS

In June of 2015, the Court granted same-sex couples the right to marry.[98] Although the majority's opinion was revolutionary in granting this right, it also purported to strike a balance between the freedom to exercise religion and the ability for same-sex couples to obtain the same rights as couples of the opposite sex.[99] Chief Justice Roberts and Justices Scalia, Thomas, and Alito each filed dissenting opinions declaring that striking this type of balance is impossible.[100] Soon after the decision in *Obergefell*, *Masterpiece Cakeshop* forced the Court back into this intersection of the freedom of religion and LGBTQ+ rights when a baker refused to make a cake for a same-sex wedding.[101] The Court ruled in *Masterpiece Cakeshop* that the Colorado Civil Rights Commission did not employ religious neutrality, thereby violating the baker's right to free exercise.[102] The Court did not address the conflict between the freedom of religion and anti-discrimination; instead, it focused on the lack of neutrality.[103] The language in *Obergefell* and the subsequent reasoning in *Masterpiece Cakeshop* heavily influenced the Court's ruling in *Fulton*.[104]

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98. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

99. *Id.* at 679-80 (discussing long-held religious beliefs and the ability of adherents to continue exercising such beliefs while still granting same-sex couples the right to marry).

100. *Id.* at 689-91 (Roberts, C.J., dissenting); *id.* at 715-17 (Scalia, J., dissenting); *id.* at 735-36 (Thomas, J., dissenting); *id.* at 741-42 (Alito, J., dissenting). Each dissent describes the apparent violation of certain aspects of religious exercise and the apparent degradation and harm toward those who oppose same-sex marriage. *Id.*

101. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

102. *Id.* at 1732.

103. *Id.* at 1729-31.

104. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (citing the reasoning from *Masterpiece* to support rule that governments do not act neutrally when they "restrict[] practices because of their religious nature."). While Chief Justice Roberts's opinion does not directly cite to *Obergefell,* the opinion does reflect the notion from *Obergefell* that "those who adhere to religious doctrines may continue to advocate . . . that, by divine precepts, same-sex marriage should not be condoned." *Obergefell*, 576 U.S. at 679. The opinion asserts that CSS wants to act in accordance with its religious beliefs in refusing to certify same-sex couples. *See Fulton*, 141 S. Ct. at 1882. Further, Justice Alito's concurrence uses the same language from *Obergefell* to support his notion that the possible harm caused by CSS's religious objection is not equal to racism and other forms of bigotry. *See id.* at 1925 (Alito, J., concurring).

1. *OBERGEFELL V. HODGES*

Obergefell is particularly instructive because the Court provided for marriage equality but also included specific language upholding the importance of the Free Exercise Clause.[105] The petitioners in that case, fourteen same-sex couples and two men whose same-sex partners were deceased, brought actions in their home states' federal district courts.[106] The petitioners claimed that state officials violated their rights under the Fourteenth Amendment by denying their right to marry or by refusing to recognize their marriages that were legally performed in other states.[107] All of the district courts ruled in favor of the petitioners, but the Sixth Circuit consolidated the cases and reversed the district courts' decisions.[108] The Supreme Court granted certiorari.[109]

The Court held that the petitioners' home states had violated their rights under the Fourteenth Amendment.[110] The majority's opinion explored the history of the institution of marriage in the United States, noting that the history is "one of both continuity and change."[111] Writing for the majority, Justice Kennedy stated that "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations."[112] The bulk of the opinion provides four principles demonstrating "that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[113] First, the personal choice of marriage is intrinsic to the concept of individual autonomy.[114] Second, the Court's jurisprudence makes the right to marry fundamental because marriage is a "two-person union unlike any other in its importance to the committed individuals."[115] Third, protecting same-sex couples' right to marry "safeguards children and families . . . draw[ing]

105. Obergefell v. Hodges, 576 U.S. 644, 679-80 (2015) (recognizing the long-held beliefs of religious objectors and granting same-sex couples the right to marry).

106. *Id.* at 655.

107. *Id.*

108. *Id.* at 656.

109. *Id.*

110. *Id.* at 681.

111. *Id.* at 659.

112. *Id.* at 660.

113. *Id.* at 665.

114. *Id.*

115. *Id.* at 666.

meaning from related rights of childrearing, procreation, and education."[116] Last, precedent and tradition make marriage a "keystone of our social order."[117] In applying these four principles to the petitioners' case, the Court concluded that the Fourteenth Amendment requires states to license marriages between same-sex couples.[118]

In spite of the decision's revolutionary outcome, the majority nonetheless acknowledged an individual's right to advocate against same-sex marriage for religious reasons.[119] First, the majority stated that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[120] The opinion also stated that people who oppose same-sex marriage for religious reasons "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[121]

In his dissent, Chief Justice Roberts predicted that the majority's decision would "create[] serious questions about religious liberty," because "[m]any good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is . . . actually spelled out in the Constitution."[122] He foresaw the situations in *Fulton* and *Masterpiece Cakeshop*, declaring that "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, . . . a religious adoption agency declines to place children with same-sex married couples."[123] Justice Scalia also expressed fear about the future of religious liberty, stating, "the majority's decision threatens the religious liberty our Nation has long sought to protect."[124] He also asserted that marriage is not solely a governmental institution but is also a "religious institution," and that the freedom of religion is about "ac-

116. Obergefell v. Hodges, 576 U.S. 644, 667 (2015).

117. *Id.* at 669.

118. *Id.* at 681.

119. *Id.* at 679-680 ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with the utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.").

120. *Id.* at 672.

121. *Id.* at 679.

122. *Id.* at 711 (Roberts, C.J., dissenting).

123. *Id.*

124. *Id.* at 733 (Scalia, J., dissenting).

tion in matters of religion generally" and is "directly correlated to the civil restraints placed upon religious practices."[125]

Although the decision in *Obergefell* resulted in marriage equality for same-sex couples, the opinions, even the majority's, go to great lengths to validate the actions and beliefs of those who religiously object to same-sex marriage.[126] The language in the majority and dissenting opinions gives credence to the beliefs of religious objectors and was used by the *Fulton* Court in support of CSS's case.[127]

2. *MASTERPIECE CAKESHOP V. COLORADO COMMISSION OF CIVIL RIGHTS*

Masterpiece Cakeshop supplies almost the exact reasoning employed by the Court later in *Fulton* and shows the Court's trepidation to approach the tension between the free exercise of religion and equal protection under the law.[128] In 2012, Jack Philips, the owner of Masterpiece Cakeshop, told a same-sex couple that he would not make a cake for their wedding because his religious beliefs did not condone their relationship.[129] The Colorado Civil Rights Commission concluded that Philips's actions violated the Colorado Anti-Discrimination Act, and the Colorado State courts affirmed that decision.[130]

The Supreme Court granted certiorari to determine whether the Commission's order violated Philips's First Amendment rights[131] and answered in the affirmative.[132] The Court reasoned that although the Constitution protects same-sex couples' right to marry, religious objections to same-sex marriages are nonetheless protected views and forms of expression.[133] The Court also stated

125. Obergefell v. Hodges, 576 U.S. 644, 734 (2015).

126. *See id.* at 679-80; *see also id.* at 689-91 (Roberts, C.J., dissenting), 715-17 (Scalia, J., dissenting), 735-36 (Thomas, J., dissenting), 741-42 (Alito, J., dissenting).

127. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (quoting the notion from *Masterpiece* that American society no longer ostracizes same-sex couples but refusing to recognize the protection of same-sex couples from stigma as sufficiently compelling); *see infra* note 225, which provides citations to *Obergefell* dissents.

128. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723-24 (2018).

129. *Id.* at 1723.

130. *Id.*

131. *Id.*

132. *Id.* at 1732.

133. *Id.* at 1727 (citing Obergefell v. Hodges, 576 U.S. 644, 679-80 (2015)).

that Colorado can enact policies and statutes that protect same-sex couples.[134] For instance, Colorado could ensure that same-sex couples are offered the same terms and conditions in the acquiring of goods and services as are other citizens; however, any given policies must be neutral toward religion.[135] The Court reasoned that "[t]he neutral and respectful consideration to which Philips was entitled was compromised."[136] The Court applied the three neutrality factors from *Lukumi*[137] and concluded that the historical background of the Commission's decision; the events and context of the implementation of the Colorado Anti-Discrimination Act; and the administrative history, including statements made by commissioners during hearings, demonstrated a hostility toward Philips's religious beliefs.[138]

The Court concluded that the Commission's actions were hostile toward Philips's religious beliefs and ruled that those actions "violated the Free Exercise Clause."[139] Because the Court found that Commission's actions were not neutral toward Philips's religious exercise, it did not have to consider whether the state-wide policy violated the First Amendment.[140] Justice Ginsburg's dissent, in which Justice Sotomayor joined, disagreed with the majority's contention that the Colorado Anti-Discrimination Act was applied in hostility.[141] Although it does not necessarily offer a solution to the impasse, the dissent does provide a glimpse of one. First, Justice Ginsburg stated that "[w]hat matters is that Philips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple."[142] She also asserted that "the comments of one or two Commissioners should [not] . . . overcome Philips'[s] refusal to sell

134. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1728 (2018).

135. *Id.*

136. *Id.* at 1729.

137. The three factors are: "[1] the historical background of the decision under challenge, [2] the specific series of events leading to the enactment or official policy in question, and [3] the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993).

138. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731-32 (citing *Lukumi*, 508 U.S. at 520).

139. *Id.* at 1724.

140. *Id.*

141. *Id.* at 1748-49 (Ginsburg, J., dissenting).

142. *Id.* at 1750 (Ginsburg, J., dissenting).

a wedding cake."[143] According to Ginsburg, the majority did not identify any prejudice in the adjudication of the case before or after the Commission.[144] Because the adjudication was fair and the couple was not offered the same goods or services as a heterosexual couple, Justice Ginsburg concluded that the Commission's application of the anti-discrimination act was "sensible" and that the lower court's decision should be affirmed.[145]

Although Justice Ginsburg's reasoning does not offer an explicit path to navigate the crossroads of free exercise and anti-discrimination, the reasoning illustrates that, when faced with a case involving such a crossroads, courts should determine whether same-sex couples are being denied something that heterosexual couples are not.[146] Justice Ginsburg also applied the third neutrality factor from *Lukumi*, requiring an analysis of the statements made by members of the decision-making body that created the policy.[147] She concluded that the neutrality factor did not weigh in Philips's favor, remarking that statements made by members of the Colorado Commission "provide[d] no firmer support for the Court's holding."[148] Regardless, the Court in *Fulton* used the majority's opinion from *Masterpiece Cakeshop* to further define the neutrality standard and to avoid balancing the rights of same-sex couples with the freedom to exercise religion.

III. THE COURT'S DECISION IN *FULTON*

In *Fulton*, the Court held that Philadelphia's actions violated CSS's freedom to exercise religion.[149] The Court first determined whether CSS's freedom to exercise religion had been burdened, which is the first step in the *Smith* analysis.[150] The Court concluded that the "City's actions . . . burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs."[151] The Court

143. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1751 (2018).

144. *Id.*

145. *Id.* at 1752.

146. *Id.* at 1750.

147. *Id.* at 1751; *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993).

148. *Id.* at 1751 (Ginsburg, J., dissenting).

149. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

150. *Id.* at 1876.

151. *Id.*

applied the "general applicability" prong of the *Smith* test, calling it more "straightforward" than the "neutrality" prong for the purposes of the instant case.[152] The *Fulton* majority stated that a "law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exceptions."[153] Further, the Court stated that the government cannot refuse to extend exceptions for "religious hardship" without a compelling reason where a system of individualized exceptions for other secular reasons already exists.[154]

Applying these rules, the Court concluded that the provision found in Section 3.21 of the City's standard contract with foster care agencies was not generally applicable because it created a system of individualized exceptions.[155] Section 3.21 stated that "[a]n exception [can be] granted by the Commissioner . . . in his/her sole discretion."[156] Although the Commissioner did not intend to grant any exceptions, the very creation of an exception system "render[ed] the contractual non-discrimination requirement not generally applicable."[157] The Court also reasoned that even though the heading of Section 3.21 reads "Rejection of Referral," the actual text of the section is broader than what the heading claims.[158] The Court stated that although the contract does have another section barring discrimination based on sexual orientation (Section 15.1), Section 3.21 must govern the other section as well because one section of the contract cannot nullify the other.[159] Overall, the Court concluded that, because the contract allowed for exceptions at the Commissioner's discretion, the nondiscrimination clause was not generally applicable.[160] The Court also reviewed the City's Fair Practices Ordinance, which the City claimed required CSS's compliance.[161]

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

153. *Id.* at 1872 (citing Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990)).

154. *Id.*

155. *Id.* at 1877-78.

156. *See* Supp. App. to Brief for City Respondents at 16-17, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

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

158. *Id.* at 1878-79.

159. *Id.* at 1879.

160. *Id.*

161. The ordinance is a city-wide anti-discrimination policy prohibiting impeding an individual's access to public accommodations based on sexual orientation, race,

Because it concluded that the contract's non-discrimination provision was not "generally applicable," the majority subjected the City's actions to strict scrutiny.[162] Strict scrutiny requires the government to show that its actions serve a compelling state interest, and the Court stated that the City's three proposed interests were insufficient.[163] First, the Court found that the City had failed to show that granting an exception to CSS would hurt the City's interest in maximizing the number of families certified.[164] Second, the Court found that the City offered nothing more than speculation that it might be held liable for CSS's certification process.[165] Third, although ensuring equal treatment for prospective foster parents and children is an important interest,[166] the "creation of a system for exemptions . . . undermines the City's contention that its non-discrimination policies can brook no departures."[167] The Court concluded that because the City's contractual requirements were not generally applicable and because the City did not identify any compelling governmental interests that would justify its denial of an exception, the City's policies violated CSS's right to free exercise of religion.[168]

Both Justices Gorsuch and Alito authored concurring opinions, both joined by Justice Thomas, agreeing with the overall decision of the majority but advocating to overrule *Smith*.[169] Justice Gorsuch articulated a fear that cases like *Fulton* would "slog on

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ethnicity, and other protected categories. Phila. Code § 9-1106(1) (2016). The Court concluded that the ordinance was not binding on CSS's actions and therefore did not need to decide on the ordinance's general applicability. *Fulton*, 141 S. Ct. at 1880. The Court reasoned that certification for foster care is not a public accommodation, as defined by the ordinance, because agencies like CSS are not providing "goods, services, facilities . . . [that are] extended, offered, sold, or otherwise made available to the public." *Id.* A public accommodation, according to the Court, 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." *Id.* Because certification involves a highly individualized assessment of potential families and because each agency has different requirements, the Court concluded that certification cannot be considered a public accommodation. *Id.* at 1880.

162. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).

163. *Id.*

164. *Id.* at 1881-82.

165. *See id.*

166. *Id.* at 1882 (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018)).

167. *Id.*

168. *Id.* at 1881-82.

169. *Id.* at 1883 (Alito, J., concurring); *id.* at 1931 (Gorsuch, J., concurring).

for years to come, consuming time and resources."[170] The majority's refusal to address *Smith*, Justice Gorsuch contended, would cause a wave of litigation until the Court finally confronted the precedent.[171]

Justice Alito's concurring opinion detailed a lengthy history of the freedom to exercise religion, providing, as he contended, the founders' intention in writing the Free Exercise Clause.[172] Fearing a "devastating effect on religious freedom,"[173] Justice Alito reasoned that the *Smith* test neither conforms to the founders' intent,[174] nor is it easily applied or understood by the overall judicial system.[175] In analyzing the majority's opinion, Justice Alito stated that focusing on the contractual clause in Philadelphia's standard foster care contract did not provide an actual resolution.[176] The City could simply delete the clause allowing for exception and hold CSS to a new contract.[177] Because of *Smith*'s odd reasoning, inconsistency with other precedents, lack of workability, and subsequent developments, Justice Alito asserted that *Smith* should be overruled.[178]

IV. ANALYSIS: KEEPING *SMITH* PERPETUATES CONFUSION AND DISCRMINATION

The Court's decisions in *Obergefell*, *Masterpiece Cakeshop*, and *Fulton* each demonstrate an unwillingness to resolve this seemingly insurmountable clash between anti-discrimination policies and religious freedom. Although possible solutions to this quandary are difficult to pinpoint, sidestepping a possible overruling of *Smith* does not bring jurisprudence any closer to fixing the impasse. The majority opinion in *Fulton* provides no path forward, and the timeline and facts of *Obergefell*, *Masterpiece Cakeshop*, and *Fulton* demonstrate the surface-level pressure between granting religious exceptions and upholding anti-discrimination policies.

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170. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1929 (Gorsuch, J., concurring).
171. *Id.* at 1931.
172. *Id.* at 1883-1925 (Alito, J., concurring).
173. *Id.* at 1883.
174. *Id.* at 1884.
175. *Id.* at 1888.
176. *Id.* at 1887.
177. *Id.*
178. *Id.* at 1912-23.

The Court should have used *Fulton* to overrule *Smith* and reinstate the *Sherbert* test, which requires answering [1] whether required compliance with a government action burdens religious exercise; [2] whether the requirement serves a compelling interest; and [3] whether requiring an actor to comply is a necessary means of serving that interest.[179] *Sherbert* provides a clearer and easier analysis, although its application would not have changed the outcome in *Fulton*. Nonetheless, *Sherbert* is still a better precedent than *Smith* because it establishes defined expectations for all parties and would give government actors a clearer standard to use when creating anti-discrimination policies, theoretically making religious exceptions harder to obtain. Overruling *Smith* might bring more free exercise challenges from religious objectors; however, the *Sherbert* test provides an explicit outline for anti-discrimination policymakers and a clearer standard for courts to apply. Even if policies place burdens on free exercise, policy makers need only show that those policies serve a compelling state interest and that requiring objectors to comply serves that interest.[180] Lastly, for the purposes of the *Sherbert* test, protecting the LGBTQ+ community from stigmatization is a compelling state interest that should always trump free exercise claims.[181]

A. THE NECESSITY OF OVERRULING *SMITH*

The petitioners in *Fulton* specifically asked the Court to reconsider its ruling in *Smith*, which demonstrates a desire for a clearer test for free exercise claims.[182] Chief Justice Roberts's opinion, however, reasoned that because neither Philadelphia's Fair Practice Ordinance nor the anti-discrimination clauses in the City's standard foster care contract were generally applicable, the Court did not need to broach the subject of *Smith*.[183] Justice Barrett echoed this reasoning in her concurrence and also won-

179. Sherbert v. Verner, 374 U.S. 398, 403-07 (1963).

180. *Id.* at 406.

181. Stigmatization is the main form of discrimination the LGBTQ+ community faces as a result from courts siding with religious objectors using the *Smith* analysis. *See infra* note 233 (discussing Professor Barak-Corren's findings regarding same-sex couples and wedding vendors in the wake of the *Masterpiece Cakeshop* decision). This Casenote argues that protecting the LGBTQ+ community from stigma should be considered a compelling state interest.

182. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021).

183. *Id.* at 1876-77.

dered what could possibly replace *Smith*.[184] But the correct answer, as Justice Alito asserted, is that the pre-*Smith* precedents should simply replace *Smith*.[185] Scholars both in favor of and against religious exceptions have lamented and criticized the Court's ruling in *Smith* for nearly thirty years.[186] Like Justice Alito, critics decry the *Smith* analysis as convoluted, incomplete, and inconsistent with precedent.[187]

The facts in *Fulton* provided the Court with the perfect avenue to reconsider *Smith*. The City's forced choice between respecting the rights of a long-established Catholic charity to exercise its religious beliefs and providing equality to the LGBTQ+ community is the type of nuanced and complex situation the *Smith* analysis simply cannot handle. On one side, CSS asserted that it would have to choose between complying with the city-wide policy and acting in a manner inconsistent with its religious beliefs. On the other side, the City claimed that it has a distinct interest in protecting both its children in foster care and members of the LGBTQ+ community from discrimination. The *Smith* analysis is too confusing to solve this.[188] Applying the *Sherbert* test would simply require the City to demonstrate that such protection is a compelling state interest, and that requiring CSS to comply serves that interest.

The *Smith* test calls for laws to be both generally applicable and neutral.[189] The Court concluded that the anti-discrimination

184. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

185. *See id.* at 1892 (Alito, J., concurring).

186. See Gary J. Simson, *Constitutional Law and the Culture Wars: When Religious Liberty and the Law Conflict, Which Should Prevail?*, Mercer University Press, FREEDOM AND SOCIETY ESSAYS ON AUTONOMY, IDENTITY, AND POLITICAL FREEDOM (forthcoming 2021) (manuscript at 6, fn.19) (providing citations to scholarship on both sides of the issue).

187. *See generally id.*; William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

188. In his concurrence in *Fulton*, Justice Alito discusses at length the problems *Smith* has presented over the past thirty years, noting its distinct lack of "workability." *Fulton*, 141 S. Ct. at 1917-19 (Alito, J., concurring). Justice Gorsuch notes the same "unworkable" quality in his concurrence, as well. *Id.* at 1926 (Gorsuch, J., concurring). While the Court does not overturn precedent because of its lack of workability, future litigants should note this quality of the *Smith* analysis, particularly considering the current makeup of the Court.

189. Emp't Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 888-89 (1990) ("The right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)").

policy was not generally applicable because the City's foster care system allowed for the Commissioner to make exceptions at their discretion.[190] This conclusion applied regardless of whether the Commissioner had granted any prior exceptions.[191] The petitioners claimed that the City violated its own anti-discrimination policies, and specifically the exceptions clause, by allowing agencies to consider an applicant's possible "disability" during the certification process.[192] This consideration of a person's disabilities is, however, mandated by the state of Pennsylvania and is only permitted in assessing the applicant's ability to care for a child.[193] The petitioners also claimed that the City's allowance for agencies to review a specific child's special needs during the placement process violated the anti-discrimination policies and the exceptions clause.[194] These requirements served the City's interest in protecting their foster children, which is certainly a compelling state interest.[195] Because the ability to consider an applicant's disability was found in the state-mandated criteria, the ability is given to all licensed agencies and should have been considered generally applicable.[196] Analyzing the issue of exceptions, however, demonstrates the confusion the *Smith* test breeds.

Exceptions involving religious objections are complicated and are different in logic and kind from other exceptions.[197] Religiously based exceptions like the ones requested by CSS in *Fulton* and by the petitioners in *Masterpiece Cakeshop*, "amplify the material and dignitary harms that accommodation of the claims can inflict on other citizens,"[198] specifically on the LGBTQ+ community. In *Fulton*, CSS argued that it was no different from agencies that seek an exception from certifying individuals with certain

190. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881-82 (2021).

191. *See id.* at 1879.

192. *See* Brief for Respondents at 31, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

193. *Id.*

194. *Id.*

195. *Id.*

196. *See id.* at 31-32 (citing 55 Pa. Code § 3700.64, which is the Pennsylvania statute providing the state-mandated criteria for potential foster parents). The ability to consider an applicant's disability extends only to that applicant's "ability to care for the child." *Id.* at 31. The statute does not refer to this consideration as an "exception" anyway; it is a requirement on agencies to "consider" a person's disability. *Id.*

197. *See* Douglas Nejaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015).

198. *Id.*

disabilities from becoming foster parents.[199] An exception of that nature, however, is based on objective criteria focused on supporting the interests of the entity in question, i.e. providing the best care for foster children.[200] Religious objections are different because religious objections to family certifications are based on hardened, orthodox teachings instead of objective, state-mandated criteria. The ability to consider a person's disability was not truly an exception because that ability is found in state statutes and is given to all agencies.[201]

A law's general applicability does not fully encapsulate the complexity of the situation in which a court is placed when attempting to provide clarity. In *Fulton,* the examples that the petitioners claimed qualified as exceptions during the certification process were actually provided for by state statutes.[202] The *Fulton* opinion demonstrates an inability to understand the exact meaning of general applicability and "exception."[203] If the Court overruled *Smith* and applied the test in *Sherbert*, the City would simply need to demonstrate a compelling state interest and a means of serving that interest.[204] Because it refused to recognize any of the City's proffered interests as compelling, the Court would have reached the same conclusion.[205] Yet had the Court overruled *Smith*, the confusing territory of general applicability analysis would have become irrelevant.

Lastly, ensuring equality and access to historically marginalized groups is important and is recognized as such by the

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199. *See generally* Reply Brief for Petitioners at 4, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (No. 19-123).

200. Reply Brief for Petitioners, *supra* note 199, at 4.

201. *See* Brief for Respondents, *supra* note 192, at 31; *see infra* note 203 (discussing citations to the Pennsylvania Code regarding foster care made in the *Fulton* opinion).

202. *See* 55 Pa. Code § 3700.64; Brief for Respondents, *supra* note 192, at 31.

203. *See Fulton*, 141 S. Ct. at 1880, 1882 (citing 55 Pa. Code § 3700.64). Chief Justice Roberts's opinion cites the Pennsylvania Code providing the state-mandated criteria for potential foster parents, but the opinion still asserts that the City "den[ied] an exception to CSS while making them [exceptions] available to others." *Id.* at 1882. Although the City's foster care system did allow for possible exceptions at the Commissioner's discretion, none had been granted, and the state-mandated criteria in the Pennsylvania Code provides required considerations for foster care agencies. It does not provide for exceptions. *See id.* at 1879.

204. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

205. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881-82 (2021).

Court.[206] Such a well-established concept requires an expansive legal analysis, one with a clear process and standard. The general applicability prong of *Smith* is too scant and incapacious to be applied to difficult situations, like the situation presented in *Fulton*. Although there is a two-pronged analysis, that analysis is incomplete. It does not account for the contentious and nuanced tension between religious exceptions and anti-discrimination.

B. *SHERBERT* PROVIDES CLARITY AND EASE

The Court should revert to the clearer and easier *Sherbert* analysis because the analysis under *Smith* is too confusing. If a Court were to apply the *Sherbert* test to the facts in *Fulton*, it would have to answer the following three questions:

i. Does requiring CSS to comply with the City's anti-discrimination policies place a substantial burden on CSS's right to exercise religion?

ii. If so, does requiring CSS to comply serve a compelling state interest?

iii. If so, is requiring CSS to comply a necessary means of serving that interest?[207]

The first question serves as a threshold matter that must be answered in the affirmative before moving on, and it may be presumed answered by the facts of the situation. However, in ana-

206. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); Loving v. Virginia, 388 U.S. 1 (1967) (holding that state laws which prohibit marriage exclusively on the basis of race violate the 14th Amendment); Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that laws may not give effect to private racial biases); Craig v. Boren, 429 U.S. 190 (1976) (holding unconstitutional state laws that discriminate on the basis of sex when the laws are founded upon archaic stereotypes); United States v. Virginia, 518 U.S. 515 (1996) (reasoning that differences between men and women can only be used legally to remedy the history of sex discrimination against women); Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (holding unconstitutional a law that was based on outdated stereotypes about unwed fathers). Each of these cases demonstrates the importance the Court has placed on ensuring equality for traditionally marginalized groups.

207. Professor Simson applies these questions to the *Masterpiece* case and illustrates that the Court could have used *Masterpiece* to overrule *Smith*. Gary J. Simson, *Constitutional Law and the Culture Wars: When Religious Liberty and the Law Conflict, Which Should Prevail?*, Mercer University Press, FREEDOM AND SOCIETY ESSAYS ON AUTONOMY, IDENTITY, AND POLITICAL FREEDOM (forthcoming 2021) (manuscript at 11).

lyzing the City's actions in *Fulton*, it is not entirely clear that the City placed a substantial burden on CSS. The key to determining whether CSS's right to exercise was substantially burdened is to ask if the organization had other options to carry out their duties as a foster care agency.[208]

The petitioners in *Masterpiece Cakeshop* and in *Fulton* claimed that they were faced with one option: choosing between exercising their religious beliefs or complying with an anti-discrimination law.[209] The characterization of that choice is not exactly accurate. As Justice Ginsburg discussed in her dissent, the petitioner could choose either to provide a service to everyone equally or not to provide the service at all.[210] The petitioner, therefore, could either make wedding cakes for heterosexual and same-sex couples alike or not make wedding cakes at all.[211] Justice Ginsburg suggested that the baker could have expanded his business into birthday cakes and other celebrations or expanded his offerings of other baked goods.[212] This option is not a light burden, as giving up wedding business could greatly change the petitioner's business. However, bearing this burden should have been required to serve the state's compelling interest in protecting the LGBTQ+ community from discrimination.

In *Fulton*, the options were not easy either. CSS did not have an alternative way of providing foster care services. However, CSS's claim that certifying a same-sex couple for foster care is tantamount to endorsing their relationship is not entirely fair. Certification is the first step in a long process in matching foster children with families, and agencies apply state-mandated criteria when certifying individuals or couples.[213] Once the certification process is complete, families are placed into a pool of certified families.[214] Agencies then look into that pool to find potential

208. Justice Ginsburg's dissent in *Masterpiece* makes this very argument, stating that the baker had an option either to make the cake for the same-sex couple or to stop making wedding cakes and build his business in other ways. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1750 (2018) (Ginsburg, J., dissenting).

209. Brief for Petitioners, *supra* note 2, at 9.

210. *Masterpiece Cakeshop*, 138 S. Ct. at 1752 (Ginsburg, J., dissenting).

211. *Id.* at 1750.

212. *Id.*

213. *See* Brief for Respondents, *supra* note 192, at 4-6.

214. *See id.*

families during the matching process.[215] Matching, according to the City's policy, is allowed to be discriminatory.[216] For example, one foster child in Philadelphia who had previously painted a racial slur on a wall was not placed with a family of color.[217] The City maintained that during the matching process, it would be acceptable for CSS to decide that it was in the best interest of a child not to place them in a same-sex couple's household.[218] The City simply wanted to keep the certification process to the statute-mandated criteria and to make the pool of certified families as large as possible.[219] There are around thirty foster care agencies in Philadelphia, so other agencies would surely see the certified same-sex couples in the pool.[220] Of course, allowing such exceptions during the matching phase could still cause stigmatic harm. However, even if disallowing exceptions at the matching phase burdened CSS, protecting the LGBTQ+ community from stigma should be more important.

The next question to answer in applying the *Sherbert* test is determining whether a policy serves a "compelling state interest." Protecting the LGBTQ+ community from stigma and discrimination is a compelling state interest. According to the Court in *Sherbert*, a compelling interest involves the "gravest abuses, endangering paramount interests, [which] give occasion for permissible limitation."[221] Though a clear definition of "compelling" is not easily found, the Court in *Obergefell* and in *Fulton* considered racial equality a compelling state interest.[222] This concept stems from protecting historically marginalized groups from stigmatization.[223] During oral arguments in *Fulton*, both Justices Breyer and Kagan asked the attorneys whether there is any difference

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215. *See* Brief for Respondents, *supra* note 192, at 4-6.

216. *See id.*

217. Oral Argument at 1:09:56, *Fulton*, 141 S. Ct. 1868 (No. 19-123), https://www.oyez.org/cases/2020/19-123.

218. *Id.* at 54:40.

219. *See* Brief for Respondents, *supra* note 192, at 5-6.

220. *See* Oral Argument, *supra* note 217, at 23:21. The City argued that this practice of allowing such discrimination during the matching process can also protect LGBTQ+ foster children from being placed into the wrong homes. It is not simply a practice to protect the applicants. *See id.* at 54:44.

221. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (citation omitted).

222. Obergefell v. Hodges, 576 U.S. 644, 645 (2015) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

223. *Id.*; *see supra* note 206 (detailing Supreme Court decisions aimed at ensuring equality to historically marginalized groups).

between protecting race and sexual orientation.[224] Although the dissents in *Obergefell* show a distinct rejection of the idea that ensuring equality to the LGBTQ+ community is a compelling state interest,[225] governments should assert this as a compelling interest because data shows that stigmatization of this community is increasing in the wake of the *Masterpiece Cakeshop* decision.[226] In its brief to the Supreme Court, the City of Philadelphia claimed that protecting the dignity of same-sex couples and shielding them from stigmatization is a compelling state interest.[227] The City also claimed that protecting children, specifically LGBTQ+ children, from stigma was also a compelling state interest.[228] Additionally, Justice Kavanaugh admitted that the fear of stigmatization is a real concern.[229] The majority opinion even cites *Masterpiece Cakeshop*, stating, "Our 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."[230]

However, the unfortunate persistence of discrimination against the LGBTQ+ community is well-documented. For example, Professor Netta Barak-Corren detailed a lengthy experiment in which she measured the increase in discrimination toward LGBTQ+ people post-*Masterpiece Cakeshop*.[231] She found that vendors were less willing to provide services to same-sex couples than to opposite-sex couples—even vendors who had previously

224. *See* Oral Argument, *supra* note 217, at 34:07, 37:37, 43:11, 1:37:49.

225. *See Obergefell*, 576 U.S. at 687, 711-12 (Roberts, C.J., dissenting) (noting possible stigmatic injury by claiming the decision might "cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept," but nevertheless concluding that the free exercise claims of religious objectors to same-sex marriage are stronger than the equal protection claims of same-sex couples); *id.* at 718-19 (Scalia, J., dissenting) (concluding that a same-sex couple's right to marry is not a fundamental right protected by the Constitution); *id.* at 733 (Thomas, J., dissenting) (reasoning that the protections for religious liberty are more important than the right of same-sex couples to marry).

226. *See* Netta Barak-Corren, *A License to Discriminate? The Market Response* to Masterpiece Cakeshop, 56 HARV. C.R.-C.L. L. REV. 1, 35 (2021).

227. *See* Brief for Respondents, *supra* note 192, at 25.

228. *Id.*

229. Oral Argument, *supra* note 217, at 1:16:09.

230. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (citing Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

231. *See* Netta Barak-Corren, *supra* note 226, at 27 (2021). Professor Barak-Corren's research design is complex, but the experiment entailed sending emails to wedding vendors asking for services for a same-sex wedding and recording their responses. *Id.*

provided said services to same-sex couples.[232] She also found that the odds that a same-sex couple would experience discrimination from vendors were anywhere between 61% and 85%, depending on their geographic location.[233] Overall, she found a 14% change in the difference between how opposite-sex couples and same-sex couples were treated by vendors post-*Masterpiece Cakeshop*.[234] This increase is nothing short of astounding, and it illustrates the detrimental consequences of decisions like *Masterpiece Cakeshop* and *Fulton*. Those decisions not only change jurisprudence, but also affect the social attitudes of the population. The effects of a judicial decision like *Fulton* are sizeable, as illustrated by Professor Barak-Corren's article and by the amount of amicus curiae filed on both sides of the *Fulton* case.[235]

Creating a compelling state interest in protecting the LGBTQ+ community is therefore necessary due to the increases in discrimination and stigmatization. Given the wave of discrimination Professor Barak-Corren details,[236] religious objectors' narrative that allowing one baker in Colorado to be exempt from an anti-discrimination policy is an insignificant decision is clearly false.[237] Decisions like *Fulton* and *Masterpiece Cakeshop* are not shields protecting religious objectors but rather swords religious objectors use to justify discrimination.

Assuming that protecting the LGBTQ+ community from stigma is a compelling state interest, courts must then decide whether requiring an individual to comply with an anti-

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232. *See* Netta Barak-Corren, *supra* note 226, at 35 (2021).

233. *See id.* at 38-39. States that had passed laws like the Religious Freedom Restoration Act of 1993 (RFRA) and that had no anti-discrimination policies in place showed a greater increase in discrimination toward same-sex couples. *Id.* States with anti-discrimination laws in place but also with RFRA-like laws showed an increase but not quite at the same level as the states with only RFRAs. *Id.* Finally, states with only anti-discrimination laws and no RFRAs showed the smallest increase, but an increase nonetheless. *Id.*

234. *Id.* at 35-38.

235. *See generally id.* Entities like the Catholic Church, seventy-six members of Congress, and the National Association of Evangelicals filed amici curiae for the petitioners, while the ACLU, PFLAG, and the Anti-Defamation League did the same for the respondents. *See* Fulton v. City of Philadelphia, American Civil Liberties Union (Nov. 8, 2021), https://www.aclu.org/cases/fulton-v-city-philadelphia.

236. *See* Netta Barak-Corren, *supra* note 226, at 35.

237. *See* Scott Lemieux, *How the 'Narrow' Ruling in* Masterpiece Cakeshop *Could Undermine Future Civil Rights Cases*, NBC News (June 5, 2018), https://www.nbcnews.com/think/opinion/how-narrow-ruling-masterpiece- cakeshop-could-undermine-future-civil-rights-ncna879976.

discrimination policy is the necessary means of serving that interest. Considering the facts in *Fulton*, Philadelphia's requirement for CSS to comply with the Fair Practice Ordinance and the anti-discrimination clauses in the contract was the best way to ensure equality to the LGBTQ+ community. Justices Gorsuch and Alito posited that because a same-sex couple had never sought CSS certification, the possible harm caused by allowing CSS its requested exception would be negligible.[238] However, the effect of the Court granting CSS an exception allows, and perhaps encourages, other agencies to seek similar exceptions.[239] Furthermore, other government contractors offering other services could request and be granted certain religious exceptions, expanding exclusions of LGBTQ+ individuals, and once again turning what is supposed to be a shield into a sword.

Additionally, denying CSS's requested exceptions would have done what Justices Gorsuch and Alito desired: keep the harm minimal. In requiring compliance, CSS's burden would be slight. As the City argued, CSS would be burdened only during the certification process because they would still be allowed to avoid placing children in the homes of same-sex couples during the matching stage.[240] However, allowing CSS to discriminate at a later stage would still cause potential stigmatic injury to the LGBTQ+ community. As provided in Barak-Corren's article, the increased discrimination following *Masterpiece Cakeshop* is significant.[241] Assuming that *Fulton* could cause a similar increase, increased discrimination leading to stigmatic injury could become real to the LGBTQ+ community, specifically in the foster care area. Protecting that community from stigmatic harm, therefore, should be recognized as a compelling state interest. If that protection was recognized as a compelling state interest, government actions requiring compliance with anti-discrimination policies could withstand the sort of religious exceptions sought by CSS. Overall, the *Sherbert* test would have provided a clearer and easier path for the Court. Although the Court would have reached the same con-

238. *See generally* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1886 (2021) (Alito, J., concurring); *id.* at 1930 (Gorsuch, J., concurring).

239. *See* Netta Barak-Corren, *supra* note 226, at 35-38 (finding a substantial increase in wedding vendors refusing services to same-sex couples after the *Masterpiece Cakeshop* decision). Professor Barak-Corren's findings help demonstrate the potential effect of the decision in *Fulton*.

240. *See* Oral Argument, *supra* note 217, at 57:44.

241. *See* Netta Barak-Corren, *supra* note 226, at 35-38.

clusion, the reasoning would have provided an easier test to follow for future litigation.

CONCLUSION: A SHRED OF OPTIMISM BUT CONTINUED INEQUALITY

Decisions like *Fulton* and *Masterpiece Cakeshop*, though dealing with specific policies in specific locations, are emblematic of a larger tension throughout the country. Over ninety entities submitted amici curiae briefs to the Court before the judgment was issued, illustrating the national interest in the outcome of the case.[242] The response to *Masterpiece Cakeshop* has not been relegated to blog postings, newspaper columns, or podcasts: it has had real, measurable effects on the LGBTQ+ community.[243] Legislatures and courts have been faced with a growing number of religious objectors seeking exceptions from anti-discrimination claims and policies ensuring equality to the LGBTQ+ community.[244] For example, the Arkansas legislature recently passed a law allowing physicians to refuse to administer non-emergency care based on religious objections, which will likely be used to discriminate against LGBTQ+ patients.[245] Arkansas also recently passed legislation ending hormone treatments for transgender youth, forcing children in the middle of treatment to abruptly stop.[246] Professor Barak-Corren's study demonstrates that religious objectors possibly feel empowered in the wake of *Masterpiece Cakeshop*—an empowerment to refuse to provide equal services to both heterosexual and homosexual couples.[247] Barak-Corren's study also shows that, just as the *Masterpiece Cakeshop* decision was not simply consigned to Colorado, *Fulton* will not be

242. For a list of amici curiae and access to their briefs, *see Fulton v. City of Philadelphia*, SCOTUS Blog, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ (last visited Nov. 19, 2021).

243. *See* Netta Barak-Corren, *supra* note 226, at 35.

244. *See* Wyatt Ronan, *South Dakota Gov. Kristi Noem Signs Religious Refusal Bill, Creating First Major RFRA Law in Six Years*, Human Rights Campaign (Mar. 13, 2021), https://www.hrc.org/press-releases/south-dakota-gov-kristi-noem-signs-religious-refusal-bill-creating-first-major-rfra-law-in-six-years.

245. *See* Andrew DeMillo, *Arkansas Governor Signs Bill Allowing Medical Workers to Refuse Treatment to LGBTQ People*, PBS (Mar. 26, 2021), https://www.pbs.org/newshour/politics/arkansas-governor-signs-bill-allowing-medical-workers-to-refuse-treatment-to-lgbtq-people

246. Jo Yurcaba, "Arkansas Passes Bill to Ban Gender-Affirming Care for Trans Youth," https://www.nbcnews.com/feature/nbc-out/arkansas-passes-bill-ban-gender-affirming-care-trans-youth-n1262412.

247. *See* Netta Barak-Corren, *supra* note 226, at 40.

limited to Philadelphia.[248] Decisions involving complicity-based conscience claims have far-reaching, negative effects on the LGBTQ+ community, even in jurisdictions with anti-discrimination laws.[249]

Although the Court's decision in *Fulton* might be an appropriate application of the first prong of the *Smith* test, the decision nevertheless fails to protect a historically marginalized group from stigmatization. As Professor Barak-Corren argues and as demonstrated by recent legislation and other judicial proceedings, exceptions based on religious objections are increasing, and the exceptions sought create further harm toward the LGBTQ+ community.[250]

The one gleam of optimism from the *Fulton* decision, however, is the insight provided by the majority's discussion of the contractual issue at the core of the case. The Court allowed CSS to obtain an exception from the contract's anti-discrimination provision not on general principle, but because the contract allowed for other exemptions, resulting in the anti-discrimination provision's failure of the "general applicability" requirement of the *Smith* test. Thus, even within the current legal status quo, the City could revise its contract based on the Court's reasoning to prevent further challenges. Specifically, the City could eliminate all exceptions from the anti-discrimination provision, which would doom future challenges from religious objectors. Other cities could also follow this guideline when writing anti-discrimination policies that might affect religious people or entities. Of course, the Court will have to face the collision of religious objections and anti-discrimination policies again, and as *Fulton* shows, a more complete and easier-to-apply analysis is needed. However, in the meantime, *Fulton* provides a helpful blueprint for cities seeking to write ironclad anti-discrimination policies to protect the LGBTQ+ community.

David Beck

248. *See* Netta Barak-Corren, *supra* note 226, at 42.

249. *See id.* at 38.

250. *Id.* at 35-36.