EMPLOYING *SMITH* TO PREVENT A CONSTITUTIONAL RIGHT TO DISCRIMINATE BASED ON FAITH: WHY THE SUPREME COURT SHOULD AFFIRM THE THIRD CIRCUIT IN *FULTON V. CITY OF PHILADELPHIA*

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In the interest of the children in the Philadelphia foster care system, the City of Philadelphia prohibits its contracting foster care agencies from discriminating against prospective foster care parents on account of race, religion, and sexual orientation, among other things. Despite this requirement, in 2018, two foster care agencies—Catholic Social Services (CSS) and Bethany Christian Services—that have annual contracts with Philadelphia refused to certify same-sex couples as foster parents for religious reasons. While Bethany Christian Services reached an agreement with the city, CSS did not. As a result, the city froze foster care placement referrals to CSS and did not renew its contract with CSS for the following year.

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In response, several foster parents and CSS sued Philadelphia to challenge the city's freeze on First Amendment religious freedom grounds. This past November, the Supreme Court of the United States heard oral arguments for Fulton v. City of Philadelphia*, spanning three separate but related issues: (1) whether free exercise plaintiffs must prove a particular type of discrimination claim to prevail; (2) whether the Court should revisit its leading precedent on Free Exercise Clause claims,* Employment Division v. Smith*; and (3) whether Philadelphia violated the First Amendment by requiring a religious foster care agency to take actions that contradict its religious beliefs to participate in the taxpayer-funded foster care system.*

This Comment argues that all courts should first apply the neutral-and-generally-applicable standard established in Smith *when evaluating Free Exercise Clause claims. Applying that standard to* Fulton*, the Supreme Court should find that Philadelphia's Services Contract and Fair Practices Ordinance are operationally neutral and generally applicable. Therefore, they are only subject to rational basis review. Moreover, this Comment argues that there is not a circuit split amongst the circuit courts on how to apply* Smith*, and, thus, there is no need for the Supreme Court to revisit* Smith*, for any purpose other than clarifying which exceptions, if any, exist. Lastly, Philadelphia's conditioning of government funds on actions contrary to CSS's religious beliefs does not constitute a First Amendment violation.*

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INTRODUCTION

In 2018, the *Philadelphia Inquirer* published a story that made the City of Philadelphia aware of two foster care agencies, Catholic Social Services (CSS) and Bethany Christian Services, that had annual contracts with Philadelphia but were refusing to certify same-sex couples as foster parents for religious reasons.[1] In its article, which focused on CSS, the *Inquirer* labeled CSS's actions for what they were: discrimination against the LGBTQ community, actions that violated its

1. Julia Terruso, *Two Foster Agencies in Philly Won't Place Kids with LGBTQ People*, PHILA. INQUIRER (Mar. 13, 2018), https://www.inquirer.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html [https://perma.cc/DGF2-ARAC]. The city and Bethany Christian Services were able to resolve the contractual issues that this conduct violated. *See infra* note 335. As a result, this Comment focuses on CSS.

contract with Philadelphia, which prohibited discrimination based on sexual orientation, among other protected categories.[2]

After receiving confirmation from CSS that it would not certify prospective LGBTQ foster parents, Philadelphia froze referrals to CSS and refused to renew its contract with CSS for the following year.[3] Several foster parents and CSS jointly sued Philadelphia to challenge the city's referral freeze on First Amendment religious freedom grounds.[4] On June 5, 2018, CSS filed a motion for a temporary restraining order and a preliminary injunction in the U.S. District Court for the Eastern District of Pennsylvania, seeking to require the city to resume foster care referrals to CSS.[5] Finding that the public interest and the balance of harms tilted in favor of the city, the district court denied CSS's motion.[6]

On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the district court's decision.[7] Applying the U.S. Supreme Court case *Employment Division v. Smith*,[8] the Third Circuit found that Philadelphia did not discriminate against CSS based on the agency's religious affiliation and beliefs.[9] On February 24, 2020, the U.S. Supreme Court granted certiorari to consider three issues.[10] The Court heard

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2. Julia Terruso, *Judge Denies Catholic Social Services Discrimination Claim in Foster Care Case*, PHILA. INQUIRER (July 13, 2018), https://www.inquirer.com/philly/news/foster-care-philadelphia-dhs-same-sex-couples-catholic-social-services-lawsuit-20180713.html [https://perma.cc/7AXZ-9J78]; *see infra* notes 109–10 and accompanying text.

3. Julia Terruso, *Did City Violate the Religious Freedom of Catholic Social Services when it Froze its Foster Care Contract?*, PHILA. INQUIRER (June 21, 2018), https://www.inquirer.com/philly/news/catholic-social-services-foster-care-dhs-religious-freedom-free-speech-constitution-lgbtq-20180621.html [https://perma.cc/6X2B-SUSL].

4. Complaint at 3, 15–16, 19, Fulton v. City of Philadelphia, 320 F. Supp. 3d 661 (E.D. Pa. 2018) (No. 18-2075), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem); Harper Neidig, *Supreme Court to Hear Philadelphia Fight over Same-Sex Foster Parents*, HILL (Feb. 24, 2020, 10:22 AM), https://thehill.com/regulation/court-battles/484326-supreme-court-to-hear-philadelphia-fight-over-same-sex-foster [https://perma.cc/A8SD-8LEX].

5. *Fulton*, 320 F. Supp. 3d at 668.

6. *Id.* at 704.

7. *Fulton*, 922 F.3d at 165.

8. 494 U.S. 872 (1990), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *as recognized in* Holt v. Hobbs, 574 U.S. 352, 357 (2015).

9. *Fulton*, 922 F.3d at 165; *see infra* Section I.A.1. (providing an in-depth explanation of *Smith*, as the key issues before the Supreme Court concern its application).

10. *See Fulton*, 140 S. Ct. 1104 (Mem); *see also Fulton v. City of Philadelphia, Pennsylvania*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-

arguments on those issues in *Fulton v. City of Philadelphia*[11] on November 4, 2020.[12] First, the Court will determine "[w]hether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views"—or "whether courts must consider other evidence that a law is not neutral and generally applicable," an issue that CSS argues has resulted in a circuit split.[13] Second, the Court will decide whether to reconsider the standard that the Court set in *Smith* for courts to use to evaluate Free Exercise Clause claims.[14] Third, the Court will consider "whether the government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs."[15] At the time of publication of this Comment, the Supreme Court has not yet issued an opinion in the case about these three issues.

Part I of this Comment first provides background information on First Amendment jurisprudence, including a detailed overview of *Smith* and its progeny, before outlining the factual and procedural history of *Fulton*. The latter portion of Part I outlines each issue before the Court in more detail, the case law that CSS uses to manufacture a nonexistent circuit split, merits and disadvantages of the *Smith* neutral-and-generally-applicable standard, and the precedent that governs situations where conditions on government contracts conflict with First Amendment rights. Part II of this Comment compares *Fulton* to existing precedent and determines that a circuit split does not actually exist; thus, courts should continue to first apply the neutral-and-generally-applicable standard, which the Supreme Court established in *Smith*, when evaluating Free Exercise Clause claims. Part II also argues that the government does

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pennsylvania [https://perma.cc/9CBW-6SXC] [hereinafter *Fulton* Summary] (compiling proceedings and orders from the case).

11. 140 S. Ct. 1104 (2020) (No. 19-123).

12. Transcript of Oral Argument at 1, *Fulton*, 140 S. Ct. 1104 (No. 19-123); *Fulton* Summary, *supra* note 10.

13. *Fulton* Summary, *supra* note 10. CSS's framing of this first issue as the existence of a circuit split is misleading. The key question before the Court pertains to the types of evidence courts should consider when determining the level of judicial scrutiny to apply to Free Exercise Clause cases, not whether *Smith* has resulted in a circuit split that the Court must resolve. *See id.* As this Comment explains, no such circuit split exists. *See infra* Section II.A.

14. *Fulton* Summary, *supra* note 10.

15. *Id.*

not violate the First Amendment by requiring an agency to act in ways that contradict the agency's religious beliefs to participate in a taxpayer-funded foster care system.[16] This Comment concludes that the Supreme Court should affirm the Third Circuit's decision and rule in favor of Philadelphia on all three issues.

I. BACKGROUND

Before determining how the Supreme Court should rule on the three issues at stake in *Fulton*, this Comment examines the applicable case law for each issue.[17] First, this Part provides an overview of First Amendment jurisprudence. This overview describes the various levels of scrutiny that the Supreme Court applies when evaluating cases that implicate fundamental rights or discrimination, the precedential *Smith* case, and the subsequent shift in scrutiny applied to Free Exercise Clause claims following *Smith*. Second, this Part explains the events that gave rise to the Supreme Court's grant of certiorari in *Fulton* and each party's argument. Third, this Part explores the cases that CSS proffers as proof of a nonexistent circuit split over how to apply *Smith*. Fourth, this Part provides both the criticisms and praises of *Smith*, which are relevant for evaluating whether the Court must revisit the case. Finally, this Part examines Supreme Court precedent concerning First Amendment claims involving government contracts that require adherence to positions that may be contrary to an agency's beliefs.

A. First Amendment Jurisprudence

The First Amendment guarantees freedom of religion and freedom of expression.[18] *Fulton* largely concerns the Free Exercise Clause[19] and the Free Speech Clause.[20] The Free Exercise Clause protects against government interference with an individual's right to practice her religion.[21] The Free Speech Clause guarantees that an individual may

16. When used in this Comment, the term "agency" refers to foster care agencies as opposed to governmental administrative agencies.

17. *See supra* notes 12–15 and accompanying text (outlining the three issues put forward by the appellants to the Supreme Court).

18. U.S. CONST. amend. I.

19. *See id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

20. *See id.* ("Congress shall make no law . . . abridging the freedom of speech . . . .").

21. *See* Emp. Div. v. Smith, 494 U.S. 872, 876–78 (1990) (holding that a State that bans acts or abstentions based only on the religious belief they display unconstitutionally

express herself, either directly through words or symbolically through actions, without government interference.[22] Further, the Free Speech Clause protects the right not to speak.[23]

When analyzing a First Amendment case, the Supreme Court applies one of three degrees of scrutiny: rational basis review, intermediate scrutiny, or strict scrutiny.[24] The Court uses rational basis review—its default and most lenient level of review—in most cases that do not involve classifications the Court has deemed suspect or quasi-suspect—such as those based on race, national origin, and gender—or fundamental rights.[25] Any conceivable legitimate basis for the challenged

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prohibits the free exercise of religion), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb; *First Amendment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/first_amendment [https://perma.cc/MS7T-DWU4].

22. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) (noting that the Court has long held "speech" to mean more than just "the spoken or written word"); United States v. O'Brien, 391 U.S. 367, 376 (1968) (distinguishing between expressive and non-expressive conduct and affirming that the First Amendment only governs expressive conduct); *First Amendment*, *supra* note 21.

23. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (finding a compulsory flag salute unconstitutional because "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

24. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163–64, 166–67 (2015) (discussing the levels of scrutiny as applied to the First Amendment's freedom of speech protection); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) (discussing rational basis review and strict scrutiny); United States v. Virginia, 518 U.S. 515, 532–33 (1996) (describing intermediate scrutiny). *See generally* Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FIND L.: LAW & DAILY LIFE (Jan. 27, 2014, 9:05 AM), https://blogs.findlaw.com/law_and_life/2014/01/challenging-laws-3-levels-of-scrutiny-explained.html [https://perma.cc/7JX5-W2BJ] (providing a high-level overview of the three tiers of scrutiny). Courts are familiar with these three levels of review from their application of the standards in Equal Protection Clause analysis. *See infra* note 75 and accompanying text (explaining that courts might refer to Equal Protection Clause cases for guidance when conducting the first part of the *Smith* Free Exercise Clause analysis).

25. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 403 (2016) (explaining that the rational basis test is used to analyze "government economic regulations and social welfare legislation when there is no discrimination based on a suspect classification or infringement of a fundamental right"); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 577 n.200 (2014) (describing what various justices take rational basis review to mean); *The Notorious RBT (Rational Basis Test)*, INST. JUST., https://ij.org/center-for-judicial-engagement/programs/the-notorious-rbt-rational-

state conduct will allow the conduct to survive rational basis review.[26] The Court uses a heightened level of review called intermediate scrutiny when considering government classifications such as those that involve sex, gender, nonmarital children, and undocumented, non-citizen children.[27] To survive intermediate scrutiny, the government "must assert a substantial interest to be achieved by restrictions."[28] The final and highest level of review is strict scrutiny, which applies to cases involving suspect government classifications, such as ones based on race, and cases involving the deprivation of fundamental rights.[29] To survive strict scrutiny, the government must prove that a compelling state interest motivated its challenged action and that the action was narrowly tailored to achieve the state interest.[30]

The Supreme Court has altered the level of scrutiny applied to Free Exercise Clause claims repeatedly over the years. In the first Free

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basis-test [https://perma.cc/AV8T-BX2Z] (providing a brief overview of the key components of rational basis analysis).

26. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 537 (1934) ("[A] [S]tate is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . ."); *see also* Lynn S. Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees*, 89 CALIF. L. REV. 999, 1016 (2001) (explaining that rational basis "requires only a rational relationship between the end (the legitimate governmental objective) and the means to that end (the statute whose constitutionality is at issue)").

27. *See* Clark v. Jeter, 486 U.S. 456, 461, 464–65 (1988) (applying intermediate scrutiny when analyzing issues related to nonmarital children); Plyler v. Doe, 457 U.S. 202, 220, 223–24, 230 (1982) (undocumented children); Craig v. Boren, 429 U.S. 190, 208–09 (1976) (gender); *see also* Linda Napikoski, Craig v. Boren*: The Case Remembered for Giving Us Intermediate Scrutiny*, THOUGHTCO. (May 4, 2019), https://www.thoughtco.com/craig-v-boren-3529460 [https://perma.cc/9NKK-8GU2] (explaining how the Court added gender as another "suspect class," thereby providing higher protections for "sex-based classification or gender classifications," which previously received rational basis review).

28. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980) (outlining that to survive intermediate scrutiny the law "must be in proportion to that [substantial] interest," and it "must be designed carefully to achieve the State's goal"); *see also Virginia*, 518 U.S. at 535–36 (explaining that Virginia Military Institute's "'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalization for actions in fact differently grounded").

29. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting) (stating bluntly that "strict scrutiny leaves few survivors").

30. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (creating what is now understood as strict scrutiny by stating that "[t]here may be [a] narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution").

Exercise Clause case, *Reynolds v. United States*,[31] the Court determined that the government could place certain limitations on the free exercise of religion.[32] This view of the Free Exercise Clause prevailed until the 1960s, when the Warren Court began to apply strict scrutiny to Free Exercise Clause claims, approaching all government limitations of free exercise of religion with heightened suspicion.[33] *Sherbert v. Verner*[34] was the landmark case that first applied strict scrutiny to Free Exercise Clause claims.[35] *Sherbert* concerned a South Carolina unemployment benefit regulation that "appl[ied] the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."[36] In *Sherbert*, the Court required the State to have a "compelling interest" that justified the infringement on free exercise to survive strict scrutiny.[37] *Sherbert* governed Free Exercise Clause claims until 1990, when Justice Scalia authored the majority opinion in *Smith*—a case central to the decision in *Fulton*—and lowered the default level of review of Free Exercise Clause claims to rational basis.[38]

1. The Smith *standard for Free Exercise Clause claims*

Until *Smith*, the Supreme Court automatically applied strict scrutiny when considering claims concerning free exercise of religion—like equal protection claims based on race, national origin, or ancestry, or cases involving fundamental rights;[39] however, after *Smith*, rational

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31. 98 U.S. 145 (1879).

32. *See id.* at 145 (finding that Reynold's "religious belief [could not] be accepted as a justification for his committing an overt act [, bigamy], made criminal by the law of the land").

33. *See Warren Court*, L. LIBR.—AM. L. & LEGAL INFO., https://law.jrank.org/pages/11230/Warren-Court.html [https://perma.cc/3Q9T-G737].

34. 374 U.S. 398 (1963).

35. *See id.* at 406 (explaining that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'" (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945))).

36. *Id.* at 410.

37. *Id.* at 406–07 (finding the mere possibility of fraudulent claims "feigning religious objection[]" to Saturday work uncompelling, and further suggesting that this contention even with the support of evidence would remain uncompelling unless the appellees could "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights").

38. *See* Emp. Div. v. Smith, 494 U.S. 872, 885–86, 888–89 (1990), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

39. *Id.* at 886 n.3; Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding that strict scrutiny applies to fundamental rights claims).

basis review is the current default standard that the Court applies to First Amendment free exercise claims.[40] On April 17, 1990, Justice Scalia delivered the majority opinion in *Smith*, which revolutionized the traditional free exercise analysis.[41] In *Smith*, a private drug rehabilitation organization fired two employees, who consumed peyote, a hallucinogen, for sacramental purposes at their Native American church.[42] After their termination, these two men did not receive unemployment benefits because Oregon law disqualified any employees who were fired for misconduct.[43] The Oregon Supreme Court found that using peyote for sacramental purposes violated Oregon's controlled substance law, but it held that the Free Exercise Clause invalidated this prohibition.[44]

Upon review, the U.S. Supreme Court held that "the Free Exercise Clause . . . permits the State . . . to deny unemployment benefits to persons dismissed from their jobs because of [] religiously inspired use" of peyote, a substance that the State's criminal laws prohibited.[45] The majority did not feel "inclined to breathe into *Sherbert* some life beyond the unemployment compensation field" and apply it in the context of "exemptions from a generally applicable criminal law."[46] Thus, *Smith* replaced the previous *Sherbert* "compelling interest"

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40. *Smith*, 494 U.S. at 886 n.3.

41. *See* Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1045–46 (2000) (highlighting that the *Smith* holding constituted a "fundamental shift" in free exercise analysis); *see also* Randy T. Austin, Note, Employment Division v. Smith*: A Giant Step Backwards in Free Exercise Jurisprudence*, 1991 BYU L. REV. 1331, 1331 n.5 (1991) (explaining that prior to *Smith*, when the *Sherbert* standard governed, the Court appeared to regard free exercise of religion as a fundamental right, as it applied strict scrutiny as the initial level of review).

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

43. *Id.*

44. *Id.* at 875.

45. *Id.* at 874.

46. *Id.* at 884 (noting that strict scrutiny is not plausible or applicable when a State has "an across-the-board" prohibition on "a particular form of conduct"); *see also* Jack Peterson, Comment, *Exceptions to* Employment Division v. Smith*: A Need for Change*, 10 LEWIS & CLARK L. REV. 701, 705 (2006) (noting that *Smith* "did not overrule *Sherbert*, but rather simply limited" *Sherbert* to cases involving unemployment benefits). While incidental impacts of a generally applicable criminal law on a party's religious practices are not cause for strict scrutiny and may not violate the First Amendment, the intentional imposition of a law or deprivation of "an otherwise generally available public benefit" solely due to a party's religious association is unconstitutional. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

standard with a standard that assumes that "neutral laws of general applicability" are constitutional, even when they unintentionally infringe on the free exercise of religion.[47] The crux of the Court's reasoning for lowering the level of scrutiny from strict to rational basis was that strict scrutiny in Free Exercise Clause cases would produce "a private right to ignore generally applicable laws."[48] Further, the majority reasoned that "[i]f the 'compelling interest' test" applied to this Free Exercise Clause claim, it would have to apply "across the board."[49] The Court viewed this "across the board" application as "courting anarchy" because it anticipated that the "compelling interest" test would create the possibility of constitutionally required religious exemptions from all types of civic obligations.[50] As such, the Court, signaling a return to the *Reynolds* era, concluded that laws of neutral and general applicability are subject only to rational basis review.[51]

a. Two potential exceptions to Smith

Although the majority opinion in *Smith* appears to significantly reduce Free Exercise Clause protections, it alludes to two possible exceptions that would allow a court to apply strict scrutiny to Free Exercise Clause claims. First, the Court suggested that courts might apply the *Sherbert* "compelling interest" test in cases where the law at

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47. *Smith*, 494 U.S. at 885 (explaining that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to [free exercise] challenges"). *But see infra* Section I.A.1.a (explaining that the *Smith* holding insinuated an exception, which some scholars refer to as the "individualized exemptions exception" or "*Sherbert* exception," when a State creates a system of individualized exemptions).

48. *Smith*, 494 U.S. at 885–86 (explaining that a strict scrutiny application in cases concerning speech or racial inequalities produces "constitutional norms," whereas a strict scrutiny application in a case concerning free exercise of religion produces a "constitutional anomaly").

49. *Id.* at 888.

50. *Id.* ("Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961))); *see also infra* note 321 and accompanying text (providing examples of various types of civic obligations that someone could avoid by claiming a religious exemption).

51. *See* Austin, *supra* note 41, at 1331 (describing the *Smith* decision to apply rational basis review as a regression "to the turn-of-the-century . . . approach to the Free Exercise Clause, depriving it of the same consideration given other fundamental rights").

issue created a system of "individualized exemptions."[52] A system of individualized exemptions exists when a government authority considers "at least some 'personal reasons'" when making determinations about an applicant's eligibility for unemployment benefits.[53] *Smith* reiterated that this line of unemployment benefits cases involving strict scrutiny "[stood] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[54]

Second, the *Smith* opinion suggests the possibility of a "hybrid rights" exception.[55] The Court envisioned certain cases that might involve a "hybrid situation" where a plaintiff raises a Free Exercise Clause claim in conjunction with another constitutional claim.[56] These two exceptions would allow a court to apply strict scrutiny to otherwise "neutral, generally applicable laws."[57] While the *Smith* opinion provided details, albeit few, of when a Court might still apply strict scrutiny to Free Exercise Clause claims, the Court did not describe how to proceed when a law does not meet the *Smith* neutral-and-generally-applicable standard.

b. Two U.S. Supreme Court cases that clarified how to apply Smith

Just three years after *Smith*, the Court heard *Church of the Lukumi Babalu Aye v. City of Hialeah*,[58] a case in which the Court encountered city ordinances that did not meet the *Smith* neutral-and-generally-applicable standard.[59] In *Lukumi*, the Court considered whether city ordinances that prohibited possession of animals for sacrifice violated

52. *Smith*, 494 U.S. at 884; *see also* Kaplan, *supra* note 41, at 1051–52 (asserting that courts should read the "*Sherbert* exception" narrowly and apply it to cases concerning government employees' discretional decisions regarding employment benefits).

53. *Smith*, 494 U.S. at 884 (quoting Sherbert v. Verner, 374 U.S. 398, 401 n.4 (1963)).

54. *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

55. *See id.* at 882 (asserting that while it is plausible that a claimant might challenge a law on the grounds of multiple constitutional violations, thereby requiring more scrutiny, this case does not present "such a hybrid situation").

56. *Id.* at 881–82 (citations omitted) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . . .").

57. *See* Peterson, *supra* note 46, at 705 (arguing that the two exceptions to *Smith* mitigate the otherwise "harsh result").

58. 508 U.S. 520 (1993).

59. *Id.* at 535.

the free exercise rights of people who practiced the Santeria religion, which prescribes ritual animal sacrifice as a form of worship.[60]

The Court began its analysis with a roadmap that clarified the process courts should follow when assessing Free Exercise Clause claims under *Smith*. First, the Court stated that Free Exercise Clause claims should begin with an assessment of whether the challenged law meets the *Smith* neutral-and-generally-applicable standard.[61] The *Lukumi* opinion clarified that the neutrality and general applicability elements are interrelated.[62] Next, the Court provided the instruction that *Smith* failed to include: "A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[63] Thus, *Lukumi* explained that the *Smith* inquiry is not dispositive of whether a court should apply rational basis review to a law that allegedly violates the Free Exercise Clause; rather, the *Smith* inquiry is merely a starting point for that analysis.[64] As the first case to apply the *Smith* standard, *Lukumi* provided insights into what factors support a finding of neutrality and general applicability.

The Court first examined the neutrality of the city ordinances that banned religious sacrifice of animals.[65] The Court explained that laws that target religious beliefs are not neutral.[66] To preface its analysis, the Court advised that, when making determinations of whether a law targets religious beliefs, courts must consider relevant evidence, such as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous

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60. *Id.* at 526.

61. *Id.* at 531 (citing Emp. Div. v. Smith, 494 U.S. 872 (1990), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb) (reiterating that the neutral laws of general applicability do not need to undergo strict scrutiny "even if the law has the incidental effect of burdening a particular religious practice").

62. *See id.* (explaining that, if a law fails to meet the neutrality standard, then it will likely fail to meet the generality standard).

63. *Id.* at 531–32 (explicitly directing courts to apply strict scrutiny when a law fails to meet the initial *Smith* neutral-and-generally-applicable standard).

64. *Id.* at 531; *see, e.g.*, Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir. 2004) (describing *Smith* as "the *threshold* requirement" of Free Exercise Clause claims (emphasis added)).

65. *Lukumi*, 508 U.S. at 532.

66. *Id.* at 533 (explaining that a law that seeks to restrict religiously motivated actions is not neutral).

statements made by members of the decisionmaking body."[67] The *Lukumi* majority instructed that when determining the object of the law, courts must begin their analysis by examining the law's text.[68] Laws that refer to religious practices "without a secular meaning discernible from the language or context" are not neutral.[69] The Court found that the ordinances' text proved facially neutral; however, the Court explained that facial neutrality alone is not determinative of whether the law meets the neutrality element.[70]

Next, the Court considered whether the challenged ordinances were operationally neutral, and it found that they were not.[71] The ordinances allowed animal slaughtering for all purposes other than Santeria sacrifice, which factored into the Court's finding.[72] Moreover, the Court noted "[a] pattern of exemptions."[73] The Court determined that the scope of the ordinances lacked operational neutrality as they "proscribe[d] more religious conduct than [] necessary" to accomplish the government's stated interests in protecting public health and preventing animal cruelty.[74]

Lastly, the Court explained that courts may refer to equal protection cases when determining if the object of a law is neutral under the Free

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67. *Id.* at 540; *see also* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (citing *Lukumi*, 580 U.S. at 540) (using these factors to analyze the neutrality of the Colorado Commission's consideration of the cakeshop owner's decision to not bake a wedding cake for a gay couple); *infra* notes 88–104 (providing further explanation of *Masterpiece Cakeshop*'s use of *Lukumi* to guide its neutrality analysis).

68. *Lukumi*, 580 U.S. at 533 (imploring courts to begin with an examination of the text because the minimum requirement of neutrality is that the law is facially neutral).

69. *Id.* at 533–34 (using the example of "sacrifice" and "ritual," as both terms are consistent with facial discrimination; however, these terms are not conclusive as they have secular meanings in addition to the traditional religious meanings). The Court referred to both the *New International Dictionary* and the *Encyclopedia of Religion* to show that "sacrifice" and "ritual" have both religious and secular meaning. *Id.* at 534.

70. *Id.* at 534 (explaining that the Free Exercise Clause "forbids subtle departures from neutrality" (quoting Gillette v. United States, 401 U.S. 437, 452 (1971))).

71. *Id.* at 534 (noting that laws sometimes include "covert suppression of particular religious beliefs" (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986))). Scholars sometimes use the term "religious gerrymander[]" to describe laws that are not operationally neutral. *See id.* at 534 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970)).

72. *Id.* at 536 (highlighting that the ordinance appears to allow for kosher slaughter, a form of food preparation that the Torah prescribes in Judaism).

73. *Id.* at 537 (explaining that patterns of exemptions and narrow prohibitions are indicative of a religious gerrymander and, thus, signal lack of operational neutrality).

74. *Id.* at 538 (reasoning that the government could achieve these interests by other means, such as regulation on proper disposal of organic garbage, than a complete prohibition of Santeria sacrificial worship).

Exercise Clause.[75] The Court concluded that the ordinances' allowance of animal slaughtering for other purposes and the pattern of exemptions proved that the object of the law was to suppress the free exercise of the Santeria religion.[76]

Having found the ordinances not neutral, the Court went on to consider their general applicability, and it found that the ordinances were "well below the minimum standard necessary" to prove general applicability.[77] To determine whether the ordinances displayed general applicability, the Court considered the scope of the ordinances.[78] The Court found the ordinances underinclusive with regard to the city's purported interest of protecting public health because they ignored other threats to public health that were unconnected to the Santeria believers' behavior.[79] Finding that the ordinances did not meet the *Smith* neutral-and-generally-applicable standard, the Court subjected the ordinances to the "most rigorous of scrutiny."[80]

The Court determined that the ordinances did not pass strict scrutiny.[81] First, the Court did not find the governmental interest of protecting health and safety compelling.[82] Additionally, even if the government had presented a compelling interest, the ordinances were not tailored narrowly enough to justify the governmental interest.[83] As such, the Court determined that the ordinances at issue violated the Free Exercise Clause and rendered them void.[84] *Lukumi* provided important guidance for courts in their application of *Smith*: it clarified that *Smith* is merely the threshold test for Free Exercise Clause claims;[85] it provided examples of what factors to consider when analyzing laws

75. *Id.* at 540 ("Neutrality in its application requires an equal protection mode of analysis." (quoting *Walz*, 397 U.S. at 696)).

76. *Id.* at 542.

77. *Id.* at 543.

78. *Id.* at 543–47.

79. *See id.* at 544–45 (explaining that the Santeria believers' improper disposal of animal carcasses poses no more of a health risk than other people's improper disposal of animal carcasses).

80. *See id.* at 546 (emphasizing that laws that target religious conduct "will survive strict scrutiny only in rare cases").

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 547.

85. *See id.* at 546.

for neutral and general applicability;[86] and it instructed that when a law fails to meet the *Smith* neutral-and-generally-applicable standard, courts must subject it to strict scrutiny.[87]

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[88] the Court built on *Lukumi* and further clarified what factors to consider during the *Smith* analysis.[89] In *Masterpiece Cakeshop*, Jack Phillips, a baker and "devout Christian," refused to create a wedding cake for a same-sex couple because of his religious opposition to same-sex marriage; however, he offered to create other baked goods for the couple.[90] The couple filed a complaint with the Colorado Civil Rights Commission ("the Commission") and alleged that Phillips violated the Colorado Anti-Discrimination Act[91] (CADA), which prohibited discrimination based on sexual orientation.[92] Phillips argued that requiring him to bake the couple's wedding cake would violate his First Amendment rights to both free speech and free exercise of religion.[93] An Administrative Law Judge did not find any violation of Phillips's First Amendment rights, and both the Commission and the Colorado Court of Appeals agreed.[94]

The U.S. Supreme Court began its review by first recognizing the constitutionality of CADA.[95] The Court then explained that the proper issue to examine was the level of neutrality and respect that the Commission applied when hearing Phillips's case.[96] The Court determined that the Commission's consideration of Phillips's case "was

86. *See id.* at 557 (Scalia, J., concurring) (explaining that the Court's opinion applies invalidating factors to the elements of "neutrality" and "general applicability").

87. *See id.* at 531–32.

88. 138 S. Ct. 1719 (2018).

89. *See id.* at 1734 (Gorsuch, J., concurring) (explaining that the Court's opinion respects the principles set forth in *Smith* and *Lukumi*).

90. *Id.* at 1724, 1735.

91. Colo. Rev. Stat. §§ 24–34–300 to –805 (2020).

92. *See Masterpiece Cakeshop*, 138 S. Ct. at 1725; *see also* Colo. Rev. Stat. § 24–34–601(2)(a) (outlawing the "discriminatory practice" of a place of public accommodation denying someone services because of his or her sexual orientation).

93. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

94. *Id.*

95. *See id.* at 1728 ("It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.").

96. *Id.* at 1729.

inconsistent with the State's obligation of religious neutrality."[97] To reach this decision, the Court considered the factors of government neutrality set forth in *Lukumi*, and in doing so, it found that the Commission showed "clear and impermissible hostility" toward Phillips's religious beliefs.[98]

Specifically, the Court observed that by allowing three other bakers with conscience-based objections to refuse service and not allowing Phillips's objection, the Commission displayed disparate treatment in its enforcement of CADA and showed hostility toward Phillips.[99] Further, the Court found some of the commissioners' comments hostile.[100] One commissioner expressed that Phillips could believe "what he wants to believe," but "if he decides to do business in the state," he cannot act on those beliefs.[101] Another commissioner compared Phillips's religious beliefs to "defenses of slavery and the Holocaust" and characterized Phillips's beliefs as "one of the most despicable pieces of rhetoric that people can use to . . . hurt others."[102] While the first commissioner's comments could be interpreted in more benign ways, the Court determined that the two commissioners' comments, when viewed together, required the Court to find that the Commission did not approach Phillips's case with neutrality.[103] As such, the Court found that the Commission's treatment of Phillips's case violated the State's First Amendment duty "not to base laws or regulations on hostility to a religion or religious viewpoint."[104] The *Masterpiece Cakeshop* opinion built on *Smith* and *Lukumi*, as it provided that courts should also consider hostility when assessing whether laws meet the *Smith* neutral-and-generally-applicable standard.

Although the Court has clarified, in *Lukumi* and *Masterpiece Cakeshop*, how to assess whether a contested law meets the *Smith* neutral-and-generally-applicable standard, the *Fulton* case has placed the *Smith* standard before the Supreme Court yet again.

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97. *Id.* at 1723.

98. *Id.* at 1729, 1731.

99. *See id.* at 1730 (citations omitted) (allowing bakers to refuse to provide cakes when the requested cakes involved "wording and images [the baker] deemed derogatory," "language and images [the baker] deemed hateful," and a message the baker "deemed as discriminatory").

100. *Id.* at 1729–30.

101. *Id.* at 1729.

102. *Id.* (quoting Tr. 11–12).

103. *Id.* at 1729–30.

104. *Id.* at 1731.

B. A Detailed Explanation of Fulton*'s Facts and Procedural History*

1. The facts of Fulton

In 2018, the city of Philadelphia had the highest per-capita rate of children in the foster care system among major American cities.[105] The Commonwealth of Pennsylvania, the City of Philadelphia, and private agencies collaborate to manage the ever-increasing number of children in need of foster care.[106] Commonwealth regulations govern the criteria that potential foster parents must meet for certification.[107] Further, the Commonwealth allocates duties between the agencies and the foster parents.[108] Philadelphia contracts with private agencies on an annual basis, and it uses taxpayer money to compensate private agencies for their services.[109] The "Services Contract" requires the private agencies to comply with state regulations; specifically, the contract contains language that prohibits agencies "from discriminating due to race, color, religion, or national origin, and [the contracts] incorporate[] the city's Fair Practices Ordinance [(FPO)], which in part prohibits sexual orientation discrimination in public accommodations."[110] Once contractual relationships between the city and private agencies form, Philadelphia, through the Department of Human Services (DHS), refers children who come into its custody to one of the agencies under contract.[111]

In 2018, Philadelphia had contracts with thirty foster care agencies, two of which refused to certify same-sex couples as foster parents.[112]

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105. *See* Susan Pearlstein, Opinion, *Philly's Humanitarian Crisis: Too Many Kids in Foster Care*, PHILA. INQUIRER (Aug. 5, 2018, 5:00 AM), https://www.inquirer.com/philly/opinion/commentary/philadelphia-foster-care-deep-generational-poverty-dhs-20180805.html [https://perma.cc/2UKJ-VAJL] (explaining that the most recent data show about 6,000 children in the Philadelphia foster care system). Currently, there are 13,000 to 15,000 Pennsylvanian children in the foster care system. *See The Facts*, PA. ST. RESOURCE FAM. ASS'N, https://www.psrfa.org/being-a-foster-parent/the-facts [https://perma.cc/Q9QG-78GR].

106. *See* Fulton v. City of Philadelphia, 922 F.3d 140, 147 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem).

107. *Id.*

108. *See id.* (noting that the Commonwealth places the onus on agencies to foster relations with prospective foster parents and to evaluate the prospective foster parents using criteria that the Commonwealth sets).

109. *See id.*

110. *Id.* at 148.

111. *Id.* at 147.

112. *Id.* at 147–48.

After learning through a *Philadelphia Inquirer* article[113] that Catholic Social Services (CSS) and Bethany Christian Services refused to work with same-sex couples due to the organizations' religious belief that marriage can only exist between a man and a woman, DHS Commissioner Cynthia Figueroa began questioning agencies about their various policies.[114] None of the other agencies that Commissioner Figueroa contacted reported similar policies.[115] Eager to continue Philadelphia's hundred-year relationship with CSS, Commissioner Figueroa met with James Amato, CSS's Secretary, to resolve the contractual issue.[116] In attempting to reach a solution, Commissioner Figueroa, "who is Catholic and Jesuit-educated," told Amato that "it would be great if CSS could follow the teachings of Pope Francis," appealing to an authority within Amato and Figueroa's shared religious tradition.[117] The parties failed to reach an agreement, and DHS stopped referring foster families to CSS.[118]

On multiple occasions during the intake freeze, DHS granted exceptions that allowed for the placement of foster care children with CSS if it was clear that CSS was the agency best suited to find a placement for a child.[119] Despite the intake freeze on foster care referrals, DHS allowed CSS to continue working as a congregate care provider and Community Umbrella Agency.[120] Two days after the *Inquirer* article, the City Council passed a resolution that created the Philadelphia Commission on Human Relations; the City Council created this Commission to "investigate Department of Human Services'[s] policies on contracting with social services agencies that . . . discriminate

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113. *See supra* note 1.

114. *See Fulton*, 922 F.3d at 148 (noting that all but one of the agencies Commissioner Figueroa called were religiously affiliated).

115. *Id.*

116. *See id.* at 148.

117. *Id.* at 148, 157 (noting that this comment, despite its religious overtones, was proper in the context of a negotiation and attempt to find common ground).

118. *See id.* at 149 (stating that Commissioner Figueroa placed the freeze because she anticipated that the contractual relationship between CSS and DHS would end in the near future; thus, she did not feel comfortable sending children to CSS if a few months later they would have to be placed with another agency).

119. *See id.* (suggesting that, if a child's siblings had been placed with a CSS family, then DHS would allow CSS to orchestrate a placement for that child).

120. *Id.* Congregate care providers are "group homes[] for children in custody who have not been assigned to a foster family," while Community Umbrella Agencies "work with children in the community to address problems in their home environment that might prevent them from remaining at home." *Id.*

against prospective LGBTQ foster parents."[121] Just one day after its formation, the Commission on Human Relations sent CSS many questions concerning CSS's policies regarding the certification of prospective LGBTQ foster parents.[122] On May 7, 2018, Philadelphia's lawyers wrote to CSS again explaining their interpretation of the contract; this letter "underscored 'respect [for CSS's] sincere religious beliefs,'" and it stated that DHS hoped to maintain its "valuable relationship" with CSS.[123] CSS never replied to these letters—it instead responded with a lawsuit.[124]

2. Procedural history of Fulton

On June 5, 2018, in the Eastern District of Pennsylvania, CSS moved for a temporary restraining order and a preliminary injunction, which would require Philadelphia to resume foster care referrals to CSS.[125] Finding that the balance of harms and the public interest tilted in favor of the defendants, the district court denied CSS's motion.[126] The district court determined that both the Services Contract and the FPO, which the Services Contract incorporated, were facially neutral and generally applicable under *Smith*.[127] The court reached this conclusion through careful consideration of the plain language of the text, which had no mention of religion other than protecting people from religious discrimination; the legislative history of the FPO; and the intent of the FPO, all of which supported a finding of neutrality.[128]

Finding the Services Contract and the FPO neutral and generally applicable, the court applied a rational basis analysis, considering whether the Services Contract and the FPO were rationally related to legitimate government objectives.[129] The court concluded that Philadelphia had "at least six permissible [and legitimate] governmental objectives": (1) ensuring that government contractors adhere to the terms of their contracts with the city; (2) ensuring that when a contractor voluntarily agrees to be subjected to local laws and customs,

121. *Id.*
122. *Id.*
123. *Id.* at 149–50 (alteration in original).
124. *See id.* at 150.
125. Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 668 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem).
126. *Id.* at 704.
127. *Id.* at 682.
128. *Id.* at 683.
129. *Id.* at 684–86.

those laws are enforceable; (3) ensuring that publicly funded services are accessible to all citizens who qualify; (4) ensuring a diverse and broad pool of potential foster parents; (5) ensuring that all taxpayers are not denied access to services that their tax dollars fund; and (6) avoiding likely Equal Protection Clause and Establishment Clause claims that would result if government contractors did not welcome all prospective parents.[130] Furthermore, the court determined that no factors, such as hostility, suggested religious-based animus, which, under *Masterpiece Cakeshop*, would trigger strict scrutiny.[131] Finally, the court did not find the free speech claim alleging compelled speech to be persuasive, which ruled out the potential hybrid rights exception to *Smith*.[132] For the foregoing reasons, the district court denied CSS's motion.[133]

On appeal, the Third Circuit affirmed the district court's decision.[134] Applying *Smith*, the Third Circuit found that Philadelphia did not discriminate against CSS based on the agency's religious affiliation or beliefs.[135] Following *Smith*, *Masterpiece Cakeshop*, *Lukumi*, and *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*,[136] the Third Circuit, like the district court, found that both the Services Contract and the FPO were neutral and generally applicable.[137] The Third Circuit took the aforementioned cases to mean that Free Exercise Clause plaintiffs "must show that [they were] treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views."[138] The court concluded that Philadelphia did not treat CSS differently than it would have treated contractors of another religion.[139] Rather, the court determined that Philadelphia "acted only to enforce its non-discrimination policy in the face of what it considers a clear

130. *Id.* at 684–85.

131. *Id.* at 690; *see also supra* Section I.A.1.b (explaining that the Court clarified in *Masterpiece Cakeshop* that courts should look for signs of religious hostility when assessing neutrality).

132. *Fulton*, 320 F. Supp. 3d at 697–98; *see also supra* Section I.A.1.a (describing the Court's suggestions that a hybrid rights situation may trigger strict scrutiny).

133. *Fulton*, 320 F. Supp. 3d at 704.

134. Fulton v. City of Philadelphia, 922 F.3d 140, 165 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem).

135. *Id.*

136. 561 U.S. 661, 674 (2010) (finding that a college's policy recognizing student groups was viewpoint neutral and reasonable and thus did not violate the First Amendment).

137. *Fulton*, 922 F.3d at 147.

138. *Id.* at 154 (alteration in original) (emphasis omitted).

139. *Id.* at 156.

violation."[140] The court found CSS's argument that Philadelphia acted out of religious hostility unpersuasive and concluded that Philadelphia treated CSS respectfully.[141] Finally, the Third Circuit determined that "[t]he Fair Practices Ordinance has not been gerrymandered as in *Lukumi*, and there is no history of ignoring widespread secular violations as in *Tenafly* or the kind of animosity against religion found in *Masterpiece [Cakeshop]*."[142] In sum, the Third Circuit concluded that the "fact that CSS's non-compliance with the city's non-discrimination requirements is based on its religious beliefs does not mean that the city's enforcement of its requirements constitutes anti-religious hostility."[143]

On February 24, 2020, the U.S. Supreme Court granted certiorari to hear *Fulton* and consider three issues.[144] First, the Court will examine a supposed circuit split to determine what evidence courts should consider when determining whether a regulation is neutral and generally applicable under *Smith*, the latest precedential Free Exercise Clause case.[145] CSS argues that the Third Circuit is on the wrong side of a "deep split" over what factors to consider when making threshold determinations of neutral and general applicability under *Smith*.[146] Philadelphia, however, argues that a circuit split does not exist.[147] Second, the Court will determine whether to revisit and overrule *Smith*.[148] CSS urges the Court to revisit *Smith* and overrule it, as it failed to deliver on its promise of continued religious freedom protections.[149] In contrast, Philadelphia suggests that this case is "an extremely poor vehicle to reconsider *Smith*."[150] Third, and finally, the Court will consider whether DHS can compel CSS to take actions contrary to its beliefs, namely the act of certifying prospective LGTBQ foster parents, as a condition of its government contract to participate in the foster

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140. *Id.*
141. *Id.* at 156–57.
142. *Id.* at 158–59; *see supra* note 71 (explaining what "religious gerrymander" means).
143. *Id.* at 159 (quoting Intervenor's Br. at 22).
144. *See supra* notes 13–15 and accompanying text (presenting the three issues that CSS petitioned the Court to hear).
145. *See supra* note 13 and accompanying text (stating the first issue the Court will address: the level of scrutiny to apply under the Free Exercise Clause).
146. Brief for Petitioners at 39, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123).
147. Brief for City Respondents at 23 n.1, *Fulton*, 140 S. Ct. 1104 (No. 19-123).
148. *See supra* note 14 and accompanying text.
149. Brief for Petitioners, *supra* note 146, at 2.
150. Brief for City Respondents, *supra* note 147, at 13.

care system.[151] CSS suggests that Philadelphia unconstitutionally compelled speech when it required CSS to certify prospective LGBTQ foster parents against its religious beliefs.[152] Philadelphia, in contrast, argues that the Third Circuit properly determined that Philadelphia did not compel speech because CSS receives government funding and CSS voluntarily assented to the conditions of its government contract.[153]

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151. *See supra* note 15 and accompanying text.

152. Brief for Petitioners, *supra* note 146, at 30–31.

153. Brief for City Respondents, *supra* note 147, at 19, 28, 46. *Fulton* raises other relevant issues beyond the scope of this Comment that are worth mentioning. First, *Fulton* poses a potential Fourteenth Amendment Equal Protection Clause issue. *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 685 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem); *see also supra* text accompanying note 130 (listing Philadelphia's desire to avoid Equal Protection Clause violations as one of six reasons to enforce the Services Contract and the FPO). That clause provides that States may not "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. As the district court in *Fulton* noted, allowing government contractors to discriminate against same-sex couples would likely violate the Fourteenth Amendment. *Fulton*, 320 F. Supp. 3d at 685. Second, the lower courts discussed the potential for an Establishment Clause claim arising from the *Fulton* facts. *Id.*; *see* Maria Elise Lasso, Note, Employment Division v. Smith*: The Supreme Court Improves the State of Free Exercise Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 569, 590 (1993) (explaining that "[c]ourt approval of some religious claims and disapproval of others risks becoming a governmental declaration of acceptable religions or a promotion or an endorsement of one religion over another"); *supra* text accompanying note 130 (listing Philadelphia's desire to avoid Establishment Clause violations as one of six reasons to enforce the Services Contract and the FPO). The district court suggested that public funding of a religious organization that imposes its religious views on others would likely result in an Establishment Clause violation. *Fulton*, 320 F. Supp. 3d at 685. On appeal to the Third Circuit, CSS raised an Establishment Clause claim, arguing that the city was punishing CSS "for refusing to adopt its preferred view of the Catholic teaching." Fulton v. City of Philadelphia, 922 F.3d 140, 160 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem). The Third Circuit ultimately found CSS's Establishment Clause argument unpersuasive. *Id.* at 161 (citing the city's ongoing contractual relationship with Bethany Christian Services, another religiously affiliated agency, and the city's continued relationships with CSS in other areas as evidence that the city did not treat any group preferentially). The Equal Protection Clause and Establishment Clause issues that *Fulton* raises are particularly interesting and timely given the current civil rights advancements for LGBTQ people. *See, e.g.*, Bostock v. Clayton Cnty. 140 S. Ct. 1731, 1754 (2020) (holding that discrimination against transgender and "homosexual" employees constitutes impermissible discrimination on the basis of sex); Obergefell v. Hodges, 576 U.S. 644, 662, 675 (2015) (building on *United States v. Windsor* and holding that same-sex couples have a fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment); United States v. Windsor, 570 U.S. 744, 769

C. Issue One: Whether a 6-2 Circuit Split over the Appropriate Analysis for Free Exercise Clause Claims Exists

As discussed, CSS declared that there is currently a circuit split on the appropriate evidence that courts should consider when analyzing Free Exercise Clause claims.[154] According to CSS's petition for certiorari, two circuits, the Ninth Circuit and the Third Circuit in *Fulton*, have decided to apply *Smith* narrowly and strictly, requiring free exercise plaintiffs to prove that a law is not neutral and generally applicable by showing that the government would allow a person with different religious views to perform the otherwise prohibited conduct.[155] However, CSS claims that six other circuits—the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits—drawing from *Smith*, *Lukumi*, and *Masterpiece Cakeshop*, apply a "more capacious" approach, allowing free

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(2013) (finding that the language in the Defense of Marriage Act, which defined marriage as a legal union between one man and one woman, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment); Lawrence v. Texas, 539 U.S. 558, 562, 564 (2003) (finding unconstitutional a Texas statute that criminalized sodomy). Civil rights advancements specifically concerning LGBTQ fostering and adoption have occurred on a state law level as well. Some states have gone beyond merely allowing same-sex couples to adopt children: twenty-five states and the District of Columbia have statutes, regulations, or agency policies that explicitly prohibit foster care agencies from discriminating against potential adoptive parents based on their sexual orientation and gender identity, while five states and Puerto Rico prohibit discrimination based on potential parents' sexual orientation only. *See Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws [https://perma.cc/DF4R-HKVZ] (depicting that Washington, Oregon, California, Nevada, Colorado, New Mexico, South Dakota, Hawaii, Minnesota, Indiana, Illinois, Kentucky, Tennessee, Michigan, West Virginia, Maine, New Hampshire, New York, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, and the District of Columbia have statutes, regulations, or agency policies that prohibit discrimination against adoptive parents on the basis of sexual orientation and gender identity). *But see id.* (showing that North Dakota, South Dakota, Kansas, Oklahoma, Texas, Michigan, Tennessee, Mississippi, Alabama, Virginia, and South Carolina allow state-licensed agencies to refuse to place children with same-sex couples if doing so would contradict an agency's religious beliefs).

154. *See* Brief for Petitioners, *supra* note 146, at 39.

155. *See* Petition for Writ of Certiorari at 19, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123) (characterizing these circuits' approach as holding all laws as neutral and generally applicable unless plaintiffs make "*one specific showing*" that government would not punish the same conduct by someone with different religious beliefs (emphasis added)); *see also Fulton*, 922 F.3d at 154 (explaining that "a challenger under the Free Exercise Clause must show that it was treated differently *because of* its religion").

exercise plaintiffs to proffer various forms of evidence to support a finding that a law is not neutral and generally applicable.[156]

1. The two circuits & their application of Smith

In *Fulton*, the Third Circuit found that Philadelphia's non-discrimination clause pertaining to adoption agencies satisfied the *Smith* neutral-and-generally-applicable standard.[157]

To make this determination, the Third Circuit assessed whether the FPO, to which CSS agreed to comply as a matter of contract law, met the neutral-and-generally-applicable *Smith* standard.[158] The court found unpersuasive CSS's argument that the "anti-discrimination clause is not permissible under *Smith*" because it was "motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct."[159]

The Third Circuit compared the city's treatment of CSS with the two Supreme Court cases that followed *Smith*: *Lukumi* and *Masterpiece Cakeshop*.[160] Additionally, the court compared CSS's treatment to two Third Circuit Free Exercise Clause cases. The Third Circuit first referred to *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[161] where a police department policy contained a system of individualized exemptions but did not allow for religious exemptions.[162] The police department allowed medical exemptions from a prohibition on facial hair, yet it refused to grant religious exemptions for Sunni Muslims whose religion forbade them from shaving their beards.[163] Second, the court referred to a similar case, *Tenafly Eruv Ass'n v. Borough of*

156. *See* Petition for Writ of Certiorari, *supra* note 155, at 19; *see e.g.*, St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 633 (7th Cir. 2007) (considering the legislative and administrative history of the challenged law).

157. *Fulton*, 922 F.3d at 147.

158. *See id.* at 152 (explaining that the Free Exercise Clause does not "relieve an individual" from complying 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)" (quoting Emp. Div. v. Smith, 494 U.S. 872, 879 (1990), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb)).

159. *Id.* at 153–54.

160. *See id.* at 158–59 (finding no evidence of "animosity against religion found in *Masterpiece*" or "gerrymander[ing] as in *Lukumi*").

161. 170 F.3d 359 (3d Cir. 1999).

162. *See id.* at 364–65 (finding a Newark Police Department policy that forbade facial hair triggered heightened scrutiny).

163. *Id.* at 360.

Tenafly,[164] where, again, a system of exemptions did not extend to religious exemptions.[165] Here, the Borough of Tenafly selectively enforced an ordinance that prohibited the posting of materials on street poles, as it only enforced the policy when Orthodox Jews attempted to erect an eruv.[166]

After comparing these cases to *Fulton*, the Third Circuit came to "a clear answer" and determined that Philadelphia did not treat CSS differently because of the agency's religious beliefs.[167] The court did not find any evidence of religious hostility, as shown in *Masterpiece Cakeshop*, for example.[168] Rather, the court pointed to DHS Commissioner Cynthia Figueroa's May 7, 2018 letter, which stated, "'[w]e respect your sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services,'" as proof that CSS's treatment did not amount to the religious hostility present in *Masterpiece Cakeshop*.[169] Similarly, the court examined Commissioner Figueroa's statement to CSS Secretary James Amato stating that "it would be great if we could follow the teachings of Pope Francis" to determine whether this statement contained religious hostility.[170] The court concluded that CSS presented this statement out of context, and it determined that Commissioner Figueroa made the comment in an effort to reach "common ground" during negotiations.[171] Moreover, the court did not find evidence that Philadelphia targeted religion when Commissioner Figueroa contacted agencies with religious affiliations; rather, the court found that calling CSS and Bethany Christian Services made the most sense because they were the only

164. 309 F.3d 144 (3d Cir. 2002).

165. *See id.* at 167 (finding that Tenafly's selective enforcement proved religious targeting).

166. *Id.*

167. *See* Fulton v. City of Philadelphia, 922 F.3d 140, 156 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem) (explaining that "[t]he [c]ity has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation").

168. *See id.* at 157 (noting that, unlike the commissioners in *Masterpiece Cakeshop*, City of Philadelphia officials "repeatedly emphasized that they respected CSS's beliefs as sincere and deeply held").

169. *Id.* (alteration in original).

170. *Id.*

171. *Id.*

agencies that Figueroa knew refused to certify same-sex couples.[172] Therefore, the court was satisfied that hostility toward religious beliefs in *Fulton* was "significantly less than what was present in *Lukumi* or even in *Masterpiece [Cakeshop]*."[173]

The court then considered whether the City of Philadelphia used a method of selective enforcement similar to the methods used in *Fraternal Order of Police* and *Tenafly*.[174] The court rejected CSS's argument and explained that just because DHS previously lacked cause to enforce contractors' adherence to the FPO's anti-discrimination clause does not mean that DHS selectively enforced the clause against CSS because of the agency's religious beliefs.[175] The court concluded that this was merely the first time that the issue of discrimination presented itself.[176]

The court also considered whether the city "acted inconsistently" because the city allowed DHS to consider other protected classifications, such as race and disability, when making placements.[177] The court determined that "unlike CSS, [DHS] never refuses to work with individuals because of their membership in a protected class."[178] Lastly, the court found no evidence that DHS allowed other contracting agencies to discriminate against classes that the FPO protects.[179]

In sum, because the court did not find any evidence of religious hostility, selective enforcement, or operational exclusion in DHS's treatment of CSS, the Third Circuit agreed with the district court's "finding that CSS [] failed to demonstrate a sufficient likelihood of

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172. *See id.* (explaining that Commissioner Figueroa "had little reason to think that nonreligious agencies might have a similar policy" and that Commissioner Figueroa also called a secular agency).

173. *Id.* To highlight the lack of religious hostility in this case, the court explained that the city, which was aware of CSS's religious affiliation, had worked with CSS for decades without any problems. *Id.* at 159. Further, the city continues to work with CSS in other capacities. *Id.* Lastly, the city expressed a desire to renew the contract with CSS so long as CSS complies with contract terms, namely the FPO anti-discrimination clause. *Id.*

174. *Id.* at 157–58.

175. *Id.* at 158.

176. *See id.* (noting that the record does not contain any evidence of discrimination from other foster care agencies).

177. *Id.*

178. *Id.* (concluding that DHS considered all circumstances to determine the best fit for each child in the system).

179. *Id.*

success on the merits of its Free Exercise Clause claim."[180] The court summarized CSS's argument as follows: "[T]he [c]ity is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore the [c]ity is targeting CSS for its religious beliefs."[181] The court found this logic not only flawed but "dangerous," as it contradicted the entire premise of *Smith*.[182] Had the Third Circuit found the non-discrimination clause not neutral nor generally applicable, the court would have followed *Lukumi* and applied strict scrutiny.[183]

Four years before the Third Circuit's *Fulton* ruling, in *Stormans v. Wiesman*,[184] the Ninth Circuit considered a case regarding a religious objection to an industry-wide rule that raised similar issues as *Fulton*. The case involved pharmacists who had "religious objections to delivering emergency contraceptives."[185] Applying *Smith* and *Lukumi*, the Ninth Circuit found that the rules requiring pharmacists to provide emergency contraceptives, among other products, were facially neutral and generally applicable.[186] When determining the neutrality of the laws, the Ninth Circuit first examined the facial neutrality, searching the rules at issue for textual references to religion.[187] The court concluded that because the rules did not reference religion in any way, they qualified as facially neutral.[188] The court then considered whether the rules were operationally neutral.[189] The court deemed the challenged rules operationally neutral, unlike the ones in *Lukumi*, because they pertained to all pharmacists and all prescriptions, not just

180. *Id.* at 159.
181. *Id.*
182. *See id.* (describing the *Smith* premise as the concept that "while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements").
183. *See supra* Section I.A.1.b (detailing the *Lukumi* framework: that a law which burdens free exercise of religion and is not neutral and generally applicable must undergo strict scrutiny).
184. 794 F.3d 1064 (9th Cir. 2015).
185. *Id.* at 1071.
186. *Id.* at 1075–77.
187. *Id.* at 1076.
188. *Id.*
189. *See id.* (noting that, in *Lukumi*, the challenged ordinance did not mention the Santeria religion, but it did prohibit sacrifice of animals, a Santeria religious practice, while providing an exemption for kosher slaughter; thus, the ordinance was facially but not operationally neutral).

emergency contraceptives.[190] Furthermore, the court found that the challenged rules "specifically *protect[ed]* religiously motivated conduct."[191]

When considering general applicability, the court examined whether the rules sufficiently covered "non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect," and it found that the rules were not substantially underinclusive.[192] Next, the Ninth Circuit examined whether a system of individualized exemptions existed and determined that "[t]he mere existence of an exemption that affords some minimal governmental discretion does not destroy a law's general applicability."[193] The court concluded that the government's system of exemptions were not left to personal discretion; rather, the government outlined five specific exemptions based on "particularized, objective criteria" that pertained to the operation of a pharmacy.[194] Finally, the court examined whether the government non-selectively enforced the rules and, thus, neutrally applied them.[195] The court found the pharmacists' selective enforcement argument unpersuasive because the government used a complaint-driven enforcement mechanism, and the government had not investigated Catholic pharmacies because no complaints had been filed against those pharmacies.[196]

After finding that the rules were both facially and operationally neutral and generally applicable, the Ninth Circuit conducted a rational basis review of the challenged rules.[197] The court concluded that the

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190. *Id.* at 1076–77.

191. *Id.* (finding that the rules' inclusion of a "right of refusal" protects and accommodates individual pharmacists who have religious or other objections to the delivery of certain prescription drugs).

192. *Id.* at 1079, 1081.

193. *See id.* at 1082 (citations omitted) (explaining that systems of individualized exemptions are suspicious when there is evidence to suggest that "certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons" (quoting Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 276 (3d Cir. 2007))).

194. *See id.* at 1080–82 (highlighting that there are five specific, business-related exemptions that would allow a pharmacy to not deliver a drug, such as not delivering drugs if the prescription is potentially fraudulent or when an emergency affects the supply of drugs).

195. *Id.* at 1083–84 (finding that the disproportionate percentage of investigations into the pharmacy was a result of the sheer number of complaints filed against it).

196. *Id.*

197. *Id.* at 1084 (explaining that under rational basis review the court "must uphold the rules if they are rationally related to a legitimate government purpose").

rules were rationally related to Washington's "legitimate interest in ensuring that its citizens have safe and timely access to their . . . medications."[198] Although CSS asserts that the Third Circuit and the Ninth Circuit apply a narrow reading of the *Smith* neutral-and-generally-applicable standard, these circuits appear to consider the same factors as the six circuits on the other side of this supposed circuit split.

2. The six circuits & their application of Smith

In its petition for certiorari, CSS highlighted cases from the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits that allow free exercise plaintiffs to present other evidence that a law is not neutral and generally applicable to prove free exercise violations.[199] CSS suggests that only the Sixth, Tenth, and Eleventh Circuits consider individualized exemptions when determining what level of scrutiny should apply.[200] In *Ward v. Polite*,[201] the Sixth Circuit considered whether a school violated one of its master's student's First Amendment rights when it expelled her for requesting, because of her religious objection to same-sex relationships, to refer a gay student seeking counseling to another counselor. The school refused her request, citing its "blanket rule" against referrals despite having made exceptions to the rule for other students.[202] The court, following both *Smith* and *Lukumi*, found that "an exception-ridden policy [that] takes on the appearance and reality of a system of individualized exemptions . . . must run the gauntlet of strict scrutiny."[203] In *Axson-Flynn v. Johnson*,[204] the Tenth Circuit recognized that, if a defendant, in this case a university, could prove that a required recitation, which was offensive to a student's religion, was neutral and generally applicable under *Smith*, the student would have the opportunity to show that one of the two *Smith* exceptions applied and triggered strict scrutiny.[205] Similarly, the Eleventh Circuit in *Midrash Sephardi, Inc. v. Town of Surfside*,[206] following *Smith* and *Lukumi*, found that strict scrutiny applies when a law "fails to similarly regulate secular and religious

198. *Id.*
199. Petition for Writ of Certiorari, *supra* note 155, at 19.
200. *Id.* at 23.
201. 667 F.3d 727 (6th Cir. 2012).
202. *Id.* at 740.
203. *Id.*
204. 356 F.3d 1277 (10th Cir. 2004).
205. *Id.* at 1294.
206. 366 F.3d 1214 (11th Cir. 2004).

conduct implicating the same government interests."[207] Relying on these cases, CSS concludes that these circuits interpreted *Smith* to mean that strict scrutiny should apply when a plaintiff presents evidence of individualized exemptions.[208]

While consideration of individualized exemptions has commonality with the Third and Ninth Circuits analysis, CSS also highlights that these other circuits consider the legislative history of the law at issue when determining what level of scrutiny to apply. For example, in *Central Rabbinical Congress of the United States & Canada v. New York City Department of Health & Mental Hygiene*,[209] the Second Circuit determined that a New York regulation prohibiting oral suction during the circumcision procedure without written consent from the child's parents was neither neutral nor generally applicable under *Smith* and *Lukumi*.[210] The court reached this conclusion after finding that the regulation, which New York enacted in response to Orthodox Jewish groups' practices, "purposefully and exclusively" targeted Orthodox groups that perform the act of *metzitzah b'peh*.[211] CSS interprets *Central Rabbinical Congress* to hold that laws "prompted" by particular religious groups or practices require strict scrutiny analysis.[212]

Though not typically determinative on its own of whether a law is neutral and generally applicable, legislative and administrative history factors into several circuits' analysis to determine the government's intent in creating the law.[213] In *Ward*, the Sixth Circuit found that a post-hoc policy impeding a student's ability to refer a client to another student counselor for faith-based reasons triggered strict scrutiny because the student's religious accommodation request clearly prompted the policy.[214] In deciding *St. John's United Church of Christ v.*

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207. *Id.* at 1232.

208. Petition for Writ of Certiorari, *supra* note 155, at 19, 23.

209. 763 F.3d 183 (2d Cir. 2014).

210. *Id.* at 186.

211. *Id.* at 186, 195. *Metzitzah b'peh* is a traditional practice during circumcision that is practiced primarily by certain Orthodox Jewish groups and involves direct oral suction on the circumcision wound. *Id.* at 187.

212. Brief for Petitioners, *supra* note 146, at 24.

213. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750 (2020) (stating that "while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose," such as providing context for what the law might have meant at the time of enactment).

214. Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012).

City of Chicago,[215] the Seventh Circuit, in accordance with *Smith* and *Lukumi*, considered events that preceded the enactment of legislation, including a government taking of two cemeteries located on the church's premises, to determine whether the legislation triggered strict scrutiny.[216] Similarly, in *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*,[217] the Eighth Circuit gave weight to legislative history when determining whether a law facially discriminated against religious nonmedical health care institutions.[218] Lastly, in *Shrum v. City of Coweta*,[219] the Tenth Circuit suggested that "[p]roof of hostility or discriminatory motivation" behind the law might be enough to prove that the government's treatment of Shrum, the plaintiff police officer who was also a minister, lacked neutrality.[220]

D. Issue Two: Does the Court Need to Revisit Smith *?*

Despite clarifying cases, such as *Lukumi* and *Masterpiece Cakeshop*, CSS argues that the Court should revisit *Smith*.[221] CSS contends that the Third Circuit's reliance on *Smith* exemplifies the conflict and confusion among the lower courts when determining how to properly apply *Smith*.[222] Finding that the *Smith* standard "has not delivered on its central promise" that governments would not use *Smith* to trample over religious exercise, CSS urges the Court to "restore free exercise to a more administrable rule that adequately protects a fundamental [F]irst [A]mendment right."[223]

While it is debatable whether *Smith* has created confusion among lower federal courts, it is clear that many First Amendment scholars have strongly held criticisms of *Smith*.[224] Some criticisms go so far as to say that the *Smith* opinion reduced free exercise of religion to a "second rate liberty."[225] Conservatives and religious groups comprise

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215. 502 F.3d 616 (7th Cir. 2007).
216. *Id.* at 633.
217. 212 F.3d 1084 (8th Cir. 2000).
218. *Id.* at 1090.
219. 449 F.3d 1132 (10th Cir. 2006).
220. *Id.* at 1145 (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993)).
221. Petition for Writ of Certiorari, *supra* note 155, at 31.
222. *Id.*
223. *Id.* at 33–34.
224. *See supra* notes 41, 46. The names of the articles alone show the frustration with *Smith* and its associated rollback of First Amendment religious protections.
225. Austin, *supra* note 41, at 1345.

the majority of *Smith*'s critics[226] and complain that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause."[227] Some critics have even asserted that the *Smith* decision completely undercut the Framers' intent when drafting the Bill of Rights.[228] While some scholars agree with Justice Scalia that legislatures are the proper forums for deciding religious exemptions, others criticize his concession that "'leaving accommodation to the political process will place at a relative disadvantage those religious practices' engaged in by the minority."[229] Critics of *Smith* argue that this concession suggests severe shortcomings in the *Smith* approach.[230]

On the other hand, some scholars believe that *Smith* at the very least deserves recognition for doing away with the outdated and underused *Sherbert* test.[231] Another benefit of *Smith*'s neutral-and-generally-applicable standard is that it gave deference to legislative authority, as opposed to the *Sherbert* test, which stripped the legislature's power.[232] The *Smith* standard also promotes judicial efficiency.[233] By beginning

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226. *See, e.g.*, Brief of Foundation for Moral Law as Amicus Curiae Supporting Petitioners at 1–2, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123) (stating that many parents believe in "traditional marriage" and do not want their children to be raised by a same-sex couple).

227. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring in judgment); *see also* Emp. Div. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in judgment) ("In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty."), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

228. *See* Austin, *supra* note 41, at 1335–36 ("[T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943))).

229. Austin, *supra* note 41, at 1345 (quoting *Smith*, 494 U.S. at 890).

230. Austin, *supra* note 41, at 1345–46.

231. *See* David B. Frohnmayer, Employment Division v. Smith*: "The Sky that Didn't Fall,"* 32 CARDOZO L. REV. 1655, 1660 (2011) (drawing attention to the "glaringly obvious" point that *Sherbert* jurisprudence was seldom applied in a stringent way and highlighting that when the Court applied *Sherbert*'s "least restrictive alternative" test, it did so only in dicta).

232. *See id.* (describing the "least restrictive alternative" aspect of the *Sherbert* test as a "legislative drafter's nightmare," as "[i]t is the complete obverse of deference to legislative judgment once found in the aftermath of the famous footnote four of *United States v. Carolene Products Co.*"); *see also supra* note 30 (describing footnote four of *United States v. Carolene Products Co.*).

233. *See* Frohnmayer, *supra* note 231, at 1670.

the free exercise analysis with a neutral-and-generally-applicable standard, courts significantly curtail taxing litigation over gray areas, which the *Sherbert* balancing test previously invited.[234]

E. Issue Three: Whether Fulton *Improperly Conditions Government Contracts on Agencies' Adoption of Positions Contrary to Their Beliefs*

The third issue that the Supreme Court will have to rule on is a familiar one, although CSS has framed it differently. CSS's petition for certiorari asked the Court to consider whether the government can require a contractor to take actions that contradict its religious beliefs to participate in the publicly funded foster care system.[235] Essentially, the Court must decide whether the government can condition public funding on the promotion, albeit tacit, of a specific ideology. The Court has considered this exact issue many times before, and it has noted that there is conflicting precedent.[236]

1. The right not to speak

The First Amendment provides that the government shall not make any laws "abridging the freedom of speech."[237] Additionally, the government

234. *Id.*

235. *See* Petition for Writ of Certiorari, *supra* note 155, at 34 (summarizing the city's actions as "effectively den[ying] CSS a license if it does not speak and act as the government prefers"). During oral arguments, CSS suggested to the Court that it functions more like a licensee than a contractor. *See* Transcript of Oral Argument, *supra* note 12, at 6–8, 17–18, 85. It is plausible to find that the "government has more leeway" to impose conditions on its contractors than it does on licensees. *Id.* at 58. This Section proceeds assuming that CSS is a contractor.

236. *See, e.g.*, Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013) (discussing how some courts suggest that when the government conditions funding on something that the recipient rejects, even when the condition impacts First Amendment rights, the recipient is free to decline the funds, while other courts argue that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 59 (2006))).

237. U.S. CONST. amend. I.

may not compel anyone to speak.[238] Like most constitutional provisions, the Free Speech Clause has exceptions.[239]

Boy Scouts of America v. Dale[240] provided insight on the constitutionality of requiring an organization to project a position contrary to its beliefs. The Court did not have to consider government funding in *Boy Scouts of America*.[241] However, it did consider the constitutionality of forcing an organization to act in a manner contrary to the organization's core beliefs.[242] In *Boy Scouts of America*, the Court held that it could not require the Boy Scouts to admit Dale, a gay man, under the New Jersey public accommodations law because doing so would violate the Boy Scouts' First Amendment right to freedom of association.[243] Because the Boy Scouts asserted that "homosexual conduct" was inconsistent with the organization's values, "Dale's presence in Boy Scouts would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[244]

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238. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943) (finding that a mandatory salute to flag amounted to "compel[ing] him to utter what is not in his mind").

239. *See* Rust v. Sullivan, 500 U.S. 173, 192 (1991) (providing that, as an exception to the Free Speech Clause, governments may place conditions on government-funded programs).

240. 530 U.S. 640 (2000).

241. *See How Scouting Is Funded*, BOY SCOUTS AM., https://www.scoutingnewsroom.org/about-the-bsa/fact-sheets/how-scouting-is-funded [https://perma.cc/HTQ3-E44J] (stating that the Boy Scouts of America is not a taxpayer-funded organization).

242. *See Boy Scouts of America*, 530 U.S. at 647 (granting certiorari to decide whether forcing the Boy Scouts of America to admit Dale, a gay man, violated the First Amendment, as the Boy Scouts of America wanted to preserve their view "that homosexuality is immoral" (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196, 1223 (N.J. 1999))).

243. *See id.* at 661 ("While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 579 (1995))).

244. *Id.* at 653.

2. The proper conditions for the conditioning of government funds on compelled speech

Rust v. Sullivan[245] was one of the first cases to address the issue of conditioning government funds on compelled speech.[246] In *Rust*, the Supreme Court upheld government-funding conditions that prevented grant recipient programs from informing their patients about abortion counseling and services.[247] The Court reasoned that "[t]he condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights."[248] These conditions governed activities within the scope of the government-funded program; they did not restrict the activities or speech of employees of recipient programs as private individuals.[249]

Not long after *Rust*, the Court reaffirmed the notion that the government may condition the acceptance of government funds on compelled speech or non-speech in *Legal Services Corp. v. Velazquez*.[250] In *Legal Services Corp.*, the Court found that the Legal Services Corporation Act[251] facilitated private speech, as opposed to government speech; therefore, the compelled speech violated the Free Speech Clause.[252] The Court qualified its holding and explained that, as a consequence of government-disbursed funds, the government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[253]

More recently in *Agency for International Development v. Alliance for Open Society International, Inc.*,[254] the Court further clarified the *Rust*

245. 500 U.S. 173 (1991).

246. Though *Rust* has lost its precedential value regarding abortion services, its commentary on the conditioning of government funds still provides courts with guidance. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 208 (2015); Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205, 206 (2013).

247. *Rust*, 500 U.S. at 193.

248. *Id.* at 198.

249. *See id.* at 199 (explaining that the employees' activities are limited only while working for the government-funded program and that limit is "a consequence of their decision to accept employment in a project" with a permissibly restricted scope).

250. 531 U.S. 533 (2001).

251. 42 U.S.C. §§ 2996–2996*l*.

252. 531 U.S. at 541–42.

253. *Id.* at 541 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

254. 570 U.S. 205 (2013).

principle.[255] In *Alliance for Open Society International*, the Court held that compelling a potential public funding recipient to affirm a belief that is unrelated to the government program as a condition of receiving that funding violates First Amendment Free Speech Clause protections.[256] While the government may condition government funding on compelled speech, the government may not force a funding "recipient[] to adopt the government's views as their own."[257] Moreover, conditions are only acceptable when they are sufficiently related to the goals of the program.[258] The policy at issue in the case required organizations receiving government funding under a since-repealed public health act to expressly oppose prostitution.[259] Ultimately, the Court reiterated that the First Amendment "prohibits the government from telling people what they must say."[260] Thus, it found that the law's conditions violated the First Amendment's free speech protections because the anti-prostitution policy requirement compelled speech and lacked a nexus to the government program.[261]

II. ANALYSIS

This Part applies the foregoing case law to the three issues pending before the Supreme Court in *Fulton* and concludes that the Supreme Court should affirm the lower courts' decisions and rule in favor of Philadelphia on all three issues. First, this Part compares the approaches of the circuit courts involved in CSS's suggested circuit split and shows that a circuit split does not actually exist. Second, this Part explains that the Court should continue to first apply the *Smith* neutral-and-generally-applicable standard when evaluating Free Exercise Clause claims. Third, and finally, this Part argues that Philadelphia did not violate the First Amendment by requiring CSS to certify LGBTQ people as foster parents.

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255. *See* Fulton v. City of Philadelphia, 922 F.3d 140, 161 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem) (citing *All. for Open Soc'y Int'l*, 570 U.S. 205).

256. *All. for Open Soc'y Int'l*, 570 U.S. at 221.

257. *Fulton*, 922 F.3d at 161 (citing *All. for Open Soc'y Int'l*, 570 U.S. 205).

258. *See Fulton*, 922 F.3d at 161 (explaining that both *Rust* and *Alliance for Open Society International* focused solely on whether the conditions were sufficiently related to the government-funded program).

259. *All. for Open Soc'y Int'l*, 570 U.S. at 208.

260. *Id.* at 213 (quoting *Rumsfeld*, 547 U.S. at 61).

261. *Id.* at 221.

A. Issue One: A Free Exercise Circuit Split Does Not Exist

Despite CSS's best efforts to show that the Third Circuit and the Ninth Circuit apply a narrower reading of *Smith*, a detailed evaluation of precedent shows that all circuits consider the same factors when determining whether a challenged law is neutral and generally applicable. CSS cobbled together components of opinions from various circuits to manufacture a circuit split in an effort to persuade the Supreme Court to overturn *Smith*, which only subjects "valid and neutral law[s] of general applicability" to rational basis review, and return to the *Sherbert* standard, which applied strict scrutiny to all Free Exercise Clause claims.[262] There is no confusion amongst the lower courts; all of the circuit courts involved in this "split"—Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh—follow *Smith* and employ the neutral-and-generally-applicable standard as the threshold step in conducting a Free Exercise Clause violation analysis that considers several factors.[263] As Philadelphia rightly points out,

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262. *Fulton*, 922 F.3d at 152 (quoting United States v. Lee, 445 U.S. 252, 263 n.3 (1962)); *see* Petition for Writ of Certiorari, *supra* note 155, at 22 (establishing the CSS explanation of the existence of a circuit split over the application of *Smith*); Brief for Petitioners, *supra* note 146, at 50 (describing CSS's recommendation that *Smith* be overturned and call for a stricter standard).

263. *See Fulton*, 922 F.3d at 152 (beginning its analysis with a statement of the *Smith* standard: "The Free Exercise Clause does not, however, 'relieve an individual of the obligation to comply with a valid and neutral law of general applicability . . . . '" (quoting Emp. Div. v. Smith, 494 U.S. 872, 879 (1990), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb)); Stormans, Inc., v. Wiesman, 794 F.3d 1064, 1075 (9th Cir. 2015) (beginning its discussion by stating: "Under the rule announced in *Smith* . . . a neutral law of general application need not be supported by a compelling government interest . . . ."); Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014) (citing Commack Self-Serv. Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 212 (2d Cir. 2012)) (explaining that "valid and neutral law of general applicability" need only undergo "rational basis review" (quoting *Smith*, 494 U.S. at 879)); Ward v. Polite, 667 F.3d 727, 738 (6th Cir. 2012) (stating that under *Smith*, "public authorities may enforce neutral and generally applicable rules and may do so even if they burden faith-based conduct in the process"); St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 631 (7th Cir. 2007) (citing *Smith*, 494 U.S. at 883) (beginning its analysis with an explanation that *Smith* governs Free Exercise Clause claims); Shrum v. City of Coweta, 449 F.3d 1132, 1143 (10th Cir. 2006) (including a statement of the relevant law under *Smith* in its Free Exercise Clause analysis); Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir. 2004) ("We first address the threshold requirement of *Smith* of determining whether the strict adherence to offensive script requirement was a 'neutral rule of general applicability.'"); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004) (citing *Smith*, 494 U.S. at 879) ("After *Smith*, it

"[n]either the Ninth Circuit nor the Third Circuit has ever held that a free[]exercise plaintiff can prevail only by making 'one specific showing: that the government would allow the same conduct by someone who held different religious views.'"[264] CSS pits the Third and the Ninth Circuits against the six other circuits solely because these two circuits reached outcomes unfavorable to Free Exercise Clause plaintiffs; in both *Fulton* and *Stormans*, the laws at issue survived the *Smith* neutral-and-generally-applicable standard.[265]

First, in *Stormans*, the Ninth Circuit followed the rule that the Supreme Court announced in *Smith* and affirmed in *Lukumi*: "a neutral law of general application need not be supported by a compelling government interest even when 'the law has the incidental effect of burdening a particular religious practice.'"[266] In assessing the neutrality of the law at issue, the Ninth Circuit examined whether a system of individualized exemptions was in play and determined that no such system existed; the court's examination of the law's history further supported its conclusion that lawmakers were not motivated by anti-religious sentiment.[267] Further, the court examined whether the requirement at issue applied to all prescriptions or just emergency contraceptives, something to which a religious person might object.[268] When considering the general applicability of the rule, the Ninth Circuit looked for substantial under-inclusion of non-religiously motivated conduct, individualized exemptions, and selective enforcement.[269]

After careful examination of all of these factors, the Ninth Circuit deemed the regulation neutral and generally applicable; therefore, the

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remains true that a law that is not neutral or generally applicable must undergo strict scrutiny.").

264. City Respondents' Brief in Opposition at 16, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123).

265. *Compare Fulton*, 922 F.3d at 159 (finding that the FPO was neutral and generally applicable and therefore applying rational basis review), *and Stormans*, 794 F.3d at 1071 (concluding that the rules were neutral and generally applicable and therefore applying rational basis review), *with Cent. Rabbinical Cong. of U.S. & Can.*, 763 F.3d at 186 (finding the regulation "neither neutral nor . . . generally applicable and therefore [that it] must satisfy strict scrutiny"), *and Midrash Sephardi*, 366 F.3d at 1232 (finding a zoning law neither neutral nor generally applicable and therefore applying strict scrutiny).

266. *Stormans*, 794 F.3d at 1075 (quoting Burwell v. Hobby Lobby Stores, Inc., 537 U.S. 682, 745 (2014) (Ginsburg, J., dissenting)).

267. *Id.* at 1077–78.

268. *Id.*

269. *Id.* at 1079, 1081, 1083.

court merely applied rational basis review.[270] Not only did the Ninth Circuit clearly consider both factors that CSS urges the Supreme Court to consider—individualized exemptions and the history of the challenged regulation—but it also looked for signs of facial and operational neutrality, substantial under-inclusion, and selective enforcement.[271] The Supreme Court did not appear to have a problem with the Ninth Circuit's application of *Smith*, as it denied the free exercise plaintiffs' petition for certiorari in *Stormans*.[272]

Second, in *Fulton*, the Third Circuit also began its analysis with the *Smith* standard to determine whether the Services Contract and the FPO were neutral and generally applicable.[273] Pursuant to *Lukumi*, the Third Circuit examined whether DHS treated CSS differently than it treated secular agencies.[274] The Third Circuit did not find any evidence that DHS had treated CSS differently.[275] Additionally, the court considered CSS's argument that DHS had selectively enforced the FPO against it, but the court ultimately found this argument unpersuasive.[276] Furthermore, the Third Circuit did not find any hostility that mirrored the hostility present in *Masterpiece Cakeshop*.[277] The Third Circuit concluded its analysis by stating that the "fact that CSS's non-compliance with the [c]ity's non-discrimination requirements is based on its religious beliefs does not mean that the [c]ity's enforcement of its requirements constitutes anti-religious hostility."[278]

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270. *Id.* at 1084.

271. *See id.* at 1076 (reviewing both facial and operational neutrality); *id.* at 1078 (examining legislative and administrative history); *id.* at 1079 (investigating whether substantial under-inclusion existed); *id.* at 1081 (looking for signs of individualized exemptions); *id.* at 1083 (searching for evidence of selective enforcement).

272. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433 (2016).

273. Fulton v. City of Philadelphia, 922 F.3d 140, 152 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem).

274. *Id.* at 156.

275. *See id.* at 157 (finding that DHS Commissioner Figueroa did not treat CSS differently when she inquired about CSS and Bethany Christian Services's policies on certifying prospective LGBTQ foster parents, as they were the only two agencies with these anti-LGBTQ policies in place).

276. *See id.* at 158 (acknowledging that this was the first time Philadelphia had cause to believe that a foster care had discriminated against a protected class, thereby violating the Services Contract and the FPO).

277. *See id.* at 158–59 (noting that DHS had known about CSS's religious character for decades and continued to work with it regardless).

278. *Id.* at 159 (quoting Intervenor's Br. at 22).

After weighing all factors, the Third Circuit concluded that the Services Contract and the FPO were neutral and generally applicable and that DHS's enforcement of them did not violate CSS's free exercise rights.[279] The Third Circuit considered individualized exemptions, selective enforcement, allowance of the same conduct by secular parties, and hostility.[280] The only factor that the Third Circuit did not examine that CSS urged it to consider was the history of the Services Contract and the FPO.[281] However, it is unlikely that consideration of the legislative or administrative history of the Services Contract and the FPO would have led the court to a different result.[282] The Services Contract and the FPO were in place well before DHS had knowledge of CSS's discrimination.[283] Moreover, the FPO explicitly protects against religious hostility,[284] which might even suggest that DHS sought to protect religion rather than attack it.

Like the Ninth and Third Circuits, the Second Circuit began its analysis of a challenged law—a New York Health Code regulation—with the *Smith* neutral-and-generally-applicable standard; however, unlike the Ninth and Third Circuits, the Second Circuit determined that the regulation at issue was not neutral and generally applicable.[285] While the Second Circuit did not have enough information to make a determination on the general applicability of the regulation, which forbade oral suction during the circumcision procedure, it had enough information to assess the neutrality of the regulation.[286] Examination of both the text and the government's application of the regulation led to a clear finding that the regulation was not neutral

279. *Id.*

280. *Id.*

281. *Id.*

282. *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 683 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem) (analyzing the FPO's legislative history and intent and determining that the history supports a finding of neutrality).

283. *Id.* at 671.

284. *Id.*

285. Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 194 (2d Cir. 2014) (deciding to apply heightened, strict scrutiny because the regulation at issue "applie[d] *exclusively* to the religious conduct performed by" Orthodox Jews).

286. *See id.* at 196–97 (explaining that although the court could not determine the general applicability of the regulation based on the record, it could still subject the non-neutral rule to strict scrutiny).

under *Smith*.[287] Thus, the Second Circuit instructed the lower court to apply strict scrutiny on remand.[288]

Similarly, the Sixth Circuit case that CSS points to also held that the challenged regulation did not meet the *Smith* neutral-and-generally-applicable standard.[289] In *Ward*, the Sixth Circuit assessed a system of exemptions where a university permitted secular exemptions but did not grant a similar exemption to a student who refused to counsel LGBTQ clients due to her religious beliefs.[290] The court determined that the university's regulation of the anti-discrimination policy failed to meet the *Smith* neutral-and-generally-applicable standard.[291] Therefore, the university's actions had to survive strict scrutiny review.[292] The remaining cases that CSS points to in its fabricated circuit split follow the same pattern as the Second Circuit and Sixth Circuit cases, finding that the challenged regulations did not meet the *Smith* neutral-and-generally-applicable standard and, thus, must survive strict scrutiny.[293]

Based on the foregoing analysis, it is curious why CSS pits the Third and Ninth Circuits against the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, as all of the circuits appear to allow free exercise plaintiffs to rely on the same forms of evidence.[294] However, an

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287. *See id.* at 194–95 (explaining that the regulation's title explicitly references the practice of oral suction, and that the regulation singles out this practice "because the religious ritual it regulates is 'the only conduct subject to' the Regulation which was 'drafted . . . to achieve this result'" (quoting Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535 (1993)).

288. *Id.* at 198.

289. *See* Ward v. Polite, 667 F.3d 727, 739–40 (6th Cir. 2012) (finding that a university provided exemptions to students who refused to counsel clients for various secular reasons, such as when clients could not pay or when clients required counseling over "end-of-life options," but it expelled a student who refused to counsel clients for religious reasons).

290. *See id.* at 739 (explaining that the problem is not the university's anti-discrimination policy, rather it is the university's "failing to apply the policy in an even-handed, much less a faith-neutral, manner to Ward").

291. *See id.* at 740 (citing Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365–67 (3d Cir. 1999)) ("A double standard is not a neutral standard.").

292. *See id.* (determining that the university's actions could not withstand strict scrutiny).

293. *See supra* notes 285–92 and accompanying text (stating the findings of the courts); *see also* Midrash Sephardi, Inc. v. Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004) (finding the challenged zoning law to not be neutral and generally applicable).

294. *See* Petition for Writ of Certiorari, *supra* note 155, at 19 (explaining that the Third Circuit and Ninth Circuit do not allow Free Exercise Clause plaintiffs to prove

examination of the outcomes of the cases that comprise CSS's manufactured circuit split provides an explanation: CSS highlighted a number of circuit opinions that achieved its desired result—a finding of non-neutrality—to persuade the Supreme Court to find that Philadelphia enforced the Services Contract and the FPO against CSS in a non-neutral manner.[295] Conveniently, the Third and Ninth Circuits determined that the laws at issue *were* neutral and generally applicable, while the Second, Sixth, and Eleventh Circuits determined that the laws at issue *were not*.[296] Thus, the only difference between the approaches of the circuit courts is the outcome of each case. The Court, therefore, should see through this ruse and find that the circuits agree about the types of evidence that free exercise plaintiffs can rely on when proving that a challenged law is not neutral and generally applicable.

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their claim by showing "individualized exemptions, that the law exempts secular conduct . . . or that [a] law's history indicates non-neutrality," whereas six other circuits do). *Compare* Fulton v. City of Philadelphia, 922 F.3d 140, 156–58 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem) (considering hostility and inconsistent treatment), *and* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076, 1078–79, 1081–84 (9th Cir. 2015) (analyzing facial and operational neutrality, legislative and administrative history, substantial under-inclusion, individualized exemptions, and selective enforcement), *with* Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 195 (2d Cir. 2014) (assessing selective enforcement), *and Ward*, 667 F.3d at 736, 740 (evaluating administrative history and individualized exemptions), *and* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 631, 633 (7th Cir. 2007) (considering legislative and administrative history), *and* Shrum v. City of Coweta, 449 F.3d 1132, 1145 (10th Cir. 2006) (instructing the district court on remand to examine hostility or discriminatory intent to determine if the action was neutral), *and* Axson-Flynn v. Johnson, 356 F.3d 1277, 1294 (10th Cir. 2004) (instructing the district court to examine the administrative history on remand to determine if the rule was discriminatorily motivated or if the rule is neutral and generally applicable), *and Midrash Sephardi, Inc.*, 366 F.3d at 1232, 1233–34 (considering selective enforcement and individualized exemptions), *and* Children's Healthcare is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084, 1090–91 (8th Cir. 2000) (considering legislative history).

295. *See supra* note 293 and accompanying text. The other three opinions that CSS cited found disputes of facts pertaining to the nature of the challenged laws, and thus remanded the cases for further fact development.

296. *See supra* note 265 and accompanying text (comparing *Fulton* and *Stormans*, which found the laws at issue to be subject to rational basis review, with *Central Rabbinical Congress* and *Midrash Sephardi*, which reviewed the laws at issue under strict scrutiny).

B. Issue Two: The Court Does Not Need to Revisit Smith

1. Smith *has not generated confusion that requires its overruling*

In its petition for certiorari, CSS urged the Court to revisit *Smith* because it "has fostered conflict and confusion among the lower courts."[297] However, as demonstrated in the previous Section, lower courts are not confused about how to apply *Smith*.[298] CSS, like all other critics of *Smith*, argues that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause."[299] Nonetheless, *Smith* should remain the threshold step for Free Exercise Clause claims, because while it reduced the initial standard of review from strict scrutiny to rational basis review, it did not foreclose all avenues to strict scrutiny review.[300]

If anything, the Court should simply clarify *Smith*'s exceptions, which allow for strict scrutiny review. There are three potential avenues to strict scrutiny: (1) under *Lukumi*, a strict scrutiny review of all regulations not found neutral and generally applicable under *Smith*,[301] (2) the "individualized exemptions" exception, which some refer to as the "*Sherbert* exception,"[302] and (3) the "hybrid rights" exception.[303] While the *Lukumi* opinion clearly provides that laws that do not meet

297. Petition for Writ of Certiorari, *supra* note 155, at 31.

298. *See supra* Section II.A (reasoning that all of the circuit courts not only apply *Smith* as the threshold standard in the Free Exercise Clause but also allow free exercise plaintiffs to present various forms of evidence to prove that the challenged law is not neutral and generally applicable under *Smith*).

299. Petition for Writ of Certiorari, *supra* note 155, at 32 (quoting Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring)); *see, e.g.*, Austin, *supra* note 41, at 1342 (arguing that *Smith* "mortally wound[ed]" *Sherbert* and, thus, the proper protections of freedom of religion).

300. *See supra* Sections I.A.1.a–b (detailing the two potential exceptions to *Smith* that would allow for strict scrutiny review of Free Exercise Clause claims, as well as two cases, *Lukumi* and *Masterpiece Cakeshop*, that explain that laws that fail to meet the *Smith* standard must survive strict scrutiny).

301. *See supra* Section I.A.1.b (providing that the *Lukumi* Court clarified *Smith* and held that laws which do not meet the threshold *Smith* neutral-and-generally-applicable standard must undergo strict scrutiny).

302. *See supra* Section I.A.1.a (detailing the dicta in the *Smith* opinion that suggested that the *Sherbert* test can apply in unemployment benefits cases that show systems of individualized exemptions).

303. *See supra* Section I.A.1.a (explaining that *Smith* considered situations involving one or more constitutional claims, which in totality may require strict scrutiny).

the threshold *Smith* standard must face strict scrutiny,[304] the other two exceptions do not provide as clear of an answer.

The individualized exemptions exception to *Smith* appeared as dicta in the *Smith* majority opinion, where the Court stated that it would not apply *Sherbert* "*beyond* the unemployment compensation field."[305] Most scholars and courts have taken that key word "beyond" to mean that in Free Exercise Clause cases involving "mechanism[s] for individualized exemptions," like *Sherbert*, government action must withstand strict scrutiny.[306] The Court did not provide more information on the individualized exemptions exception in either *Lukumi* or *Masterpiece Cakeshop*. Thus, lower courts have treated cases involving individualized exemptions differently.[307] On one hand, a narrow reading of this dicta in *Smith* would suggest that courts should only allow the individualized exemptions exception in cases involving unemployment benefits. On the other hand, a broad reading of this dicta in *Smith* would suggest that courts should apply the individualized exemptions exception any time a system of individualized exceptions is present. While the Supreme Court should not reconsider *Smith*, it should instruct the lower courts on how to apply the individualized exemptions exception, as these varying interpretations yield vastly different results.

Like the individualized exemptions exception, the Court introduced the hybrid rights exception as dicta in *Smith*.[308] The Court merely stated that "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."[309] The Court characterized this type of claim as a

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

305. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990) (emphasis added), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

306. *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)); *see, e.g.*, Kaplan, *supra* note 41, at 1052 (reasoning that the Court wanted to "ensure" that the government would not treat citizens unfairly on the basis of religion, and thus it allowed *Sherbert* to govern cases involving individualized exemptions exceptions).

307. *See generally* Kaplan, *supra* note 41, at 1060–62 (comparing courts that apply strict scrutiny upon finding a system of individualized exemptions with courts that consider a system of individualized exemptions to represent just one factor pointing towards a lack of neutrality, as well as with courts that narrowly apply the individualized exemptions exception in cases involving unemployment benefits).

308. *See Smith*, 494 U.S. at 882 (discussing certain cases where the Court prohibited compelled expression when the claim involved both free speech and freedom of religion).

309. *Id.*

"hybrid situation."[310] Many scholars and courts have read this dicta to mean that the Court created another exception—the hybrid rights exception—that requires strict scrutiny when a plaintiff makes a free exercise claim in conjunction with another constitutional claim.[311] As with the individualized exemptions exception, the Court did not provide any indication of how to apply a hybrid rights exception in either *Lukumi* or *Masterpiece Cakeshop*. Thus, the issue that arises when a court applies the individualized exemptions exception applies to the hybrid rights exception, too, and arguably to a larger degree.

The Court never stated that strict scrutiny would apply in any case involving hybrid rights as it stated regarding the individualized exemptions exception; it merely stated that it could envision cases that present multiple issues.[312] Yet some courts have applied strict scrutiny when First Amendment plaintiffs claim violations of multiple rights, such as freedom of speech and free exercise.[313] In *Fulton*, the Court should clarify whether *Smith* creates a hybrid rights exception. While the confusion surrounding the individualized exemptions and the hybrid rights exceptions requires clarification from the Court, no other confusion exists that would require the Court to revisit and possibly overturn *Smith*.

2. Stare decisis and judicial efficiency caution against revisiting Smith

Since 1990, *Smith* has served an unpopular but necessary role in First Amendment jurisprudence; as such, the Court's overruling of *Smith* would present severe stare decisis concerns. The doctrine of stare decisis is "in English, the idea that today's Court should stand by yesterday's decisions."[314] The Supreme Court considers "the quality of

310. *Id.*

311. *See* Kaplan, *supra* note 41, at 1046 (noting the controversy that surrounds the interpretation of the hybrid rights exception and arguing that courts that read this exception into *Smith* misinterpret the true meaning of the case).

312. *Smith*, 494 U.S. at 882.

313. *See, e.g.*, Equal Emp. Opportunity Comm'n v. Cath. Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that a free exercise claim based on the hybrid rights exception must provide an independent, viable claim of infringement of a companion constitutional right); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 181–83 (Wash. 1992) (en banc) (applying strict scrutiny to the Church's claim that is "hybrid" because the designation at issue "violates . . . [the] right to freely exercise religion, [and] it infringes on . . . rights to free speech").

314. Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015); *see also* Brief of the National Women's Law Center et al. as Amici Curiae in Support of Respondents and Intervenor-Respondents at 11, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020)

[the decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision" when deciding whether to overrule a decision.[315] Applying these principles to *Smith*, the quality of the majority's reasoning in *Smith* is sound.[316] The *Smith* rule is entirely workable, as all courts consistently apply it as the threshold step in a Free Exercise Clause analysis without problem or confusion.[317] Further, overruling *Smith* would risk inconsistencies with recent developments in case law that seek to safeguard protected classes, such as the LGBTQ community, against discrimination in other spheres.[318] The Court has had ample opportunity to overrule, limit, or modify *Smith* in the recent past, such as in *Lukumi*, *Masterpiece Cakeshop*, and *Stormans*, but it has not. *Smith* has governed Free Exercise Clause claims successfully for thirty years; there was no reason to overturn *Smith* in 2018 with *Masterpiece Cakeshop*, and there is no reason to overturn it now. The overruling of *Smith* at this point in our jurisprudence would result in an entire lack of predictability.

The predictability that *Smith* currently provides also substantially enhances judicial efficiency.[319] In *Smith*, Justice Scalia warned that "[a]ny society adopting [the "compelling interest" test] would be courting anarchy."[320] While the use of "anarchy" may appear hyperbolic, the courts have heard cases where plaintiffs argue for "constitutionally

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(No. 19-123) (characterizing stare decisis as the Court's "North Star"). *But see* Payne v. Tennessee, 501 U.S. 808, 828 (1991) (explaining that "*[s]tare decisis* is not an inexorable command").

315. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps. Council, 138 S. Ct. 2448, 2478–79 (2018).

316. *See supra* notes 231–34 and accompanying text.

317. *See supra* Section II.A. (discussing how a free exercise circuit split does not exist because all courts follow *Smith* and employ the neutral-and-generally-applicable standard when conducting a free exercise violation analysis).

318. *See supra* note 153 (listing recent decisions that have advanced LGBTQ rights); *see also* Brief of the National Women's Law Center et al. as Amici Curiae, *supra* note 314, at 11 (arguing that reversing *Smith* would "come at a great cost," as it undoubtedly led to challenges of "non-discrimination civil rights protections" in various sectors across the nation).

319. *See* Lasso, *supra* note 153, at 584–85 (arguing that predictability will result because courts will no longer have to determine and weigh the government interests at stake, a task that requires substantial evidence and predictions of experts in various fields).

320. Emp. Div. v. Smith, 494 U.S. 872, 888 (1990), *superseded at federal level by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

required religious exemptions from civic obligations of almost every conceivable kind."[321] *Smith* has stood the test of time, and it is clearly strong enough to resist meddling from special interest groups seeking to receive special treatment or exploit potential loopholes.[322]

Lastly, *Smith* bolsters the separation of powers principle. Reconsidering *Smith* would undermine the legislative process.[323] No single person can be an expert of the central tenets of all religions, not even Supreme Court justices.[324] Therefore, as so many justices have said before, it is not the Court's place to determine what qualifies as a central tenet of each religion to discern whether a claim for religious exemption is proffered for legitimate religious reasons or to exploit a loophole.[325] Courts should leave this duty to the one branch of government that truly represents the American people: Congress.[326]

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321. *See id.* at 888–89 (listing the various requirements from which litigants have sought religious exemptions: "compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races" (citations omitted)). *But see* Brief of Archbishop Jerome E. Listecki & the Roman Catholic Archdiocese of Milwaukee as Amici Curiae Supporting Petitioners at 5–6, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123) (finding that "the *Smith* majority feared [a] parade of horribles" and that its "fears were overstated").

322. *See* Lasso, *supra* note 153, at 586–87 (explaining that there are disagreements amongst courts, "theologians, sociologists, and others" when it comes to defining "religion," "religious practices," or "religious beliefs," which can lead to inequities in the distribution of exemptions).

323. *See, e.g.*, Brief of National League of Cities et al. as Amici Curiae Supporting Respondents at 8–9, *Fulton*, 140 S. Ct. 1104 (No. 19-123) (finding that an application of strict scrutiny would require the judiciary to make "policy decisions best left to the legislature").

324. Justice Scalia delivered a speech in which he shared a useful observation on the complex religious landscape of the United States that a prominent French judge once told him: "[T]he essential difference between France and the United States [is] as follows: France has two religions and three hundred cheeses; the United States has two cheeses and three hundred religions." ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 134–35 (Christopher J. Scalia & Edward Whelan eds., 1st ed. 2017).

325. *See supra* note 322 and accompanying text (discussing the vast disagreements amongst courts, theologians, sociologists, and other entities on how to best define religion).

326. *See, e.g.*, *Smith*, 494 U.S. at 887 ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring))).

Separation of powers is what our nation was built on; an overruling or reconsidering of *Smith* would require the Court to take on Congress's role of adjusting laws to reflect society's norms.[327]

C. Issue Three: Philadelphia's Conditioning of Government Contracts on Actions Contrary to CSS's Religious Beliefs is Constitutionally Permissible

The Court has repeatedly held that the government may condition receipt of government funds on the professing of a belief that runs contrary to the belief of a recipient agency;[328] the situation at issue in *Fulton* is in no way unique. Philadelphia did not violate the First Amendment when it conditioned CSS's government contract on compelled anti-discrimination speech because the city provides public funding to CSS's foster care agency operations. CSS's publicly funded nature severely lessens the level of free speech protections afforded to it under the Constitution, as the government can regulate the messages that its publicly funded agents espouse.[329]

In its petition for certiorari, CSS relied heavily on *Alliance for Open Society International*—where the compelled speech fell outside of the scope of the government-funded program and thus was unconstitutional[330]—yet the facts of *Fulton* do not parallel that case closely enough to bind the Court. In fact, *Fulton* more closely resembles *Rust*. In *Rust*, the Court allowed the government to prohibit publicly funded programs from informing their patients about abortion services because the condition had a close nexus to the scope of the government program.[331] Moreover, the Court reasoned that the condition was acceptable because the

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327. *See* Brief of Professor Eugene Volokh as Amicus Curiae Supporting Neither Party at 4–12, *Fulton*, 140 S. Ct. 1104 (No. 19-123) (discussing the balance of power between Congress and the Court).

328. *See supra* Section I.E.2. (outlining the proper conditions for the conditioning of government funds on compelled speech).

329. *See supra* Section I.E.1 (explaining that, in accordance with *Rust*, the government can condition the receipt of government funding on compelled speech, as long as the affirmed belief is sufficiently related to the government program).

330. Reply Brief for Petitioners at 8–9, *Fulton*, 140 S. Ct. 1104 (2020) (citing Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 218–221 (2013)) (explaining that the central holding of *Alliance for Open Society International* is "that the government may not condition participation in a government program on speech outside that program"). In *Alliance for Open Society International*, the Court deemed the regulation unconstitutional because the regulation lacked a sufficient nexus between the conditions of the funding and the scope of the government program. *See supra* notes 258–61 and accompanying text.

331. 500 U.S. 173, 193–95 (1991).

recipients were only required to follow this condition when working at the program; the moment the recipients left their office, they could advocate on behalf of any of their beliefs.[332] Considering that the Philadelphia foster care system was oversaturated with children when the city contracted with CSS, Philadelphia had every interest to welcome and include all individuals seeking to serve as foster parents.[333] By discriminating against same-sex couples, not only would Philadelphia, through CSS, reduce opportunities for children to obtain critical developmental support from foster parents, but it would also make the pool of potential foster parents less diverse.[334] Thus, Philadelphia's requirements for its contracting agencies had a sufficient nexus to the government program's goals.[335]

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332. *See id.* at 199 (describing the compelled speech as a "consequence" that came with voluntarily accepting government funds).

333. *See supra* note 105 and accompanying text (highlighting that in 2018, when DHS became aware of CSS discrimination of LGBTQ people, Philadelphia was experiencing a foster care crisis, as it had the highest per capita rate of children in the foster care system).

334. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD.'S BUREAU, 26 THE AFCARS REPORT 6 (2019), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf [https://perma.cc/337H-2JTB] (finding that married couples comprise 68 percent of adoptive families; unmarried couples comprise 3 percent; single females comprise 25 percent; and single males comprise 3 percent); *LGBTQ: The Issue*, CHILD.'S RIGHTS, https://www.childrensrights.org/lgbtq-2 [https://perma.cc/WL8R-7B7A] (stating that 30.4 percent of youth in foster care identify as LGBTQ and 5 percent as transgender, compared to 11.2 percent and 1.17 percent of youth not in foster care); *see, e.g.*, Brief for Children's Rights et al. as Amici Curiae Supporting Respondents at 30, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123) (arguing that allowing CSS to thwart Philadelphia's goal of recruiting diverse foster families would harm children, especially LGBTQ children, because CSS's discrimination sends the "message that LGBTQ people are considered unsuitable to provide loving homes").

335. In its petition for certiorari, CSS also relied on *Trinity Lutheran Church of Columbia, Inc. v. Comer*. In *Trinity Lutheran*, the government program refused to provide government-funded reimbursements to religiously affiliated schools altogether. 137 S. Ct. 2012, 2014 (2017). This alone constituted substantial under-inclusion because the government program discriminated against religious schools. *Id.* at 2024 (holding that the government "pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character," which violated the Free Exercise Clause). The Court determined that the operation of the government program essentially forced the government's beliefs on the religious schools, which would have to abandon their religious identities and adopt the government's secular identity, to receive government funding. *Id.* at 2021. In *Fulton*, however, Philadelphia did not require CSS, nor any other religiously affiliated foster care agency, to do away with its religious identity and beliefs. DHS continues to work with Bethany Christian Services in the foster care arena. *See* Fulton v. City of Philadelphia,

In *Legal Services Corp.*, the Court reiterated the long-held principle that the government may condition funds on certain compelled speech because it has the authority to ensure that a recipient of government funding does not distort the message that the government wants to profess with its program.[336] Because it receives taxpayer money, CSS acts as an agent of the Philadelphia DHS. Therefore, if CSS refuses to certify same-sex couples as foster parents while the agency continues to participate in the Philadelphia foster care system, one can logically infer that Philadelphia does not support same-sex couples becoming foster parents. This clearly distorts the all-inclusive, anti-discrimination message that Philadelphia wants its agencies to convey.

Precedent requires the Court to find that Philadelphia may place conditions on CSS's speech when CSS serves as an agent of the city. Finding otherwise not only would contravene free speech jurisprudence, but it would also likely result in Establishment Clause and Equal Protection Clause violations.[337]

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922 F.3d 140, 149 n.2, 151 (3d Cir. 2019) (explaining that, prior to the Third Circuit's opinion, Bethany Christian Services reached an agreement with the city that allowed the agency to resume receiving foster care referrals), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem). Further, DHS showed repeatedly that it wished to continue its decades-long relationship with CSS. *See supra* text accompanying notes 122–24 (characterizing its relationship with CSS as "valuable" in a letter sent to CSS that expressed Philadelphia's wish to continue working with CSS). Moreover, Philadelphia continues to work with CSS in other capacities. *See supra* notes 119–20 and accompanying text (referring to Philadelphia's ongoing relationship with CSS in other foster care capacities, such as congregate care); *see also* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 674 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (Mem) (highlighting Philadelphia's "explicitly stated . . . preference" to continue working with CSS, "despite CSS's religious nature, so long as CSS complies with its contract responsibilities"). Philadelphia explicitly professed its respect for CSS's religion, but it refused to condone CSS's discriminatory behavior, which violated its contract.

336. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541–42 (2001) ("[W]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995))).

337. *See supra* note 153 (explaining that if Philadelphia continued to fund CSS while CSS espoused its religious beliefs and discriminated against the LGBTQ community, Philadelphia would violate both the Establishment Clause and the Equal Protection Clause).

CONCLUSION

The U.S. Supreme Court should affirm the Third Circuit's ruling in *Fulton v. City of Philadelphia*. A central issue for the Court to consider—the circuit split on how to evaluate Free Exercise Clause claims—is nonexistent in practice because all circuit courts currently allow plaintiffs to proffer various forms of evidence to prove that a law is neither neutral nor generally applicable. Thus, despite CSS's argument, *Smith* has not confused the courts, and its framework is the most efficient standard because it prevents courts from hearing claims for every conceivable exemption to government regulations. Further, *Smith* bolsters the separation of powers principle by allowing Congress to determine which religious tenets deserve exemption, thereby precluding judicial activism. Lastly, although Philadelphia's Services Contract and FPO effectively compel speech, which the First Amendment typically prohibits, requiring non-discrimination is closely related to the objective of the government's foster care system to place as many foster children in supportive homes as possible. Therefore, Supreme Court precedent condones this instance of compelled speech as a condition of participation in a government program. For the foregoing reasons, the Court should affirm the Third Circuit and rule in favor of Philadelphia on all three issues.