FROM PEYOTE TO PARENTHOOD: WHY *EMPLOYMENT DIVISION V. SMITH* MUST (AND MIGHT) GO

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INTRODUCTION

A bold promise from a boisterous president was once made on the biggest stage: "In America, we don't punish prayer. We don't tear down crosses. We don't ban symbols of faith. We don't muzzle preachers and pastors. In America, we celebrate faith. We cherish religion. We lift our voices in prayer, and we raise our sights to the glory of God."[1] In the final State of the Union Address of his first term, President Donald Trump presented this ambitious illustration of religious life in the United States.[2] However, achieving these grand presidential claims requires a balancing act between two constitutional pillars: the Establishment Clause, which prevents state establishment of religion, and the Free Exercise Clause, which protects the right of all Americans to exercise the religion of their choosing.[3] The Supreme Court of the United States has emphasized that one clause cannot be read without paying heed to the other, writing:

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1. 166 CONG. REC. H762 (daily ed. Feb. 4, 2020) (statement of President Donald Trump).
2. *Id.*
3. U.S. CONST. amend. I.

"These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension . . . [y]et we have long said that 'there is room for play in the joints' between them."[4]

However, the balance needed to meet President Trump's aspirations are not currently realized. Both Free Exercise and Establishment Clause jurisprudence have a history of precedent that is hostile to the First Amendment and its precarious stability.[5] In the 2018 term, the Court heard argument in *American Legion v. American Humanist Association* and took the opportunity to drastically undermine the power of a test that had wreaked havoc on the Founders' original intent for the Establishment Clause for forty-eight years.[6] Having brought the Establishment Clause to the necessary place for equilibrium,[7] the Court has now turned its focus to the other side of the scale.[8]

Restoring the Free Exercise Clause would require the Court to overrule *Employment Division v. Smith* – "one of the most heavily criticized constitutional decisions of recent times."[9] *Smith* held that the Free Exercise Clause cannot be used to challenge a "'valid and neutral law of general applicability . . . .'"[10] This holding leaves religious citizens without a judicial avenue to seek an exemption or religious accommodation from a generally applicable law, forcing reliance on the legislative process.[11] A Justice typically known for his brilliance, *Smith* has been dubbed "Justice Scalia's worst opinion" and a "constitutional disaster" by law professors.[12] After the opinion was issued, "[a]n extraordinary coalition of religious and civil liberties groups . . . sought to

4. Locke v. Davey, 540 U.S. 712, 718 (2004).

5. *See* Mark Rienzi, *Symposium: The Calm Before the Storm for Religious-Liberty Cases?*, SCOTUSBLOG (Jul. 26, 2019, 10:42 AM), https://www.scotusblog.com/2019/07/symposium-the-calm-before-the-storm-for-religious-liberty-cases/; *See generally* Emp. Div., Dep't. of Hum. Res. of Or. v. Smith (*Smith II*), 494 U.S. 872 (1990); Lemon v. Kurtzman, 403 U.S. 602 (1971).

6. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

7. *See* Rienzi, *supra* note 5.

8. *See* Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted,* 140 S. Ct. 1104 (Feb. 24, 2020) (No. 19-123).

9. MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 145 (Vicki Been et al. eds., 2d ed. 2006).

10. *Smith II*, 494 U.S. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

11. *See id.* at 890.

12. Michael Stokes Paulsen, *Justice Scalia's Worst Opinion*, PUBLIC DISCOURSE (Apr. 17, 2015), https://www.thepublicdiscourse.com/2015/04/14844/.

have *Smith* overturned, first by an unsuccessful petition for rehearing and . . . by proposed legislation."[13] It has been rumored that even Scalia himself, in retrospect, thought that *Smith's* precedent should not stand.[14] Yet despite advocates' efforts, *Smith* celebrated its thirtieth birthday on April 17, 2020: a milestone many have hoped would not be reached.[15]

But these efforts have not fallen on deaf judicial ears. The Court's recent movement on the Establishment Clause proves the majority is open to restoring the balance between the two religion clauses.[16] Greater evidence is found in the words of the Justices themselves.[17] In a rare "statement . . . respecting the denial of certiorari," in *Kennedy v. Bremerton School District*, Justice Alito mentions that the certiorari petition does not ask the Court "to revisit" *Smith*.[18] Advocates for religious liberty read this as an implicit hint that the Supreme Court was open to reevaluating the status of *Smith*.[19] Finally, on February 24, 2020, the Justices followed through and granted certiorari in *Fulton v. City of Philadelphia,* which explicitly asks "[w]hether *Employment Division v. Smith* should be revisited?"[20]

Overruling *Smith* would be a precedential upheaval, but one that *must* be made to protect religious liberty in the United States. While cases in the 1960s and 1970s expanded the right to free exercise of religion as an individual liberty, *Smith* turned the tides of judicial protection of that right – so much so that legislative action has done everything possible to create another sea change. However, it has not done enough to shake *Smith*'s shackles. Not only is *Smith* deeply contrary to the original design of the Free Exercise Clause, it was a distortion of precedent when decided. Further, it is inconsistent with the other protections of the First Amendment, it has become diluted by subsequent legal developments, and it lacks the type of reliance that would require the decision to remain good law.

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13. Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 1 (1990).

14. *See* Stephen L. Carter, *Scalia, J., Dissenting: A Fragment on Religion*, 126 YALE L. J. 1612 (2017).

15. *Smith II*, 494 U.S. at 872.

16. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

17. *See* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (Jan. 22, 2019) (No. 18-12) (Alito, J., concurring).

18. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (Jan. 22, 2019) (No. 18-12) (Alito, J., concurring).

19. *See* Rienzi, *supra* note 5.

20. Petition for a Writ of Certiorari at i, Fulton v. City of Phila., 140 S. Ct. 1104 (2020) (No. 19-123).

In this Note, I will seek to prove these points and analyze the likelihood that the Court takes a historic step in *Fulton*. In Part One, I will examine the pre-*Smith* cases that defined free exercise precedent for decades, analyze the *Smith* decision itself, and discuss the effect that *Smith* had on our legal landscape post-decision. Next, in Part Two, I will consider the command of *stare decisis* and apply the Court's criteria for overruling precedent to *Smith*. Finally, in Part Three, I will present *Fulton v. City of Philadelphia*, the free exercise case to be argued in the October 2020 term, before finishing with a prediction of whether the Court will use *Fulton* to restore balance to the religion clauses of the First Amendment.

PART ONE – THE CIVIL LIBERTY OF FREE EXERCISE

I. Pre-Smith: Sherbert and Strict Scrutiny

Unfortunately, "the word 'religion' is not defined in the Constitution."[21] In fact, the sixteen words "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"[22] provide a noticeable lack of guidance. However, for Justice Brennan, the lack of definite instruction provided a fortunate opportunity for judicial expansion of individual rights. The most memorable free exercise opinion in the pre-*Smith* era was Justice Brennan's *Sherbert v. Verner*, which embodied his belief that "the fundamental purpose of the Constitution . . . [was] 'the protection of the dignity of the human being and the recognition that every individual has fundamental rights which government cannot deny him.'"[23] But Justice Brennan's expansive protections of religious liberty in *Sherbert* were not always popular before the Court: early free exercise cases demonstrate the low ebb of free exercise and help illustrate the vast protections of *Sherbert*.[24]

A. Early Free Exercise Challenges

The Free Exercise Clause was rarely used under the newly ratified Constitution, as the widespread brand of American Protestants worshipped

21. Reynolds v. United States, 98 U.S. 145, 162 (1879).

22. U.S. CONST. amend. I.

23. Nat Hentoff, *The Constitutionalist*, THE NEW YORKER (Mar. 12, 1990), https://www.newyorker.com/magazine/1990/03/12/the-constitutionalist.

24. *Reynolds*, 98 U.S. at 166; Braunfeld v. Brown, 366 U.S. 599 (1960).

in a manner consistent with the laws of the public.[25] However, one of the most common issues with free exercise was the oath requirement – especially for Quakers.[26] In Matthew 5:33, Jesus lays a practical ethic: "[D]o not swear an oath at all . . . [a]ll you need to say is simply 'Yes' or 'No'; anything beyond this comes from the evil one."[27] The solution by most of the colonies was to create exemptions, such as allowing votes or testimony by affirmation, to avoid discriminating against the Quakers through a neutral law.[28] At the time, it was understood that "[e]ven the mighty democratic will of the people is, in principle, subordinate to the commands of God."[29]

B. *Reynolds v. United States* (1879)

Reynolds was one of the Supreme Court's earliest opportunities postbellum to examine several issues germane to individual rights including whether an "accused [should] have been acquitted if he married the second time, because he believed it to be his religious duty?"[30] For a unanimous court, Chief Justice Waite held that free exercise of religion was not a defense for a violation of an anti-bigamy law.[31] While the appellant argued that his multiple marriages were a commandment of his Mormon faith, the Chief Justice decreed that "polygamy has always been odious among the northern and western nations of Europe" and provided a thorough analysis on the English common laws of marriage.[32] After concluding that the statute was within the power of Congress to enact, the Court turned to the analysis of whether Mormons that practice polygamy should receive an exemption from the law.[33] In rejecting the exemption, the Court used a dramatic illustration to make its point: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he

25. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466 (1990).
26. *Id.* at 1466-67.
27. *Matthew* 5:34 – 37 (New International Version).
28. McConnell, *supra* note 25, at 1467, 1475.
29. *Id.* at 1516.
30. Reynolds v. United States, 98 U.S. 145, 153 (1879).
31. *See id.* at 166.
32. *Id.* at 164.
33. *Id.* at 166.

lived could not interfere to prevent a sacrifice?"[34] The central message of *Reynolds* was 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,"[35] for holding otherwise would be to "make the professed doctrines of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself."[36] While this early interpretation of the Free Exercise Clause is considered evil to advocates of civil liberties, its reasoning planted a seed that Justice Scalia would later nurture into the holding of *Smith*.[37]

C. *Braunfeld v. Brown* (1960)

Braunfeld can be considered a companion to *Reynolds* for its lack of protection of individual rights. Orthodox Jewish business owners sued for an injunction of enforcement of a Sunday-closing law; because their faith required closure from nightfall Friday to nightfall Saturday, the plaintiffs needed to make sales on Sunday to remain economically viable.[38] The majority ultimately held that a criminal statute preventing retail sales of certain merchandise on Sunday was not a violation of the Free Exercise Clause or the Establishment Clause.[39] However, Justice Brennan's partial concurrence and dissent was a preview of the Court's future under *Sherbert*.[40] Hinting at strict scrutiny, the dissenting portion of the opinion asked:

> What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds* . . . .[41]

34. *Id.*
35. *Id.*
36. *Id.* at 167.
37. *See Smith II*, 494 U.S. 872, 878-79 (1990).
38. Braunfeld v. Brown, 366 U.S. 599, 601 (1960).
39. *Id.* at 600-01.
40. *See id.* at 613-14.
41. *Id.*

Highly critical of the majority's adherence to *Reynolds*, Justice Brennan accused the Court of "exalt[ing] administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous."[42] Justice Stewart doubled down, and argued that Pennsylvania has forced an Orthodox Jew into a "cruel choice" "between his religious faith and his economic survival" amounting to a "gross[] violat[ion] [of] [his] constitutional right to the free exercise of [his] religion."[43]

D. *Sherbert v. Verner* (1963)

In 1963, Justin Brennan's vision of free exercise was realized, and until *Smith*, *Sherbert* defined the parameters of free exercise.[44] In *Sherbert,* the appellant was a member of the Seventh-day Adventist Church and was fired by her employer for refusing to work on Saturday, her sabbath.[45] Ms. Sherbert was denied unemployment benefits from the State of South Carolina, which required that a potential recipient "be 'able to work and . . . [be] available for work[,]'" but becomes unavailable if she "has failed . . . to accept available suitable work."[46] The Employment Security Commission held that her refusal to work on Saturday made her ineligible for failing to accept available work.[47] Ms. Sherbert brought her case to the Supreme Court on the theory that the denial of unemployment benefits infringed on her right to free exercise of her Seventh-day Adventist faith.[48] Justice Brennan used this opportunity to greatly expand the protection of the First Amendment and establish what would come be known as the *Sherbert* test.[49] First, the challenger must show that the government "impose[d] any burden on the free exercise of [her] religion."[50] Next, the government must assert a "compelling state interest . . . [that] justifies the substantial infringement of [the challenger's] First Amendment right."[51] Finally, the government must show that there are "no alternative forms of

42. *Id.* at 615-16.
43. *Id.* at 616.
44. *See* McConnell, *supra* note 25, at 1412.
45. Sherbert v. Verner, 374 U.S. 398, 399 (1963).
46. *Id.* at 400-01 (quoting S.C. CODE ANN. §§ 68-1 to -404).
47. *Id.* at 401.
48. *Id.*
49. *Id.* at 403-06.
50. *Id.* at 403.
51. *Id.* at 406.

regulation" or that the act is narrowly tailored to serve the government's compelling interest.[52] Under this strict scrutiny test, it was held that South Carolina had violated Ms. Sherbert's right of free exercise by forcing her to forsake her convictions to receive unemployment benefits.[53] Justice Brennan was careful to avoid any Establishment Clause issues by mentioning that the extension of unemployment benefits to Ms. Sherbert "reflects nothing more than the governmental obligation of neutrality in the face of religious differences."[54] The holding does not "serve to abridge any other person's religious liberties"[55] but rather "reaffirms a principle that . . . no state may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.'"[56]

E. *Wisconsin v. Yoder* (1972)

Sherbert was unanimously reinforced nearly a decade later.[57] In *Yoder,* several members of the Old Order Amish were convicted of violating Wisconsin's compulsory attendance law for declining to send their children to school past the eighth grade.[58] The petitioners believed that attending high school would "expose them[] to the danger of censure of the church community … [and] endanger their own salvation and that of their children."[59] Justice Burger began his analysis by noting that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."[60] Applying *Sherbert,* the Court held that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other

52. *Id.* at 407.
53. *Id.* at 410.
54. *Id.* at 409.
55. *Id.* at 409.
56. *Id.* at 410 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).
57. Wisconsin v. Yoder, 406 U.S. 205 (1972).
58. *Id.* at 207.
59. *Id.* at 209.
60. *Id.* at 214.

interests."[61] *Yoder* became known as the "high water mark"[62] for mandatory free exercise exemptions. Justice Burger wrote "[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."[63] *Yoder's* application of *Sherbert* thus came to represent the broadest example of neutral laws that conflict with religious exercise not serving a sufficiently compelling interest, but it is likely the approach the Framers would appreciate.[64]

F. *Thomas v. Review Board of the Indiana Employment Security Division* (1981)

However, the tides soon changed. "[After *Yoder* in] 1972, the Court … rejected every claim for a free exercise exemption to come before it, outside the narrow context of unemployment benefits governed strictly by *Sherbert*."[65] *Thomas*, however, presented a similar factual situation to *Sherbert*, and thus arrived at the same result.[66] Mr. Thomas, a Jehovah's Witness, ended his employment at a machinery company, after being transferred to a division that manufactured products for military tanks.[67] When he discovered that his new department and the remaining departments at the plant were weapons related, Mr. Thomas quit to avoid violating his religious principles.[68] Chief Justice Burger, again writing for the majority, wrote:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise

61. *Id.* at 215.
62. MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *supra* note 9, at 136.
63. *Yoder*, 406 U.S. at 220.
64. *See id.* at 234-35.
65. McConnell, *supra* note 25, at 1417.
66. Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 717-18 (1981).
67. *Id.* at 710.
68. *Id.*

is nonetheless substantial.[69]

Justice Rehnquist dissented, acknowledging a concern that the majority's holding creates a constitutional requirement to provide benefits to a person based on his religious beliefs, creating an issue under the Establishment Clause.[70] It is *Sherbert*, Rehnquist reasoned, that upset the tension between Free Exercise and Establishment Clauses, as a state's general statute with a secular purpose did not implicate a free exercise concern.[71] This dissent began to lay a foundation for the result in *Smith.*

II. Smith: Peyote and Precedent

A. Procedural History

The procedural history of *Smith* is complicated. The journey to its precedent-shattering conclusion began in September 1982[72] at the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT).[73] Galen Black and Alfred Smith were employed by ADAPT and, due to their own former drug and alcohol dependencies, qualified to be counselors.[74] ADAPT's personnel policies required abstention from the "use of an illegal drug or use of prescription drugs in a nonprescribed manner" under the threat of immediate termination.[75] Both Black and Smith are members of the Native American Church.[76] As part of a church ceremony, Black and Smith "ingested a small amount of peyote, a cactus 'button' containing the hallucinogen mescaline, which is illegal in Oregon."[77] Before participating, Black spoke with friends and co-workers about the advisability of ingesting peyote, a practice not *required* by the church, but rather left up to the individual on whether to participate in the spiritual ceremony.[78] ADAPT learned of the ceremonial ingestions, leading to a social worker's recommendation that Black be placed in a

69. *Id.* at 717-18.
70. *Id.* at 720.
71. *Id.* at 723.
72. Black v. Emp't Div., 707 P.2d 1274, 1276 (Or. Ct. App. 1985).
73. Emp't Div., Dept. of Human Res. of Or. v. Smith (*Smith I*), 485 U.S. 660, 662 (1988).
74. *Id.*
75. *Id.* at 662 n.3.
76. *Id.* at 663.
77. *Black*, 707 P.2d at 1276 (citing OR. REV. STAT. § 475.005).
78. *Id.*

residential care facility for drug counseling; this recommendation was refused by Black, who disagreed with ADAPT's assessment that his religious practices were a sign of relapse.[79] ADAPT then terminated Black and Smith.[80]

Black and Smith applied for unemployment compensation benefits, beginning a lengthy journey leading to the Supreme Court – twice. Unemployment compensation was denied under an Oregon law stating that "[a]n individual shall be disqualified from the receipt of benefits . . . if . . . the individual . . . [h]as been discharged for misconduct connected with work"[81] because the injection of peyote was work-related misconduct that Black and Smith willfully made.[82]

Black and Smith appealed the Board's denial of unemployment benefits to the Oregon Court of Appeals.[83] The court used rules delineated in *Sherbert* and *Yoder* to guide their analysis of whether Black and Smith's right to free exercise was violated under the First Amendment, ultimately holding that denial of unemployment benefits was a substantial burden, and the state had not "demonstrated a compelling interest justifying the infringement."[84] After the state appealed, the Oregon Supreme Court held that Black and Smith were "entitled to prevail under the federal First Amendment" of the United States Constitution under *Sherbert* and *Thomas,* which demonstrated that a free exercise claimant must not be forced into a choice between religious practice and the receipt of unemployment benefits.[85] The state appealed again, and a writ of certiorari was granted by the United States Supreme Court.[86] Out of respect for federalism, Justice John Paul Stevens, writing for a 5-3 court, did not come to a direct conclusion for either party and remanded the case to the Supreme Court of Oregon.[87] As guidance, Justice Stevens proposed a formula: "[I]f a [s]tate has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may . . . deny[] unemployment

79. *Id.*
80. *Smith I*, 485 U.S. at 622.
81. OR. REV. STAT. § 657.176(2)(a) (2019).
82. *Black*, 707 P.2d at 1276-77; *Smith I*, 485 U.S. at 663 n.5.
83. *See Black*, 707 P.2d at 1276; Smith v. Emp't Div., Dept. of Human Res. of Or., 709 P.2d 246 (Or. Ct. App. 1985) (mem.).
84. *Black*, 707 P.2d at 1278.
85. Smith v. Emp't Div., Dept. of Hum. Res., 721 P.2d 445, 449 (Or. 1986).
86. Emp't Div., Dept. of Hum. Res. of Or. v. Smith, 480 U.S. 916 (1987).
87. *Smith I*, 485 U.S. 660, 673-74 (1988).

compensation benefits to persons who engage in that conduct."[88] However, if Oregon provided an exemption from its criminal laws for the religious use of peyote, Black and Smith would be entitled to constitutional protection.[89] The majority analogized the case to *Reynolds*, writing, "if a bigamist may be sent to jail despite the religious motivation for his misconduct, surely a State may refuse to pay unemployment compensation to a marriage counselor who was discharged because he or she entered into a bigamous relationship."[90] Nevertheless, a "necessary predicate" to evaluating whether Black and Smith should receive unemployment benefits is a judicial determination of the legality of religious use of peyote under the state laws of Oregon.[91] Dissenting, Justice William Brennan saw no distinction between the case presented and *Sherbert* and *Thomas*; he would have held that the Oregon Supreme Court should be affirmed without remand.[92]

In a per curiam opinion, the Oregon Supreme Court

> conclude[d] that the Oregon statute against possession of controlled substances, which include[s] peyote, makes no exception for the sacramental use of peyote, but that outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress.[93]

The state, once again, appealed its own high court's decision to the Supreme Court of the United States.[94] It was this grant of certiorari that led to one of the most important precedents in religious liberty jurisprudence.

B. Justice Scalia, For the Majority

Black and Smith's second appearance before the Supreme Court of the United States occasioned the Court with the opportunity to answer the

88. *Id.* at 670.
89. *Id.* at 672.
90. *Id.* at 671 (citing Reynolds v. United States, 98 U.S. 145, 168 (1879)).
91. *Id.* at 672.
92. *Id.* at 677.
93. Smith v. Emp't Div., 763 P.2d 146, 148 (Or. 1988).
94. Emp't Div., Dept. of Hum. Res. of Or. v. Smith, 489 U.S. 1077 (1989) (mem.)

question previously left open.[95] The Court was required "to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[96] The Court reinforced the distinctions previously drawn between the present case and *Sherbert* and *Thomas* by pointing out that the employee's conduct in those cases was not prohibited by law.[97] Because the Oregon Supreme Court on remand confirmed that Oregon law does in fact prohibit the use of peyote, the Court turned to a consideration of "whether that prohibition is permissible under the Free Exercise Clause."[98] Justice Antonin Scalia, writing for the majority, was quick to correctly point out that it would be certainly unconstitutional under the Free Exercise Clause if Oregon had banned peyote only when used for religious expression.[99] However, as this was not the case, Black and Smith turned to several arguments to support their claims.

First, Black and Smith proposed that the religiously motivated use of peyote is "beyond the reach of a criminal law that is not specifically directed at their religious practice" by arguing that "'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[100] Yet, in a shocking turn of opinion, the majority reasoned that prior precedent had never held that an individual is excused from compliance with a valid law prohibiting conduct that the state has the power to regulate on exclusively religious grounds, but rather, asserted that a century's worth of precedent compels otherwise.[101] In so reasoning, Justice Scalia resurrected the decisions of *Reynolds*[102] and *Braunfeld*[103] to craft a history of the Court striking down neutral, generally applicable laws that burden religious exercise.

The Court then turned to Black and Smith's argument that "even

95. *See Smith II*, 494 U.S. 872, 874 (1990).
96. *Id.*
97. *Id.* at 884.
98. *Id.* at 876.
99. *Id.* at 885.
100. *Id.* at 878.
101. *Id.* at 878-79.
102. Reynolds v. United States, 98 U.S. 145, 166 (1879).
103. Braunfeld v. Brown, 366 U.S. 599, 601 (1960).

though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert*."[104] Instead, Justice Scalia began his dismantling of the *Sherbert* test by mentioning the Court had not used it to invalidate any government action outside of unemployment compensation benefits, though they purported to in other contexts, only to have always found it satisfied.[105] This narrow application of *Sherbert*, Scalia wrote, would never compel the Court to apply it in a way that required exemptions from a generally applicable criminal law.[106] It was therefore concluded that *Sherbert* was inapplicable to "across-the-board criminal prohibition[s] on a particular form of conduct" because "the government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[107] Apparently, it would "contradict[] both constitutional tradition and common sense" to make compliance with the law contingent on a coincidence with religious obligations except where there is a compelling interest.[108] According to Scalia, the "compelling government interest" standard, while a norm for equal protection and free speech claims, would produce a constitutional anomaly when applied to free exercise: "[A] private right to ignore generally applicable laws."[109] Justice Scalia also found it impossible to limit Black and Smith's proposition by requiring a compelling government interest only when the conduct is "central" to religious belief, as it would be inappropriate for judges to determine "centrality"[110] because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[111] Because the United States is a "cosmopolitan nation made up of people of almost every conceivable religious preference,"[112] laws that regulate

104. *Smith II*, 494 U.S at 882-83.
105. *Id.* at 883.
106. *Id.* at 884.
107. *Id.* at 884-85 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).
108. *Id.* at 885.
109. *Id.* at 885-86.
110. *Id.* at 886-87.
111. *Id.* at 887 (citing Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)).
112. *Id.* at 888 (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

conduct cannot be presumed invalid as applied to a religious objector.[113] Such a holding would require religious exemptions of "almost every conceivable kind," as shown by Justice Scalia's slippery-slope citation of twelve cases that would then require a religious exemption.[114] In the majority's opinion, such exemptions should not be created by the Free Exercise Clause but are more appropriately placed by respective state legislatures in the laws themselves, as they are best left to the political process.[115]

The juxtaposition of the prior cases and *Smith* readily demonstrates the decision's precedential inconsistencies, however the best evidence for *Smith*'s errors is found in a comparison of the author's own words. Dissenting from the majority in *Texas Monthly v. Bullock*, Justice Scalia wrote: "In such cases as *Sherbert v. Verner*, *Wisconsin v. Yoder*, [and] *Thomas v. Review Bd. of Indiana Employment Security Div.,* . . . we held that the Free Exercise Clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws."[116] However, fourteen months later in *Smith*[117] Justice Scalia squarely contradicted himself by writing: "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."[118] Thus, by rejecting the *Sherbert* strict scrutiny standard, *Smith* allows the government to "punish religiously motivated conduct pursuant to a generally applicable law without satisfying the strict scrutiny standard."[119] After *Smith*, strict scrutiny would only be used in a Free Exercise Clause challenge on three narrow conditions: (1) if a government facially discriminates against religion; (2) if a challenger was denied unemployment compensation based on religion, and; (3) if the challenger's claim is a "hybrid" of free exercise and some other

113. *Id.*
114. *Id.* at 888-89.
115. *Id.* at 890.
116. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (emphasis in original) (citations omitted).
117. Laycock, *supra* note 13, at 3.
118. *Smith II*, 494 U.S. at 878-89.
119. Stephen M. Feldman*, Conservative Eras in Supreme Court Decision-Making: Employment*
Division v. Smith, Judicial Restraint, and Neoconservatism, 32 CARDOZO L. REV. 1791, 1797-98
(2011).

constitutional right.[120] Therefore, any neutral, generally applicable law, despite interference with one's religion, is subject to the deferential rational basis standard – that it is rationally related to any legitimate government objective.[121]

However, this turning and dismantling of precedent was purposeful, as Justice Scalia was attempting to protect the integrity of strict scrutiny. Courts after *Sherbert* and *Yoder* declined to apply the eponymous test in the formalistic manner it demanded, or they declined to apply it at all.[122] Instead, *Sherbert*'s strict scrutiny became more of a balancing test that was "sometimes used [to] . . . analyze free exercise challenges," but "never applied . . . to invalidate."[123] This is hardly consistent with the idea that "'strict scrutiny' [is] scrutiny that is strict in theory, but fatal in fact."[124] The restraint-minded Scalia disapproved of the weakening of a powerful force: if judges are going to heighten their scrutiny of legislative actions, they must either do it correctly or not at all.[125]

C. Justice O'Connor, Concurring In The Judgment

Justice O'Connor concurred in the judgment and was joined in part by the Court's liberal block: Justices Brennan, Marshall, and Blackmun.[126] While she agreed with the outcome, Justice O'Connor astutely believed the majority's reasoning "dramatically depart[ed] from well-settled First Amendment jurisprudence, appear[ed] unnecessary to resolve the question presented, and [was] incompatible with [the] Nation's fundamental commitment to individual religious liberty."[127] According to the concurrence, the majority's "sweeping result . . . must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct."[128] This criticism proves a clear disagreement with Justice Scalia's positive use of *Reynolds* and *Braunfeld.* Justice O'Connor spotted *Smith's* dangerous

120. *Id.* at 1798.
121. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 48 (Erwin Chemerinsky, et al. eds., 5th ed. 2016).
122. *Smith II*, 494 U.S. at 884-85.
123. *Id.* at 883-85.
124. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980).
125. *Smith II*, 494 U.S. at 888.
126. *Id.* at 891.
127. *Id.*
128. *Id.* at 892.

potential from the beginning and opined that the majority has given permission to the "government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable."[129] However, if the First Amendment is to be more than just a pretext, it must have the ability to protect more than "the extreme and hypothetical situation in which a State directly targets a religious practice."[130] Justice O'Connor reminded the majority that it is possible to respect the "freedom to act" and the government's interest in regulating conduct and that the Court has done so on ten occasions.[131] The majority opinion's reasoning was expressly rejected in *Yoder,* when Chief Justice Burger wrote "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[132] It is this principle that Justice O'Connor would reaffirm on behalf of Black and Smith: "A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit."[133] "[L]aws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[134] Therefore, the "compelling interest" test is more appropriate and more consistent with First Amendment jurisprudence; the Court should have asked "whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State . . . is compelling . . . [on] a case-by-case determination . . . sensitive to the facts of each particular claim."[135] Clearly, Justice O'Connor, known for her frequent use of fact-based balancing tests, did take issue with the discretion being built into the *Sherbert* test. In fact, she referred to the test as the "'delicate balancing required by [the] decisions in' *Sherbert* and *Yoder*."[136] While the majority "suggest[ed] that the disfavoring of minority religions is an 'unavoidable consequence,'" Justice O'Connor advocated that "the First Amendment was enacted precisely to protect the rights of those whose religious

129. *Id.* at 893.
130. *Id.* at 894.
131. *Id.* at 894-95.
132. *Id.* at 896 (quoting Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972)).
133. *Id.* at 898-99.
134. *Id.* at 901.
135. *Id.* at 899.
136. *Id.* at 889 (quoting McDaniel v. Paty, 435 U.S. 618, 628 n.8 (1978)).

practices are not shared by the majority and may be viewed with hostility."[137] However, because there is "no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances,"[138] "the critical question in this case [was] whether exempting [Black and Smith] from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.'"[139] Ultimately, because Justice O'Connor believed that uniform application of Oregon's criminal laws was essential, and because the "health effects" caused by this use were the same regardless of motive, the outcome reached by the majority was correct.[140]

D. Justice Blackmun, Dissenting

Justice Blackmun authored a dissent that remained faithful to his Brother Brennan's vision for individual liberties under the Bill of Rights.[141] From the outset, he expressed his surprise that the Court was hearing this case for a second time, writing in a footnote

> [i]t is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and . . . federal control over matters of state law would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's criminal prohibition of peyote use.[142]

However, the merits of the dissent concerned the application of the compelling interest test, which marks the divide between the dissenting Justices Blackmun, Brennan, and Marshall from Justice O'Connor's concurrence.[143] The dissent argued that it was not Oregon's broad interest in controlling drugs, but the "narrow interest in refusing to make an exception for the religious, ceremonial use of peyote" that should be considered in the compelling interest test.[144] Measuring the individual interest against something as broad as citizen safety will always result in

137. *Id.* at 902.
138. *Id.* at 904.
139. *Id.* at 905 (quoting United States v. Lee, 455 U.S. 252, 259 (1982)).
140. *Id.*
141. *Id.* at 907.
142. *Id.* at 909 n.2.
143. *See id.* at 909.
144. *Id.* at 910.

the individual interest appearing insignificant and minimal.[145] But, the dissent reasoned, the state of Oregon has never sought to prosecute religious users, including Black and Smith, making the interest in crime control nothing more than pretext.[146] In fact, the dissent pointed out that the Native American Church already restricted non-religious use of peyote by its members, that it was seldom abused by members,[147] that there was practically no illegal traffic in peyote, and that an exemption would not result in a flood of other religious exemption claims.[148] Finally, Justice Blackmun argued that the judicial prohibition on evaluating the "centrality" of a practice to one's religion does not require the Court to "turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion."[149] Therefore, "Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh [Black and Smith's] right to the free exercise of their religion."[150] Blackmun's dissent clearly provided the broadest protection for civil liberties.

III. Post-Smith: Regret and Restoration

The precedential change by Justice Scalia and other conservative members of the Court pretends to reflect a commitment to judicial restraint, or deference to the political branches, by upholding any law that is not patently arbitrary or irrational.[151] However, as Justice Souter later noted, the split decision in *Smith* was reached without either party requesting that *Sherbert* be abandoned, without briefing or arguing on *Sherbert's* fate, and without attempting a narrower holding.[152] Thus, the allegedly restraint-conscious holding in *Smith* began with a leap of judicial activism.[153]

Rightfully disturbed with the decision in *Smith*, Congress decided to

145. *Id.* (citing J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969)).
146. *Id.* at 911.
147. *Id.* at 913-14 (quoting R. JULIEN, A PRIMER OF DRUG ACTION 148 (3d ed. 1981)).
148. *Id.* at 915-16.
149. *Id.* at 919.
150. *Id.* at 921.
151. *See* Feldman, *supra* note 119, at 1799.
152. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring).
153. *Id.*

take action.[154] By a vote of 97-3 in the Senate, a unanimous voice vote in the House, and a signature by President Bill Clinton, the Religious Freedom Restoration Act (RFRA) became law.[155] The purpose of RFRA was to restore the promise of free exercise by legislatively implementing the *Sherbert* test.[156] RFRA requires that a challenger show that his sincere religious belief is being burdened by the government.[157] The burden then shifts to the government to show a "compelling governmental interest" and that the action taken was "the least restrictive means of furthering that . . . interest."[158]

The Act was sponsored by an incredibly broad coalition: "Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations."[159] When passed, RFRA applied to the federal government and the states under section five of the Fourteenth Amendment.[160] RFRA has been applied in cases analogous to *Smith* and has resulted in the opposite outcome.[161] For example, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court upheld the constitutionality of the federal RFRA and found that the government did not demonstrate a compelling interest in prohibiting the use of *hoasca*, a hallucinogenic tea, by a Christian Spiritist sect with origins in the Amazon region.[162] However, in *City of Boerne v. Flores,* Justice Kennedy held that Congress exceeded its powers in applying RFRA to the states, while essentially reaffirming a central idea in *Smith*: enforcement of neutral, generally applicable law is not religious discrimination.[163] After *Boerne*, twenty-one states have enacted their own form of RFRA to restore a *Sherbert*-type standard of review to free exercise claims.[164] However, in a posthumous publication, an alleged Justice Scalia warned that an era in which

154. 42 U.S.C. § 2000bb – 2000bb-4.

155. Douglas Laycock and Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 210, 210 (1994).

156. *Id.*

157. 42 U.S.C. § 2000bb-1(b).

158. *Id.*

159. Laycock & Thomas, *supra* note 155, at 210.

160. *Id.* at 211.

161. *See* Gonzalez v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006).

162. *Id.* at 425.

163. City of Boerne v. Flores, 521 U.S. 507, 511, 514 (1997).

164. *See* State Religious Freedom Restoration Acts, National Conference of State Legislatures, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Apr. 26, 2020).

legislatures are sensitive to the rights of the religious is an "era . . . [that] does not seem to be one [that] . . . is likely to continue."[165] For this reason, *Smith* should be overturned and *Sherbert* should be reinstated to protect the intent of our Founders, realign precedent, and protect religious liberty. The Supreme Court has an opportunity to make this courageous change in the October 2020 term with *Fulton v. City of Philadelphia.*[166] With *Fulton* on the Court's docket, the future of free exercise is hopefully headed toward a long-awaited upheaval.

PART TWO – THE COMMAND OF *STARE DECISIS*

Overruling *Smith* requires a loosening of the shackles of *stare decisis* that bind our Nation's highest Court. *Stare decisis* is a judicial maxim derived from Latin: "[S]tand by the thing decided and do not disturb the calm."[167] *Stare decisis* promotes "fairness, stability, predictability, and efficiency,"[168] or in the words of Justice Douglas, "there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon."[169] As *Smith* currently stands, it is horizontally binding on the Supreme Court itself and vertically binding on lower federal courts.[170] However, this command is not absolute, as the Court has demonstrated in its overruling of approximately 141 cases concerning federal constitutional law.[171] The Supreme Court has explicitly overruled its own precedent[172] for Establishment Clause cases at least twice and implicitly eradicated or underruled other establishment tests.[173] In Free Exercise jurisprudence, the Court has never explicitly overturned its own ruling but has eliminated precedent implicitly and weathered dissenting accusations of switching precedent.[174]

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165. Carter, *supra* note 14, at 1624.

166. Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019), *cert. granted,* 140 S. Ct. 1104 (Feb. 24, 2020) (No. 19-123).

167. James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

168. *Id.*

169. *Id.*

170. BRANDON J. MURRILL, CONG. RESEARCH SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 4 (2018).

171. *See id.* at 27 app. tbl.A-1.

172. *See* Agostini v. Felton, 521 U.S. 203, 236 (1997); Mitchell v. Helms, 530 U.S. 793, 835 (2000).

173. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).

174. *See Smith II*, 494 U.S. 872 (1990).

When the Court determines that there is a "special reason over and above the belief that a prior case was wrongly decided," the Justices will consider whether the decision needs to be overruled.[175] It is through this "special reason" lens that the Court will approach the question of overruling *Smith,*[176] meaning that the Court will not overrule precedent without "strong grounds for doing so."[177] But what are these "strong grounds" that might change the Court's mind? The command of *stare decisis* is "at its weakest when [the Court] interpret[s] the Constitution because [the] interpretation can be altered only by constitutional amendment or by overruling . . . prior decisions."[178] Furthermore, it applies with "perhaps least force of all to decision that wrongly denied First Amendment rights, which functions as the "fixed star in our constitutional constellation, if there is one."[179] To aid in the determination of whether a case should be overturned, the Court considers "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision."[180]

I. Quality of Reasoning

Mere disagreement with the outcome in *Smith* would not be enough to justify the current Court's decision to overrule *Smith.*[181] However, when the Court has significant disagreements with the reasoning in a precedential case, it will consider overruling.[182] In a recent case challenging a precedential rule, Justice Gorsuch wrote that "no one on the Court today is prepared to say [the precedential case] was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true."[183]

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175. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion).

176. *Id.*

177. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31,138 S. Ct. 2448, 2478 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

178. Agostini v. Felton, 521 U.S. 203, 235 (1997).

179. *Janus*, 138 S. Ct. at 2478 (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (Scalia, J., concurring in part and concurring in judgment)).

180. Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020).

181. *Casey*, 505 U.S. at 864 ("[T]he Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973).

182. *See generally* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

183. *Ramos*, 140 S. Ct. at 1405.

When evaluating the quality of a case's reasoning, the Court begins with an analysis of the errors committed by the precedential case.[184] The errors in *Smith*'s reasoning are many, prompting several Justices to call its reasoning into question while asking for the "demonstrably wrong" decision to be reconsidered.[185] *Smith* is purposely inconsistent with preceding cases and garnered petitions for rehearing by both conservative and liberal groups, as well as over one hundred professors of constitutional law immediately after the opinion was released.[186] Justice Souter dedicated an entire section of his partial concurrence in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* to exposing what he believed to be *Smith*'s shortcomings in its reasoning.[187] In 2015, Justice Alito also took aim at the *Smith* reasoning in *Holt v. Hobbs*, writing that it "repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder* . . . and *Sherbert v. Verner.*"[188] Both Justices and constitutional law scholars would agree that *Smith* is built on a shaky foundation.

Smith is also inconsistent with the Founding Father's intentions for the Free Exercise Clause. In 1993, Justice Souter correctly asserted that there is a "curious absence of history from our free-exercise decisions [which] creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent."[189] What makes the Free Exercise Clause jurisprudence interesting, though, is that Justice Brennan, the anti-originalist, arrived at the originalist conclusion in *Sherbert,* while Justice Scalia, ever-concerned with history and tradition, authored an opinion inconsistent with our Founding Father's intentions in *Smith.*

As mentioned earlier, the brevity of the First Amendment provides little insight into the intention of our Founders, and history has been unhelpful, "meager, or . . . inconclusive."[190] While the Justices appear to have been concerned with creating modern precedent that "accords with history and faithfully reflects the understanding of the Founding

184. *See Janus*, 138 S. Ct. at 2463.

185. City of Boerne v. Flores, 521 U.S. 507, 548 (1997) (O'Connor, J., dissenting); *accord. Boerne*, 521 U.S. at 566 (Breyer, J., dissenting); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J, concurring in part).

186. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

187. *Lukumi*, 508 U.S. at 571 (Souter, J., concurring in part).

188. Holt v. Hobbs, 574 U.S. 352, 357 (2015).

189. Lukumi, 508 U.S. at 575 (Souter, J., concurring in part).

190. McConnell, *supra* note 25, at 1414.

Fathers,"[191] no "Supreme Court opinion – majority, concurring, or dissenting – has ever grounded the interpretation of the free exercise clause in its historical meaning."[192] However, former Tenth Circuit judge, professor of constitutional law, and preeminent free exercise scholar, Michael W. McConnell thoroughly analyzed the "major philosophical, legal, and historical sources that preceded the free exercise clause" and concluded:

> (1) that exemptions were seen as a constitutionally permissible means for protecting religious freedom, (2) that constitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause, and (3) that exemptions were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God.[193]

Professor McConnell's *The Origins and Historical Understanding of Free Exercise of Religion* has been cited eight times by the Supreme Court since it was published in May 1990, mere days after the *Smith* decision was issued.[194] Had Justice Scalia seen Professor McConnell's article before writing *Smith*, he might have thought twice before dismantling *Sherbert*.[195]

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191. *Id.* at 1413 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

192. *Id.*

193. *Id.* at 1414-15.

194. *See* Obergefell v. Hodges, 576 U.S. 644, 733 (2015) (Thomas, J., dissenting); City of Boerne v. Flores, 521 U.S. 507, 537-38, 548 (1997) (Scalia, J., concurring in part and O'Connor, J., dissenting); Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring); Town of Greece v. Galloway, 572 U.S. 565, 605 (2014) (Thomas, J., concurring in part); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182-83 (2012) (Roberts, CJ.); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in judgment); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring in judgment); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 574-75 (1993) (Souter, J., concurring).

195. It is important to note that Judge McConnell's conclusions on exemptions are not shared by all originalist scholars. His fellow originalist Professor Phillip Hamburger disagrees; he believes that the First Amendment does not guarantee an exemption from general laws. These two preeminent scholars recently debated this idea at the Federalist Society's Twelfth Annual Rosenkranz Debate and Luncheon during the 2019 National Lawyer's Convention. *See* The Federalist Society, *Twelfth Annual Rosenkranz Debate & Luncheon [2019 NLC]*, YOUTUBE (Nov. 16, 2019), https://www.youtube.com/watch?v=Hd2taxGIdOw.

A. Free Exercise in the Colonies and Young States

Professor McConnell first observed that "if the states can serve as 'laboratories of democracy,' the American colonies surely served as laboratories for the exploration of different approaches to religion and government."[196] Our earliest settlers left England in the wake of religious hostility and strife, seeking a safe haven to practice their chosen faith.[197] New England was home to English Calvinists, or Puritans, who wanted to establish a society directed entirely by the word of God.[198] In Virginia, the Church of England was established and became a controlling authority over the government, gaining the reputation as the more intolerant of the colonies.[199] New York and New Jersey's attitude toward religion was described by Professor McConnell as "benign neglect," leading to diversity and "de facto religious toleration."[200] Other colonies, such as Maryland and Rhode Island, were established to be havens for religious dissenters.[201]

The term "free exercise" first appeared in the colonies when the Maryland Assembly passed a statute saying "noe person . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled . . . for . . . his or her religion nor in the free exercise thereof . . . nor any way be compelled to the beliefe or exercise of any other Religion against his or her consent [sic]."[202] However, the most common religious freedom protections post-Revolution were found in Rhode Island, the Carolinas, and New Jersey, which limited free exercise only as necessary for the prevention of perverse behavior or "outward disturbance of others" rather than by all generally applicable laws.[203] Carolina's second charter provided a broad grant of religious exemptions for those who "cannot, in their private opinions, conform" to the laws of the colony, by "giv[ing] and grant[ing] unto such person . . . such indulgences and dispensations. . . . [as they] in their discretion, think reasonable."[204] At this time, "indulgences" and "dispensations" referred to the power of a government

196. McConnell, *supra* note 25, at 1421.
197. *Id.*
198. *Id.* at 1422.
199. *Id.* at 1423.
200. *Id.* at 1424.
201. *Id.* at 1424-25.
202. *Id.* at 1425.
203. *Id.* at 1427.
204. *Id.* at 1428.

to exempt citizens from the effect and enforcement of a law. They were commonly used to exempt Roman Catholics or Protestant dissenters from certain oppressive laws and Quakers from oath requirements.[205] Post-Revolution, states began to write constitutions that included free exercise clauses that only allowed for infringement on religious practice in narrow and compelling circumstances, such as Georgia, who mandated that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not *repugnant* to the peace and safety of the State."[206] Other constitutions prohibited punishment of any person in the practice of his religion or equated the word "exercise" with "action."[207] This strong language suggests that early attempts at self-government by the states were consistent with the idea of exemptions from neutral, generally applicable laws,[208] as the limitations on free exercise would be without effect if religious worship was not expected to violate some generally applicable laws.[209]

B. Free Exercise under the Federal Constitution

The concepts of toleration, free exercise, and religious exemption also made impressions on our Federal Constitution's drafters.[210] Thomas Jefferson, like most of the Founders, was well versed in John Locke's writings on religious toleration, and he was less amenable toward religious exemptions from generally applicable laws; however, he was still cognizant of the impact of religion on public life and authored Virginia's Bill for Establishing Religious Freedom.[211] Like Locke, Jefferson appeared to have believed that government should not interfere with the free exercise of religion, but he did not advocate for religious exemptions from generally applicable laws.[212] Locke believed that the right of free exercise was simply the right of nondiscrimination: "if the 'interest of the commonwealth required all slaughter of beasts should be forborn [sic] for some while,' the ritual slaughter of a calf for religion purposes may be

205. *Id.*
206. *Id.* at 1457 (emphasis added).
207. *Id.* at 1459.
208. *Id.* at 1427-28.
209. *Id.* at 1462.
210. *Id.* at 1430-31.
211. *Id.* at 1431-32.
212. *Id.* at 1431, 1433-35.

forbidden as well."[213]

However, in a familiar clash of titans, James Madison did not exactly reciprocate the Jeffersonian or Lockean opinions on exemptions.[214] Unlike Madison, Locke could not imagine the concept of judicial review, in which a "mediator . . . could transform [a] moral, prepolitical right into positive law," and the two had a "difference in [the] conception of the nature and role of religion."[215] Madison wrote: "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"[216] and that "in matters of Religion, no man's right is abridged by the institution of Civil Society."[217] These passages provide evidence that Madison, the drafter of the Free Exercise Clause himself, favored religious exemptions.[218] "It would seem to follow that the dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable."[219]

While Madison initially believed the structure of the new Constitution would prevent federal government oppression, he finally acceded to the Antifederalist rhetoric and cut a deal: the new Constitution would be ratified if the First Congress would amend it to include a Bill of Rights.[220] Unfortunately, much of the recorded debate in the House over the religion clauses concerns the Establishment Clause.[221] Madison's first draft of the Bill of Rights provided that: "The civil rights of none shall be abridged on account of religious belief or worship, [n]or shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed."[222] This original formulation recognizes that the powers of Congress could infringe on free exercise even when the law makes no reference to religion.[223] However, because certain representatives raised concerns that Madison's initial draft might

213. *Id.* at 1435 (quoting J. Locke, A Letter Concerning Toleration, *in* 6 WORKS OF LOCKE at 34).
214. *Id.* at 1452.
215. *Id.* at 1444.
216. *Id.* at 1453 (quoting J. Madison, Memorial and Remonstrance, *in* 2 THE WRITINGS OF JAMES MADISON at 184).
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 1477.
221. *Id.* at 1481.
222. *Id.* (quoting 1 ANNALS OF CONG. 451) (Joseph Gales ed. 1834) (Proposal of James Madison, June 8, 1789).
223. *Id.* at 1482.

complicate a state's ability to sponsor religion, the House adopted new language: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[224] The Senate changed the word "prevent" to "prohibit," and used either the phrase "rights of conscience" *or* "free exercise," not both.[225] In 1789, "prohibit" would have been synonymous with "hinder" which encompasses broader protection for the Free Exercise Clause to ensure that it will "little bear the gentlest touch of governmental hand."[226] "Free exercise of religion" was substituted to ensure that the clause included both belief and conduct, as "exercise" was connotated at the time with "action."[227] "Religion" was more expansive to include institutional belief, rather than "conscience," which was more closely associated with individual judgment and non-religious beliefs.[228] The final version did not include both phrases, which Judge McConnell suggests was because the drafters were seeking to avoid redundancy, or they wished to confine the right to only religious motivations.[229] Either way, the final language of the First Amendment reflects the drafter's profound conception of God:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.[230]

If, according to James Madison, the man must save his allegiance to God when he enters a civil society, then the free exercise of religion is infringed by neutral, generally applicable laws. "The freedom of religion is unalienable because it is a duty to God and not a privilege of the

224. *Id.* (quoting 1 ANNALS OF CONG. 796) (Joseph Gales ed. 1834) (Proposal of Fisher Ames, Aug. 20, 1789).
225. *Id.* at 1483-84.
226. *Id.* at 1486-87 (quoting 1 ANNALS OF CONG. 757-58). (Joseph Gales ed. 1834).
227. *Id.* at 1488-89.
228. *Id.* at 1491.
229. *Id.* at 1494-95.
230. *Id.* at 1497 (quoting J. Madison, *Memorial and Remonstrance*, *in* 2 THE WRITINGS OF JAMES MADISON at 185).

individual."[231]

This evidence, while not unequivocal, makes it "possible to say that the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation."[232] Experiences in the colonies and in early post-Revolution America suggest that a failure to exempt religious conduct from generally applicable laws would violate the First Amendment.[233]

While *Smith*'s efforts at judicial restraint are certainly admirable, the result is without foundation in original public meaning of the Constitution.[234] Clearly, the Founder's concern with religious exemption would be more consistent with Justice Brennan's *Sherbert* opinion that requires strict scrutiny for any neutral, generally applicable law that infringes on free exercise of religion.[235] Justice O'Connor described the American Experiment by acknowledging that "[r]easonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society."[236] The ideas of James Madison and the words of Justice O'Connor refute Justice Scalia's idea that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[237]

Revered judge and conservative legal scholar, Robert Bork, argued that the only theory that produces politically neutral results is originalism.[238] Judge Bork wrote that "the judge who looks outside the historic Constitution always looks inside himself and nowhere else."[239] Therefore, "[a]ll that counts is how the words used in the Constitution would have been understood at the time."[240] Being wholly inconsistent

231. *Id.*
232. *Id.* at 1512.
233. *Id.*
234. Feldman, *supra* note 119, at 1800.
235. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).
236. Angela C. Carmella, *Exemptions and the Establishments Clause*, 32 CARDOZO L. REV. 1731, 1733 (2011) (quoting McCreary Cty. v. ACLU, 545 U.S. 844, 882 (O'Connor, J., concurring)).
237. *Smith II*, 494 U.S. 872, 890 (1990).
238. Feldman, *supra* note 119, at 1800.
239. *Id.* at 1801 (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA 242 (1990)).
240. *Id.* at 1800 (quoting BORK, *supra* note 239, at 144 (1990)).

with originalism, *Smith* has been wrong from the start and has been built on reasoning of a poor quality.

II. Consistency with Related Decisions and Legal Developments Since Smith

Smith is inconsistent with related decisions under any possible method of analysis. First, the Court has considered "whether a precedent should be overruled because it is a recent outlier … by examining *past* decisions and determining whether overruling the case would 'restore' coherency in the law."[241] As demonstrated above, *Smith* stands as an outlier among its predecessors.

Second, the Court may also evaluate "whether the precedent is inconsistent with other Court decisions on similar matters of constitutional law" when the case was presently decided.[242] *Smith*'s application of rational basis scrutiny to neutral laws that incidentally burden religion is inconsistent with the broad protection of strict scrutiny that the Court applies to laws that have an incidental effect on other First Amendment rights.[243] The Court has not shied away from granting exemptions from neutral laws in the form of as-applied challenges to other First Amendment rights.[244] Thus, *Smith* stands as an outlier among other First Amendment rights.

Finally, "precedent may become inconsistent with related decisions when its legal foundation, including its reasoning, principles, or rules, has been subsequently eroded by later decisions."[245] While *Smith* fails both aforementioned tests for consistency, an analysis of post-decision developments provides the most convincing evidence for overturning the rule.

Smith stands as a model for both legislative and judicial erosion, leading to a rule that is largely unworkable and, in some instances, useless. Congress swiftly began undermining the decision, so *Smith* stands alone in a world with RFRA and its companion, the Religious Land Use and

241. MURRILL, *supra* note 170, at 15 (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 233-34 (1995)).

242. *Id.*

243. *See, e.g.,* Arcara v. Cloud Books, Inc., 478 U.S. 697, 703-04 (1986); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

244. Stephanie H. Barclay & Mark Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions,* 59 B.C. L. REV. 1595, 1612-13 (2018).

245. MURRILL, *supra* note 170, at 15.

Institutionalized Persons Act (RLUIPA).[246] Factually analogous cases decided under RFRA and RLUIPA have led to opposite outcomes than those that would have been reached under *Smith*.[247]

Beyond this congressionally created inconsistency, the Supreme Court and circuit courts have also caused the erosion of *Smith* within the federal judiciary. Because *Smith* took the meaning of *neutral* and *generally applicable* for granted, the courts have been left to work through the semantics of the decision.[248] Three years post-decision, the Court limited the power of *Smith* by setting a high standard that a law must meet to be neutral or generally applicable.[249] In *Church of the Lukumi Babalu Aye,* a local ordinance sought to ban animal sacrifice with a series of neutral, generally applicable laws.[250] However, the neutrality of these ordinances was pretextual; the reality was that City of Hialeah was using *Smith* to commit back-door religious discrimination under the guise of neutrality.[251] The ordinances, which exempted practically any type of secular animal killing, were cleverly designed to target the Santeria, an Afro-Caribbean religion that sacrifices small animals to their gods.[252] The Supreme Court evaluated the text of the ordinances and the circumstances surrounding its passage to unanimously hold that these laws were not neutral or generally applicable because the object of the law was to infringe or suppress religious conduct.[253]

This *Lukumi* exception to the *Smith* rule has created a split among circuit courts with the fact of many free exercise challenges falling somewhere in between the two poles. The Third[254] and Ninth[255] Circuits have interpreted *Lukumi* much stricter than the loose application by

246. *See* 42 U.S.C § 2000cc – 2000cc-5.
247. *See, e.g.,* Burwell v. Hobby Lobby, Inc., 573 U.S. 682 (2014).
248. *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
249. *See id.* at 545.
250. *Id.* at 526.
251. *Id.* at 545.
252. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5 (2016).
253. *See Lukumi*, 508 U.S. at 533-35.
254. Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019).
255. Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

Second,[256] Sixth,[257] Seventh,[258] Eighth,[259] Tenth,[260] and Eleventh[261] Circuits. The strict-*Lukumi* approach requires a challenger to "show that is was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views."[262] The looser approach allows a challenge to rely on a variety of evidentiary sources to prove that a law is not neutral or generally applicable under *Lukumi*, such as a plethora of secular-purpose exemptions,[263] enhanced discretion at the hand of state actors,[264] and the history of the law.[265] These inconsistencies as to the interpretation of *Lukumi* have led to differing applications of the controlling power of *Smith,* further eroding the opinion's legitimacy. Therefore, it does not matter whether the Court chooses to analyze *Smith*'s consistency based on its predecessors, related cases, or post-decision developments, the conclusion is that *Smith* is a stark outlier that must be remedied.

III. Reliance

Lastly, "in some cases, reliance provides a strong reason for adhering to established law."[266] However, the *Smith* decision has produced anything *but* reliance in its thirty years – soliciting outright rejection by Congress and state legislatures.[267] In *Ramos v. Louisiana*, Justice Alito dissented, joined by Chief Justice Roberts and Justice Kagan, to criticize the majority's overturning of a case that "has elicited enormous and entirely reasonable reliance."[268] The issue in *Ramos* was whether a unanimous jury verdict is required to convict a defendant in state court.[269] The majority

256. Central Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).
257. Ward v. Polite, 667 F.3d 727 (6th Cir. 2012).
258. St. John's United Church of Christ v. City of Chi., 502 F.3d 616 (7th Cir. 2007).
259. CHILD, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000).
260. Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004).
261. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).
262. Fulton v. City of Phila., 922 F.3d 140, 154 (3d Cir. 2019).
263. Ward v. Polite, 667 F.3d 727, 738 (6th Cir. 2012).
264. *Axson-Flynn*, 356 F.3d at 1298-99.
265. Central Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 195 (2d Cir. 2014).
266. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2484 (2018).
267. *See* 42 U.S.C. § 2000bb – 2000bb-4; 42 U.S.C. § 2000cc – 2000cc-5.
268. Ramos v. Louisiana, 140 S. Ct. 1390, 1425-26 (2020). (Alito, J., dissenting).
269. *Id.* at 1397.

opinion overturned the controlling case that answered "no," to now require unanimous jury verdicts in state criminal trials.[270] However, the dissent points out that "no Justice has even hinted that [the case] should be reconsidered," and then it provides a lengthy paragraph of citations in which the Court has relied on the precedent.[271] *Smith* can be immediately distinguished from this criticism of the majority in *Ramos*. Unlike *Ramos,* overruling *Smith* would not unravel nearly a half-century worth of criminal convictions, but rather, it would make the Supreme Court's precedent consistent with legislatively created rules. While *Smith* may be "intertwined with [our] body of . . . law," both judicial and legislative decisions have weakened *Smith* to an almost unrecognizable rule, full of complicated exceptions.[272] While the *Ramos* decision switched "no" to "yes," much to Justice Alito's disapproval, overruling *Smith* would not require such a 180˚ change in reliance interest.

Clearly, under the factors articulated by the Court for overruling precedent, *Smith* stands perfectly poised for upheaval. Therefore, the Court's grant of certiorari in *Fulton v. City of Philadelphia* might signal the end of *Smith*'s era.

PART THREE – THE FUTURE OF FREE EXERCISE

I. Fulton v. City of Philadelphia

In various opinions, seven different Justices have suggested that *Smith* be revisited,[273] in addition to the three dissenters in *Smith* itself.[274] Five of these Justices—Alito, Thomas, Gorsuch, Kavanaugh, and Breyer—will finally get their chance in *Fulton v. City of Philadelphia* during the October 2020 term.[275] *Fulton*'s facts demonstrate the need for *Smith* to be overruled and illustrate how the circuit split on interpreting *Lukumi* can

270. *Id.* at 1408.
271. *Id.* at 1425, 1428.
272. *Id.* at 1436.
273. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634, 637 (Jan. 22, 2019) (No. 18-12) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ.); City of Boerne v. Flores, 521 U.S. 507, 544 (1997) (O'Connor, J., dissenting); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part).
274. *See Smith II*, 494 U.S. 872, 907 (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.).
275. Petition for a Writ of Certiorari, *Fulton v. City of Phila.*, 140 S. Ct. 1104 (No. 19-123).

cause detrimental outcomes.

Fulton concerns Catholic Social Services (CSS), a centuries old faith-based foster care agency and ministry governed by the Archdiocese of Philadelphia.[276] Due to their Catholic convictions, CSS does not provide endorsements for same-sex couples; however, in over one hundred years, not a single same-sex couple has approached CSS seeking an endorsement.[277] In March 2018, a reporter from the *Philadelphia Inquirer* published an article stating that CSS would not work with same-sex couples and reported the agency to Pennsylvania's Department of Human Services.[278] Within days, the article prompted the Philadelphia City Council, guided by a mayor with a history of anti-Catholic rhetoric, to pass a resolution calling for an investigation into "'discrimination' occurring 'under the guise of' religion,"[279] implicitly threatening action under anti-discrimination statutes.[280] The DHS commissioner scolded CSS, telling the agency to "follow 'the teachings of Pope Francis', . . . that 'times have changed,' 'attitudes have changed,' and it is 'not 100 years ago.'"[281] Immediately after, CSS received notice that DHS would no longer refer new children to CSS for placement,[282] despite the city's urgent and public plea for new foster homes in the very same month.[283]

The city claimed a series of rationales, outside of religious discrimination, that justify their actions.[284] The first rationale the city presented was a violation of Philadelphia's Fair Practices Ordinance, which deems discrimination on the basis of sexual orientation unlawful in public accommodations.[285] However, foster care has never previously been considered a public accommodation and the city has routinely expected agencies to consider "marital status, familial status, and any mental disabilities of potential foster parents."[286] Second, the city attempted to invoke "provision 3.21" of the foster care contract between the city and CSS, which disallows an agency the authority to "'reject a

276. *Id.* at 1.
277. *Id.*
278. Fulton v. City of Phila., 922 F.3d 140, 148 (3d Cir. 2019).
279. Petition for a Writ of Certiorari, *supra* note 275, at 9.
280. *Fulton*, 922 F.3d at 149.
281. Petition for a Writ of Certiorari, *supra* note 275, at 10.
282. *Fulton*, 922 F.3d at 149.
283. Petition for a Writ of Certiorari, *supra* note 275, at 4.
284. *Id.* at 10.
285. Petition for a Writ of Certiorari, *supra* note 275, at 11; Philadelphia Code § 9-1106.
286. Petition for a Writ of Certiorari, *supra* note 275, at 11.

child or family for Services' unless 'an exception is granted.'"[287] However, this provision applies only to a "rejection of referrals from DHS" and exemptions may be granted under the provision.[288] When its initial rationales failed, the city then instituted a new policy of including a provision in its contracts with agencies that expressly prohibits discrimination based on sexual orientation. CSS's contract expired on June 30, 2018, forcing the agency into a choice between closing its doors or signing a contract that conflicts with its sincerely held religious beliefs.[289] While these rationales may appear to be grounded in law, they are merely a camouflage for the exact type of *Smith*-motivated hostility that *Lukumi* seeks to eradicate.

CSS sought preliminary injunctive relief that was denied on the grounds that the agency was not likely to succeed on the merits because of *Smith*.[290] On appeal, the Third Circuit evaluated whether the city "treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs" to determine if *Lukumi*'s exception would apply.[291] The court held that the city has not acted with such religious animus and applied *Smith* to deny the injunction.[292] The Third Circuit avoided Pennsylvania's Religious Freedom Protection Act (RFPA) in denying the injunction by reasoning that the Pennsylvania courts would not recognize the city's actions as a substantial burden on CSS's free exercise of religion and find Philadelphia's actions to be the least restrictive means of "eradicating discrimination"; thus the claim was unlikely to succeed on the merits.[293]

After being distributed for conference seven times, certiorari was granted as to three issues:

> (1) Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held? (2) Whether

287. *Id.* at 12-13.
288. *Id.* at 13.
289. Fulton v. City of Phila., 922 F.3d 140, 150 (3d Cir. 2019).
290. *Id.* at 151.
291. Petition for a Writ of Certiorari, *supra* note 275, at 16.
292. *Id.*
293. *Fulton*, 922 F.3d at 163.

> *Employment Division v. Smith* should be revisited? [and] (3) Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?[294]

The third issue attempts to restore some consistency and balance to the First Amendment by correcting the actions of the Third Circuit, however, the most powerful and compelling issues are the first and the second for which certiorari was granted.

The first issue concerns the circuit split regarding the interpretation of *Lukumi*. The application of *Lukumi* by the Third Circuit required CSS to 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."[295] However, the only relevant evidence, according to the Third Circuit, would be nearly impossible proof of an exemption for another agency that did not endorse same-sex couples but had different religious convictions.[296] Despite evidence that religious hostility was the "impetus,"[297] the law was considered to be neutral and generally applicable.[298] In contrast, had the Third Circuit properly applied *Lukumi,* in the same way as the Second, Sixth, Seventh, Eighth, Tenth, or Eleventh Circuits, the law could have clearly been declared non-neutral under *Lukumi*, therefore triggering strict scrutiny.[299]

The second issue, however, is the most important to the future of religious liberty in the United States and the step the Court needs to take to correct its own errors. *Fulton* is an excellent example of the confusion that *Smith* and its progeny have created and the havoc the decision has wreaked on the balance between the Free Exercise Clause and the Establishment Clause for years.[300] Furthermore, the factual scenario presented in *Fulton* rests squarely in a blind spot for strict scrutiny: the rule is generally applicable, the *Lukumi* exception has failed, and the city intends to make no exceptions to its anti-discrimination policy – religious or nonreligious. Therefore, a city that harnessed the power of *Smith* and

294. Petition for a Writ of Certiorari, *supra* note 275, at i.
295. *Id.* at 20.
296. *Id.*
297. *Id.* at 21 (citing Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016)).
298. *Id.*
299. *Id.* at 27.
300. *Id.* at 31.

unleashed it on a hundred-year-old Catholic ministry is set to receive a rational basis review of its actions.[301] In the very city our Constitution was drafted, the "City of Brotherly Love," government actors have chosen to offend our Founding Father's vision of religious liberty at the expense of children in need of a loving home.

II. A Judicial Prediction

Justice Scalia passed away in 2016; a shock to not only the Court, but to an entire nation deep in the throes of a contentious election. In 2017, the Yale Law Journal published a draft of an unpublished opinion found among the papers of Justice Scalia.[302] The author of the piece, Stephen L. Carter, declined to say with absolute certainty, but believed the opinion to be Scalia's prepared roadmap to overturning *Smith* – though it appeared unattached to any case.[303] The draft opinion contradicted Justice Scalia's rhetoric in *Smith*: "What surely hurts minority religions more is a callous neutrality that leaves them to the political process to protect ways of life that may be under threat" and "accommodations . . . are fully within the power of the Government."[304] The alleged Scalia acknowledged his own errors in *Smith* and wrote "[b]ut a freedom of religion that must await the Government's favorable response to a 'Mother, may I?' is not a freedom of religion at all."[305] "If exercising religion does not include the freedom of the believer to live and act in the world according to his understanding of what God commands, then the constitutional guarantee is a mere grimbly-gunk," a supposed-Scalia argued.[306] To ease the concerns of a restraint-minded Court, Scalia posited that while the Court owes the elected branches deference, it does not owe them "fealty."[307] Justice Scalia's presence still unmistakably lingers in our Nation's highest Court, and currently-serving Justices certainly take his cues. A majority of them just might listen to his command this term: "We should tear down the edifice of Free Exercise law built over the past several decades and begin anew."[308]

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301. *Id.* at 33.
302. Carter, *supra* note 14, at 1612.
303. *Id.*
304. *Id.* at 1614-15.
305. *Id.* at 1617.
306. *Id.* at 1619.
307. *Id.* at 1624.
308. *Id.*

I predict the Court will use the opportunity presented in *Fulton* to make a major change in the legal landscape, as prior musings by the Court have shown no shortage of desire, but merely a shortage of votes.[309] In 2016, the Court denied certiorari in *Stormans, Inc. v. Wiesman,* but Justice Alito wrote a scathing dissent to the denial.[310] *Stormans* is the Ninth Circuit's controlling precedent on the interpretation of *Lukumi*, which creates a circuit split in the application of *Smith.*[311] The case *could* have been used to reform free exercise, but the Court, down to eight members after the loss of Justice Scalia, didn't have the necessary votes at the time to make the change.[312] But with the addition of Justice Gorsuch in 2017, Justice Kavanaugh in 2019, and Justice Barrett in 2020, the day – and the votes – has come. Although, this new majority is persnickety. Multiple petitions concerning the future of *Smith* crossed the desk of the Justices,[313] yet *Fulton* was the holy grail. The choosy nature of the Justices might just prove that they are preparing for a precedential upheaval and have found the proper case to do so.

It is foreseeable that the Court will take their chance in *Fulton* to overturn *Smith* and wipe the free exercise slate clean. In 2018, a very similar majority (the only differences being Justice Kennedy instead of Justice Kavanaugh and Justice Ginsburg instead of Justice Barrett) did not hide behind the command of *stare decisis* and overturned forty-one-year-old precedent in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*[314] and in 2020, the Court overturned forty-eight-year-old precedent in *Ramos*.[315] Though they bicker over the strength of the command of *stare decisis,* a majority of Justices are up to the task, if warranted.[316] In fact, *Fulton* not only presents an opportunity to fix the free exercise problem, but also a chance for the Justices to clear up some of their debates over the proper role of *stare decisis*.

A Supreme Court win is a race to the number five between the parties.

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309. *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015), *cert. denied,* 136 S. Ct. 2433 (Jun 28, 2016) (No.15-862) (Alito, J., dissenting).

310. *Id.*

311. *See generally id.*

312. *Id.*

313. *Id.*; Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (Jan. 22, 2019) (No. 18-12); Petition for Writ of Certiorari, *Ricks v. Idaho Bd. of Contractors,* 435 P.3d 1(Idaho Ct. App. 2018) (No. 19-66).

314. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

315. Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring).

316. *Id.*; *Id.* at 1410 (Kavanaugh, J., concurring); *Id.* at 1425 (Alito, J., concurring).

Based on the errors of *Smith,* it is likely that CSS will cross the finish line first. Although he was reluctant to upset *stare decisis* in *Ramos*, Justice Alito authored *Janus* in 2018, proving he is willing to overrule a case when warranted. Fortunate for CSS, Justice Alito has perhaps demonstrated the clearest commitment to reconsidering *Smith*. In 2016, he authored the dissent from the denial of certiorari in *Stormans,* warning that it presented an "ominous sign" for those who value religious freedom.[317] In January 2019, he made his requests to reconsider *Smith* even more explicit.[318] Writing a concurrence respecting the denial of certiorari in *Kennedy*, the Justice was quick to point out that the Court had "not been asked to revisit [*Smith*]."[319] In his keynote speech at the Federalist Society's 2020 National Lawyers Convention, given after the oral argument in *Smith* had taken place, Alito warned that "religious liberty is fast becoming a disfavored right."[320] Specifically, he mentioned that *Smith* had "cut back sharply on the protection provided by the Free Exercise Clause of the First Amendment," and praised Congress for its response in passing RFRA.[321]

For Justices Thomas, Gorsuch, Kavanaugh, and Barrett all known for their adherence to originalism, the arguments pointing out *Smith*'s inconsistencies with history and tradition will be irresistible. Justice Thomas joined Justice Alito's dissent from denial of certiorari in *Stormans,* and Justices Thomas, Gorsuch, and Kavanaugh all joined the statement respecting the denial in *Kennedy.*[322] Further, Justice Gorsuch used his concurrence in *Masterpiece Cakeshop,* which narrowly held that a Colorado baker was the target of religious hostility when he declined to make a cake for a same-sex couple,[323] to remind readers of the errors of *Smith*.[324] Though she is new to the Supreme Court, Justice Barrett has written extensively about the application of *stare decisis* and the role of

317. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting from denial of certiorari).

318. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634, 637 (Jan. 22, 2019) (Alito, J., concurring).

319. *Id.*

320. *See* The Federalist Society, *Address by Samuel Alito [2020 NLC]*, YOUTUBE (Nov. 12, 2019), https://www.youtube.com/watch?v=tYLZL4GZVbA

321. *Id.*

322. *Stormans*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied,* 136 S. Ct. 2433, 2433 (Jun. 28, 2016) (No.15-862); *Kennedy*., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634, 635 (Jan. 22, 2019) (No. 18-12).

323. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723, 1732 (2018).

324. *Id.* at 1734 (Gorsuch, J., concurring).

originalism during her tenure as a professor prior to joining the judiciary.[325] Specifically in *Precedent and Jurisprudential Disagreement*, then-Professor Barrett argues that "[she] tend[s] to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."[326]

Trickier to predict is Chief Justice Roberts. However, the Chief Justice predicted the *Fulton* issue would arise as early as 2015: "Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example … a religious adoption agency declines to place children with same-sex married couples."[327] In 2016, the Chief Justice joined the dissent from a denial of certiorari in *Stormans*.[328]

Although the aforementioned Justices comprise the typical conservative majority, the concern over *Smith*'s errors cuts across the jurisprudential spectrum. *Fulton* presents a unique set of facts that has the potential to swing a vote or two. In *City of Boerne*, Justice Breyer hinted at a desire to reconsider *Smith*, writing: "[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided, and set this case for reargument."[329] Justices Breyer and Kagan tend to vote as a team in free exercise cases, operating as an offshoot of a more conservative majority. In addition to joining the majority in *American Legion*, Justices Breyer and Kagan concurred with the conservatives in *Masterpiece Cakeshop, Ltd*.[330] Less likely to be persuaded is Justice Sotomayor, who would likely dissent should the majority overrule *Smith*.[331]

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325. Amy Coney Barrett, *Stare Decisis and Due Process,* 74 U. Colo. L. Rev. (2003); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals,* 73 Geo. Wash. L. Rev. 317 (2005); Amy Coney Barrett, *Stare Decisis and Nonjudicial Actors,* 83 Notre Dame L. Rev. 1147 (2008); *Amy* Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711 (2013); Amy Coney Barrett and John Copeland Nagle, *Congressional Originalism,* 19 U. Penn. J. of Const. L. (2017); Amy Coney Barrett, *Originalism and Stare Decisis,* 92 Notre Dame L. Rev.1921 (2017).

326. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement,* 91 Tex. L. Rev, 1711, 1728 (2013).

327. Obergefell v. Hodges, 135 S. Ct. 2584, 2625-26 (2015) (Roberts, C.J., dissenting).

328. *Stormans*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied,* 136 S. Ct. 2433 (Jun. 28, 2016) (No.15-862).

329. City of Boerne v. Flores, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

330. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (Kagan, J., concurring).

331. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 739 (2014); *Masterpiece*, 138

Across the bench, these are important similarities between Justices, and the facts of this case cannot be ignored. Justices Roberts, Thomas, Alito, Sotomayor, Kavanaugh, and Barrett are all practicing Catholics, Justice Gorsuch was raised in Catholicism, and CSS is a Catholic ministry.[332] Further, Justice Roberts and Justice Barrett are both adoptive parents.[333] While a shining virtue of the judiciary is independence and Lady Justice remains blindfolded, these Justices will surely be fighting their own battle between their legal principle and spiritual convictions. By holding for CSS, the Catholic Justices are helping guarantee *their own right* to free exercise.

CONCLUSION

Employment Division v. Smith has ravaged First Amendment jurisprudence and the right to free exercise of religion for thirty years. Its holding is inconsistent with originalism, causes confusion among circuit courts, and creates a roadmap for state-sponsored religious hostility under the guise of neutrality. However, this upcoming term presents an opportunity for change and true restoration of American freedom. I believe that a majority of the Justices recognize the shortcomings of *Smith* and will use *Fulton v. City of Philadelphia* to restore the balance between the Establishment Clause and Free Exercise Clause by overturning *Smith.* For advocates of religious liberty, this day will be a long time coming, yet welcomed with open arms. A new era of religious freedom will flourish once *Smith* is overruled.

S. Ct. at 1748; Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019).

332. Tom Gjelten, *Amy Coney Barrett's Catholicism is Controversial but May Not Be Confirmation Issue*, NPR (September 29, 2020), https://www.npr.org/2020/09/29/917943045/amy-coney-barretts-catholicism-is-controversial-but-may-not-be-confirmation-issu

333. Todd S. Purdum, Jodi Wilgoren, & Pam Belluck, *Court Nominee's Life Is Rooted in Faith and Respect for the Law,* THE NEW YORK TIMES (July 21, 2005), https://www.nytimes.com/2005/07/21/politics/court-nominees-life-is-rooted-in-faith-and-respect-for-law.html; Matt Keeley, *Who Is Amy Coney Barrett's Familu? Supreme Court Nominee Is Mother of Seven and Has Six Siblings,* NEWSWEEK (Sept. 20, 2020), https://www.newsweek.com/who-amy-coney-barretts-family-potential-supreme-court-nominee-mother-seven-has-six-siblings-1533120.