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Cover Page Footnote

J.D. Candidate, University of Washington School of Law, Class of 2022. I would like to say a huge thank you to all the students and professors who helped create and edit this Comment. I would like to thank Professor Terry Price for his invaluable guidance and expertise throughout this process. I would also like to thank all of the Washington Law Review editing staff who worked on this piece: Kayla Ganir, Zander Hoke, Stasia Skalbania, Kyung Sun Park, Caitlin Loyd, Lucy Bauer, Anna Le, Sam Parry, Julia Bladin, Ayla Kadah, Ben Desch, Emma Elder, Melissa London, Jasmin Chigbrow, Emily Parker, KT Nguyen, Ali Johnson, Sarah Cooper, and Jessica Cable.

QUEER AND CONVINCING: REVIEWING FREEDOM OF RELIGION AND LGBTQ+ PROTECTIONS POST-*FULTON V. CITY OF PHILADELPHIA*

Arianna Nord*

Abstract: Recent increases in LGBTQ+ anti-discrimination laws have generated new conversations in the free exercise of religion debate. While federal courts have been wrestling with claims brought under the Free Exercise Clause of the First Amendment since the nineteenth century, city and state efforts to codify legal protections for LGBTQ+ individuals in the mid-twentieth century birthed novel challenges. Private individuals who do not condone intimate same-sex relationships and/or gender non-conforming behavior, on religious grounds seek greater legal protection for the ability to refuse to offer goods and services to LGBTQ+ persons. Federal and state courts must determine how to resolve these competing discriminations. This Comment addresses which standard of review federal courts ought to apply when considering whether LGBTQ+-protective laws violate the Free Exercise Clause of the First Amendment.

INTRODUCTION

Following the premiere of the documentary *Francesco* on October 21, 2020, the head of the Catholic Church, Pope Francis, appeared in news headlines around the world for his remarks supporting civil legal protections for same-sex couples.[1] Pope Francis stated that civil unions for same-sex couples[2] were necessary to afford gay people proper legal

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1. *See, e.g.*, Mark Lowen, *Pope Francis Indicates Support for Same-Sex Civil Unions*, BBC (Oct. 21, 2020), https://www.bbc.com/news/world-europe-54627625 [https://perma.cc/6U7S-SWNS] (describing the Pope's remarks in contrast with contemporary Catholic doctrine regarding homosexuality); *see also* Allison Hope, Opinion, *How to Read Pope Francis' Message of Love for LGBTQ People*, CNN (Oct. 21, 2020, 5:24 PM), https://www.cnn.com/2020/10/21/opinions/pope-francis-civil-unions-lgbtq-families-hope/index.html [https://perma.cc/N27C-YAUY] (contextualizing the Pope's statement within the history of LGBTQ+ inclusion in Catholicism).

2. In this Comment, I use the terms "same-sex marriage" and "same-sex relationships" to refer, respectively, to the same-sex couples who participate in the institution of marriage and same-sex couples who are in intimate relationships but may not be married.

protection and affirmed that gay people are "children of God."[3] To many people around the world, Pope Francis's remarks were a sign of changing times.[4] However, behind the initial joyful reaction were signs of an uneasy relationship between LGBTQ+[5] advocates and followers of Catholicism. For many gay Catholics, and gay people generally, Pope Francis's remarks reflected a surface-level recognition of acceptance while masking a painful underlying belief that same-sex partnerships are not on equal footing with heterosexual partnerships.[6] Many followers of the Catholic Church praised the pope's statement, while others saw it as a departure from deeply-held beliefs regarding the immorality of same-sex intimacy.[7] For some, this moment symbolized the church adapting to the mainstream acceptance for gay people across the world; for others, this moment symbolized the dispossession of a fundamental religious belief.

The response to Pope Francis's remarks is one example of the growing tension between LGBTQ+ protections and the right to exercise one's religion in opposition to those protections. In the U.S., courts are asked

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3. Jason Horowitz, *In Shift for Church, Pope Francis Voices Support for Same-Sex Civil Unions*, N.Y. TIMES (June 27, 2021), https://www.nytimes.com/2020/10/21/world/europe/pope-francis-same-sex-civil-unions.html [https://perma.cc/XAF7-CW4C].

4. *See Openly Gay Catholic Priest Discusses Pope Francis' Appeal for LGBTQ Protections*, NPR: MORNING EDITION (Oct. 23, 2020, 4:58 AM), https://www.npr.org/2020/10/23/927015178/openly-gay-catholic-priest-discusses-pope-francis-appeal-for-lgbtq-protections [https://perma.cc/N732-MUAG]; Graeme Reid, *Why the Pope's Endorsement of Same-Sex Unions Matters*, HUM. RTS. WATCH (Nov. 6, 2020, 9:12 AM), https://www.hrw.org/news/2020/11/06/why-popes-endorsement-same-sex-unions-matters [https://perma.cc/C8CV-8FLA]; Julie Hanlon Rubio, *In Supporting Civil Unions for Same Sex Couples, Pope Francis Is Moving Catholics Toward a More Expansive Understanding of Family*, CONVERSATION (Nov. 3, 2020, 8:26 AM), https://theconversation.com/in-supporting-civil-unions-for-same-sex-couples-pope-francis-is-moving-catholics-toward-a-more-expansive-understanding-of-family-148773 [https://perma.cc/8TS6-KTAF].

5. In this Comment, I use the term "LGBTQ+" to indicate the community comprised of lesbian people, gay people, bisexual people, transgender people, and queer or questioning people, as well as other communities (such as pansexual, bigender, and Two-Spirit) within the broader "Queer Community." "LGBTQ" is one of the more common terms to refer to the community at large, while the added "+" is meant to signify inclusion of people who are not lesbians, gay, bisexual, transgender, or queer/questioning. *See What Does LGBTQ+ Mean?*, OK2BME, https://ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/ [https://perma.cc/X3YX-YYD9].

6. *See, e.g.*, Jamie Manson, *Pope Francis Still Places Heterosexual Couples Above LGBTQ People Like Me*, WASH. POST (Oct. 26, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/10/26/pope-francis-lgbtq-rights/ (last visited Feb. 21, 2022) (expressing disappointment that the Pope continues to treat heterosexual relationships as more sacred than homosexual relationships); *see also* Astrid Prange, *Pope Francis and Homosexuality in the Catholic Church: An Analysis*, DEUTSCHE WELLE (Oct. 23, 2020), https://www.dw.com/en/pope-francis-and-homosexuality-in-the-catholic-church-an-analysis/a-55371918 [https://perma.cc/7VYG-GRTR] (arguing that the Pope continues to perpetuate discrimination among LGBTQ+ people in the Catholic clergy and laity).

7. Yuliya Talmazan, Eric Baculinao & Claudio Lavanga, *Pope Francis Faces Divided Catholic Church After Backing Same-Sex Civil Unions*, NBC NEWS (Oct. 22, 2020, 9:27 AM), https://www.nbcnews.com/news/world/pope-francis-faces-divided-reactions-after-backing-same-sex-civil-n1244243 [https://perma.cc/5SRS-25J9].

whether LGBTQ+ anti-discrimination laws violate individuals' right to free exercise of religion.[8] Plaintiffs are bringing claims under the Free Exercise Clause of the First Amendment, alleging that in order to follow an LGBTQ+-protective law, they must compromise their religious beliefs.[9] Although Free Exercise case law already covers a variety of legal fields (such as employment, medicine, and animal rights), increases in LGBTQ+ anti-discrimination laws in the twenty-first century continue to conflict with Free Exercise claims.

In order to resolve this growing conflict, courts need to determine how to balance the protections of the Free Exercise Clause with LGBTQ+-protective laws. In particular, courts must determine which standard of review ought to be applied when examining whether an LGBTQ+-protective law violates the Free Exercise Clause. U.S. constitutional analysis of legislation requires different standards of review depending on what group of people a law allegedly discriminates against: rational basis, intermediate scrutiny, and strict scrutiny.[10] Federal courts are divided on when LGBTQ+-protective laws must face strict scrutiny, rather than intermediate scrutiny, in the face of a religious discrimination claim.[11] Strict scrutiny is a notoriously high bar to pass.[12] If the courts require LGBTQ+-protective laws to pass strict scrutiny, those laws are much more likely to violate the Free Exercise Clause.[13]

This Comment argues that federal courts should adopt an analytical framework that reduces the number of LGBTQ+ anti-discrimination laws that face strict scrutiny. Part I begins by discussing the development of the Free Exercise doctrine, from constitutional framework to case law. Part I will then chronicle legal protections for LGBTQ+ persons, culminating in a conversation about the contemporary tensions between the Free Exercise doctrine and LGBTQ+ protections. Part II then outlines the current circuit split in federal courts regarding which standard of

8. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. __, 138 S. Ct. 1719 (2018) (asking whether a requirement to bake cakes for same-sex weddings violates a shop owner's free exercise of religion); *see also* U.S. CONST. amend. I (restricting Congress from making laws that prohibit the free exercise of religion).

9. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1726–27 (arguing that in order to serve same-sex couples, the shop owner would have to violate their religious beliefs).

10. *See infra* section I.

11. *See, e.g.*, Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014) (considering factors such as a law's legislative history to determine that strict scrutiny must apply); *see also* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (considering only whether a law applies differently based on religious belief to determine that rational basis scrutiny applies).

12. *See infra* Part II.

13. *See infra* Part I.

review ought to be applied to LGBTQ+-protective laws in the face of Free Exercise claims. Part III analyzes the recent U.S. Supreme Court case regarding this issue, *Fulton v. City of Philadelphia*,[14] and discusses the potential consequences of that decision. Part IV adopts the analytical framework put forward by the respondents in *Fulton* to ultimately argue that federal courts should adopt a standard of review that would reduce the number of LGBTQ+ anti-discrimination laws facing strict scrutiny for Free Exercise claims.

I. THE FREE EXERCISE CLAUSE AND SEXUAL ORIENTATION AND GENDER IDENTITY ANTI-DISCRIMINATION LAWS

This Part outlines the progression of Free Exercise of religion law in the U.S., from the constitutional framework to the contemporary span of protections. It then analyzes the history of sexual orientation and gender identity[15] anti-discrimination laws and the increase in protections during the twenty-first century. After discussing this history, Part I culminates by examining how federal courts grapple with the question of which standard prevails when a plaintiff alleges that anti-discrimination protections have violated their right to free exercise of religion. Federal courts are split on how to determine whether an anti-discrimination law is "neutral" and subject to less-strict scrutiny on review. The most recent U.S. Supreme Court case on this subject, *Fulton v. City of Philadelphia*, offers a clear picture of contemporary conflicts between these opposing protections.

A. The Foundations of U.S. Constitutional Law Review

Before delving into the specific analysis that courts employ for Free Exercise claims, this section briefly outlines how courts review federal constitutional issues in general. When the federal courts review legislation for constitutionality, they check for three factors: 1) what governmental interests support the legislation; 2) what the nexus is between those governmental interests and the legislation; and 3) what burdens the legislation impose and how proportionate those burdens are to the

14. 593 U.S. __, 141 S. Ct. 1868 (2021).

15. Throughout this Comment I use the terms "gender identity" and "gender non-conforming." The term "gender non-conforming" refers to people who choose not to conform to the gender roles that people expect from them. This term includes transgender and nonbinary people, but also applies to people, actions, and ideas that generally stray from expected gender norms. *See* Sian Ferguson, *What Does It Mean to Be Gender Nonconforming?*, HEALTHLINE (Jan. 13, 2021), https://www.healthline.com/health/gender-nonconforming#:~:text=%E2%80%9Cgender%20nonconforming%E2%80%9D%20is%20a%20term,t%20conform%20to%20gender%20norms [https://perma.cc/MZJ7-EQ65].

governmental interests.[16] For example, in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*,[17] respondents asserted that legislation which prohibited animal sacrifice was justified based on public health concerns and preventing animal cruelty.[18] The U.S. Supreme Court found there was an insufficient nexus between those stated governmental interests and the legislation because there was no evidence that respondents had attempted to achieve the same interests through other means.[19] The Court further found that the governmental interests imposed a disproportionate burden on petitioners' religious activities because respondents failed to demonstrate that the interests could not be achieved through other, less burdensome means.[20]

The courts developed three main forms of scrutiny to categorize laws based on their potential for heightened risk. In order from least to most strict, those forms are: 1) rational basis scrutiny; 2) intermediate scrutiny; and 3) strict scrutiny.[21] Courts apply strict scrutiny in constitutional analyses where there is a heightened risk that systemic patterns of discrimination will operate absent extremely careful examination.[22] Racial discrimination, for example, is recognized as so pervasive and harmful that a party must make a clear showing that the regulation in question is justified by a compelling governmental interest.[23] When there is a particular danger that a form of discrimination will be silently perpetuated by a law, courts can apply strict scrutiny in order to properly evaluate the level of risk posed by the law. Therefore, if an area of law requires strict scrutiny review, such as laws that make racial distinctions in violation of the Equal Protection Clause, a court is much more likely to

16. *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 229 (2002).

17. 508 U.S. 520 (1993).

18. *Id.* at 546–47.

19. *Id.*

20. *Id.* at 546.

21. Kelso, *supra* note 16, at 228 ("Thus, under minimum rationality review, the legislation only has to be rationally related to the legitimate government interests, and not impose irrational burdens on individuals. Under intermediate review, the legislation must be substantially related to advancing important or substantial governmental interests, and not be substantially more burdensome than necessary to advance those interests. Under strict scrutiny, the statute must directly advance compelling governmental interests and be the least restrictive effective means of doing so.").

22. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category. Such classifications are subject to the most exacting scrutiny . . . ." (internal citation omitted)).

23. *Id.*

find the legislation unconstitutional.[24]

B. The Free Exercise Clause

Legal protection for the expression of religious beliefs stems from the Free Exercise Clause of the U.S. Constitution, which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[25] Although the Constitution has protected the free exercise of religion since the eighteenth century,[26] protections for religious practices remain controversial, particularly when religious protections collide with other legal protections.[27] As U.S. law gradually incorporates greater legal protections for identities and communities that have been historically marginalized,[28] one lingering barrier LGBTQ+ advocates face is the legal right to exclude certain identities, communities, and practices for religious reasons.[29] Because of recent increases in LGBTQ+-protective laws, federal courts are now frequently determining whether the right to practice a religion should take precedence over other newer rights and protections.[30] In order to provide background on how Free Exercise doctrine evolved into its contemporary form, this section outlines the history of the Free Exercise Clause and how it has developed into contemporary protections.

1. Constitutional Framing

Although the idea of religious freedom frequently appears as one of the pillars of European settlement in North America, the U.S. Constitution did not include the right to free exercise of religion when it was ratified in 1787.[31] The original text of the Constitution mentioned religion only in Article VI, prohibiting the use of a "religious test" as a qualification for service within the federal government.[32] It was not until the states ratified the First Amendment in 1791 that the Constitution protected the practice

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24. *See, e.g.*, *Church of the Lukumi*, 508 U.S. 520 (applying strict scrutiny to determine that an ordinance violated the Free Exercise Clause).

25. U.S. CONST. amend. I.

26. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

27. *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. __, 141 S. Ct. 1868 (2021) (balancing plaintiffs' free exercise of religion rights with defendants' municipal LGBTQ+ rights).

28. *See infra* section I.C.

29. *See infra* section I.D.

30. *Id.*

31. *See* McConnell, *supra* note 26, at 1473.

32. U.S. CONST. art. VI.

of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[33] The framers intended that the language of the First Amendment "make[] plain the protection of actions as well as beliefs."[34] Therefore, the Free Exercise Clause covers both the underlying religious belief and the ways in which people manifest that belief.[35]

2. Judicial and Legislative Development

The Free Exercise Clause has been contentious since its creation. In 1879, George Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, argued to the U.S. Supreme Court that, because one of the central tenants of his religion was the practice of polygamy, his conviction under federal anti-bigamy laws violated the Free Exercise Clause.[36] The Supreme Court unanimously ruled that the federal law did not violate the Free Exercise Clause because, although Congress does not have the power to regulate religious beliefs, Congress has the power to regulate actions stemming therefrom.[37] In his majority opinion, Chief Justice Waite famously stated that "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[38] The Court thus curtailed the reach of the Free Exercise Clause by holding that religious beliefs do not relieve an individual of the duty to comply with federal laws that are within Congress's power to pass.[39] However, courts continue to grapple with which laws Congress has the power to pass when those laws appear to restrict a party's religious beliefs or actions.

In the twentieth century, the U.S. Supreme Court issued significant Free Exercise Clause and employment law decisions. In 1963, the Court in *Sherbert v. Verner*[40] held that the denial of unemployment compensation to an employee who refused to work on Sundays due to

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33. U.S. CONST. amend. I.

34. Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265 [https://perma.cc/B428-Q6ND].

35. Sherbert v. Verner, 374 U.S. 398, 402 (1963).

36. Reynolds v. United States, 98 U.S. 145 (1879); John R. Hermann, Reynolds v. United States *(1879)*, FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/493/reynolds-v-united-states [https://perma.cc/W5XP-LULY].

37. *Reynolds*, 98 U.S. at 167.

38. *Id.* Chief Justice Waite also noted that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166.

39. *Id.* at 166.

40. 374 U.S. 398 (1963).

religious beliefs violated the First Amendment.[41] The Court reasoned that, although disqualification from unemployment benefits was an "indirect result" of the legislation, "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid."[42] Ultimately, forcing the plaintiff to choose between unemployment benefits and observing one of the core principles of her religion constituted a substantial burden on the plaintiff's free exercise of religion.[43] The Court further found the compelling state interest asserted by appellees—the possibility of fraudulent claims—did not warrant the substantial burden imposed by the law because the record did not reflect a high probability of fraud.[44] The test that arose from *Sherbert* asked whether the government's action would substantially burden the practice of a religion and, if so, whether such a burden was justified by a compelling governmental interest.[45]

In 1990, the Court in *Employment Division, Department of Human Resources of Oregon v. Smith*[46] considered whether Oregon drug laws prohibiting ceremonial ingestion of peyote violated the Free Exercise Clause and, subsequently, whether the state could deny unemployment benefits to employees whose violation of the Oregon drug laws resulted in work-related misconduct.[47] The Court first held that the Oregon drug law was a "valid and neutral law of general applicability"[48] because it did not represent "an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs."[49] The Court then applied the *Sherbert* test, questioning whether there was a sufficiently compelling governmental interest to justify a substantial burden on the practice of religion.[50] The Court held the *Sherbert* test is inapplicable in cases with a neutral law of general applicability because the government must have the ability to pass neutral legislation to prohibit "socially harmful conduct."[51] Ultimately, the Court determined that because respondents' activity violated a constitutionally-

41. *Id.*
42. *Id.* at 403–04 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).
43. *Id.* at 404.
44. *Id.* at 407.
45. *Id.* at 404.
46. 494 U.S. 872 (1990).
47. *Id.* at 874.
48. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).
49. *Id.* at 882.
50. *Id.* at 883.
51. *Id.* at 885.

sound state law, the state did not violate the Free Exercise Clause by denying respondents' unemployment benefits.[52] The *Smith* test states if a law is neither neutral nor generally applicable and imposes a substantial burden on an individual's practice of religion, that burden must be justified by a compelling governmental interest.[53]

The Supreme Court further expanded upon the *Smith* test in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* in 1993.[54] In *Church of the Lukumi*, a church practicing the Santeria religion sued the city of Hialeah, Florida, for passing city ordinances that prohibited ritual animal sacrifice, one of the principal practices of the Santeria religion.[55] The Court began by analyzing the neutrality of the city ordinance to determine whether the law targeted the Santeria religion specifically.[56] The Court first looked at the law's text: "the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context."[57] After determining that the city ordinance's text was neutral, the Court then looked at whether the law shielded subtle forms of targeting, such as neutrality in text but clear disproportionality in effect.[58] The Court found sufficient evidence that the legislature passed the law with the intent of targeting the Santeria religion, and that the law had a disproportionately adverse impact on the Santeria members.[59] This evidence led the Court to find that the law was neither neutral nor generally applicable.[60] The Court went on to note that "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied."[61]

Because the city of Hialeah's ordinance was neither neutral nor generally applicable, the Court applied the "most rigorous of scrutiny" to determine whether there were legitimate governmental interests that justified the law's burden.[62] Strict scrutiny requires that the law "must advance 'interests of the highest order' and must be narrowly tailored in

52. *Id.* at 890.
53. *Id.* at 888.
54. 508 U.S. 520 (1993).
55. *Id.* at 528.
56. *Id.* at 533.
57. *Id.*
58. *Id.* at 534–35.
59. *Id.* at 535.
60. *Id.* at 543.
61. *Id.* at 531.
62. *Id.* at 546.

pursuit of those interests."[63] The Court found that the ordinances did not pass strict scrutiny because the governmental interests were not sufficiently compelling and the ordinances were not sufficiently narrow.[64] The Court noted that the ordinances were "overbroad or underinclusive in substantial respects," including that they did not target non-religious activities and were not narrowly tailored to achieve the ordinance's purported goals.[65] The Court found the City failed to demonstrate the governmental interests—protecting public health and preventing animal cruelty—were sufficiently compelling.[66] The Court found the City had not sought to achieve their interests by any other means beyond targeting religious conduct.[67] The Court concluded the city of Hialeah's ordinances were unconstitutional under the Free Exercise Clause.

The contemporary test, which is a combination of *Sherbert*, *Smith*, and *Church of the Lukumi*, first considers whether a law is neutral and generally applicable.[68] For a law to be neutral, it must be non-discriminatory on its face, the legislative record must reflect a non-discriminatory intent, and the actual effect of the law must be non-discriminatory.[69] For a law to be generally applicable, it must not "impose burdens only on conduct motivated by religious belief."[70] Although neutrality and general applicability are distinct factors, failure to satisfy one typically indicates failure to satisfy the other.[71] If the law is neither neutral nor generally applicable, then strict scrutiny must be applied.[72] The strict scrutiny test requires the law to serve a compelling governmental interest and be narrowly tailored to that pursuit.[73]

Beyond common law judicial action, both federal and state governments have enacted Religious Freedom Restoration Acts (RFRAs)

63. *Id.* (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

64. *Id.*

65. *Id.*

66. *Id.* at 546–47.

67. *Id.*

68. *See* Fulton v. City of Philadelphia, 593 U.S. __, 141 S. Ct. 1868, 1876–77 (2021).

69. *Church of the Lukumi*, 508 U.S. at 542.

70. *Id.* at 543.

71. *Id.* at 531.

72. *Id.* at 546.

73. *Id.*

since the 1990s.[74] Congress first enacted a federal RFRA[75] in 1993, prohibiting governments from "substantially burdening the rights of individuals to religious exercise without compelling justification."[76] In *City of Boerne v. Flores*,[77] the Supreme Court held that Congress, by enacting the federal RFRA, exceeded its powers under the Fourteenth Amendment by subjecting local ordinances to federal regulation.[78] After *Boerne*, the federal RFRA now only applies to the federal government, not to state laws, and makes strict scrutiny the standard of review for all Free Exercise Clause claims against federal laws.[79] However, the standard of review for non-federal laws remains undecided. In response, many states enacted their own version of the RFRA through legislation.[80]

Following increased recognition that state RFRAs permit discrimination against women and people in the LGBTQ+ community, passage of state RFRAs has slowed since 2013.[81] Of the twenty-one states that have existing RFRAs,[82] fourteen of those states are labeled by the Human Rights Campaign as "High Priority to Achieve Basic Equality" (that is, high priority to overturn in order to achieve equality) for LGBTQ+ individuals.[83] The history of federal and state RFRAs highlights the growing tension between religious freedom and LGBTQ+-protective

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74. *See* Jonathan Griffin, *Religious Freedom Restoration Acts*, NAT'L CONF. STATE LEGISLATURES: LEGISBRIEF (May 2015), https://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx [https://perma.cc/7QSE-RBEN] ("Religious Freedom Restoration Acts (RFRAs) provide a 'strict scrutiny' test for courts: namely, that government may not burden or restrict a person's exercise of religion, unless it demonstrates that the burden or restriction furthers a compelling government interest and is done through the least restrictive means.").

75. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

76. Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act, 42 U.S.C.A. §§ 2000bb et seq.*, 135 A.L.R. Fed. 121, 121 (1996).

77. 521 U.S. 507 (1997).

78. *Id.* at 536.

79. *See generally id.* (holding that the RFRA exceeded Congress' powers under the Enforcement Clause of the Fourteenth Amendment to guarantee that the states do not deprive any person of due process or equal protection).

80. *State Religious Freedom Restoration Acts*, NAT'L CONF. STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/VHE2-79Z9].

81. Paul Baumgardner & Brian K. Miller, *Moving from the Statehouses to the State Courts? The Post-RFRA Future of State Religious Freedom Protections*, 82 ALB. L. REV. 1385, 1407 (2019).

82. *State Religious Freedom Restoration Acts*, *supra* note 80.

83. *State Equality Index 2020*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/state-equality-index#state-categories [https://perma.cc/5M3W-J6MW]. The Human Rights Campaign is an activist organization that mobilizes support for LGBTQ+ advances in legislation and political representation. *See About*, HUM. RTS. CAMPAIGN, https://www.hrc.org/about [https://perma.cc/GD3N-2Q82].

laws.

C. Sexual Orientation & Gender Identity Anti-Discrimination Laws

Legal protections for intimate same-sex relationships and gender identity expression have been significantly expanding in state and federal law for the past forty years.[84] Homosexual, bisexual, and pansexual relationships have been increasingly absorbed into mainstream rhetoric and representation, along with expressions of gender identity that do not conform to the dominant practice of gender assignment based on sex.[85] As mainstream awareness of sexual orientation and gender identity has increased, mainstream awareness of the violence inflicted on members of the LGBTQ+ community has increased as well.[86] In response, federal and state legislatures have enacted laws seeking to reduce discrimination against LGBTQ+ community members by extending anti-discrimination protections to sexual orientation and gender identity.[87] The following section describes the progression of these anti-discrimination protections in the courts and legislatures. The history of these protections provides insight into how and why the contemporary disputes between religious freedom and LGBTQ+ protections emerged.

1. Origins and Development

After decades of highly public violence and discrimination targeted at LGBTQ+ people,[88] the Supreme Court first considered LGBTQ+ rights in the mid-twentieth century. In *One, Inc. v. Oleson*,[89] the Court reversed

84. *See, e.g.*, Civil Rights Act of 2007, 2007 Cal. Stat. 4603 (prohibiting discrimination on the basis of sexual orientation in California); *see also* Civil Rights Act of 1964 § 701 (Title VII), 42 U.S.C. §2000e (1964) (protecting against employment discrimination on the basis of sexual orientation).

85. *Queer Representation in the Media*, MEDIA SMARTS, https://mediasmarts.ca/diversity-media/queer-representation/queer-representation-media [https://perma.cc/4HJH-7C4V] ("No longer relegated to the realms of innuendo and secrecy, we now see lesbians, gays, bisexuals, and transgender people represented on television and in mainstream film.").

86. *E.g.*, Christina Nunez, *Before Orlando: A History of Modern Anti-LGBT Violence*, NAT'L GEOGRAPHIC (June 13, 2016, 11:00 AM), https://www.nationalgeographic.com/history/article/orlando-nightclub-shooting-lgbt-gay-hate-crimes-history [https://perma.cc/8K6P-HYBY].

87. *See infra* section I.C.2.

88. James Polchin, *How True-Crime Stories Reveal the Overlooked History of Pre-Stonewall Violence Against Queer People*, TIME (June 4, 2019, 1:10 PM), https://time.com/5600232/lgbt-crime-history (last visited Jan. 16, 2022) ("While such fears [of press openly discussing homosexuality of murder victims] underscored the shame induced in the victim's relatives if the details of the crime were made public, it also meant that defendants were given lesser sentences for such brutal crimes. But this reticence was understandable in an era when queer men were so routinely portrayed as criminals. As sodomy was a felony in every state, the victims were often viewed as complicit in their own violent deaths at the hands of men they invited back home.").

89. 355 U.S. 371 (1958).

a Ninth Circuit ruling that the publication and mailing of pro-homosexual writing violated the First Amendment.[90] Although *One, Inc.* is largely a "little-noticed, one-line Supreme Court ruling . . . that [doesn't] mention the word 'homosexuality,'" the case continues to be hailed as the first gay rights victory in America.[91] The Court's decision created First Amendment protections for same-sex publications, opening the door to LGBTQ+ protections.[92] Four years later in *Manual Enterprises, Inc. v. Day*,[93] the Court held the U.S. Post Office had to distribute materials aimed at gay readers despite objections on "obscenity" grounds.[94] However, the Court's decision was made in conjunction with the perception that individuals in same-sex relationships constitute "'sexual deviates' to be distinguished from 'sexually normal individuals.'"[95] Public support for such an opinion was dominant when both *One, Inc.* and *Manual Enterprises, Inc.* were decided.[96] However, the Court recognized in *Manual Enterprises, Inc.*, that the legal issue of First Amendment rights needed to be separate from the moral judgment towards same-sex intimacy and upheld the First Amendment's protections.[97] Justice Harlan's opinion in *Manual Enterprises, Inc.* solidified an important distinction between the morality and the constitutionality of same-sex materials.[98] This distinction opened the door for constitutional protections for LGBTQ+ materials even when condemnation was the dominant attitude towards same-sex intimacy.[99]

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90. *Id.*

91. David G. Savage, *Supreme Court Faced Gay Rights Decision in 1958 over 'Obscene' Magazine*, L.A. TIMES (Jan. 11, 2015, 5:30 AM), https://www.latimes.com/nation/la-na-court-gay-magazine-20150111-story.html (last visited Jan. 16, 2022).

92. Carlos A. Ball, *Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court*, 28 COLUM. J. GENDER & L. 229, 230 (2014) ("By making it clear that the First Amendment did not allow the government to suppress lesbian and gay publications, the Court . . . provided crucial protection to those advocating on behalf of the rights of sexual minorities.").

93. 370 U.S. 478 (1962).

94. *Id.*

95. Ball, *supra* note 92, at 288 (quoting *Manual Enterprises, Inc.*, 370 U.S. at 481).

96. *Id.* at 277.

97. *Id.* at 288 (quoting *Manual Enterprises, Inc.*, 370 U.S. at 489–90 ("Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.' Divorced from their 'prurient interest' appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates.")).

98. *Id.* at 289.

99. *Id.*

In 1986, the Court held in *Bowers v. Hardwick*[100] that a Georgia sodomy statute that criminalized homosexual acts within private individuals' homes did not violate respondents' fundamental rights under the Ninth Amendment[101] and the Due Process Clause of the Fourteenth Amendment.[102] In 1982, Michael Hardwick was arrested in Georgia after a police officer observed him in his own bedroom having sex with another man.[103] The Court determined that the "issue presented [was] whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[104] The Court held that there was no fundamental right to engage in consensual sodomy and reversed the Eleventh Circuit's decision.[105]

The U.S. Supreme Court's seminal case regarding sexual orientation and gender identity in the 1990s was *Romer v. Evans*.[106] In *Romer*, the Court heard challenges against the Second Amendment to Colorado's State Constitution, which prohibited people from holding office on the basis of sexual orientation.[107] The Court held the amendment violated the Equal Protection Clause of the Fourteenth Amendment because homosexual and bisexual persons were being disadvantaged without justification of a legitimate governmental interest.[108] In his dissent, Justice Scalia (citing *Bowers*) argued for a moral objection to same-sex intimacy to be available through democratic processes, such as state constitutions.[109] This is perhaps unsurprising given that the Court decided *Romer* in 1996, only three years after Congress enacted the federal Religious Freedom Restoration Act in 1993.[110]

In the twenty-first century, the Supreme Court, led by *Romer* author Justice Kennedy, continues to create broader protections for LGBTQ+

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100. 478 U.S. 186 (1986).

101. U.S. CONST. amend. IX (providing that the rights enumerated in the U.S. Constitution do not limit other rights not enumerated in the Constitution).

102. *Bowers*, 478 U.S. at 191 ("[R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

103. *Sodomy Arrest Sparks Controversy*, HISTORY (Aug. 2, 2021), https://www.history.com/this-day-in-history/sodomy-arrest-sparks-controversy [http://perma.cc/XRA7-KSU7].

104. *Bowers*, 478 U.S. at 190.

105. *Id.* at 191.

106. 517 U.S. 620 (1996).

107. *Id.* at 623–24.

108. *Id.* at 635.

109. *Looking Back at* Romer, *a Key Supreme Court Decision About Gay Rights*, NAT'L CONST. CTR. (May 20, 2021), https://constitutioncenter.org/blog/looking-back-at-a-huge-victory-for-gays-in-the-supreme-court [https://perma.cc/J7HJ-KYTE].

110. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

individuals while declining to fully establish LGBTQ+ peoples' rights and liberties. In 2003, the Court in *Lawrence v. Texas*[111] overturned *Bowers* and struck down a Texas "Homosexual Conduct" law that made it a crime for two people of the same sex to engage in intimate conduct.[112] The Court held that the Texas statute rendered individuals criminally liable for engaging in private, intimate conduct even if there was no legitimate state interest justifying intrusion.[113] In 2013, the Court continued to broaden LGBTQ+ rights with *United States v. Windsor*[114] by holding that the Federal Defense of Marriage Act's definition of "marriage" as between one man and one woman deprived same-sex couples of their Fifth Amendment right to equal protection.[115] Finally, in 2015, the *Obergefell v. Hodges*[116] Court held that the Fourteenth Amendment required states to license marriage between two people of the same sex and to recognize such licenses performed in other states.[117] Most recently, in perhaps its broadest holding, the Court held in 2020 in *Bostock v. Clayton County*[118] that Title VII of the Civil Rights Act of 1964—which protects employees from discrimination on the basis of certain characteristics—protects gay people *and* transgender people from discrimination on the basis of "sex."[119] However, in none of these cases did the Court address standard of review.

2. Contemporary LGBTQ+ Anti-Discrimination Laws

Federal legislation prohibiting individuals from discriminating on the basis of sexual orientation and gender identity is sparse.[120] After the

111. 539 U.S. 558 (2003).

112. *Id.*

113. *Id.* at 774–75.

114. 570 U.S. 744 (2013).

115. *Id.*

116. 576 U.S. 644 (2015).

117. *Id.*

118. 590 U.S. __, 140 S. Ct. 1731 (2020).

119. *Id.*

120. In 1996, Congress passed the "Defense of Marriage Act," or DOMA, which included in § 3 that for the purpose of federal laws and programs, the federal government would not recognize gay or lesbian marriages. Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, sec. 3, § 7, 110 Stat. 2419, 2419, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013); *Frequently Asked Questions: Defense of Marriage Act (DOMA)*, GLAAD, https://www.glaad.org/marriage/doma [https://perma.cc/U6M2-QR28]. When the Supreme Court struck down § 3 of DOMA in *Windsor*, 570 U.S. 744, President Obama applauded the decision. *See* Gautam Raghavan, *Obama Administration Statements on the Supreme Court's DOMA Ruling*, WHITE HOUSE: PRESIDENT BARACK OBAMA (June 27, 2013, 5:00 PM), https://obamawhitehouse.archives.gov/blog/2013/06/27/obama-administration-statements-supreme-court-s-doma-ruling [https://perma.cc/W5DT-T3TG].

Court's decision in *Bostock*, the only federal legislation that specifically protects LGBTQ+ persons from discrimination is the Civil Rights Act of 1964.[121] However, there are many federal legislative acts currently proposed that would expand protections for LGBTQ+ persons.[122] In 2021, the House of Representatives passed the Equality Act for the second time after being blocked by the Senate in 2019.[123] The Equality Act would extend the protections of Title VI of the Civil Rights Act to cover discrimination based on sexual orientation and gender identity.[124] Title VI currently allows the federal government to halt federal funding to institutions that engage in racial discrimination; the Equality Act would permit the same oversight for gender identity and sexual orientation discrimination.[125] While some faith leaders have raised concerns at the prospect of losing federal funding due to religiously-based prohibitions on same-sex relationships and gender nonconforming expression, LGBTQ+ advocates argue that the Equality Act would critically bolster protections for LGBTQ+ people.[126]

Partly due to federal legislation, some cities and states now protect persons from discrimination based on sexual orientation and gender identity through housing, public accommodation, and credit and lending non-discrimination laws. Twenty-two states and the District of Columbia explicitly prohibit discrimination in housing practices on the basis of sexual orientation and gender identity, while nine additional states

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Three years later, President Trump implemented a reversing policy designed to keep transgender people out of the armed services. *See* Hallie Jackson & Courtney Kube, *Trump's Controversial Transgender Military Policy Goes into Effect*, NBC NEWS (April 12, 2019, 8:53 AM), https://www.nbcnews.com/feature/nbc-out/trump-s-controversial-transgender-military-policy-goes-effect-n993826 [https://perma.cc/H69G-A5GD]. In 2021, President Biden began to swing back towards greater LGBTQ+ protections. *See President Biden's Pro-LGBTQ+ Timeline*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/president-bidens-pro-lgbtq-timeline [https://perma.cc/PZ8Q-CZ2E].

121. Civil Rights Act of 1964 § 701 (Title VII), 42 U.S.C. §2000e; *Know Your Rights: LGBTQ Rights*, ACLU, https://www.aclu.org/know-your-rights/lgbtq-rights/ [https://perma.cc/QDR8-TV2S].

122. *See, e.g.*, *Federal Legislation*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/federal-legislation [https://perma.cc/973P-URTN] (including information on the Do No Harm Act, which would clarify that the federal RFRA does not allow for religious protections that inflict harm on other people).

123. Tom Gjelten, *Some Faith Leaders Call Equality Act Devastating; For Others, It's God's Will*, NPR: ALL THINGS CONSIDERED (March 10, 2021, 5:01 AM), https://www.npr.org/2021/03/10/974672313/some-faith-leaders-call-equality-act-devastating-for-others-its-gods-will [https://perma.cc/U7VE-8HSJ].

124. *Id.*

125. *Id.*

126. Thee Santos, Caroline Medina & Sharita Gruberg, *What You Need to Know About the Equality Act*, CTR. FOR AM. PROGRESS (Mar. 15, 2021), https://www.americanprogress.org/article/need-know-equality-act/ [https://perma.cc/UVM5-NW27].

interpret their existing prohibition on sex discrimination to include sexual orientation and/or gender identity.[127] For public accommodations, twenty-one states and the District of Columbia explicitly prohibit discrimination based on sexual orientation and gender identity, and seven interpret their state's existing discrimination prohibitions to include these categories.[128] Fifteen states and the District of Columbia also explicitly prohibit discrimination in credit and lending based on sexual orientation and gender identity.[129] As of January 2022, "[a]t least 225 cities and counties prohibit employment discrimination on the basis of gender identity."[130] While many states have implemented at least some protections for LGBTQ+ people, twenty-seven states do not have any statewide laws explicitly protecting LGBTQ+ people from discrimination.[131]

D. Contemporary Tensions Between Free Exercise and LGBTQ+ Protections

Increasing LGBTQ+ political power and the ensuing state anti-discrimination laws protecting sexual orientation and gender identity have led to a novel branch of Free Exercise claims brought by individuals whose religious beliefs prohibit them from condoning same-sex relationships. Although free exercise claims used to typically center around state actors, claims in the twenty-first century largely involve private actors.[132] Disputes between these private individuals usually arise in the exchange of goods and services.[133] In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[134] the Supreme Court considered whether Colorado's public accommodation laws, which prohibited

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127. *Nondiscrimination Laws: Housing*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/Z6YD-RJEQ].

128. *Nondiscrimination Laws: Public Accommodations*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/Z6YD-RJEQ].

129. *Nondiscrimination Laws: Credit*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [https://perma.cc/Z6YD-RJEQ].

130. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender [https://perma.cc/2N2A-RAMS].

131. *LGBTQ Americans Aren't Fully Protected from Discrimination in 29 States*, FREEDOM FOR ALL AMS., https://freedomforallamericans.org/states/ [https://perma.cc/D2D4-32XF].

132. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. __, 138 S. Ct. 1719 (2018) (considering a claim by a religious party who was the owner of a business); *see also* Davis v. Ermold, 592 U.S. __, 141 S. Ct. 3 (2020) (considering a case where a religious party was a county clerk who refused to comply with the Governor's directive).

133. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (considering a claim arising from the potential sale of a wedding cake).

134. 584 U.S. __, 138 S. Ct. 1719 (2018).

discrimination on the basis of sexual orientation, violated a cake maker's Free Exercise right to practice his religious beliefs regarding same-sex marriage.[135] After the Colorado Civil Rights Division found probable cause of discrimination, it referred the case to the Commission, which in turn initiated a formal hearing before a state Administrative Law Judge, who found for the couple.[136] The Supreme Court eventually reversed, finding that the anti-discrimination law must "be applied in a manner that is neutral toward religion" and that the Commission failed to do so because of its hostile treatment of the cake shop owner.[137]

The Court found that the Commission had not applied the Colorado Anti-Discrimination Act[138] neutrally toward the cake shop owner's religion,[139] and so it did not need to consider the strict scrutiny *Smith* test.[140] The record in *Masterpiece Cakeshop* showed that members of the Commission "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain," "disparage[d] [the shop owner's] religion . . . by describing it as despicable, and . . . characterizing it as merely rhetorical," and "compare[d] [his] invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust."[141] The Court found that the Commission's treatment of the cake shop owner violated the Free Exercise Clause because a government body "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[142] The Court found that the Commission's application of Colorado's anti-discrimination law was not neutral and therefore violated the Free Exercise Clause.[143] The Court decided the case on narrow grounds, providing little guidance on how free exercise claims against LGBTQ+-protective laws should be handled going forward.[144]

Because the Court focused on the fact-finder's hostility towards the cake shop owner, the legal community has been left to wonder: "what

135. *Id.* at 1723.

136. *Id.* at 1725–26.

137. *Id.* at 1724, 1732.

138. COLO. REV. STAT. § 24-34-301 to -801 (2020).

139. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

140. 494 U.S. 872, 888 (1990).

141. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

142. *Id.* at 1731.

143. *Id.* at 1731–32.

144. *Id.* at 1732; Emily Haigh, Devjani Mishra & Mark Phillis, *The Supreme Court's Ruling in Masterpiece Cakeshop: A Masterpiece on Dodging Key Constitutional Issues*, LITTLER (June 4, 2018), https://www.littler.com/publication-press/publication/supreme-court%E2%80%99s-ruling-masterpiece-cakeshop-masterpiece-dodging-key [https://perma.cc/U7V8-UBCE].

constitutes government 'neutrality' to religion?"[145] Proponents of greater religious accommodation likely consider "nonhostility" to be the government actively working to guarantee religious freedoms over competing discrimination concerns.[146] On the other hand, proponents of LGBTQ+ protections would likely view "nonhostility" as anything that does not actively work *against* religious expression.[147] The *Masterpiece Cakeshop* decision is unclear "in how it balances the fundamental rights involved. . . . [B]oth sides of the clash interpret the hostility holding differently."[148]

In October 2020, Justice Thomas, joined by Justice Alito, created greater uncertainty. The Court denied certiorari for *Ermold v. Davis*,[149] a case in which a former county clerk in Kentucky refused to issue a marriage license to a same-sex couple due to her religious beliefs.[150] Although Justice Thomas only released a brief statement on the case, his statement raised alarm bells for proponents of LGBTQ+ protections.[151] He stated that the *Obergefell* decision created a lasting problem "[b]y choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment."[152] He also stated that the Court would have to take up this question again and overtly signaled that he would support a rollback of same-sex protections in the name of religious freedom.[153]

II. THE CURRENT CIRCUIT SPLIT: WHAT IS THE PROPER STANDARD OF REVIEW FOR ALLEGED VIOLATIONS OF THE FREE EXERCISE CLAUSE?

The federal courts are split on which level of scrutiny to employ when reviewing the neutrality and general applicability requirements in free exercise claims. All courts apply the *Smith* framework, first testing for

145. *See* Kimberly Crowley, Note, *The Many Layers of Masterpiece Cakeshop*, 100 B.U. L. REV. 301, 320–21 (2020) (arguing that Justice Kennedy's conception of "nonhostility" could equate to any conflict between religious freedom and LGBTQ+ protections being decided in favor of religious freedom).

146. *Id.* at 320–26.

147. *See id.* at 321.

148. *Id.* at 326.

149. 936 F.3d 429 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 3 (2020).

150. *Id.*

151. Katrina C. Rose, *Clarence Thomas & Samuel Alito Want to End Marriage Equality & They Won't Stop There*, LGBTQ NATION (Oct. 7, 2020), https://www.lgbtqnation.com/2020/10/clarence-thomas-samuel-alito-want-end-marriage-equality-wont-stop/ [https://perma.cc/5JNK-CVBA].

152. *Davis*, 141 S. Ct. at 4.

153. *Id.*

neutrality and general applicability before moving to strict scrutiny, but differ in how they determine neutrality and general applicability.[154] The majority of circuit courts apply the "broad" approach, which allows for a more diverse body of evidence to prove that a law is neither neutral nor generally applicable, while the minority applies the "narrow" approach, which only asks whether the government would permit the same activity if done by someone with different religious views.[155] Under the broad approach, a plaintiff "can prove a free exercise violation without showing that the government permits the exact same conduct by others who lack religious motivation."[156] Therefore, the broad approach provides an easier pathway to proving a law is neither neutral nor generally applicable. As a result, under the *Smith* test, the broad approach is much more likely to render a law in violation of the Free Exercise Clause than the narrow approach.

A. The Broad Approach

The Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits apply the broad approach, wherein the plaintiff bringing a free exercise claim can rely on various forms of evidence to prove that a law is neither neutral nor generally applicable.[157] In the following section, three cases from three different circuits demonstrate the types of evidence that courts have relied upon when applying the broad approach to free exercise claims. These cases highlight how the broad approach creates greater opportunities for anti-discrimination regulations to be found non-neutral and not generally applicable, therefore increasing the likelihood that anti-discrimination laws will be subject to strict scrutiny.

In 2014, the Second Circuit considered claims by multiple Orthodox Jewish organizations alleging that a New York City ordinance violated their free exercise rights in *Central Rabbinical*.[158] The city ordinance

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154. *See, e.g.*, Cent. Rabbinical Cong. of the U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014) (finding that the law was not neutral nor generally applicable after considering the law's legislative history); Stormans, Inc., v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (finding that the law was neutral and generally applicable after considering whether the law engaged in disparate treatment on the basis of religion).

155. Petition for Writ of Certiorari at 22–25, Fulton v. City of Philadelphia, 593 U.S. __, 141 S. Ct. 1868 (2021) (No. 19-123), 2019 WL 3380520.

156. *Id.*

157. *Id.* at 22–27 (analyzing *Cent. Rabbinical*, 763 F.3d 183; Ward v. Polite, 667 F.3d 727 (6th Cir. 2012); St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007); Childs. Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000); Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004)).

158. *Cent. Rabbinical*, 763 F.3d at 186.

required a person to first obtain written consent from a child's parents before performing "direct oral suction" as part of religious circumcision ceremonies.[159] The City sought to regulate oral suction in circumcision practices due to a finding that such practices were spreading herpes simplex virus (HSV) to infants.[160] The plaintiffs alleged that this "burden[ed] their free exercise of religion."[161] The Second Circuit reversed the lower court's decision, finding that the law was neither neutral nor generally applicable and therefore needed to be subject to strict scrutiny.[162] In determining that the law was not neutral, the court began by analyzing facial neutrality and then moved to operational neutrality.[163] Operational neutrality is determined by asking whether the religious practice is the only conduct subject to regulation in the relevant law and whether the law was drafted for that specific purpose.[164] To determine whether the law was generally applicable, the court asked whether the law was "substantially underinclusive such that it regulate[d] religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it."[165]

Ultimately, the court in *Central Rabbinical* determined that the New York City law was neither neutral nor generally applicable and remanded for the lower court to apply the strict scrutiny test.[166] The law was "not neutral in 'operation'" because the only religious ritual that the law applied to was the metzitzah b'peh—the direct oral suction during circumcision.[167] The law was not generally applicable because it targeted religious practices, which accounted for a significantly lower portion of the asserted risk of HSV infection, while allowing for secular practices that made up over 90% of HSV infections.[168] Thus, the court found that the law was neither neutral nor generally applicable.[169] Importantly, the *Central Rabbinical* court heavily relied on the history of the law to determine that it was not neutral; the legislative history considered by the court served as one type of evidence permitted under the broad approach

159. *Id.* at 186. For background, some Orthodox Jewish communities perform direct oral suction, called "metzitzah b'peh" or "MBP" as part of the circumcision ritual. *Id.* at 187.

160. *Id.* at 185–86.

161. *Id.* at 186.

162. *Id.*

163. *Id.* at 193–95.

164. *Id.* at 195.

165. *Id.* at 197.

166. *Id.* at 186.

167. *Id.* at 194.

168. *Id.* at 197.

169. *Id.*

but not permitted under the narrow approach.[170]

In *Ward v. Polite*,[171] the Sixth Circuit applied a test similar to the Second Circuit.[172] The court considered whether a public university violated a graduate-level counseling student's free exercise rights by expelling her when she refused to counsel a homosexual client.[173] Like *Central Rabbinical*, the court remanded the case to the lower court to apply strict scrutiny after finding that the school's policy was neither neutral nor generally applied.[174] Although the school's anti-discrimination policy was neutral on its face, the policy was subject to multiple secular exemptions, but no religious exemptions when implemented.[175] Furthermore, there was no written policy against refusing counseling to homosexual students, and the university ethics code permitted referrals to other counselors because of faith-based beliefs.[176] The court found that this evidence demonstrated that the policy was neither neutral nor generally applicable.[177]

In *Axson-Flynn v. Johnson*,[178] the Tenth Circuit outlined a similar line of reasoning to the Sixth Circuit's reliance on secular exemptions. In *Axson-Flynn*, a former student of the University of Utah's Actor Training Program (ATP) sued faculty members for trying to force her to use explicit language, which she claimed was against her religion, during acting exercises.[179] The court ultimately reversed and remanded the case to the lower court to determine whether the faculty's script-reading policy was neutral and generally applied, but laid out two exceptions that may apply even if the policy were neutral and generally applicable.[180] The first exception, stemming from *Wisconsin v. Yoder*,[181] applies when a free exercise claim is coupled with another constitutional claim (such as free speech).[182] The second exception, following *Sherbert v. Verner*,[183] applies when a "facially neutral rule contains a system of individualized

170. *See* Petition for Writ of Certiorari, *supra* note 155, at 25–26.

171. 667 F.3d 272 (6th Cir. 2012).

172. *Id.*

173. *Id.* at 730.

174. *Id.* at 738–39, 742.

175. *Id.* at 739.

176. *Id.*

177. *Id.* at 738–39.

178. 356 F.3d 1277 (10th Cir. 2004).

179. *Id.* at 1280.

180. *Id.* at 1294–95, 1301.

181. 406 U.S. 205 (1972).

182. *Axson-Flynn*, 356 F.3d at 1295.

183. 374 U.S. 398, 401 (1963).

exemptions" that does not permit exceptions based on religious beliefs.[184] This "individualized exemptions"[185] exception is present in both the Tenth and the Sixth Circuits.

As *Central Rabbinical*, *Ward*, and *Axson-Flynn* demonstrate, the broad approach allows multiple forms of evidence to prove that an anti-discrimination regulation is neither applied neutrally nor generally. By increasing the number of avenues that a plaintiff has available to prove non-neutrality and general inapplicability, the likelihood that anti-discrimination laws will face strict scrutiny rather than rational basis review also increases. Consequently, the chance that the law will pass strict scrutiny is very low.[186]

B. The Narrow Approach

The Ninth and Third Circuits apply the narrow approach, which states that in order for a law to be found neutral and generally applicable, the only relevant question is whether the government would permit the same activity if performed by someone with different religious beliefs than the plaintiff.[187] As the cases below demonstrate, the narrow approach limits the number of avenues that plaintiffs can use to prove a law is neither neutral nor generally applicable. As a result, fewer cases rise to the level of strict scrutiny than those cases subject to the broad approach. The likelihood that a case will face strict scrutiny under the narrow approach is therefore much lower than under the broad approach.

In 2015, the Ninth Circuit considered free exercise in the context of pharmaceutical rules in *Stormans, Inc. v. Wiesman*.[188] In *Stormans*, owners of a pharmacy and two individual pharmacists sued the Secretary of the Washington State Department of Health, claiming that a pharmacy rule requiring the delivery of all prescription medications, including contraceptives such as Plan B, violated their free exercise rights.[189] The

184. *Axson-Flynn*, 356 F.3d at 1295.

185. *Id.*

186. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

187. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1077–78 (9th Cir. 2015); Fulton v. City of Philadelphia, 922 F.3d 140, 154 (3d Cir. 2019).

188. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015). The Ninth Circuit decided *Stormans Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) in 2009, where it held that the rules were neutral and generally applicable and remanded to the District Court, which ruled in Plaintiff's favor and was subsequently appealed again. 586 F.3d at 1142.

189. *Stormans*, 794 F.3d at 1071.

court found that the rule was both facially neutral[190] and operationally neutral.[191] In finding that the rule was operationally neutral, the court focused on whether the rule applied in the same manner to all pharmacies, regardless of the religious beliefs of pharmacist-owners.[192] The court noted that even if the rule disproportionately burdened pharmacists with religious objections, the "Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct."[193] So long as the rules apply to all, regardless of religious motivation, the rules are operationally neutral.[194]

In determining general applicability, the *Stormans* court again focused on whether non-religiously motivated conduct would be regulated in the same manner as religiously motivated conduct.[195] The court invoked the *Smith* limitation on the "individualized exemptions"[196] exception, stating if the rules "do not afford unfettered discretion that could lead to religious discrimination because the provisions are tied to particularized, objective criteria," then the individualized exemptions exception does not apply.[197] The court ultimately found that the rule was generally applicable because there was no evidence that the rule would be enforced differently for non-religiously motivated conduct than for religiously motivated conduct.[198] The court applied rational basis review and, after finding the rule was both neutral and generally applicable, held the rule did not violate the Free Exercise Clause.[199]

The Third Circuit applied the narrow approach to free exercise claims in its decision in *Fulton v. City of Philadelphia*,[200] laying the groundwork for the Supreme Court to settle the Circuit split.[201] In *Fulton*, Catholic Social Services (CSS), a foster care agency, sued the City of Philadelphia, claiming that the City's refusal to contract with agencies that would not work with same-sex couples as foster parents violated its free exercise

190. *Id.* at 1076.

191. *Id.* at 1079.

192. *Id.* at 1077.

193. *Id.*

194. *Id.* at 1078.

195. *Id.* at 1079.

196. Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).

197. *Stormans*, 794 F.3d at 1081–82.

198. *Id.* at 1084.

199. *Id.* at 1088.

200. Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *rev'd*, 593 U.S. __, 141 S. Ct. 1868 (2021).

201. Steve West, *Religious Liberty Takes Center Stage*, WORLD (Jan. 5, 2021), https://world.wng.org/content/religious_liberty_takes_center_stage [https://perma.cc/Z8PU-J5P9].

rights.[202] The City viewed the refusal as a violation of municipal anti-discrimination laws.[203] In considering the free exercise claim, the court applied the narrow approach, stating a "challenger under the Free Exercise Clause must show that it was treated differently *because of* its religion."[204] The different treatment must also be worse than the treatment given to non-religiously motivated conduct.[205] The court combined neutrality and general applicability into a single analysis: was the Catholic foster care agency treated differently, and worse, than a foster care agency with different religious values would have been treated?[206] The court ultimately answered no.[207]

Stormans and the Supreme Court's opinion in *Fulton* reviewing the Third Circuit's approach, illustrate that the narrow approach focuses solely on whether the application of a regulation differs depending on the religious values of the group being regulated. The narrow approach limits the extent to which exceptions to this general rule are taken into consideration, thereby decreasing the number of avenues available to a plaintiff to prove that a law was neither applied neutrally nor with general applicability. Under the narrow approach, the regulation at issue is more likely to be subject to rational basis review, and much more likely not to violate the Free Exercise Clause.

III. *FULTON V. CITY OF PHILADELPHIA* AND POTENTIAL CONSEQUENCES

As previously mentioned, the Supreme Court took up the issue of the Free Exercise Clause as it pertains to anti-discrimination regulation in *Fulton*.[208] Arguments before the Court took place on November 4, 2020, and the Court released its decision on June 17, 2021.[209] Prior to the decision, parties anticipated that the Supreme Court would have to determine which interpretation of the test to apply, either "that the government would allow the same conduct by someone who held different religious views . . . as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable,

202. *Fulton*, 922 F.3d at 146.

203. *Id.*

204. *Id.* at 154 (emphasis in original).

205. *Id.* at 156.

206. *Id.*

207. *Id.*

208. *See* West, *supra* note 201.

209. Fulton v. City of Philadelphia, 593 U.S. __, 141 S. Ct. 1868 (2021).

as six circuits have held[.]"[210] In their opposition brief, respondents argued that there was no actual circuit split.[211] Instead, respondents asserted that petitioners characterized the dispute as a circuit split inaccurately, trying to tee up the kind of case where the Supreme Court can broaden religious protections under the Free Exercise Clause.[212] Like the *Masterpiece Cakeshop* Court, the *Fulton* Court largely side-stepped the heart of the religious freedom issue and found for plaintiffs on narrow grounds.[213] This section outlines the *Fulton* parties' respective arguments on appeal to the Supreme Court, then discusses the Court's decision. This section ends by considering the potential consequences of the *Fulton* decision and its importance.

A. Fulton*'s Supreme Court Arguments and Amicus Advocacy*

In their petition for a writ of certiorari to the Supreme Court, petitioners argued that the Third Circuit joined the wrong side of the circuit split by adopting the narrow approach to the free exercise question.[214] Petitioners asserted that the narrow approach breaks from precedent set in *Smith*, *Church of the Lukumi*, and *Masterpiece Cakeshop* by refusing to consider evidence beyond disparate treatment.[215] Petitioners ultimately argued that the narrow approach protects cases that ought to be subject to strict scrutiny review, making it much harder for free exercise plaintiffs to prevail.[216]

In their brief in opposition, respondents rejected the framework of a circuit split altogether.[217] Respondents asserted that petitioners "manufactur[ed]" a circuit split from one line in the Third Circuit's decision by taking it out of context.[218] Even if there was a circuit split, respondents argued that *Fulton* would not be an appropriate case to consider the split because the Court's answer would not be outcome

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210. Petition for Writ of Certiorari, *supra* note 155, at i.

211. City Respondents' Brief in Opposition at 16, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2019 WL 5189127, at *16.

212. *Id.* at 17.

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

214. Petition for Writ of Certiorari, *supra* note 155, at 2.

215. *Id.* at 29.

216. *Id.* at 39.

217. City Respondents' Brief in Opposition, *supra* note 211, at 16.

218. *Id.* at 17–18 ("[T]he court observed that free-exercise 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.' CSS seeks to manufacture a circuit split by taking that one line out of context, treating it as a stand-alone legal test, and asserting that it precludes consideration of any other evidence.").

determinative for CSS.[219] Furthermore, respondents argued the Third Circuit applied constitutional principles correctly, so the decision should not be overruled on review.[220]

Given the 2020 changes to the Supreme Court's make up,[221] LGBTQ+ advocates already recognized *Fulton*'s potential to begin rollbacks in sexual orientation and gender identity protections.[222] Lambda Legal, an organization that advocates on behalf of LGBTQ+ persons' legal rights, submitted an amicus brief to the Supreme Court urging the Justices that if petitioners CSS were to prevail it would "(i) send the damaging message that same-sex parents are not good parents and not equal under the law, (ii) reduce the pool of homes likely to care properly for LGBTQ youth, or (iii) refuse to serve or otherwise discriminate against LGBTQ[+] youth."[223] Lambda Legal was joined by three national organizations, four Pennsylvania organizations, and nineteen local organizations from around the U.S.[224] Raising similar concerns, Freedom for All Americans began a pledge in response to *Fulton*, addressing concerns that "[t]he wrong decision could give agencies across the country a broad license to discriminate."[225]

B. The Fulton *Decision*

Although the *Fulton* parties, as well as activists on both sides of the free exercise debate, anticipated that the Supreme Court would grapple

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219. *Id.* at 20.

220. *Id.* at 23.

221. David Leonhardt, *The New Supreme Court*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/2020/10/27/briefing/southern-california-wildfire-amy-coney-barrett-hurricane-zeta.html [https://perma.cc/SRD2-H839]; *see also* Joan Biskupic, *Amy Coney Barrett Joins the Supreme Court in Unprecedented Times*, CNN POLITICS (Oct. 27, 2020, 11:09 AM), https://www.cnn.com/2020/10/27/politics/amy-coney-barrett-joins-supreme-court-unprecedented/index.html [https://perma.cc/ZJ6U-99X8] ("[Amy Coney Barrett's] sheer presence on a new 6-3, conservative-liberal bench could transform the law in America for a generation, affecting abortion and religious rights, LGBTQ protections, and the scope of federal regulatory control over the environment, workplace safety and consumer protection.").

222. *Lambda Legal Urges Supreme Court to Uphold Ruling Protecting LGBTQ Foster Youth and Parents*, LAMBDA LEGAL (Aug. 20, 2020), https://www.lambdalegal.org/blog/20200820_supreme-court-uphold-ruling-lgbtq-foster-youth-parents [https://perma.cc/6W69-38DB] [hereinafter *Lambda Legal*]; Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *rev'd*, 593 U.S. __, 141 S. Ct. 1868 (2021); Aaron Belkin, *Supreme Court Poised to Roll Back LGBTQ Rights*, WASH. BLADE (Jan. 12, 2021), https://www.washingtonblade.com/2021/01/12/supreme-court-poised-to-roll-back-lgbtq-rights/ [https://perma.cc/5KXL-785E].

223. *Lambda Legal*, *supra* note 222; Brief of Amici Curiae Organizations Serving LGBTQ Youth in Support of Respondents, *Fulton*, 141 S. Ct. 1868 (No. 19-123), 2020 WL 5020356.

224. *Id.*

225. *LGBTQ Nondiscrimination* & Fulton v. City of Philadelphia, FREEDOM FOR ALL AMS., https://freedomforallamericans.org/fulton/ [https://perma.cc/V8GG-EEWW].

with whether the *Smith* decision ought to be overturned and what approach ought to instead be applied, the Court largely side-stepped those two issues. Firstly, the Court held that the City's Fair Practices Ordinance did not apply to CSS because foster care agencies are not public accommodations.[226] The Court then found that *Smith* did not apply at all in *Fulton* because the City of Philadelphia's policies, which froze foster care referrals to CSS unless they agreed to certify same sex couples as foster parents, were neither neutral nor generally applicable.[227] The Court noted that although the City's policies were neither neutral nor generally applicable, the general applicability analysis was cleaner, so they did not conduct a neutrality analysis[228] (both neutrality and general applicability are dispositive individually, so failure to demonstrate one subjects the policy to strict scrutiny review).[229] With regard to neutrality, the Court briefly stated that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[230]

The Court instead relied on the general applicability test and determined that the City's contractual provisions requiring certification of eligible same sex couples as foster parents violated the Free Exercise Clause.[231] The Court's test for general applicability asks whether the policy "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'"[232] Comparing this provision to the provisions in *Sherbert*,[233] the Court found that the City's "system of individual exemptions" made entirely by the Commissioner could not be generally applicable, regardless of the level of deference granted to the City.[234] Section 3.21 was therefore not generally applicable.[235]

The Court similarly found that section 15.1 was not generally applicable by extension of section 3.21, even though it was not facially discriminatory, because it did not allow for exceptions.[236] Section 15.1

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

227. *Id.* at 1877.

228. *Id.*

229. *See supra* section I.B.2.vi.

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

231. *Id.* at 1878.

232. *Id.* at 1877 (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)).

233. *See supra* section I.B.2.

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

235. *Id.*

236. *Id.* at 1879.

barred discrimination on the basis of sexual orientation.[237] However, the Court noted that Pennsylvania state law required that one contractual provision cannot be interpreted to annul another part, so any exception that came as a result of section 3.21 would also have to govern section 15.1.[238] Therefore, neither section 3.21 nor section 15.1 provided a generally applicable non-discrimination requirement.[239]

Because the City's contractual provisions were not generally applicable, the Court found that the contract must face strict scrutiny review.[240] *Smith* provides that laws burdening free exercise of religion are not subject to strict scrutiny so long as they are neutral and generally applicable.[241] Additionally, because the City's contract was not generally applicable, the Court found that *Fulton* lay outside *Smith*'s purview.[242] The Court stated that "[a] government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests."[243] The City asserted three interests in defense of the contractual provisions: 1) maximizing the number of foster parents, 2) protecting the City from liability, and 3) ensuring equal treatment of foster children and parents.[244] The Court found that none of these interests justified denying CSS an exception for religious exercise.[245] Thus, the Court concluded that the City's contractual provisions failed strict scrutiny review and the City violated the Free Exercise Clause by requiring CSS to certify eligible same sex couples.[246]

C. Potential Consequences of the Fulton *Decision*

Although the Court's decision in *Fulton* was not as sweeping as some LGBTQ+ advocates worried,[247] there are fears that the Court's decision

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 1881.

241. *See supra* section I.B.2.

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

243. *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

244. *Id.*

245. *Id.* at 1882.

246. *Id.*

247. Aryn Fields, *The Human Rights Campaign Reacts to Supreme Court Decision in* Fulton v. City of Philadelphia, HUM. RTS. CAMPAIGN (June 17, 2021), https://www.hrc.org/news/the-human-rights-campaign-reacts-to-supreme-court-decision-in-fulton-v-city-of-philadelphia [https://perma.cc/J4S4-UQ2L] ("The case could have had a sweeping, harmful impact in the provision of child welfare services by enabling discrimination against LGBTQ people, same-sex couples, interfaith couples, single parents, married couples in which one prospective parent has previously been divorced, or other qualified parents to whom an agency has an objection.").

in *Fulton* will deter LGBTQ+ anti-discrimination efforts in the foster care system and create further harm to LGBTQ+ children in foster care.[248] After the Court released its decision in *Fulton*, advocates agreed that, at the very least, the Court's decision played into a "pattern of the high court taking the side of faith-based organizations and businesses without answering the larger question of whether they have a right to discriminate" against LGBTQ+ people.[249] While the Court's decision not to overturn *Smith* allows for somewhat of a sigh of relief for LGBTQ+ advocates, some read the Court's decision as legal gymnastics that allowed the Court to find in favor of the religious plaintiffs.[250] Although the Court largely declined to answer the question of whether religious-based organizations must follow LGBTQ+ anti-discrimination policies, eventually this question will need to be addressed fully.

D. How Fulton *Exemplifies the Conflict Regarding Religious Protections and LGBTQ+ Anti-Discrimination Protections*

Fulton showcases the contemporary tension between religious and LGBTQ+ protections in the twenty-first century. The exercise of religious practices has the longer history of legal protection in the U.S. and is often championed as a component of "traditional" American society and politics.[251] Legal protections for sexual orientation and gender identity, on the other hand, are much newer and represent the expansion of non-conformist beliefs into the mainstream in the twentieth and twenty-first centuries.[252] In a certain sense, the type of tension between the two protections is not new; the American legal system has been charged with marrying the ideals of the past with the reality of the present since its inception. But with more and more Americans recognizing an individual's right to determine the direction of their identity and relationships regardless of traditional ideals,[253] LGBTQ+ protections cut to the heart of

248. *See* CATHRYN OAKLEY, HUM. RTS. CAMPAIGN FOUND., DISREGARDING THE BEST INTEREST OF THE CHILD: WHY CREATING LICENSES TO DISCRIMINATE FOR GOVERNMENT CONTRACTORS HURTS CHILDREN IN THE CHILD WELFARE SYSTEM 12 (2020), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Disregarding-the-Best-Interest-of-the-Child-FINAL.pdf?mtime=20201102165913&focal=none [https://perma.cc/AQP3-VNUL]; *see also* Jo Yurcaba, *Court's Foster Care Ruling Has Experts, Advocates Split on Potential LGBTQ Impact*, NBC NEWS (June 17, 2021, 4:03 PM), https://www.nbcnews.com/nbc-out/courts-foster-care-ruling-experts-advocates-split-potential-lgbtq-impa-rcna1210 [https://perma.cc/HD4V-UWKZ].

249. Yurcaba, *supra* note 248.

250. *Id.*

251. *See supra* section I.B.

252. *See supra* section I.C.

253. *See, e.g.*, Dan Avery, *Support for Gay Marriage Reaches All-Time High, Survey Finds*, NBC

religious objectors' asserted right to condemn such behavior.

IV. FEDERAL COURTS SHOULD ADOPT THE "NARROW" APPROACH TO EXAMINE LGBTQ+ ANTI-DISCRIMINATION LAWS UNDER FREE EXERCISE ANALYSIS

Federal courts, and eventually the U.S. Supreme Court, must still determine how to analyze LGBTQ+ anti-discrimination laws in the context of religious freedom, i.e., in the context of neutrality and general applicability. When analyzing a law's neutrality and general applicability, the central question is whether the law regulates all people's behavior in the same way regardless of religious beliefs.[254] The narrow approach upholds that question as the only dispositive analysis while still allowing multiple forms of evidence to be introduced in support of a party's claim. In large part, the *Fulton* respondents are accurate in describing the circuit split as manufactured: although the circuits give different levels of weight to certain evidence, the narrow approach does not restrict the form of evidence relied upon by courts applying the broad approach.[255] Instead, the narrow approach appropriately centers the analysis on the ultimate question of whether a law regulates behavior differently according to religious beliefs. The narrow approach also properly limits strict scrutiny review to a small number of cases involving LGBTQ+ anti-discrimination laws, which do not have the heightened risk of discriminatory effects that strict scrutiny was designed to alleviate. Federal courts should adopt the narrow approach in order to center review of LGBTQ+ anti-discrimination laws on the question of neutrality and general applicability, while still providing adequate protection for the free exercise of religion.

A. The Narrow Approach and Free Exercise Doctrine

Since *Reynolds v. United States*,[256] federal courts have tethered the free exercise analysis to whether the law in question applies to people

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NEWS (Oct. 21, 2020, 9:23 AM), https://www.nbcnews.com/feature/nbc-out/support-gay-marriage-reaches-all-time-high-survey-finds-n1244143 [https://perma.cc/D628-EB6R] (reporting that 70% of Americans support same-sex marriage); *see also* Abby Vesoulis, *Survey Shows Americans Are Becoming More Supportive of Transgender Rights Amid Federal Rollback of LGBTQ Protections*, TIME (June 11, 2019, 6:02 AM), https://time.com/5604398/growing-support-trans-rights/ (last visited Jan. 18, 2022) (reporting that more than six out of ten Americans became more supportive of transgender rights between 2014 and 2019).

254. *See supra* section I.B.2.

255. City Respondents' Brief in Opposition, *supra* note 211, at 18.

256. 98 U.S. 145 (1879).

differently because of their religious beliefs.[257] Although legislation may not regulate what religious beliefs a person holds, legislation may regulate the behavior that stems from that belief.[258] If the federal and state governments were unable to regulate any behavior that arose from a religious belief, there would be no way to mandate societal norms and expectations for how people treat one another.[259] Thus, the protection of religious beliefs and the practices stemming therefrom must always be balanced against the protection of people who would be harmed by those practices.[260] That balance has been at the heart of free exercise case law throughout its history.[261]

In order to determine that balance in a particular case, courts look for "neutrality" as a marker suggesting that it is not religious *beliefs* being regulated but rather religious *conduct*. If the text, intent, and actual effects of a law treat the holders of different religious beliefs equally, then the law is neutral.[262] Neutrality and general applicability suggest that legislators were not concerned with punishing a specific religious belief but were instead concerned with curtailing the harmful effects of certain conduct on other beings.[263] The appropriate focus of the neutrality analysis in free exercise cases centers on whether a person with a different religious belief than the plaintiff would have been subject to a significantly lower burden on their conduct as a result of the law in question.

The narrow approach to neutrality prioritizes this question of disparate treatment in the neutrality analysis. By using disparate treatment as the only dispositive question for neutrality, narrow approach courts accurately trace the line of reasoning in free exercise doctrine that has evolved since the nineteenth century. In practice, both courts applying the narrow approach and courts applying the broad approach must answer the question of disparate treatment in their analyses. Courts applying the

257. *See generally id.*

258. *Id.* at 166.

259. *Id.* at 167.

260. *See* Marcia L. McCormick, *The Growing Gender/Religion Divide*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 197, 216 (2018).

261. *See, e.g.*, Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."); *see also* Reynolds v. United States, 98 U.S. 145, 166–167 (1879).

262. *See supra* section I.B.2.

263. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–42 (1993) (finding that the case record demonstrated that the City's impetus for the ordinance was motivated by religion rather than concern for the treatment of animals, which is what the City purported).

narrow approach, however, explicitly state the disparate treatment question as the only dispositive question in the neutrality analysis, whereas courts applying the broad approach may treat other questions within the disparate treatment question as dispositive in themselves.[264] Ultimately, courts applying the narrow approach are accurate in their description of disparate treatment as the singular dispositive question in the neutrality analysis.

B. Types of Evidence Permitted by Both Approaches

As respondents argued in *Fulton*, the circuit split between the narrow and the broad approach is not clean-cut.[265] The narrow approach centers on disparate treatment as the dispositive question in the neutrality analysis, but it does not necessarily exclude the types of evidence allowed in the broad approach. Following the narrow approach, those forms of evidence may still be admissible to show disparate treatment, but may not be dispositive in themselves. Narrow approach courts have allowed a variety of forms of evidence to demonstrate disparate treatment while centering the ultimate question on whether a person with different religious beliefs than the plaintiff would have been treated differently. So, although the courts' neutrality analyses have not been identical, they are not entirely at odds with one another.

Stormans, Inc. v. Weisman offers one example of courts applying the narrow approach while also considering the type of evidence admitted under the broad approach.[266] In *Stormans*, the court applied the narrow approach, upholding the centrality of disparate treatment, while also considering evidence of individualized exemptions.[267] Although the *Fulton* petitioners construed "individualized exemptions" as one of the forms of evidence only allowed in broad approach courts, the Ninth Circuit evaluated individualized exemptions as part of a narrow analysis in *Stormans*.[268] The *Stormans* court held that although there was evidence

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264. *See* Fulton v. City of Philadelphia, 922 F.3d 140, 154 (3d Cir. 2019), *rev'd*, 593 U.S. __, 141 S. Ct. 1868 (2021) ("Thus, a challenger under the Free Exercise Clause must show that it was treated differently *because of* its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." (emphasis in original)); *see also* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076 (9th Cir. 2015) (framing the neutrality analysis around the proposition that "'if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral'" (quoting *Church of the Lukumi*, 508 U.S. at 533)).

265. City Respondents' Brief in Opposition, *supra* note 211, at 18.

266. *Stormans*, 794 F.3d at 1081.

267. *Id.* at 1081.

268. *Id.*

of other individualized exemptions that applied to secular but not religious conduct, there was insufficient evidence of disparate treatment on the basis of religious belief to warrant strict scrutiny review.[269] Thus, although the *Stormans* court applied the narrow approach and treated disparate treatment as the sole dispositive question when evaluating neutrality and general applicability, the court also considered the kinds of evidence relied upon in the broad approach.

C. Proper Scrutiny for LGBTQ+ Anti-Discrimination

The narrow approach makes it less likely that LGBTQ+ anti-discrimination laws will face strict scrutiny. This in turn makes it more likely that those laws will not be found to violate the Free Exercise Clause.[270] This outcome appropriately reflects the purpose of strict scrutiny review and the reality of LGBTQ+ anti-discrimination laws. LGBTQ+ anti-discrimination laws do not pose such a heightened risk of religious discrimination to warrant strict scrutiny review. Strict scrutiny applies when there is an established pattern of systemic legal oppression so pervasive that extremely careful review is necessary to protect against discrimination.[271] But LGBTQ+ anti-discrimination laws have neither been in place long enough nor had sufficient political power to pose an undue influence on the free exercise of religion in the U.S. Strict scrutiny works as a check on invidious discrimination that already exists in mainstream society and policy.[272] LGBTQ+ protections have arisen out of marginalized communities that lack the normative power that gives rise to invidious discrimination.

*D. The Narrow Approach and the Federal RFRA Post-*Boerne

The narrow approach does not create a conflict with the federal RFRA because it only applies to non-federal policies. The Supreme Court held in *City of Boerne v. Flores* that the federal RFRA only applies to federal laws; so, when a plaintiff brings a free exercise claim against a federal regulation, it automatically faces strict scrutiny upon review.[273] In *Fulton*, the Supreme Court considered what standard of review to apply to non-

269. *Id.* at 1082 (holding "[i]n summary, because the exemptions at issue are tied directly to limited, particularized, business-related, objective criteria, they do not create a regime of unfettered discretion that would permit discriminatory treatment of religion or religiously motivated conduct").

270. *See supra* note 24 and accompanying text.

271. *See supra* note 22 and accompanying text.

272. *Id.*

273. *See supra* section I.B.2.

federal regulations, specifically municipal regulations.[274] If courts apply the narrow approach, it does not violate the federal RFRA because that statute applies only to non-federal policies. Courts would still review free exercise claims against federal policies under strict scrutiny while using the narrow approach to determine which standard of review is appropriate for non-federal policies.

Ultimately, federal courts ought to adopt the narrow approach to evaluating neutrality and general applicability. The narrow approach appropriately centers on disparate treatment as the dispositive question in the neutrality/general applicability analysis while still considering the forms of evidence that are relied upon in broad approach courts. The narrow approach also reduces the likelihood that LGBTQ anti-discrimination laws will face strict scrutiny review, which better reflects the purpose of strict scrutiny review and the political power dynamic between the Free Exercise Clause and LGBTQ+ anti-discrimination laws. The narrow approach provides the better framework for understanding claims of religious discrimination brought against LGBTQ+ anti-discrimination laws in light of federal case law and Constitutional analysis.

CONCLUSION

As legal protections for LGBTQ+ people become more and more mainstream, U.S. courts must provide clarity regarding the conflict between these new protections and the Free Exercise Clause. While an easy alliance between the two categories of protections is unlikely, federal courts have the opportunity to create a standard that will recognize LGBTQ+ people's rights while respecting the beliefs held by religious individuals. By restricting the number of cases that force LGBTQ+ anti-discrimination laws to face strict scrutiny, federal courts would properly balance the right to exercise religion and LGBTQ+ people's right to liberty.

274. Fulton v. City of Philadelphia, 593 U.S. __, 141 S. Ct. 1876 (2021).