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KICKING THE CAN DOWN THE ROAD: WHY FULTON V. CITY OF PHILADELPHIA “MIGHT AS WELL BE WRITTEN ON THE DISSOLVING PAPER SOLD IN MAGIC SHOPS”

LOGAN SCHAEFBAUER†

With several fresh faces on the bench, lawsuits have been testing the waters on a variety of issues to determine the direction of this new Supreme Court. One of these issues is religion, which has been a lively issue for centuries, and remains a contentious legal issue today. In 2021, the Court granted certiorari to Fulton v. City of Philadelphia, providing it the opportunity to clean up decades of free exercise precedent gone awry. The Court ruled unanimously in favor of the petitioners but failed to fix the recurring issues of the modern free exercise jurisprudence. A majority of the court declined to overturn Employment Division Department of Human Resources of Oregon v. Smith, a controversial decision from its inception that has been rebuffed by Congress and widely criticized for running afoul of the Free Exercise Clause. In Fulton, the Court offered a narrow holding and did not address the core issues at the heart of the case. Because of the Court’s shortcomings, the problems of Smith remain and leave the Free Exercise Clause in a precarious state.

I. INTRODUCTION

Religious freedom has long been considered one of America’s most important values.† The right of the individual to practice his or her religion free from government interference is a cornerstone of the American way of life.‡ This

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1. See Importance of Religion in One’s Life, PEW RSCCH. CTR. (May 30, 2014), https://perma.cc/7H2L-8RAC (finding that fifty-three percent of Americans say religion is “very important” while twenty-four percent of Americans say religion is “somewhat important”).

2. See Ben Moreell, Religion in American Life, FEE (May 1, 1955), https://perma.cc/4U3E-E59P (arguing “the Founding Fathers were trying to set up a secular order based on their idea of the pattern laid down by God for man’s conduct in society”). The article also includes an abbreviated statement about the importance of religion from George Washington’s farewell address in 1796. Id. The full statement reads:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in courts of justice? And let us
right was so important to the Founding Fathers that they made it the first freedom mentioned in the First Amendment of the Bill of Rights. In addition to the Constitution, freedom of religion was among the most widely recognized rights protected by state bills of rights and judicial decisions in early America. Expressing support for such a provision in Virginia, James Madison, the main author of the First Amendment, stated:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.

James Madison and many of the Founders were deeply religious men who believed religion was key to a civil society.

American history is filled with sensational events that involved matters of religion. The Salem Witch Trials of the late 1600s came about as a result of the religious extremism of the Puritans in Massachusetts. The western and southern expansion of the United States in the 1800s was fueled by the idea of “manifest destiny”—the idea (or justification) that the United States was destined by God to

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with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.


3. U.S. CONST. amend. 1 (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”).


expand its dominion across the entire North American continent. The infamous Waco siege—colloquially known as the Waco massacre—occurred when the Bureau of Alcohol, Tobacco, and Firearms conducted a siege of the compound of the religious sect, Branch Davidians. The attacks on September 11, 2001, by the Islamic group Al-Qaeda was the largest terrorist attack in American history and resulted in monumental changes to the course of the United States. More recent scandals include sexual abuse both in the Catholic Church as well as the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“FLDS”). Perhaps most notably, the Supreme Court recently overturned Roe v. Wade with the landmark decision of Dobbs v. Jackson Women’s Health Organization—a decision that religious organizations have been striving toward for decades.

These incidents illustrate a complicated history regarding freedom to practice religion and the government’s interest in enforcing law. One Supreme Court case describes the conflict eloquently: “[T]he [First] Amendment embraces two

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10. Justin Sturken & Mary Dore, *Remembrance the Waco Siege*, ABC NEWS (Feb. 28, 2007), https://perma.cc/HGS6-T9UP. This fifty-one-day face-off between the religious sect and the Bureau of Alcohol, Tobacco, and Firearms ended with seventy-four people dead—including twenty-five children—when the compound was consumed by a fire. *Id.*


concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.\textsuperscript{17} The extent to which the government may regulate this conduct has been a struggle for the entirety of our nation’s history.\textsuperscript{18}

Recent developments have revived the age-old debates regarding religious issues.\textsuperscript{19} One of these is the nomination and confirmation of Justice Amy Coney Barrett to the Supreme Court.\textsuperscript{20} Following the death of Justice Ruth Bader Ginsburg, then-President Donald Trump announced the nomination of Barrett to fill the vacancy.\textsuperscript{21} Barrett would become the third Justice to be appointed during Trump’s presidency, marking a significant ideological shift on the Supreme Court.\textsuperscript{22} To make matters more contentious, Barrett is a self-proclaimed “faithful Catholic.”\textsuperscript{23} Barrett is now one of six Catholics on the bench, along with an Episcopalian Justice and two Jewish Justices.\textsuperscript{24} Barrett is regarded as the final addition to a six-member conservative majority on the Supreme Court.\textsuperscript{25}

Many were concerned that Justice Barrett’s religious affiliation would push the Court even farther to the right on religious issues.\textsuperscript{26} Recent cases suggest that the extent to which the Court is trending to the right on religious issues is unclear.\textsuperscript{27} In 2018, before Justices Kavanaugh and Barrett were appointed, the

\textsuperscript{17} Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).
\textsuperscript{18} Gedicks & McConnell, supra note 4, at 1 (“From the beginning, courts in the United States have struggled to find a balance between the religious liberty of believers, who often claim the right to be excused or ‘exempted’ from laws that interfere with their religious practices, and the interests of society reflected in those very laws.”).
\textsuperscript{19} See infra notes 21-30 and accompanying text (describing recent events which have prompted discussion about religious freedom issues).
\textsuperscript{20} Lucien Bruggeman et al., President Trump Nominates Amy Coney Barrett for Supreme Court Seat, ABC NEWS (Sept. 26, 2020, 4:32 PM), https://perma.cc/E7ZV-T8ZM.
\textsuperscript{21} Id.
\textsuperscript{22} Adam Liptak, A Transformative Term at the Most Conservative Supreme Court in Nearly a Century, N.Y. TIMES (July 1, 2022, 12:00 PM), https://perma.cc/AGL4-5528 (“The dynamic on the new court is different and lopsided, with six Republican appointees and three Democratic ones.”).
\textsuperscript{25} Isaac Chotiner, How Trump Transformed the Supreme Court, NEW YORKER (Nov. 11, 2021), https://perma.cc/LHU9-KQNS. Granted, the so-called members of the conservative majority often come down on different sides of cases. See, e.g., Robert Barnes, They’re Not ‘Wonder Twins’: Gorsuch, Kavanaugh Shift the Supreme Court, but Their Differences are Striking, WASH. POST (June 29, 2019, 7:00 AM), https://perma.cc/R4U5-EABY (explaining how, at least in 2019, Gorsuch and Kavanaugh had disagreed on decisions more than any other pair on the Supreme Court).
\textsuperscript{27} See infra notes 29-32 and accompanying text (illustrating that the Court is divided on religious issues).
Court vindicated a Colorado cakeshop who declined to make a wedding cake for a same-sex couple.\textsuperscript{28} In 2020, Barrett’s addition to the Court played a critical role in a five-to-four decision striking down New York’s Covid-19 restrictions on religious services.\textsuperscript{29} Justice John Roberts’s vote with the left-leaning justices (in this case and others) suggests the “Conservative Justices” are far from lock-step with each other.\textsuperscript{30} \textit{Fulton v. City of Philadelphia},\textsuperscript{31} albeit a unanimous decision, illustrates a factious Court in regard to the underpinnings of religious freedom matters.\textsuperscript{32}

This uncertainty about the Court’s collective view towards religious freedom has left the future of the Free Exercise Clause anything but clear.\textsuperscript{33} For many, the addition of three Justices under a Republican president signified the beginning of a new age for religious freedom.\textsuperscript{34} However, if \textit{Fulton} is any indication, the Supreme Court is far from a return to the religious freedom jurisprudence predating \textit{Employment Division Department of Human Resources of Oregon v. Smith}.\textsuperscript{35}

This casenote begins in Part II by exploring how a private foster agency in Philadelphia came under fire from the City of Philadelphia for acting in accordance with its religious beliefs.\textsuperscript{36} Part III walks through some of the vast history of religious freedom and the evolution of the Free Exercise Clause throughout American history.\textsuperscript{37} Part IV explores how the Court departed from the proper free exercise jurisprudence in \textit{Smith} and how the Court failed to resolve this crucial issue in \textit{Fulton}.\textsuperscript{38} This article argues that the Court must reconsider \textit{Smith} without delay in order to protect the true meaning of the First Amendment’s Free Exercise Clause.\textsuperscript{39}

\textsuperscript{29} Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68-69 (2020). In previous cases brought while Justice Ginsburg was on the Court, the restrictions of religious services were upheld. \textit{See generally} South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020).
\textsuperscript{30} \textit{See Cuomo}, 141 S. Ct. at 75-76 (Roberts, J., dissenting) (discussing New York’s restrictions on church services during the pandemic; Justice Roberts writes “it may well be that such restrictions violate the Free Exercise Clause” but votes to deny the injunction regardless).
\textsuperscript{31} 141 S. Ct. 1868 (2021).
\textsuperscript{32} \textit{See generally} id. (illustrating the different views of the justices between the majority and concurring opinions).
\textsuperscript{33} \textit{See id.} (displaying the different positions of the right-leaning Justices on this Free Exercise decision).
\textsuperscript{35} 494 U.S. 872 (1990). \textit{See generally Fulton}, 141 S. Ct. at 1868-82 (deciding in favor of petitioners on narrow grounds instead of revisiting \textit{Smith}).
\textsuperscript{36} \textit{See infra} Part II (describing the facts leading up to the \textit{Fulton} decision).
\textsuperscript{37} \textit{See infra} Part III (explaining the historical evolution of the Free Exercise Clause).
\textsuperscript{38} \textit{See infra} Part IV (analyzing the Court’s decision in \textit{Fulton}).
\textsuperscript{39} \textit{Id.}
exercise jurisprudence. The analysis argues that the Court could have addressed Smith but declined, leaving in place a precedent contrary to the true meaning of the Free Exercise Clause of the First Amendment.

II. FACTS AND PROCEDURE

For over two centuries, the Catholic Church has served the needy children of Philadelphia. “After the yellow fever epidemic hit Philadelphia in the 1790s, Catholics, Jews, and other religious groups established orphanages.” The Catholic Church grew in Philadelphia and so did its services to orphaned and neglected children. By 1910, the Catholic Church of Philadelphia was providing foster care to almost 26,000 children.

During the twentieth century, the government “increased its involvement in (and regulation of) care for abused and neglected children.” Modernly, the City of Philadelphia takes custody of children in need, most of whom will be placed with foster families. The City’s foster care system depends on cooperation with private foster agencies like Catholic Social Services (“CSS”) to find homes for children. The opinion states, “[w]hen children cannot remain in their homes, the City’s Department of Human Services assumes custody of them.” The Department must then find a suitable home for these children and is required by law to place them in the most family-like setting possible.

The majority explains that “[t]he placement process begins with review of prospective foster families.” Under Pennsylvania law, state-licensed foster agencies like CSS possess the authority to certify foster families. Before certification, an agency must conduct a home study “during which it considers statutory criteria including the family’s ‘ability to provide care, nurturing and supervision to children,’ ‘[e]xisting family relationships,’ and ability to ‘work in partnership’ with a foster agency.” The agency then decides whether to approve, disapprove, or provisionally approve the foster family.

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40. See Fulton, 141 S. Ct. at 1883-1926 (Alito, J., concurring) (explaining how the Free Exercise Clause should be applied to the Fulton case).
41. See infra Part IV.B (arguing the Court could have resolved the Smith decision in Fulton).
42. Fulton, 141 S. Ct. at 1874.
43. Brief for Petitioners at 4, Fulton, 141 S. Ct. 1868 (No. 19-123), 2020 WL 2836494 [hereinafter Petitioner’s Brief].
44. Id.
45. Id.
46. Id.
47. Id. at 5.
48. Fulton, 141 S. Ct. at 1875.
49. Id.
50. Petitioner’s Brief, supra note 43, at 6 (citing 11 PA. CONS. STAT. § 2633 (2011)).
51. Fulton, 141 S. Ct. at 1875.
52. Id. (citing 55 PA. CODE § 3700.61 (1982) (amended 1987)).
53. Id. (alteration in original) (quoting 55 PA. CODE § 3700.64 (1982)).
54. Id. (citing 55 PA. CODE § 3700.69 (1982) (amended 1987)).
The religious views of CSS heavily influence its work in this system. CSS believes that “marriage is a sacred bond between a man and a woman.” The agency believes that certification of a prospective foster family is an endorsement of their relationships, and therefore, will not certify unmarried couples or same-sex married couples. However, CSS does not object to certifying gay or lesbian individuals as single foster parents or placing gay and lesbian children. In fact, no same-sex couple had ever sought certification from CSS. If a couple did, “CSS would refer them to another nearby agency.”

In May 2013, a story was published in the Philadelphia Inquirer, entitled “Two Foster Agencies in Philly won’t place kids with LGBTQ people.” “The story was about a complaint against a different agency, but contained a quote from the Archdiocese’s spokesperson[,] . . . [who] confirmed CSS’s longstanding religious policy and also emphasized that CSS had not received inquiries from same-sex couples.” After this story ran, “[t]he City Council [of Philadelphia] ‘called for an investigation, saying that the City had “laws in place to protect its people from discrimination that occurs under the guise of religious freedom.”’ The Philadelphia Commission on Human Relations also launched an inquiry into the CSS.

The Commissioner of the Department of Human Services (“DHS”) met with CSS, remarking that “things have changed since 100 years ago,” and “it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church.” After this meeting, CSS was informed that the DHS would no longer refer children to the agency. These actions were taken despite a major foster parent shortage across the nation. Two days after Philadelphia shut down foster placements with CSS, DHS sent out an urgent plea for 300 new foster homes.

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55. Id.
56. Id. (quoting J.A. vol. 1 at 171, Fulton, 141 S. Ct. 1868 (No. 19-123), 2020 WL 3006565).
57. Id. at 1875.
58. Id.
60. Id.
61. Id.
62. Id.
63. Fulton, 141 S. Ct. at 1875 (quoting Petition for Writ of Certiorari, Fulton, 142 S. Ct. 1868 (No. 19-123)).
64. Id.
65. Id. “Pope Francis has been viewed with cautious optimism by LGBTQ groups” because of his past statements that “homosexuals are ‘part of the family’ and that same-sex and other nontraditional couples need a ‘civil union law.’” Bill Chappell, Vatican Says Catholic Church Cannot Bless Same-Sex Marriages, NAT’L PUB. RADIO (Mar. 15, 2021), https://perma.cc/3TRE-5RMB. However, Pope Francis has never implied that the Catholic church condones or blesses same-sex marriage. See id. (quoting Pope Francis as saying, “[T]here are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God’s plan for marriage and family.”).
66. Fulton, 141 S. Ct. at 1875.
68. Petitioner’s Brief, supra note 43, at 12 (quoting Julia Terruso, Philly Puts Out ‘Urgent’ Call - 300 Families Needed for Fostering, PHILADELPHIA INQUIRER (Mar. 18, 2018), https://perma.cc/C7UH-
The City explained after the fact that “the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.” The City stated that it would not enter into a foster care contract with CSS in the future unless the agency agreed to change its policies and certify same-sex couples. CSS and several foster parents affiliated with the agency brought suit against the respondents. “CSS sought a temporary restraining order and preliminary injunction directing the Department to continue referring children to CSS without requiring the agency to certify same-sex couples.” CSS also alleged that “the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment.”

The United States District Court for the Eastern District of Pennsylvania denied preliminary relief, concluding “that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under” the framework from Smith. Additionally, the district court found that the free speech claims were unlikely to prevail because CSS was part of a government program. The United States Court of Appeals for the Third Circuit held that the contract between CSS and the City states that CSS shall not reject a child or family for Services based upon the location or condition of the family’s residence, their environmental or social condition, or for any other reason if the profiles of such child or family are consistent with Provider’s Scope of Services or DHS’s applicable standards as listed in the [Services Contract], unless an exception is granted by the Commissioner or the Commissioner’s designee, in his/her sole discretion.


15.1 Non-Discrimination; Fair Practices. This Contract is entered into under the terms of the Charter, the Fair Practices Ordinance (Chapter 9-1100 of the Code) . . . Provider shall not discriminate or permit discrimination against any individual because of race, color, religion or national origin. Nor shall Provider discriminate or permit discrimination against individuals in . . . public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of sex, sexual orientation, gender identity, marital status, familiar [sic] status . . . or engage in any other act or practice made unlawful under the Charter . . . .
Circuit affirmed, also concluding that “the proposed contractual terms were a neutral and generally applicable policy under Smith.”76 The Supreme Court granted certiorari.77

III. BACKGROUND

The legal issues surrounding this case entail a rigorous history of the constitutional right to religious freedom.78 The First Amendment states in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”79 The concept of religious freedom arose long before the ratification of the Constitution.80 Many colonists fled from England to America “to escape religious persecution during the reign of King James I” and Charles I.81 The Puritans were one such example.82 They “spread out across what is now Massachusetts and New Hampshire[,]” establishing the Massachusetts Bay Company.83 The Puritans, however, were not fans of religious tolerance.84 Their society was one of theocracy, which governed nearly every aspect of their lives.85 “Roger Williams, the founder of what [would become] Rhode Island, fled Massachusetts after his proposal to separate church and state [was] met with Puritan hostility.”86


76. Fulton, 141 S. Ct. at 1876 (citing Fulton II, 922 F.3d at 152-59).
77. Id.
78. See infra notes 79-160 and accompanying text (describing the historical background of this case).
80. See infra notes 81-96 and accompanying text (providing a brief history of religious liberty in early America).
In order to enforce this uniformity, Europe of the sixteenth and seventeenth centuries was rent by both religious wars and religious persecution. Protestant dissenters were harasse[d] in Catholic Spain and France, while Catholics received like treatment in Protestant countries. In England the particular group to be mistreated depended upon the religion of the sovereign in power at the time.

Id. at 19-20.
82. Puritans, supra note 81.
83. Id.
84. Even the most favorable methods of private worship were not sufficient for the Puritans. M. Cathleen Kaveny, The Remnants of Theocracy: The Puritans, the Jeremiad and the Contemporary Culture Wars, 9 L. CULTURE & HUM. 59, 63 (2013). “They wanted the whole government, and ideally the whole society, to act in a godly manner as well. In the seventeenth century, the idea of separation of church and state would have been almost universally scandalous . . . .” Id.
85. See id.
86. Puritans, supra note 81.
Freedom of religion—once known as “liberty of conscience”—was first applied in Maryland in 1634. 87 “Fifteen years later, the Maryland Toleration Act protected the rights of Christian colonists,” saying, “No person or persons whatsoever within the Province or the islands, ports, harbors, creekes [sic] or havens thereunto belonging . . . shall from henceforth be any waies [sic] troubled, molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof.” 88

The Maryland Toleration Act was soon repealed with the help of Protestant assemblymen, and a new law barring Catholics from practicing their religion was passed. 89 “In 1658 Lord Baltimore regained control of the province and the Act . . . was restored . . .” 90 The Act survived for over thirty years this time, when it was eventually rescinded so that Catholics would be prevented from holding political office. 91 This religious intolerance would continue until the American Revolution in the late 1700s. 92

Rhode Island, Connecticut, New Jersey, and Pennsylvania all established religious freedom in their colonies in opposition to the earlier Plymouth Colony and Massachusetts Bay Colony. 93 Rhode Island, in its 1663 Charter, was the first to include language that would later be recognized as “liberty of conscience” clauses. 94 Liberty of conscience, an expansive term, largely comprises the inherent right of each person to follow the dictates of their conscience without interference by any authorities, so long as the fundamental rights of others are not

88. Id. (alteration in original) (emphasis added). This was the first “free exercise” clause to be passed on the Continent. Act Concerning Religion of 1649, reprinted in 5 THE FOUNDERS’ CONSTITUTION 49, 50 (Philip B. Kurland & Ralph Lerner eds., 1987).
89. ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 21 (1988). The thirteen colonies were widely known for their anti-Catholic biases. John F. Fink, History of the Catholic Church in the United States, CRITERION (June 9, 2017), https://perma.cc/535P-UMCN. John Tracy Ellis, a Catholic Priest and historian, wrote that a “universal anti-Catholic bias was brought to Jamestown in 1607, and vigorously cultivated in all the 13 colonies from Massachusetts to Georgia.” Id.
91. ELISABETH LOUISE ROARK, ARTISTS OF COLONIAL AMERICA 78 (2003).
92. See Kenneth Lasson, Religious Freedom and the Church-State Relationship in Maryland, 14 CATH. L. 4, 14-16 (1968).
being violated.\textsuperscript{95} The substantive language of the Rhode Island provisions was the most common form of protection for religious freedom in the early colonies, and later became the most common provisions adopted in state constitutions after the American Revolution.\textsuperscript{96}

For the next two centuries, courts struggled to balance the religious liberty of believers who claim the right to be exempted from laws interfering with their religious practices, and the interests of a society in enforcing those laws.\textsuperscript{97} One of the best examples of this struggle comes from a series of cases involving state laws targeting the practice of polygamy by members of the Church of Jesus Christ of Latter-Day Saints.\textsuperscript{98} In 1878, the Supreme Court unanimously rejected free exercise challenges to these laws in \textit{Reynolds v. United States}.\textsuperscript{99} In doing so, the Court held that the Free Exercise Clause protects beliefs, not necessarily conduct: “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may [interfere] with practices.”\textsuperscript{100} The Court’s decision reflects the concern that certain exemptions for religious practices undermine the rule of law.\textsuperscript{101}

The \textit{Reynolds} decision and the distinction between beliefs and actions carried well into the twentieth century.\textsuperscript{102} In 1940, the Court extended this doctrine to state laws and state actions burdening religious exercise in \textit{Cantwell v. Connecticut}.\textsuperscript{103} In \textit{Cantwell}, members of the Jehovah’s Witnesses denomination were going from house to house attempting to sell their religious documents and solicit contributions.\textsuperscript{104} They were charged under a Connecticut statute that forbid “solicit[ing] money . . . for any alleged religious, charitable[,] or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting . . . unless such cause shall have been approved by the secretary of the public welfare council.”\textsuperscript{105} Citing \textit{Reynolds} as authority, the Court confirmed the idea that conduct related to religious activity is subject to regulation from the

\textsuperscript{95} See, e.g., GA. CONST. art. I, § I, para. III (reading, “[E]ach person has the natural and inalienable right to worship God, each according to the dictates of that person’s own conscience; and no human authority should, in any case, control or interfere with such right of conscience.”).


\textsuperscript{97} See Gedicks & McConnell, supra note 4, at 1-2. The article states:

\textit{From the beginning, courts in the United States have struggled to find a balance between the religious liberty of believers, who often claim the right to be excused or “exempted” from laws that interfere with their religious practices, and the interests of society reflected in those very laws. Early state court decisions went both ways on this central question.}

\textit{Id.}

\textsuperscript{98} \textit{Reynolds v. United States}, 98 U.S. 145, 166-67 (1878).

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} \textit{Id.} at 166.

\textsuperscript{101} \textit{Id.} at 167. “To 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. Government could exist only in name under such circumstances.” \textit{Id.}

\textsuperscript{102} See infra notes 104-108 and accompanying text (applying this doctrine in 1940).

\textsuperscript{103} 310 U.S. 296, 310-11 (1940).

\textsuperscript{104} \textit{Id.} at 300-01.

\textsuperscript{105} \textit{Id.} at 301-02.
government. The Court held that the state is free to “regulate the time and manner of solicitation generally” but may not condition the “solicitation of aid for the perpetuation of religious views or systems upon a license,” as this unduly burdens the exercise of one’s religion.

A 1961 case, again citing Reynolds, upheld a statute proscribing Sunday retail sale of certain enumerated commodities. The appellants were Jewish merchants of clothing and furniture who claimed the statute interfered with the free exercise of their religion. They argued that, because their Orthodox Jewish Faith required the closing of their business from Friday through Saturday, requiring them to additionally close their business on Sunday would substantially impair their ability to make a living. According to the appellants, the statute was unconstitutional because it would require them either to “give up their Sabbath observance” or put them in economic peril compared to their non-Jewish competitors. The Court made their doctrine clear, “legislative power over mere opinion is forbidden but it may reach people’s actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one’s religion.”

In several of these early free exercise cases, the Court cited the oft-quoted letter from Thomas Jefferson to the Danbury Baptist association in his attempt to convince them that the Constitution will sufficiently protect religious freedoms:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

The inclusion of this quote in several cases illustrates a certain uniformity in the Court’s early free exercise jurisprudence: that “legislative power over mere opinion is forbidden but it may reach people’s actions when they are found to be

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106. *Id.* at 304.
107. *Id.* at 306-07.
109. *Id.* at 601-02.
110. *Id.* at 601.
111. *Id.* at 602.
112. *Id.* at 603-04.
in violation of important social duties or subversive of good order, even when the actions are demanded by one’s religion.”¹¹⁴

The 1960s and 1970s marked a shift toward strengthening protection for religious conduct.¹¹⁵ The Sherbert v. Verner case from 1963 is the first and leading case for the Supreme Court’s modern free exercise jurisprudence.¹¹⁶ In Sherbert, the Court held that a Seventh-Day Adventist was not required to agree to work on Saturday (in violation of his religion) in order to be eligible for unemployment compensation.¹¹⁷ While the state has a legitimate need and the authority to regulate unemployment benefits, it may not enforce limitations that conflict with sincere religious practices.¹¹⁸

The Sherbert decision is credited with creating the potential for challenges by religious believers to a range of laws that conflict with their religious convictions “because such laws impose penalties either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct.”¹¹⁹ The so-called “Sherbert test”—that “a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule [in free exercise claims] for the next 27 years.”¹²⁰

The Sherbert test was favorable for free exercise claims, as illustrated by the case of Wisconsin v. Yoder.¹²¹ In this case, the Supreme Court held that the free exercise rights of Amish parents were violated by a state law requiring all students to remain in school until the age of sixteen when their religious practices object to formal education beyond the eighth grade.¹²² Even considering the State’s strong interest in compulsory education, the Court found that the State had failed to show how its interest would be adversely affected by granting an exemption to the Amish.¹²³

The Yoder decision includes a clear rejection of the Smith doctrine that would later become the Court’s guide to free exercise claims:

[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability . . . [a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. . . . ¹²⁴

¹¹� Braunfeld, 366 U.S. at 603-04.
¹¹⁵ See, e.g., Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring any law that substantially burdens a religious exercise be narrowly tailored to promote a compelling government interest).
¹¹⁶ Id. at 398-410.
¹¹⁷ Id. at 409-10.
¹¹⁸ Id. at 410.
¹¹⁹ Origins of Free Exercise, supra note 96, at 1412.
¹²² Id. at 212, 234-36.
¹²³ Id. at 235-36.
¹²⁴ Id. at 220 (citations omitted).
Smith, as this article discusses, completely uproots the holdings of Yoder and prior free exercise cases.125

In Thomas v. Review Board of Indiana Employment Security Division,126 a 1981 free exercise case, the Court held that a state may not withhold unemployment benefits from a Jehovah’s Witness member who quit due to refusal to do work he viewed as contributing to the production of military weapons.127 In Thomas, the Court included the same quote from Yoder, saying “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”128

A few years later, in Hobbie v. Unemployment Appeals Commission of Florida,129 a claimant was denied unemployment compensation benefits after being discharged for refusing to work on her day of Sabbath.130 The Supreme Court held that “Florida’s refusal to award unemployment compensation benefits . . . violated the Free Exercise Clause of the First Amendment.”131 Similarly, in Frazee v. Illinois Department of Employment Security,132 the Supreme Court found that Illinois’s denial of unemployment benefits to the worker who refused to work on Sunday was a violation of the Free Exercise Clause of the First Amendment.133 Many cases applied the Sherbert test and found no First Amendment violation.134 Of the many cases applying this test, none of them questioned the validity of Sherbert’s interpretation or signaled a shift to the Court’s free exercise jurisprudence.135

Then came the landmark case of Employment Division Department of Human Resources of Oregon v. Smith.136 The underlying fact-pattern of Smith was rather similar to that of Sherbert.137 Alfred Smith and Galen Black were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes during a religious ceremony.138 The State of Oregon denied their unemployment compensation applications because their action was considered work-related “misconduct.”139

125. See infra notes 137-147 and accompanying text (describing the decision in Smith).
127. Id. at 710, 720.
128. Id. at 717 (alteration in original) (quoting Yoder, 406 U.S. at 220).
130. Id. at 138-39.
131. Id. at 146.
133. Id. at 835.
134. See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1891 (2021) (Alito, J., concurring) (providing examples of several cases—some of which are discussed in this article—applying Sherbert yet finding no violation).
135. Id.
137. See generally id.; Sherbert v. Verner, 374 U.S. 398 (1963) (involving the denial of unemployment benefits for conduct relating to religion in both cases).
138. Smith, 494 U.S. at 874.
139. Id.
The Supreme Court of Oregon found that the denials violated Smith and Black’s free exercise rights, but the United States Supreme Court reversed.140 Without any briefs or argument on whether the Sherbert test should be replaced, the Supreme Court fashioned a new test for free exercise claims: “A ‘generally applicable and otherwise valid’ rule does not violate the Free Exercise Clause ‘if prohibiting the exercise of religion . . . is not [its] object . . . but merely the incidental effect of’ its operation.”141

Ultimately, the Court held that the “Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use.”142 As Justice Alito pointed out in his Fulton concurrence, the majority was satisfied that its interpretation of the Free Exercise Clause represented a “permissible” reading of the text.143 The majority distinguished the previous cases of Sherbert, Thomas, and Hobbie as merely concerning the award of unemployment compensation.144 Yoder was distinguished as involving both a free exercise claim and a parental rights claim, which the Court in Smith referred to as “hybrid situation[s].”145 After Smith, the Sherbert test is held to apply to two narrow categories: “(1) those involving the award of unemployment benefits or other schemes allowing individualized exemptions and (2) so called ‘hybrid rights’ cases.”146

Smith and its progeny have long been criticized for failing to protect what many view as the essence of the Free Exercise Clause of the First Amendment.147 In his lengthy concurrence in Fulton, Justice Alito mentions several circumstances that would satisfy Smith yet infringe on the practice of religion:

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140. Id. at 876, 890.
141. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1892 (2021) (Alito, J., concurring) (alterations in original) (quoting Smith, 494 U.S. at 878). Justice Alito specifically writes that there were no briefs or arguments on this issue, illustrating his clear disagreement with the decision. Id. at 1892. To illustrate this point further, Justice Alito wrote, “To clear the way for this new regime, the majority was willing to take liberties.” Id.
142. Smith, 494 U.S. at 872 (quoting the syllabus).
143. Fulton, 141 S. Ct. at 1892 (Alito, J., concurring) (quoting Smith, 494 U.S. at 878). Justice Alito’s full quote reads, “Paying little attention to the terms of the Free Exercise Clause, [the Court] was satisfied that its interpretation represented a ‘permissible’ reading of the text.” Id. at 1892.
144. Smith, 494 U.S. at 883.
145. Id. at 881-84.
146. Fulton, 141 S. Ct. at 1892 (Alito, J., concurring) (citing Smith, 494 U.S. at 881-84). “Hybrid-rights” cases, as explained by the Court in Smith, are cases that “have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.” Smith, 494 U.S. at 881.
Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with Smith even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under Smith, even though it would outlaw kosher and halal slaughter. Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. A San Francisco ballot initiative in 2010 proposed just that. A categorical ban would be allowed by Smith even though it would prohibit an ancient and important Jewish and Muslim practice. Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy Smith even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.\textsuperscript{148}

In short, Smith has the effect of placing burdens specifically on religious practices, even if the law applies neutrally to everyone in society.\textsuperscript{149}

In the aftermath of Smith, Congress received many reports regarding the consequences of the decision.\textsuperscript{150} Justice Alito highlights one tragic example involving a case in which a judge was compelled by Smith to reverse his earlier decision holding the state medical examiner liable for performing an autopsy of a young Hmong man who was killed in a car accident.\textsuperscript{151} The young man’s parents were under the belief that the autopsy would prevent their son from entering the afterlife.\textsuperscript{152} In response to these reports, a bill was introduced in the United States House of Representatives that attempted to restore the Sherbert test.\textsuperscript{153} This bill eventually became known as the Religious Freedom Restoration Act ("RFRA").\textsuperscript{154} The RFRA was passed in the House, approved in the Senate by a vote of ninety-seven to three, and was signed into law by President Bill Clinton.\textsuperscript{155}

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\textsuperscript{148} Fulton, 141 S. Ct. at 1884 (Alito, J., concurring) (citation omitted).
\textsuperscript{149} See id.
\textsuperscript{150} Id. at 1893.
\textsuperscript{151} You Vang Yang v. Sturner, 750 F. Supp. 558, 560 (D.R.I. 1990). The Hmong people are an ethnic group who live chiefly in China and Southeast Asia. Nicholas Tapp, Hmong People, BRITANNICA, https://perma.cc/PN75-7Y6S (last visited Jan. 17, 2022). There are more than 170,000 Hmong people living in the United States. Id. Hmong people participate in long funeral rites in which they believe reincarnated souls of the deceased return to the original village of ancestors, where they are reborn. Id.
\textsuperscript{152} You Vang Yang, 750 F. Supp. at 558.
\textsuperscript{153} H.R. REP NO. 103-88 (1993).
\textsuperscript{155} Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894 (Alito, J., concurring) (citing "139 Cong. Rec. 27239-27341 (1993) (House voice vote); Id. at 26414 (Senate vote); Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 Weekly Comp. of Pres. Doc. 2377 (1993)").
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In 1997, the same Supreme Court partially struck down the RFRA as it applies to the states because Congress lacked the power under the Fourteenth Amendment to impose such rules on the states.\textsuperscript{156} In response, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), this time under its spending and commerce powers.\textsuperscript{157} The RLUIPA passed both the House and the Senate unanimously and was signed into law by President Clinton.\textsuperscript{158} As Justice Alito explains, the RFRA and RLUIPA have restored part of the protection that Smith took away, but the acts are limited in scope and are subject to the whims of Congress.\textsuperscript{159} These acts, Justice Alito explains, are "no substitute for a proper interpretation of the Free Exercise Clause" from the Supreme Court.\textsuperscript{160}

Recently, religious freedom advocates received somewhat of a victory in the case of Tandon v. Newsom.\textsuperscript{161} Touted as "steal[ing] Fulton's thunder," this case addressed California’s prohibitions on certain religious practices as opposed to secular activities during the Covid-19 pandemic.\textsuperscript{162} Most notably, the Court held that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise."\textsuperscript{163} However, Tandon does not address the remaining issues of Smith or Fulton.\textsuperscript{164} Fulton did not involve a secular activity receiving more favorable treatment than a religious exercise; rather, Fulton involved an exemption system which is not

\textsuperscript{156} City of Boerne v. Flores, 521 U.S. 507, 536 (1997). This decision was based on the enumerated powers granted by the Constitution. \textit{Id.} at 516. Although Section 5 of the 14th Amendment states, "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," the RFRA exceeded the power possessed by Congress. \textit{Id.} at 517 (quoting U.S. CONST. amend. XIV, § 5). The Court’s reasoning is best illustrated by this paragraph:

Congress’ power under § 5, however, extends only to “enforcement” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial.” The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”

\textit{Id.} at 519 (alterations in original) (citation omitted).


\textsuperscript{158} Fulton, 141 S. Ct. at 1893-94 (Alito, J., concurring).

\textsuperscript{159} Id. at 1894. In 1997, the Supreme Court held that Congress only had the constitutional authority to apply the RFRA to federal laws, not to state or local laws. \textit{Boerne}, 521 U.S. at 536. The RLUIPA applies the compelling-interest test only to state laws affecting prisoners and land use. S. 2869, 106th Cong., 2d Sess. (2000); 42 U.S.C. §§ 2000cc–1 to –5.

\textsuperscript{160} Fulton, 141 S. Ct. at 1894 (Alito, J., concurring).

\textsuperscript{161} 141 S. Ct. 1294 (2021).


\textsuperscript{163} Tandon, 141 S. Ct. at 1296 (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67-68 (2020) (per curiam)).

\textsuperscript{164} See infra notes 165-166 and accompanying text (distinguishing Fulton from Tandon).
neutral and generally applicable according to precedent. Tandon “began to resolve at least some of the confusion surrounding Smith’s application . . . . But Tandon treated the symptoms, not the underlying ailment.”

IV. ANALYSIS

Justice Alito’s concurrence should guide the future of the Free Exercise Clause rather than the doctrines of Smith or the majority opinion of Fulton. Many constitutional scholars believe that originalism is the best approach for interpreting the Constitution. Originalism is the belief “that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law.” Under this approach, the Constitution’s meaning “remains constant even as new applications arise,” rather than allowing “philosopher-king judges [to] swoop down from their marble palace to ordain answers . . . .”

This is the method of interpretation that Justice Alito utilized in his concurrence. Justice Alito went to great lengths—roughly eighty pages worth—to ascertain the true meaning of the Free Exercise Clause as intended by the Framers of the Constitution. This lies in stark contrast to the minimal

165. Fulton, 141 S. Ct. at 1877.
166. Id. at 1930-31 (Gorsuch, J., concurring).
167. See infra notes 168-174 and accompanying text (explaining why Justice Alito’s approach should be followed rather than that of the Fulton majority).
168. See, e.g., NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019), as reprinted in Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution, TIME (Sept. 6, 2019), https://perma.cc/XU2M-DBZM?type=image; Rosenkranz Originalism Conference Features Justice Thomas ’74, YALE L. SCH. (Nov. 4, 2019), https://perma.cc/8Q8E-TWUA (Justice Thomas stating “Words have meaning at the time they are written. When we read something that someone else has written, we give the words and phrases used by that person natural meaning in context.”); Justice Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 862 (1989). In discussing the benefits and detriments of originalism, Scalia stated:

[O]riginalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect “current values.” Elections take care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.

Id.

170. GORSUCH, supra note 168.
171. See generally Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883-926 (Alito, J., concurring) (attempting to ascertain the original meaning of the Free Exercise Clause).
172. See id.
histories offered in *Smith* or in *Fulton* to explain why each Court ruled as it did.\textsuperscript{173} Justice Alito’s concurrence eloquently describes the flaws of modern free exercise jurisprudence while calling for a reversion to workable law that accords with the original meaning of the Clause.\textsuperscript{174}

A. THE SUPREME COURT REACHED A NINE-TO-ZERO AGREEMENT IN FAVOR OF THE PETITIONERS BUT FAILED TO PROVIDE A RULING THAT RESOLVES THE CURRENT JURISPRUDENCE FOLLOWING *SMITH*.

The Supreme Court unanimously found that the actions of the City of Philadelphia violated the Free Exercise Clause.\textsuperscript{175} Therefore, the judgment of the Third Circuit Court of Appeals was reversed, and the case was remanded for further proceedings.\textsuperscript{176} The majority declined to revisit *Smith*, instead asserting *Fulton* fell outside the parameters of *Smith* “because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.”\textsuperscript{177} Instead, the majority found that the non-discrimination requirement in the City’s standard foster care contract was not generally applicable.\textsuperscript{178} Therefore, the City’s actions were subject to strict scrutiny, and could only survive if they advanced “interests of the highest order” and were “narrowly tailored” to achieve those interests.\textsuperscript{179}

The City of Philadelphia argued that “its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children.”\textsuperscript{180} The compelling interest test, as explained by the Court, requires “[s]crutinizing the asserted harm of granting specific exemptions to particular religious claimants.”\textsuperscript{181} While the Court found that maximizing the number of foster families and minimizing liability were important goals, the City ultimately failed to show that granting CSS an exception would put those goals at risk.\textsuperscript{182} As for the City’s interest in the equal treatment of prospective foster parents and foster children, the Court found the interest did not justify denying

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\textsuperscript{173} See Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872, 876-80 (1990) (providing a cursory history of the Free Exercise Clause compared to Justice Alito’s concurrence); Fulton, 141 S. Ct. at 1874-82 (failing to discuss the origins of the Free Exercise Clause).
\textsuperscript{174} See *Fulton*, 141 S. Ct. at 1883-926.
\textsuperscript{175} Id. at 1882.
\textsuperscript{176} Id.
\textsuperscript{177} Id. The Court cites *Church of Lukumi Babalu Ave. Inc. v. Hialeah*, 508 U.S. 520, 531-532 (1993). In *Lukumi*, the City’s ordinances failed to meet the neutral and generally applicable standard set out in *Smith* because “almost the only conduct subject to [the ordinance] is the religious exercise of the Santeria church members.” Id. at 535.
\textsuperscript{178} *Fulton*, 141 S. Ct. at 1881. The Court states, “The contractual non-discrimination requirement imposes a burden on CSS’s religious exercise and does not qualify as generally applicable.” Id.
\textsuperscript{179} Id. (quoting *Lukumi*, 508 U.S. at 546).
\textsuperscript{180} *Fulton*, 141 S. Ct. at 1881.
\textsuperscript{181} Id. (quoting Gonzales v. O Centro Espirita Beneficente União do Vegetal, 546 U.S. 418, 430-32 (2006)).
\textsuperscript{182} *Fulton*, 141 S. Ct. at 1881-82. The Court determined that, if anything, the inclusion of CSS in the program would be likely to increase the available foster parents rather than reduce them. Id. at 1882.
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CSS an exception for its religious exercise. If the City has created a system of exceptions, it must offer a compelling reason for its interest in denying CSS an exception while making them available to others. The Court decided the City did not.

In summary, the Court held neutral and generally applicable laws that only incidentally prohibit the exercise of religion apply to agencies like CSS, without the city or municipality having to overcome strict scrutiny for the laws. There is no general exception under the Free Exercise Clause for religious adoption agencies like CSS from anti-discrimination provisions like the one in this case. But if there is a system in place that provides exceptions, the state or municipality needs to overcome strict scrutiny as to why it declined to extend those exceptions to the agency. Because the majority found that the City’s interests were not sufficiently compelling and its interests were not sufficiently advanced by denying CSS an exception, the Court reversed the decision of the Third Circuit Court of Appeals and remanded the case.

While the majority arrived at a conclusion favorable to CSS, it squandered an opportunity to restore a workable test for free exercise claims. Additionally, the majority’s decision likely offers only temporary relief to CSS. Smith did not apply to this case because the City’s contract gave it the power to grant exceptions, and “Smith’s holding about categorical rules does not apply if a rule permits individualized exemptions . . .”

But the City never granted such an exemption and apparently had no intention of ever granting an exemption to CSS. Philadelphia made its intentions clear about pressuring CSS to surrender its religious convictions. For the City to circumvent this decision, it may simply eliminate the exemption power, as Justice Alito pointed out. Then, presumably, the City has a neutral and generally

183. Id.
184. Id.
185. Id.
186. Id. at 1876 (citing Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878-82 (1990)).
187. See generally U.S. CONST. amend. 1; Fulton, 141 S. Ct. at 1868-82 (holding CSS is subject to the anti-discrimination provisions).
188. Fulton, 141 S. Ct. at 1881.
189. Id. at 1881-82.
190. See id. at 1887 (Alito, J., concurring) (“One of the questions that we accepted for review is ‘whether Employment Division v. Smith should be revisited.’ We should confront that question. Regrettably, the Court declines to do so.” (alteration in original)).
191. Id. at 1887-88 (Alito, J., concurring).
192. Id. at 1887.
193. Id.
194. Id.
195. Id.
applicable policy that is constitutional under Smith. For this reason, the Court’s decision “might as well be written on the dissolving paper sold in magic shops.”

B. IN FULTON, THE COURT COULD HAVE ADDRESSED SMITH AS THE PETITIONERS REQUESTED BUT DECIDED NOT TO.

In granting certiorari for this case, the Court accepted for review the question of whether it would revisit Smith. However, the Court declined. According to the majority, this case fell outside the parameters of Smith because “the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.” Admittedly, if the Court is to adhere to the precedent of Smith, the “neutral and generally applicable law” standard does not apply to Fulton because of the exemption system of the City of Philadelphia.

However, one must consider the fact that such an exemption has never been granted for any purpose. The basis for this doctrine in Smith is that a law is not considered generally applicable if the government may grant exemptions considering the circumstances of each application. But if such an exemption system is never utilized, and there is seemingly no intent to utilize the exemption system, the law is de facto generally applicable.

Furthermore, the doctrines of Smith apply to “hybrid rights” claims. In Smith, the Court stated:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press[.]

See id. at 1877 (quoting Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990) (stating, “A law is not generally applicable if it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions.’” (alteration in original)).

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

Id.

Id.

Id. at 1877.

Id.


But see Fulton, 141 S. Ct. at 1877 (holding that Smith would not be applied in Fulton because the law was not neutral and generally applicable).

See infra note 206 and accompanying text (discussing Smith as applied to special categories).

Smith, 494 U.S. at 881 (citing Cantwell v. Connecticut, 310 U.S. 296, 304-07). Michael McConnell, the aforementioned constitutional scholar, suggests that “the notion of ‘hybrid’ claims was created for the sole purpose of distinguishing Yoder[.]” Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1121 (1990) [hereinafter Free Exercise Revisionism].
The “hybrid rights” category created in Smith could have applied to the issue at hand, just as one can make a colorable “hybrid rights” claim for nearly any case.\(^{207}\) The Smith case involved claims for unemployment benefits, and the ingesting of peyote as part of a religious ceremony certainly seems to be expressive conduct under the Free Speech Clause.\(^{208}\) Similarly, the Fulton petitioners simply could have tossed in a free speech claim, which, presumably, would place them under the hybrid-rights category created in Smith.\(^{209}\) The Smith majority places no limits on this “hybrid rights” category, but offers the examples of free speech claims or parental rights claims.\(^{210}\)

It is worth repeating that the Smith court was willing to take it upon themselves to overturn years of precedent without the question being briefed by the parties or circumstances requiring it.\(^{211}\) Yet the majority in Fulton felt bound to the judicial edicts of Smith that Congress has denounced multiple times and scholars have decried as running afoul of the true meaning of the Free Exercise Clause.\(^{212}\) The Fulton majority should not have felt bound by precedent or otherwise to uphold the creations of Smith.\(^{213}\) Rather, the majority should have looked to the Constitution and relevant history to determine what the Clause means.\(^{214}\)

C. THE SMITH DECISION RUNS CONTRARY TO THE BEST INTERPRETATIONS OF THE FREE EXERCISE CLAUSE.

Smith provides a strange and seemingly unprecedented example of judicial interpretation.\(^{215}\) In explaining its holding, the Court stated,

> It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a

\(^{207}\) Fulton, 141 S. Ct. at 1893 (Alito, J., concurring). Smith itself could have been viewed as a hybrid rights case because “it involved claims for unemployment benefits, and members of the Native American Church who ingest peyote as part of a religious ceremony are surely engaging in expressive conduct that falls within the scope of the Free Speech Clause.” Id. The petitioners in Fulton could have made a similar argument. See infra notes 208-209 (explaining the broad nature of hybrid-rights claims).

\(^{208}\) Id. Expressive conduct is defined broadly. See Ex Parte Barrett, 608 S.W.3d 80, 91 (2020). This case explains, “To constitute expressive conduct, the actor must intend to convey a particularized message and there must be a likelihood, given the surrounding circumstances, that the message will be understood by viewers.” Id. (citing Texas v. Johnson, 491 U.S. 397, 404 (1989)).

\(^{209}\) See Fulton, 141 S. Ct. at 1915 (Alito, J., concurring) (“A great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims.”).

\(^{210}\) Smith, 494 U.S. at 881.

\(^{211}\) Fulton, 141 S. Ct. at 1892 (Alito, J., concurring).

\(^{212}\) See discussion infra Part IV.C (explaining how the Smith decision does not align with the Free Exercise Clause).

\(^{213}\) See discussion infra Part IV.C (explaining how the Smith decision does not align with the Free Exercise Clause).

\(^{214}\) See discussion infra Part IV.C (arguing Smith is contrary to the true meaning of the Free Exercise Clause).

\(^{215}\) Fulton, 141 S. Ct. at 1894 (Alito, J., concurring).
generally applicable and otherwise valid provision, the First Amendment has not been offended.\footnote{216}

Justice Alito refers to this as a “strange treatment of the constitutional text [that] cannot be justified—and is especially surprising since it clashes so sharply with the way in which Smith’s author, Justice Scalia, generally treated the text of the Constitution . . . ”\footnote{217}

After all, the 1803 case of \textit{Marbury v. Madison}\footnote{218} tells us “[i]t is emphatically the . . . duty of the judicial department to say what the law is.”\footnote{219} It is not the duty of the judiciary to say what a permissible reading of the law is, as there are many permissible readings of a certain text.\footnote{220} One scholar explains, “a court should determine the reading of the text that is most probable and should give that reading presumptive weight unless there is good evidence based on extratextual sources that it is wrong.”\footnote{221} Justice Antonin Scalia, in nearly all of his decisions, looked at the Constitution and statutes alike to find the original meaning of the text.\footnote{222} For this reason, three sitting Justices on the Supreme Court found Justice Scalia’s opinion in \textit{Smith} to be surprising and somewhat uncharacteristic.\footnote{223}

Definitions from the late 1700s, when the Constitution was drafted, are very probative to the actual meaning of the First Amendment.\footnote{224} The phrasing goes as follows, “Congress shall make no law . . . prohibiting the free exercise [of religion].”\footnote{225} The contentious words, of course, are “prohibiting” and “the free exercise of religion.”\footnote{226} The term “prohibit” meant “[to] forbid; to interdict by authority” or “to debar or hinder.”\footnote{227} “Exercise” included the definitions “practice; outward performance” and “act of divine worship, whether publick [sic] or private.”\footnote{228} The most applicable definition of “free” concerning religion was

\begin{enumerate}
\item \textit{Smith}, 494 U.S. at 878.
\item 5 U.S. 137 (1803).
\item Id. at 177.
\item Id.
\item Free Exercise Revisionism, supra note 206, at 1115.
\item ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997). \textit{See generally} Scalia, supra note 168 (arguing for originalism as the appropriate method of constitutional and statutory interpretation).
\item \textit{See generally Fulton}, 141 S. Ct. at 1883-1926 (Alito, J., concurring) (displaying strong disagreement with the majority’s decision, joined by Justices Gorsuch and Thomas).
\item \textit{See infra} notes 227-229 and accompanying text (utilizing eighteenth century dictionaries to determine the meaning of the First Amendment).
\item U.S. CONST. amend. I. Justice Alito explains that, although the First Amendment refers to Congress, the Court has held that the Fourteenth Amendment applies the First Amendment to the states. \textit{Fulton}, 141 S. Ct. at 1895 n.27 (Alito, J., concurring) (citing Gitlow v. New York, 268 U.S. 652 (1925)).
\item U.S. CONST. amend. I.
\item SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE 404 (London, 6th ed. 1766) [hereinafter 1766 DICTIONARY]
\item SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE 730 (London, 6th ed. 1785) [hereinafter 1785 DICTIONARY]. The Supreme Court has declined to apply this second definition to the First Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).
\end{enumerate}
“unrestrained,” which carries essentially the same meaning today as it did in 1788.\textsuperscript{229}

Putting these terms together, the textual meaning of “prohibiting the free exercise of religion” is “forbidding or hindering the unrestrained religious practices or worship.”\textsuperscript{230} Considering the dictionary definitions from the time period of the drafting, the newly adopted distinctions of “generally applicable” or “laws targeted at religion” seem far-removed from the contemplation of the Framers.\textsuperscript{231}

Even at first glance, \textit{Smith’s} decision seems to contradict the language of the Free Exercise Clause.\textsuperscript{232} To reiterate, the Clause states, “Congress shall make no law . . . prohibiting the free exercise [of religion].”\textsuperscript{233} \textit{Smith} says that prohibiting the exercise of religion does not violate the Free Exercise Clause if it is “the incidental effect of a neutral” and generally applicable law.\textsuperscript{234} The First Amendment contains no such language of “incidental effect” or “neutral and generally applicable laws.”\textsuperscript{235} The Clause simply states that no law may prohibit the free exercise of religion.\textsuperscript{236} In a purely textual sense, the Constitution and \textit{Smith} contradict one another.\textsuperscript{237}

Perhaps the Framers of the Constitution left the Clause intentionally vague so that it could be clarified and expanded to meet the needs of the country, as they seemingly often did.\textsuperscript{238} For example, consider the judicial evolution of the terms “Commerce” from Article I of the Constitution,\textsuperscript{239} and “unreasonable searches

\begin{itemize}
\item \textsuperscript{229} 1785 \textit{Dictionary}, supra note 228, at 832. “Unrestrained,” in the same dictionary, is defined as “not confined; not hindered.” 1766 \textit{Dictionary}, supra note 227 at 992; \textit{MERRIAM-WEBSTER, Unrestrained}, https://perma.cc/9VMX-46N7 (providing the definition of “unrestrained” as “not restrained; free of constraint”).
\item \textsuperscript{230} See supra notes 227-229 and accompanying text (providing the relevant dictionary definitions); \textit{Fulton}, 141 S. Ct. at 1896 (2021) (Alito, J., concurring).
\item \textsuperscript{231} \textit{Fulton}, 141 S. Ct. at 1896 (Alito, J., concurring).
\item \textsuperscript{232} See \textit{generally} Emp. Div., Dep’t Hum. Res. of Or. v. \textit{Smith}, 494 U.S. 872 (1990) (applying a “neutral and generally applicable” test to free exercise cases); see also \textit{Fulton}, 141 S. Ct. at 1896 (Alito, J., concurring) (rejecting \textit{Smith’s} interpretation of the Free Exercise Clause).
\item \textsuperscript{233} \textit{U.S. CONST.} amend. I.
\item \textsuperscript{234} \textit{Smith}, 494 U.S. at 878.
\item \textsuperscript{235} \textit{U.S. CONST.} amend. I.
\item \textsuperscript{236} Id.
\item \textsuperscript{237} Id.; see also \textit{Fulton}, 141 S. Ct. at 1883-1926 (Alito, J., concurring) (arguing that the \textit{Smith} Court did not base its opinion on the text of the First Amendment).
\item \textsuperscript{238} See infra notes 224-25 and accompanying text (utilizing dictionary definitions from the eighteenth century to interpret the First Amendment).
\item \textsuperscript{239} \textit{U.S. CONST.} art. I, § 8, cl. 3. The Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[].” \textit{Id.} Consider the evolution of the Commerce Clause from 1824 to 1995: \textit{Gibbons v. Ogden} defined commerce as “undoubtedly . . . traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” \textit{Gibbons v. Ogden}, 22 U.S. (9 Wheat. 1) 1, 189-90 (1824). Over 150 years later, the Commerce Clause had evolved substantially. \textit{See generally} United States v. \textit{Lopez}, 514 U.S. 549 (1995).
\end{itemize}
and seizures” from the Fourth Amendment. However, Smith’s lack of historical references to the original meaning of the Free Exercise Clause leaves much to be desired. Instead of citations to what the Framers of the Constitution intended by the Clause, the Smith court cites a series of twentieth century cases as evidence of the meaning of the Clause. Ultimately, the Court was satisfied that it provided a permissible reading and left it at that.

“[T]he text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the ‘exercise of religion’) the right to do so without hindrance.” As opposed to the Court’s interpretation in Smith, the Clause makes no mention of those not participating in the exercise of religion. This, as well as the early constitutions of the thirteen colonies, tends to show that those exercising a religious practice are entitled to certain exemptions rather than being subject to neutral and generally applicable laws. One illustrative example is the exemptions granted to Quakers, Mennonites, and other religious groups who objected to militia service, which was a requirement for able-bodied men in the colonies. Another example is that “[c]olonies with established churches also permitted non-members to decline to pay special taxes dedicated to the support of ministers of the established church.” Justice Alito provides several more examples that illustrate this point. The constitutional text—as well as the early understanding of religious freedom in America—prove that “the case against Smith is very convincing.”

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come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce."

Id. at 558-59 (internal citations omitted).

240. U.S. CONST. amend. IV. It states, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” Id. Modernly, the Fourth Amendment has evolved and expanded in a number of ways. See, e.g., Katz v. United States, 389 U.S. 347, 349, 351 (1967) (deciding that the attachment of a listening device to the outside of a public phone booth, without a warrant, violated the Fourth Amendment because “the Fourth Amendment protects people, not places”). But see United States v. Robinson, 414 U.S. 218, 224 (1973) (holding “a search incident to lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment”); Payton v. New York, 445 U.S. 573, 581 (1980) (explaining that “exigent circumstances” may justify a warrantless search of a home).

241. See Fulton, 141 S. Ct. at 1888 (Alito, J., concurring) (stating that Smith “can’t be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment’s adoption.”).


243. Smith, 494 U.S. at 878.

244. Fulton, 141 S. Ct. at 1897 (Alito, J., concurring).

245. See Smith, 494 U.S. at 872 (applying the doctrine of neutral and general applicability); U.S. CONST. amend. I.

246. See generally Fulton, 141 S. Ct. at 1905-12 (Alito, J., concurring) (arguing this point).

247. Id. at 1905-06 (citing Origins of Free Exercise, supra note 96, at 1468).

248. Id. at 1906 (citing Origins of Free Exercise, supra note 96, at 1469).

249. See id. at 1905-12.

250. Id. at 1912.
D. THE FULTON MAJORITY APPLIES STRICT SCRUTINY TO THE ACTIONS OF PHILADELPHIA AGAINST CSS BECAUSE A SYSTEM OF EXEMPTIONS EXISTS; BUT THIS SMALL CAVEAT CANNOT STAND UP TO INFRACTIONS AGAINST RELIGIOUS FREEDOM.

The contractual provision at issue, titled “Rejection of Referral” reads, “Provider shall not reject a child or family including, but not limited to... prospective foster or adoptive parents, for Services based upon... their... sexual orientation... unless an exception is granted by the Commissioner or the Commissioner’s designee, in his/her sole discretion.”251 The exemptions doctrine states that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”252

The practical shortfalls of this doctrine cannot be overstated.253 Considering the prior actions of the City of Philadelphia and growing public pressure, it is not unlikely that the City removes its exemption system and the Smith doctrine subsequently vindicates the City’s actions against CSS.254 In effect, this decision may act as a directive to cities across the nation to eliminate their provisions regarding exemptions for agencies like CSS.255 Anti-discrimination provisions like that of Philadelphia’s are not uncommon.256 California, Washington D.C., and Massachusetts all have legislation targeted at religious adoption agencies.257 After the Fulton decision, one can expect these authorities to alter their contracts so that exceptions to non-discrimination provisions are no longer available.258

Neutral and generally applicable laws effectively target religious practices, regardless of whether that is the “object” or merely an “incidental effect” of the law.259 One constitutional scholar explains the dilemma: “If a zoning ordinance limits a particular area to residential use, we would naturally say that it ‘prohibits’ an ice cream store within the zone—even though no one in the zoning commission had any particular intention with respect to ice cream.”260 However, in many situations concerning religion, the religious practice is the one most affected by

252. Smith, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).
253. See Fulton, 141 S. Ct. at 1888. Justice Alito describes how the decision “will be of no help in other cases involving the exclusion of faith-based foster care and adoption agencies unless by some chance the relevant laws contain the same glint as the Philadelphia contractual provision on which the majority’s decision hangs.” Id.
254. See Smith, 494 U.S. at 879 (holding that a “valid and neutral law of general applicability” which burdens the exercise of religion does not violate the Free Exercise Clause).
255. For example, if the City of Philadelphia wished to circumvent the Court’s decision, it could get rid of their contract’s exemption clause. Fulton, 141 S. Ct. at 1887 (Alito, J., concurring).
256. See id. at 1888.
257. Id. at 1888 n.23.
258. See id. at 1887.
259. See supra text accompanying notes 141, 147-149 (providing several examples of neutral and generally applicable laws that target religious practices).
the ordinance. In Smith, for example, state law outlawed the use of peyote for the entire population. Peyote, however, is regarded as unpleasant to use and is not a widely used drug connected to drug trafficking. In his dissent in Smith, Justice Harry Blackmun noted that twenty-three states had exempted the religious use of peyote, and that the federal government had licensed its production and implementation. Logically, the Native Americans have been the most severely affected by this ban on peyote.

Or, considering the example from earlier, imagine a policy that categorically bans headwear in a court of law. Christians, atheists, and scientologists alike are subject to this rule, yet they are unaffected as they have little interest in wearing headwear to court. Orthodox Jews, Sikhs, or Muslims, conversely, are uniquely targeted by this regulation as their religion—the most important aspect of their lives—calls them to do so.

The right to practice one’s religion is just as deserving of the protections of strict scrutiny as other constitutional protections. The right to marry, the right to be free from racial discrimination, and the right to use contraceptives are protected by strict scrutiny. However, the right to practice one’s religion—often the most important aspect of a person’s life—does not always receive the same protection. As Justice Alito notes, “Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to Smith, provides no protection.” Smith effectively singles out religious freedom as undeserving of the protections afforded to the other actions that Americans value.

V. CONCLUSION

In 2020, the petitioners brought their claims to the Supreme Court—their last hope to save their religious agency. The legal battle was not one that the

262. Id. at 874.
263. Free Exercise Revisionism, supra note 206, at 1113.
264. Smith, 494 U.S. at 912 n.5 (Blackmun, J., dissenting).
265. See supra text accompanying notes 244-250.
266. See supra text accompanying note 148.
267. See supra text accompanying note 148.
268. See supra text accompanying note 148.
269. See generally Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring any law that substantially burdens a religious exercise be narrowly tailored to promote a compelling government interest).
275. See generally Smith, 494 U.S. at 874-90 (declining to apply strict scrutiny to laws that are neutral and generally applicable).
276. Fulton, 141 S. Ct. at 1876.
petitioners asked for, yet their adoption agency’s fate was in the hands of nine Justices on the Court. Petitioners had an opportunity to save their practice of serving the needy foster children of Philadelphia. The Court also had a profound opportunity in this case: first, it could rescue CSS from the various attacks by the City of Philadelphia. Second, it could resolve decades of controversy resulting from Smith and its progeny.

Unfortunately, the Court’s decision leaves the petitioners (and countless agencies like them) in a precarious position. The Court decided Fulton on very narrow grounds. Because the City’s contract contained a system for granting exemptions, the Court was able to apply strict scrutiny to the City’s laws and reverse because they could not pass muster. As explained, one snap of a finger from the City could render Fulton useless and leave the petitioners to start this process over once again. Without this exemption, the petitioners are likely facing a losing battle under the Smith ruling.

Religious freedom and the Constitution require that the Court revisit Smith as soon as possible. A “permissible” reading of the Free Exercise Clause simply will not suffice. Judicial review under the Constitution calls for the Court to say what the law is. That is, the Court should provide the best possible meaning for the text of the Constitution and apply it to the situation at hand. Until then, agencies like CSS may fall prey to the same attacks as seen in Fulton. For these reasons, Justice Alito’s concurrence should guide the Court back to the jurisprudence pre-dating Smith to protect religious freedoms from government intrusions.

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277. Id.
278. Id.
279. Id.
280. Id.
281. Id. at 1888 (Alito, J., concurring) (“Not only is the Court’s decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions.”).
282. See supra text accompanying notes 186-97 (explaining the basis for the Court’s decision).
283. Fulton, 14 S. Ct. at 1887 (Alito, J., concurring).
284. Id. at 1887-88.
285. Id.
286. See id. at 1888.
287. Id. at 1892 (citing Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990)).
289. See Fulton, 14 S. Ct. at 1892 (Alito, J., concurring). Instead, as Justice Alito writes, “The majority made no effort to ascertain the original understanding of the free-exercise right, and it limited past precedents on grounds never previously suggested.” Id.
290. Id. at 1876.
291. See id. at 1883-926.