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Free Exercise in the Mirror

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FREE EXERCISE IN THE MIRROR

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Recent U.S. Supreme Court cases present an opportunity to apply a new form of analysis to discrimination claims. In 2018's Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission and 2021's Fulton v. City of Philadelphia, there is a party complaining about discrimination on each side of the dispute. In both cases, one side (respondent) claims that the other (petitioner) is discriminating based on sexual orientation, while the other side (petitioner) claims that subjecting petitioner to the law prohibiting sexual orientation discrimination itself discriminates based on religion. With discrimination claims coming from both directions, this article performs what it calls "mirror-image analysis" to better understand how the Court thinks about the issues it faces in Free Exercise cases. Mirror-image analysis takes a definition that the Court applies to one side of the dispute, whether it is the definition of discrimination or of coercion, and then considers what the other side's claim would look like if it deployed a similarly capacious definition of the term. The article uses hypothetical cases, some quite provocative, to help clarify the nature of the Court's approach to Free Exercise. It concludes that because the religions at issue in both Masterpiece Cakeshop and Fulton were mainstream Christian faiths, it takes a mirror to appreciate how extreme the Court's analysis of religious freedom has become.

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INTRODUCTION

In the last several years, the U.S. Supreme Court decided two important religion cases which happen to be unusual in one significant respect. Each case involved petitioners and respondents that appeared to be mirror images of each other. Each side claimed it was the authentic victim of discrimination. The mirror image structure allows us to evaluate the symmetry or lack thereof in the Justices' analysis of the issues going in both directions. In performing this evaluation, we will see that the Court exhibited a profound empathy for the religious petitioners in each case, Masterpiece Cakeshop ("MC," referring to both the baker and the corporate entity) and Catholic Social Services ("CSS"), respectively. The selective empathy surfaced when the Court deployed an extremely broad definition of "discrimination" for religious petitioners while, in the very same disputes, applied a far stingier and narrower definition of "discrimination" for the governmental entities enforcing the laws prohibiting sexual orientation discrimination on behalf of LGBTQ+ persons, whose own rights and interests the Court downplayed.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[1] a majority of the Justices failed to reach the merits of the principal First Amendment issues presented[2] but revealed quite a bit (about, among other things, their heightened sensitivity to a moral critique of bigotry in the name of religion) in what they ultimately did say. In the second, *Fulton v. City of Philadelphia*,[3] the Justices reached a conclusion on the merits that drew criticism from progressives.[4] In both cases, religious petitioners argued that government actors had engaged in discrimination against petitioners' respective religions.[5] And both sets of traditional religious petitioners won their cases.[6]

Most of the critical commentary on the two decisions and related "shadow docket" Free Exercise cases during the COVID-19 pandemic points out the flawed nature of how the Court applied the landmark 1990 precedent of *Employment Division v. Smith*.[7] Although the Justices said that *Smith*

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[1] 138 S. Ct. 1719, 1723-24 (2018). I do not mean to suggest that *Masterpiece Cakeshop* was the only important religion case on the Court's docket in the October 2017 Term. The Court, for example, rejected a religious discrimination claim in Trump v. Hawaii, 138 S. Ct. 2392, 2393 (2018).

[2] These were the questions presented: "Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment." Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop*, 138 S. Ct. (No. 16-111).

[3] 141 S. Ct. 1868 (2021).

[4] *See, e.g.*, Andrew R. Lewis, *The Supreme Court Handed Conservatives a Narrow Religious Freedom Victory in* Fulton v. City of Philadelphia, WASH. POST (June 18, 2021), https://www.washingtonpost.com/politics/2021/06/18/supreme-court-handed-conservatives-narrow-religious-freedom-victory-fulton-v-city-philadelphia/ (warning that the decision could create "a license to discriminate against LGBTQ people").

[5] Brief for Petitioners at 42, *Masterpiece Cakeshop*, 138 S. Ct. (No. 16-111) (claiming that the Colorado Civil Rights Commission was targeting "a specific religious belief 'for discriminatory treatment'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993)); Petition for a Writ of Certiorari at 18, *Fulton*, 141 S. Ct. (No. 19-123) ("Philadelphia's actions [against Catholic Social Services] were baseless, discriminatory, and entirely unnecessary.").

[6] *Masterpiece Cakeshop*, 138 S. Ct. at 1740; *Fulton*, 141 S. Ct. at 1882.

[7] 494 U.S. 872 (1990). For a background in the Court's shifting Free Exercise jurisprudence and an argument about the dangers in reinterpreting *Smith*, see James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 739 (arguing that the Court's Free Exercise decisions over the last sixty years have tended to defy precedent by

governs,[8] meaning that the Free Exercise Clause requires general applicability, neutrality, and non-discrimination, critics argue that the Court in fact applied a label of "discrimination" to facially neutral government activity that at most incidentally burdened religious practice.[9] One critique asserts that the Court covertly reverted to the regime of *Sherbert v. Verner*,[10] which *Smith* overruled.[11] Another account contends that the Court engaged in an enterprise of protecting "Christian privilege," by analogy to "white privilege," wherein the Court recognized the loss of unfairly appropriated special entitlements as a cognizable harm against Christians.[12] Still others propose that the Court granted "most favored nation" status to religion, thereby departing—perhaps rightly, perhaps wrongly—from the more formal

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disingenuously interpreting it, and warning against continuing this pattern in reinterpreting *Smith*). The "shadow docket" refers to cases the Court decides without plenary consideration. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 3 (2015). For examples of Free Exercise cases on the Court's shadow docket during the pandemic, see *infra* note 39.

[8] A majority of Justices in *Fulton* actually criticized *Smith*, but they nonetheless applied it because they could not agree on a workable alternative. *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring) (noting that "[t]here would be a number of issues to work through if *Smith* were overruled").

[9] *See*, *e.g.*, Dahlia Lithwick, *The Supreme Court Moves the Shadow Docket Out Into the Light*, SLATE (June 21, 2021) (statement of Professor Erwin Chemerinsky), https://slate.com/news-and-politics/2021/06/fulton-v-philadelphia-supreme-court-religious-freedom-discrimination.html ("The court's saying the very possibility of exceptions is what makes this religious discrimination. And that to me is a very troubling holding.").

[10] 374 U.S. 398, 403, 406 (1963).

[11] Emp. Div. v. Smith 494 U.S. 872, 885 (1990) ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to such challenges."). *See, e.g.*, Michael Peabody, *High Court Hands Catholic Social Services Narrowly Drafted Victory*, RELIGIOUS LIBERTY.TV (June 18, 2021), https://religiousliberty.tv/high-court-hands-catholic-social-services-narrowly-drafted-victory.html. Much of the criticism stems from the COVID-19 cases (including primarily or exclusively cases on the shadow docket). *See, e.g.*, Jim Oleske, Fulton *Quiets* Tandon*'s Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (June 18, 2021, 4:20 PM), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/.

[12] Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST AMEND. L. REV. 185, 209 (2017); Caroline Mala Corbin, *Should We Placate White Christian Fragility?*, BALKINIZATION (July 17, 2020), https://balkin.blogspot.com/2020/07/should-we-placate-white-christian.html.

conception of neutrality associated with *Smith*.[13] And some observers maintain that the Court applied a disparate impact theory of discrimination of the sort that the Justices sanctioned in *Griggs v. Duke Power Co.* and that Congress approved in the 1991 Civil Rights Act.[14]

In this article, I aim to do something different. I take seriously the Court's claim that it was protecting religion against discrimination and doing so under the rubric of *Smith*, which, even on its face, forbids religious discrimination. I accordingly refrain from suggesting that the Court was covertly (or overtly) returning us to the world of *Sherbert* or to some more or less malign version of that regime. Taking the Justices at their word, I analyze the Court's approach to the opposing parties in each of the two cases and assess that approach for symmetry. The two cases offer excellent vehicles for assessing symmetry because in each of the disputes, one side (petitioners) argued the government discriminated against it based on religion by prohibiting it from discriminating against a same-sex couple based on sexual orientation. Because we have claims of discrimination on both sides of the two disputes, one forming the predicate for the other, we can ask the following question: What would the dispute look like if the Supreme Court took the approach that it used to evaluate respondents' conduct and applied it to petitioners' conduct? In other words, I will take seriously the Court's template for discrimination based on religion and apply it to the behavior of the putative

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[13] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50) (claiming that even under *Smith*, whenever government favors some activities over others, "it must place religious organizations in the favored or exempt category" absent a "sufficient justification"). For a sympathetic explication of this approach in theory if not as practiced by the Supreme Court, see Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV., 2397 (2021). *See also* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 177 (arguing that under the Court's reasoning in *Smith*, religion should enjoy something akin to "most-favored nation status" (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–51)).

[14] 401 U.S. 424, 431 (1971); Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 3(3), 105 Stat. 1071, 1071; *see also* James M. Dise, *Religious Exemptions to Neutral Laws of General Applicability and the Theory of Disparate Impact Discrimination*, 6 COLUM. J. RACE & L. 115, 118–19 (2016) (characterizing religious exemptions as implicitly protecting against disparate impact); David Cole, *A New Assault on Marriage Equality*, N.Y. REV. BOOKS (Dec. 3, 2020), https://www.nybooks.com/articles/2020/12/03/new-assault-marriage-equality/?lp_txn_id=1262059 (describing the petitioner's appeal in *Fulton* as a request to extend religious protections to include disparate impact).

victims of that discrimination. I shall refer to this approach, investigating whether we have symmetry between how the Court looked at each of two symmetrical discrimination claims in one case, as "mirror-image analysis."

One might object that while the same-sex couples claimed that Masterpiece Cakeshop and Catholic Social Services were discriminating against them,[15] Masterpiece Cakeshop and Catholic Social Services did not claim that same-sex couples discriminated against the two businesses. The claim was instead that the *government*, by applying the anti-discrimination laws to petitioners without allowing a religious exemption, discriminated against them.[16] Accordingly, the government was unwilling to tolerate discrimination by petitioners against same-sex couples, and petitioners said this government position discriminated against religious people. And, the objector might add, isn't governmental discrimination in violation of the Constitution more invidious (and, in a sense, "more unlawful") than private discrimination in violation of a statute?

Neither objection is persuasive. As to the first, when Masterpiece Cakeshop and Catholic Social Services complained that the government was discriminating against them, the government stood in the place of actual or potential same-sex couples whose demands for equal treatment (backed up by the law) struck MC and CSS as discriminatory because of its impact on religious people. In other words, same-sex couples, through the government that represented their legal rights, complained that MC and CSS were discriminating based on sexual orientation, and MC and CSS complained in turn that enforcing such anti-discrimination principles on behalf of same sex couples itself discriminated against MC and CSS on the basis of religion.

As to the second objection, sometimes the Constitution requires more of government actors than statutes require of private actors, but other times the opposite is true. The Equal Protection Clause, under *Washington v. Davis*,[17] prohibits only intentional discrimination by the government, while Title VII of the Civil Rights Act of 1964 protects private employees against not only disparate treatment but also conduct with an unintentional disparate impact.[18] We can therefore evaluate how the Supreme Court treats discrimination

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[15] *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1725 (2018); *Fulton v. City of Phil.*, 141 S. Ct. 1868, 1875 (2021).

[16] *Supra* note 5.

[17] 426 U.S. 229, 238–39 (1976).

[18] Title VII, Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000-e2 (as amended in 1991 by Pub. L. No. 102-166, 105 Stat. 1071).

claims generally, whether those claims arise under the Constitution or under a statute, and assess how faithfully the Court applies its own approach to discrimination from one party to a case to another, without worrying about the above objections to such analysis.

Victims can also be perpetrators. A baker can discriminate against same sex couples looking to buy a wedding cake even as the government allegedly discriminates against the religious baker by punishing him for discriminating against same sex couples. What can make such contests coherent and logical is that "discrimination" means more or less the same thing going each way. If Jacob can be said to have committed an assault against Blythe while Blythe is said to have committed an assault against Jacob, then we would want the word "assault" to carry the same meaning for both confrontations, unless we have a good reason to say that an assault means something different in each context.

In analyzing *Masterpiece Cakeshop* and *Fulton*, I will examine ways in which the meaning of "discrimination" differed when the actions were those of the government on behalf of same-sex couples and against religion, versus those of petitioners against same-sex couples. I will describe what the two cases would look like were the Free Exercise definition of religious discrimination to apply to sexual orientation discrimination. Finally, I will provide a better understanding of the Court's analysis purportedly applying *Smith* and thus identifying religious discrimination under the circumstances that presented themselves to the Court in the two cases, taking account of how petitioners would fare under the analysis they successfully urged on the Court. I will offer the hypothesis that the Court so strongly identified with the religious petitioners in these cases that it failed to recognize bigotry against sexual minorities, mistaking it for benign religious observance. By surfacing such bigotry using the Court's own tools for uncovering religious prejudice, my method hoists the Court by its own petard.

Part I begins by describing the conflict that reached the Supreme Court in *Masterpiece Cakeshop*. After briefly touching on the theory of discrimination that animated the petitioner's claim, I turn to the basis on which the Court disposed of the case. I then use mirror-image analysis to determine what the Court would have done if it had applied its definition of discriminatory animus to the actions of petitioner, Masterpiece Cakeshop. The Court's understanding of animus appeared to rest on the harshness of the Colorado Civil Rights Commission's critique of Masterpiece Cakeshop's refusal to bake a wedding cake for a same-sex couple. The contrast between

this definition of animus—as applied to the Commission—and the definition of discrimination that the Court applied to Masterpiece Cakeshop is arresting. It suggests that the Court was—perhaps unintentionally—manifesting the sort of bigotry that it believed it was neutrally observing.

Part II addresses *Fulton*, describing the more developed sort of narrative that would likely have faced the Court in *Masterpiece Cakeshop* if it had reached the merits of the primary claims there. I apply mirror-image analysis to *Fulton* to assess the crossclaim of discrimination that Philadelphia would have been able to make on behalf of same-sex couples seeking to become foster parents if the Court's version of anti-queer discrimination were as robust as its understanding of anti-religion discrimination. Using analogies from different areas of the law, this section provides a clear picture of the fun-house mirror that same-sex couples face in attempting to avoid religious people's discrimination against the couples based on sexual orientation.

Part III describes the most robust test of religious coercion that would have applied under the regime that governed Free Exercise claims prior to *Smith*. I once again use mirror-image analysis here, this time to highlight the unrecognizably enhanced view of anti-religious coercion that the Court took in reaching the results that it did in *Fulton*. I offer hypothetical examples of similarly enhanced Free Exercise claims that a disempowered person, adhering to a nontraditional religion, could make if the Court applied a uniform definition of anti-religious coercion. A Conclusion follows, reflecting on the lessons of mirror-image analysis.

I. *MASTERPIECE CAKESHOP* AND DISCRIMINATION ASYMMETRY

A. The Masterpiece Claim

In *Masterpiece Cakeshop*, a gay couple planning their nuptials entered a bakery and asked to purchase a wedding cake.[19] The individual petitioner (and corporate owner of the bakery) told the couple that because they were having a same-sex wedding, it would violate MC's Christian obligations to provide the cake they wanted.[20] He would happily sell them

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[19] 138 S. Ct. 1719, 1723 (2018).

[20] *Id.* As a reminder, for simplicity I refer to either the individual or the bakery or both by the term MC. Context provides a clear picture of that entity to which MC refers at any time.

rolls or other baked goods, but a wedding cake was out of the question.[21] The couple brought a lawsuit claiming discrimination on the basis of sexual orientation in violation of state law.[22] If the couple were straight—if one of the two people was a woman instead of a man—MC would have served them. MC defended itself by invoking its religious observance, contending that by obligating MC to sell a wedding cake to a same-sex couple, a transgression of MC's religion, the Colorado Civil Rights Commission ("the Commission") violated the First Amendment Free Exercise Clause, which prohibits official discrimination based on religion.[23]

In addition to its religion claim, MC presented a free speech claim, arguing that it should not have to communicate a message with which it disagrees (that the marriage of two men warrants celebration) by creating a same sex wedding cake.[24] How best to answer this free speech question depends on facts that never became entirely clear in the record. Did the couple in question want a special cake indicating that two men were marrying? If so, then MC's free speech claim might be substantial. To see why, consider a scene from *Borat Subsequent Moviefilm*, in which Sacha Baron Cohen as Borat asks a baker to decorate a cake with the slogan "Jews will not replace us."[25] A law that required the baker to accede to such a request would at least *implicate* the baker's free speech right not to speak. Likewise, so might a cake decorated with written or artistic representations of a same-sex couple marrying *implicate* this right.

However, the *Masterpiece Cakeshop* record does not clearly show that the couple sought a bespoke cake. MC apparently refused the couple a cake before knowing what sort of cake—pre-made generic wedding cake or

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[21] *Id.* at 1724.

[22] *Id.* at 1723. Unlike other provisions of federal antidiscrimination law, the public accommodations provision, Title II, does not bar sex discrimination. 42 U.S.C. § 2000a (a) (forbidding "discrimination . . . on the ground of race, color, religion, or national origin" in public accommodations). If the federal public accommodations statute did cover sex discrimination, it would, *ipso facto*, also cover sexual orientation discrimination. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (construing Title VII's prohibition on sex-based discrimination in employment as extending to discrimination based on sexual orientation and gender identity).

[23] Brief for Petitioners, *supra* note 6, at 16.

[24] *Id.* at 17.

[25] BORAT SUBSEQUENT MOVIEFILM (Four by Two Films 2020).

custom—they wanted.[26] As far as MC knew, all that the couple (and the government enforcing the law against discrimination) wanted was for MC to sell the two men a generic wedding cake on the same terms as it would sell one to any other marrying couple.

The religious claim is different, however. MC said it is Christian and its religion opposes same-sex marriage.[27] To compel MC to sell a wedding cake to two men getting married would, according to MC, require MC to violate its religious commitments. I shall say more about MC's Free Exercise argument when I take up the *Fulton* case, but for now, note that the Court did not reach this question because it found in favor of MC's religious discrimination claim on other grounds.[28]

The Colorado Civil Rights Commission ruled in favor of the same-sex couple over MC in its original claim.[29] In separate comments that the Commission did not disclaim, one commissioner stated:

> Freedom of religion and religion has [sic] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[30]

The Colorado state courts affirmed the Commission's decision.[31] Then the U.S. Supreme Court ruled that the Commission had exhibited anti-religious animus, evidenced chiefly in the above quote, and that MC would prevail over the marrying same-sex couple for that reason.[32] The Commission could, presumably, revisit the issue and decide it without evident animus, and the Supreme Court might then be willing to evaluate the Commission's new opinion under the Free Exercise Clause.[33]

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[26] Brief of the Colorado Civil Rights Commission in Opposition at 9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

[27] *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

[28] *Id.* at 1732.

[29] *Id.* at 1723.

[30] *Id.* at 1729 (quoting Transcript of Colorado Civil Rights Commission Meeting, July 25, 2014, 11–12).

[31] *Id.* at 1723.

[32] *Id.* at 1732.

[33] *Id.*

B. The Court's Reaction to a Triggering Analogy

Why did the Court believe that the Commission harbored animus against religion? The content of the statement itself appears to be that *the fact that you are religious and act out of religious motives does not exempt your conduct from criticism and condemnation and further, historically, we have seen people invoke religion when carrying out atrocities*. That statement is surely true, so the objection cannot be that the Commission defamed religion. What might have especially bothered the Court, though, was likely the invocation of slavery and the Holocaust.

When someone offers these atrocities as examples of what people can do in the name of religion, they perhaps betray a negative view of religion. Say, for example, someone asks an observant Catholic why she has ash on her forehead, and she says it is because she is Catholic and observes Ash Wednesday. Imagine that her friend follows up by saying, "you know that a lot of Catholic priests molested children and then were just moved to other congregations to continue their abuse, so you don't want to be doing something just because religious Catholics do it!" The Catholic might feel justifiably offended at that statement, even though it asserts facts. Putting ash on one's forehead is unobjectionable, so there is no need to reference Catholic priests who have done horrible things or to invoke a specific and scandalous example.

Refusing to sell a same-sex couple a wedding cake, however, is different from placing ash on one's forehead for the holiday. The former is hurtful and exclusionary. It is probably for this reason that a commissioner saw fit to bring up admittedly far more serious historical atrocities; refusing to engage in commerce with a same-sex couple might have looked like it stemmed from similarly antiquated and invidious bigotry that would have given rise to the larger past injustices. From the point of view of the Supreme Court, however, it appeared that MC had done nothing wrong or nothing especially hurtful—in refusing to serve the same-sex couple—so long as the refusal was the product of religious faith, particularly given that same sex couples could easily find other bakers willing to serve them. From the Court's perspective, a comparison to atrocities could not have come from a genuine grievance, so it must therefore have reflected animus against religion.

The Court was coming from a standpoint of tolerance for what MC did, just as any sensible person would feel tolerance for the ash on the Catholic woman's forehead. No need, under these circumstances, to invoke historical atrocities or misconduct. The Court thus might have viewed the putative

perpetrator of sexual-orientation-based discrimination as engaged in relatively anodyne conduct that should not have triggered any reference to atrocities in the name of religion. Viewing things in this way, it would be natural to conclude that the commissioner and therefore the Commission, which failed to take issue with the bigoted statement, were in fact discriminating against MC by speaking of atrocities justified in the name of religion.[34]

For the Court to have viewed the commissioner's words as comparable to the above example required the Court to regard what MC did to the same-sex couple with empathy. Why? Because unlike wearing ash on one's forehead, a place of public accommodation refusing to serve a couple because the couple consists of two men or two women is illegal. The illegality under state law of this private discrimination stems from the fact that many people, apparently including Colorado lawmakers, believe it is morally wrong. It is wrong for the same reason that race discrimination is wrong. It denies people full participation in the marketplace on account of an invidious classification. Such discrimination does not merely deny a person the opportunity to buy a product, a denial for which some other willing vendor might be able to compensate. It stigmatizes a person and makes him or her feel like an outsider, an exile, a pariah. It also reinforces existing oppressive power relationships at odds with American ideals of freedom and fairness. One of the key attributes that recommends a capitalist "free market" over its alternatives is that any willing customer can walk into any place of business and expect to be served, regardless of race, sex, sexual orientation, religion, or other characteristic.[35]

Freedom from the stigma of discrimination within the market, however, did not, in the Court's estimation, seem to register as a significant enough liberty interest to merit the caustic reply that the commission issued (with the Commission's tacit approval) in response to the denial of that freedom.[36] The

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[34] For an interesting contrast, see Trump v. Hawaii, 138 S. Ct. 2392, 2417–23 (2018) (holding that, despite the history of blatant and explicit anti-Muslim animus behind the Trump travel ban against the entry of travelers and refugees from designated countries into the United States, the cosmetic changes to the ban sufficed to validate it as something other than the discriminatory measure that it plainly was).

[35] *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED, 64, 76–77 (2012) (asserting that "a free market puts a premium on empathy" and that "[i]f you're trading favors or surplus with someone, your trading partner suddenly becomes more valuable to you alive than dead.").

[36] *See Masterpiece Cakeshop*, 138 S. Ct. at 1732.

caustic reply therefore struck the Court as itself discriminatory, much as it would have been discriminatory to mention atrocities by pedophiles and their protectors in response to a Catholic having some ash on their forehead. The Court's empathy for MC was part of its approach to determining whether MC was doing something wrong by refusing to sell a wedding cake to a same-sex couple. In thinking about that question, the Justices in the majority in *Masterpiece Cakeshop* seemed to betray *f* B. the view that if it was wrong to refuse to sell a wedding cake to a same-sex couple, it was not *all that wrong*.[37] It was not wrong enough to justify a response invoking prior religious atrocities. Nothing like slavery or the Holocaust.

C. Masterpiece Cakeshop *in the Mirror*

Now let us apply mirror-image analysis. Imagine the Court taking a similarly empathic stance toward the same-sex couple that came into MC's bakery for a wedding cake. The two men, maybe filled with excitement about this next chapter in their lives, walk into the bakery. The shopkeeper welcomes them and smiles. The two men know that not that long ago, the law not only prevented them from marrying but authorized the police to arrest them for their choice of partner, while police allowed themselves to do a whole lot more.[38] It feels good to be recognized as equal members of society. The shopkeeper asks how he can help them. They grin and say they will be wed and will need a cake for the occasion. They pay him a compliment, saying they have heard that his cakes are beautiful and delectable.

MC is no longer smiling. He tells the men that he would be happy to sell them a loaf of bread or rolls. But he cannot make them a wedding cake. "Why not?" They ask. "We are willing to pay whatever it costs. We can afford it." "I am sorry," he says, "but it violates my religion to sell you a wedding cake." One of the two men becomes visibly upset and says that the baker takes money from people for wedding cakes all day. Why can't he just do the same for them? He does not even know them, after all. They are good people. Seeing that the shopkeeper has made up his mind and will not budge, the other of the two men says, "get ready for a lawsuit, pal. It is illegal to

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[37] *See id.*

[38] Victoria A. Brownworth, *Police violence is LGBTQ history, past and present*, PHILA. GAY NEWS (Apr. 14, 2021), https://epgn.com/2021/04/14/police-violence-is-lgbtq-history-past-and-present/.

discriminate against us." "I am not discriminating," he assures them. "I am just being a Christian."

Mirror-image analysis asks that we take the same friendly approach to the same-sex couple that the Court took to the baker. Doing so, we note how very insulting and unkind it was to refuse service to the couple. We feel for the men, just as the Court felt for the baker. It would be humiliating for anyone to hear that a store open to the public would not serve them because of their sexual orientation (or because of what amounts to the same thing, their wish to marry someone of the same sex). A refusal to serve customers based on sexual orientation also reinvigorates a properly receding oppressive social structure that long denied LGBTQ+ citizens full access to, and participation in, society.

Empathizing with the couple, we would ask whether the baker sincerely believed that his religion prohibited him from selling a wedding cake to the men. As a particular sort of Christian, he might believe himself to be prohibited from having sex with a man, and he probably could not officiate at a same-sex wedding because that would make him a quasi-partner in the union. But was it truly the case that he could not sell a wedding cake to a same-sex couple? We can suppose he believed in this interpretation, but lending our generosity to the couple, as the Court did to the baker, we might wish to consider whether MC treated some similarly situated sinners differently, which seems likely (as discussed below), just as the commissioner might have spoken less harshly of nonreligious actors who violated antidiscrimination law. Indeed, one way to determine whether a party is engaged in illicit discrimination is to examine how broadly that party applies its own stated criterion in comparable situations.[39] Let us accordingly consider who else should have been unable to shop at the bakery.

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[39] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring) (enjoining enforcement of occupancy limits in places of worship because "New York's restrictions on houses of worship not only are severe, but also are discriminatory. . . . In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction."); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (Statement of Gorsuch, J.) (supporting the Court's injunction against enforcement of a prohibition on indoor worship services because "California has openly imposed more stringent regulations on religious institutions than on many businesses."); Gateway City Church v. Newsom, No. 20A138, slip op. at 1 (Feb. 26, 2021) (similarly granting injunctive relief against Covid regulations to religious institutions because the

As a matter of Christian doctrine, as generally understood, people must believe in God and must also believe that Jesus died for their sins. A failure to believe is a sin.[40] What if a straight couple walked into MC, and they were wearing matching T-shirts featuring the Flying Spaghetti Monster? They would thereby have designated themselves as atheists. It is sinful not to believe in God and Jesus. Would the Christian baker sell the couple a wedding cake? Absent evidence to the contrary, the answer is almost certainly yes, notwithstanding religious objections to nonbelief.[41]

Next, imagine that a mixed-religion, straight couple came in. The man was Christian and the woman was Jewish. They each wore jewelry indicating their respective faiths. Christian sects assert a variety of views on interfaith marriages, but let us suppose that this baker belongs to one that deems such marriages sinful. Would he sell the couple a cake? Again, absent evidence to the contrary, almost certainly yes.[42] Third, imagine that a man and a woman

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Court's decision in *S. Bay United Pentecostal Church* "clearly dictated" the outcome); Tandon v. Newsom, No. 20A151, slip op. at 3 (Apr. 9, 2021) (per curium) (likewise granting injunctive relief against enforcement of a ban on at-home worship because "California treats some comparable secular activities more favorably than at-home religious exercise."). Notwithstanding the Court's analysis, however, the difference between the stores that were allowed to remain open while churches were ordered to close ought to have been obvious to the Court, given the fact that sitting in church involves prolonged exposure to large numbers of people who are talking and singing, all of which dramatically raises the risk of droplet transmission, while a visit to a market or "bus station[] and airport[], . . . laundromat[] and bank[], . . . hardware store[] and liquor shop[]," *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring), involves relatively brief exposure and relatively little talking, no singing, and therefore a far more limited risk of droplet transmission. In other words, what the Court described as like cases, discriminatorily treated differently, were quite plainly unlike cases, properly treated differently. *Id.* at 65. These shadow docket decisions demonstrate that the Court is sometimes very sensitive to the mere possibility of anti-religious discrimination, even as it is at other times (in the case of the same-sex couples in *Masterpiece Cakeshop* and *Fulton* as well as the Muslims in *Trump v. Hawaii*) oblivious or indifferent to real and palpable discrimination.

[40] *John* 16:9 (New King James), https://biblehub.com/john/16-9.htm ("[O]f sin, because they do not believe in Me."); CATECHISM OF THE CATHOLIC CHURCH, pt. 3, § 1, ch. 1, art. 8(II) (1851), https://www.vatican.va/archive/ENG0015/__P6A.HTM (listing "unbelief" as one of the "many forms" of sin).

[41] Brief Amici Curiae of Lambda Legal Defense and Education Fund, Inc., One Colorado, and One Colorado Educational Fund in Support of Appellees at 4, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (describing the baker's "routine willingness to serve those of faiths different from his, as well as atheists and interfaith couples").

[42] *Id.*

came into the bakery and the woman was visibly pregnant, wearing a T-shirt that says "a choice, not a child"—referring to abortion—on it. Most religious Christians believe that abortion is tantamount to murder. Could our baker, consistent with his beliefs, nonetheless sell a wedding cake to these customers? Once again, we can assume, absent contrary evidence, that the answer is yes, even assuming the baker personally holds the anti-abortion views of his church.[43] Why? Because common experience tells those of us who have frequented the businesses of devout Christians that Christian salespeople generally do not require their customers to conform their conduct to the salesperson's religion. Out of all the sinful people that might walk into the bakery seeking to buy a wedding cake, then, so far as we know, MC refuses wedding cakes only to people from the LGBTQ+ community.[44]

Recall the Court's reaction to the commissioner having mentioned the Holocaust and slavery to make a point about how people sometimes invoke religion to justify evil acts. The Court plainly believed that to compare the actions of MC in refusing to provide a same-sex couple with a wedding cake to such atrocities was grossly disproportionate, so much so that it evidenced animus against religion. A similarly empathic stance toward the same-sex couple that visited the bakery would give rise to a corresponding sense that refusing to sell the two men a wedding cake was insulting and disproportionate relative to the fact that a couple planning to marry within their sex had walked into a Christian's bakery. We can tell that refusing to sell them a wedding cake goes too far because opposite-sex couples with sinful lifestyles walk into the bakery all the time and find a baker who is happy to sell them a wedding cake.

Were MC to turn away every couple that rejects the beliefs, customs, or marital directives of even mainstream Christianity, he would quickly find himself out of customers. He therefore instead makes the uniquely insulting choice to turn away business from a same-sex couple. That looks like anti-

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[43] *See id.*

[44] Indeed, the only other apparent suit against MC for refusing service to a customer also involved discrimination against the LGBTQ+ community; MC was again a defendant in a suit over its refusal to sell a blue birthday cake with pink frosting to a transgender woman after discovering that she sought to celebrate her transition. Scardina v. Masterpiece Cakeshop, Ltd., No. 2019CV32214, slip op. 1, 5 (Dist. Ct. Denver June 15, 2021). However, it is worth noting that having to bake a special pink and blue cake to specification might be different, for free speech purposes, from having to sell a same-sex couple a generic wedding cake just as the baker would sell an opposite sex couple the same generic wedding cake.

queer animus that tracks societal prejudice rather than simply fidelity to the tenets of Christianity.

One might contend that out of all the sins that engaged couples commit while getting married, the worst of all—from the point of view of some version of Christianity—is homosexuality. If that is so, then the argument that MC should have been excluding other sinners as well if it was excluding same-sex couples for religious reasons might be weaker because MC would no longer be treating like cases differently; it would instead be singling out the most serious transgression for the most severe measure. On the other hand, given the breadth and depth of Christianity, one might have reason for skepticism regarding the sincerity of a claim that the core commitment of Christianity is an opposition to homosexuality and to same-sex marriage.

Had the Supreme Court applied the sort of analysis to MC's behavior that it applied to the conduct of the Commission (and specifically to the words of the commissioner) reviewing MC's behavior, it would have said something like the following: We believe that the Commission is discriminating against religion because one of its commissioners (without contradiction by others) speaks of religion as though it belongs in the same conversation as slavery and the Holocaust, thereby treating unlikes alike, with religion getting the short end of the stick. Analyzing MC's behavior similarly, we observe that MC is refusing to sell wedding cakes to same-sex couples even as it sells wedding cakes to other couples whose planned wedded lifestyles substantially deviate from what MC's faith prescribes. By singling out LGBTQ+ couples for exclusion from its wedding cake business, MC therefore treats like cases differently, a move that signals discrimination in just the way that treating distinct cases alike does. Though the Commission would register as a wrongdoer, so would MC in its discriminatory conduct for which religion here offers only an apparent but not an actual explanation, given its underinclusive application.

Had the Supreme Court ignored the allegedly animus-based thinking of the Commission, we would have a different sort of comparison to draw. Aside from the free speech issue that I regard as potentially difficult, consider what the conflict would look like. On one side would be the same male couple walking into the bakery seeking the opportunity to purchase a wedding cake. On the other side this time would be the application of anti-discrimination law to a religious man who says he cannot sell a wedding cake to the same-sex couple because doing so would violate his religious obligations. For MC to prevail under *Smith*—the standard that the Court said it was applying and

that we will therefore assume that it was applying—we would need to find a way to construe the application of anti-discrimination law *to* MC as discrimination *against* MC based on religion.

II. CATHOLIC SOCIAL SERVICES AND DISCRIMINATION ASYMMETRY

A. The Catholic Social Services Claim

To see how the conflict would work, let us turn to a case in which the Supreme Court addressed what was essentially the same fight as we saw in *Masterpiece Cakeshop* but on the merits. *Fulton* involved the foster care system in Philadelphia. The city contracted with various private foster care agencies to review and certify applicants for fostering children in the system.[45] If you wanted to foster children in Philadelphia, you could go to one of the agencies, and it would review your qualifications and conclude that you either were or were not qualified to be a foster parent.

One of the parties to the dispute was Catholic Social Services ("CSS"), a foster care agency that had a contract with the city.[46] CSS believed, as a matter of religious faith, that marriage was a sacred bond between a man and a woman.[47] CSS accordingly refused to review and certify couples that were unmarried or that consisted of two people of the same sex, even if they were married.[48] The city told CSS that if it did not drop its refusal to certify same-sex married couples, the city would stop referring children to the agency and refuse to enter future foster care contracts with CSS.[49] CSS intended to continue its bar against same-sex couples and brought a lawsuit claiming a violation of its Free Exercise right to practice its religion without suffering discrimination and seeking to enjoin the city from terminating its contract with CSS.[50]

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[45] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875 (2021) (explaining that the city "enters standard annual contracts with private foster agencies to place . . . children with foster families" and that these foster agencies have "the authority to certify foster families" under the law).

[46] *Id.* at 1874.

[47] *Id.* at 1875.

[48] *Id.*

[49] *Id.* at 1875–76.

[50] *Id.* at 1876.

The U.S. Supreme Court ruled in favor of CSS, holding that, given the city's broad authority to grant exemptions from the prohibition against discrimination, a refusal to grant such an exemption to a religious group failed the "law of general applicability" test of *Smith* and had to meet strict scrutiny, like any discriminatory burden upon religion.[51] Because the City of Philadelphia had the *option* of granting an exemption from the antidiscrimination provision of the contract with CSS but evidently chose not to grant such an exemption to CSS, the Court viewed enforcement of the antidiscrimination provision as falling outside the category of neutral rules that avoid triggering strict scrutiny. In the free speech context, for instance, the Court has gone one step further and subjected a system of granting parade permits—a system that gives the grantor complete discretion to deny permits for whatever reason they like—to strict scrutiny (which the parade granting system would likely fail) under the First Amendment.[52]

B. The Court's Reaction to an Exemption & the Non-Discriminating Alternatives

Let us consider how the Court thought about the facts such that it ultimately concluded that Philadelphia had engaged in anti-religious discrimination. Philadelphia had an ordinance as well as contract provisions in foster-care-agency agreements that prohibited discrimination on the basis of sexual orientation.[53] The city applied the contract provision to CSS by refusing to do business with an entity that discriminated against same-sex couples.[54] The city could have granted (though it did not actually grant any) exemption from the provision, and it is sometimes fair to worry that the discretion to grant permits or exemptions could amount to a cover for discrimination.[55] In the context of an agreement organized around providing

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[51] *Id.* at 1916 (Barrett, J., concurring) (discussing *Smith*'s "law of general applicability" test); *id.* at 1878 (majority opinion) (ruling in favor of CSS because the city's non-discrimination law was not generally applicable).

[52] *Id.* at 1878.

[53] *Id.* at 1875.

[54] *Id.* at 1875–76.

[55] The Court has, in other areas, treated a public official's boundless discretion to decide whether to grant or deny a privilege as tantamount to discrimination in the provision of that privilege. In the context of freedom of speech, for example, the Court has invalidated speech-licensing schemes that afford the licensing official unlimited discretion to decide whether to

foster care for children, however, the Court might have best exercised constitutional avoidance and understood any discretion in applying contractual rules as narrowly dedicated to furthering the interests of the foster children. Given that the city had not yet exempted anyone from the provisions prohibiting discrimination,[56] it would have made sense to conclude that the city would grant an exemption only if the needs of children in foster care militated in favor of such an exemption.

One could imagine, for instance, that a trans foster child might best thrive in the custody of a trans family rather than a cis family. Rejecting the second for the first family would technically violate the provision prohibiting discrimination based on gender identity.[57] Thus, the apparently never-yet-used exemption would perhaps be available for that kind of a case. Understood in this way, the exemption would have nothing to do with accommodating the *agency* or its special needs. The goal would be to meet the needs of the children while generally avoiding discrimination.

Another context in which a related type of child-centered discrimination might be appropriate is in the placement of African American children.[58] Where the law prohibits race discrimination in adoption or foster care placement, we nonetheless see social work agencies preferring African American parents for fostering or adopting African American children.[59] The

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grant or deny a license. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (parade licensing); Schneider v. New Jersey, 308 U.S. 147, 164 (1939) (leafletting licensing). In the area of search and seizure too, the Court has held that when an officer, in the absence of articulable individualized suspicion, singles out an individual motorist on the road to ask for license and registration, the officer conducts an unreasonable seizure in violation of the Fourth Amendment, though officers may lawfully erect a checkpoint and stop every oncoming driver to ask for license and registration. The main difference between the two is that in the first but not the second, the police exercise unbridled discretion. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979). And in a later case, Michigan v. Sitz, 496 U.S. 444, 454-55 (1990), the Supreme Court, for similar reasons, approved a sobriety checkpoint system in which every driver had to stop. The apparent elimination of discretion removed the possibility of discrimination and thereby changed traffic stops from unlawful to lawful under the Fourth Amendment.

[56] *Fulton*, 141 S. Ct. at 1879.

[57] PHILA. CODE § 9-1106(1) (2013).

[58] Kristie Ann Rooney, *Racial Matching vs. Transracial Adoption: An Overview of the Transracial Adoption Debate*, 53 J. MO. BAR 32, 32 (1997).

[59] *Id.* at 33 ("[C]ourts and adoption agencies often practice a policy of racial matching whereby they strive to place Black children with Black parents and discourage placement

theory for this type of racial preference is that growing up African American in our society is sufficiently distinct from growing up White that an African American child might do better in the home of an African American couple that can teach the child how to manage the particular struggles that face an African American individual in the U.S. today.[60] This practice is not without controversy,[61] but it stems from the view that on occasion, a race-neutral approach to the placement of children could disserve a child's best interests. One might imagine a similar argument for placing hearing-impaired children with a deaf family, and so on.[62] Once again, by contrast to what CSS did—accommodating its *own* spiritual or other needs—the interests of the agency would play no role in justifying an exemption from the rules against discrimination. The exemption would be for the children whose interests the agency is supposed to be serving.

Although the exemption language in Philadelphia's foster care contract was broad and seemingly boundless, it would have been sensible to assume that in carrying out its responsibilities toward the children, the exemption would apply only if the children's wellbeing at least arguably called for such an exemption.

Nonetheless, the Supreme Court saw the exemption provision very differently. To understand the Court's perspective, it is useful to recall a fact that the Court highlighted in its opinion: *other* contracting agencies evaluating foster care applications were willing to review a same-sex couple's qualifications, a willingness that meant that same-sex couples would

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with white parents."); Ezra E. H. Griffith & Rachel L. Bergeron, *Cultural Stereotypes Die Hard: The Case of Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY L. 303, 303 (2006) (noting that despite "statutory efforts . . . meant to promote race-neutral approaches to adoption . . . , the cultural preference for race-matching in the construction of families remains powerfully ingrained"); Jessica M. Hadley, Note, *Transracial Adoptions in America: An Analysis of the Role of Racial Identity Among Black Adoptees and the Benefits of Reconceptualizing Success Within Adoptions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 689, 692 (2020) (pointing out that, despite prohibitions against the consideration of race in adoptions, "some states have allowed race to be considered as one factor among many others").

[60] Rooney, *supra* note 59, at 33 (citing NAT'L ASS'N OF BLACK SOC. WORKERS, POSITION STATEMENT ON TRANS-RACIAL ADOPTIONS 2 (1972)).

[61] Griffith & Bergeron, *supra* note 60, at 305 ("Race-matching has been and remains an influential and controversial concept regarding how best to construct adoptive families.").

[62] Barbara White, *When Deaf Parents Adopt Deaf Children: An Investigation of the Concept of Adoptive Parent Entitlement in Deaf Adopted Families*, JADARA, Oct. 2019, at 1.

allegedly lose nothing from CSS's refusal to consider their applications.[63] From the Court's perspective, CSS was doing the best it could, given its religious commitments, and a same-sex couple would have had many other agencies from which to choose.[64] Indeed, no same-sex couple had ever asked CSS to review their application to become foster parents.[65] The Court thus saw same-sex couples as having plenty of options for becoming eligible to foster children, so long as they did not insist on being serviced by the one agency that—due to religious commitments—was unable to offer its services.[66]

Because alternative, non-discriminating, agencies were available, the Court did not see the same-sex couple as suffering any real harm.[67] CSS was able to fulfill its religious requirements, and same-sex couples could become foster parents by undergoing review with a different agency.[68] CSS even offered to help couples find another agency, thus manifesting its lack of animus toward the couple.[69] If CSS was doing everything it could, and if same-sex couples could readily get what they wanted elsewhere, then only an animus towards religion would lead the City of Philadelphia to terminate its contract with CSS.[70] Unlike a same-sex couple seeking to foster a child,

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[63] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1886 (2021) (observing that according to the record, if a same-sex couple were to approach CSS, "CSS would simply refer the couple to another agency that is happy to provide that service—and there are at least 27 such agencies in Philadelphia") (citing App. 171; Petition for a Writ of Certiorari, *supra* note 6, at App. 137a).

[64] *See id.* at 1886, 1930 (Gorsuch, J., concurring) (mentioning that "dozens of other foster agencies stand willing to serve same-sex couples").

[65] *Fulton*, 141 S. Ct. at 1886.

[66] *Id.* (noting that, due to the plethora of other agencies serving same-sex couples in Philadelphia, "not only is there no evidence that CSS's policy has ever interfered in the slightest with the efforts of a same-sex couple to care for a foster child, there is no reason to fear that it would ever have that effect").

[67] *Id.*

[68] *Id.*

[69] *Id.* at 1930 (Gorsuch, J., concurring) ("CSS is committed to help any inquiring same-sex couples find those other agencies").

[70] To be sure, the Court says it is not looking for animus as the test of a Free Exercise violation but is instead faulting Philadelphia for applying a contractual provision that is not generally applicable because the city reserves the right to offer exemptions but did not offer one to CSS for its religiously motivated noncompliance. *See id.* at 1877. Still, the claim that

moreover, CSS would suffer a serious setback from the termination of its contract with the City of Philadelphia.

From the Court's perspective, instead of appreciating and acknowledging how well the Catholic agency had worked things out and instead of accordingly going forward with all contracts intact, the City of Philadelphia sought to punish the religious organization for its actions. Other parties contracting with the city perhaps would not lose their contracts for offering compromises and for trying to make everything go smoothly. Yet, when a religious party was unwilling to stick to the contract when the provision creating a conflict was an anti-discrimination rule that interfered with the party's religious beliefs, the city inflicted a discretionary, severe penalty on the religious party.

The above description of what the City of Philadelphia did is how we might most charitably construe the claim that the city did more than just fail to accommodate religious practice. Such a failure would seem to violate *Sherbert* or Christian privilege or a most-favored-nation approach if we lived in the pre- or post-*Smith* universe. The Court's view instead was that the city, by retaining the authority to offer an exemption while simultaneously refusing to grant such an exemption for religious reasons, effectively discriminated against CSS because of its religion, a claim that falls within the *Smith* standard.

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the Court isn't looking for animus is unpersuasive here. Part of why the Court highlights a failure to grant an exemption to a religious actor is that the failure signals subjective animus on the part of the government. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, for instance, where the Court applied *Smith* to strike down an animal sacrifice ordinance, the existence of exceptions to the putatively neutral legal principle of furthering public health or animal protection goals revealed the animus of the City of Hialeah, Florida, toward practitioners of the Santeria religion. 508 U.S. 520, 542 (1993) ("[T]he pattern we have recited discloses animosity to Santeria adherents . . . . [T]he texts of the ordinance were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."). If someone gets—or could get—an exemption from the rule for a non-religious pursuit but the religious party gets no exemption for a religious pursuit, then the government appears to be engaged in purposeful discrimination based on religion. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 500 (1989) (asserting that the Court must "'smoke out' illegitimate uses of race" by subjecting any legislation containing racial classifications to strict scrutiny because "[r]acial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice"); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 436–37 (1997) (describing "[h]eightened scrutiny of a racial classification" as "a test of ulterior state interests," which functions "to smoke out illegitimate purposes" and "permits a court to conclude, in effect, '[i]f the state were really interested in race-neutral purpose x, it would not have done what it did'").

We caught a hint of the Court's perspective on the conflict during oral argument. Justice Kavanaugh said to Neal Katyal, the lawyer representing the City of Philadelphia, that the city "was looking for a fight . . . even though no same-sex couple had gone to CSS," characterizing the city's position as "absolutist and extreme."[71] According to Justice Kavanaugh's line of questioning, making extreme demands of a religious entity that would require the entity to violate its own faith sounds a lot like anti-religious discrimination. Further, people need to be able to work together, as working together is a sign of mutual respect. Here, CSS was prepared to work with any same-sex couple to find an agency better suited to the couple's needs. And any same-sex couple that might have come to CSS for an evaluation should have been willing, in the interests of cooperation and religious tolerance, to go to a different agency to form their family. Thus, the city taking the extreme position that it did, reflected an anti-religious sentiment. A win-win solution was available, and Philadelphia, on behalf of same-sex couples looking to foster children, chose to reject that solution and instead to seek a win-lose proposition, thereby manifesting hostility to religion.[72]

C. Catholic Social Services: Coercion in the Mirror

Now let us conduct mirror-image analysis. What if the Court had applied this sort of reasoning—the reasoning that allowed it to identify anti-religious discrimination by Philadelphia against CSS—in analyzing the same-sex couple's predicament? As in the Masterpiece Cakeshop scenario, we might have a gay couple, this time seeking the opportunity to foster one of the many children living without the support of either parent. Many sincere and kind people become foster parents because they are generous and wish to share their home with a child in need, perhaps in preparation for adopting the same or a different child. They might feel good about what they are doing, especially because their actions will also save a child from the unscrupulous individuals who sometimes become involved in the foster care system.

The hypothetical couple might approach one of the agencies hired by the government to carry out what is essentially a government function: to review

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[71] Oral Argument at 1:16:10—17:24, *Fulton*, 141 S. Ct. 1868 (No. 19-123) (Kavanaugh, J.), https://www.oyez.org/cases/2020/19-123.

[72] *Id.* at 1:15:41–15:54 (Kavanaugh, J.) ("There are strong—very strong feelings on all sides that warrant respect. And it seems like we and governments should be looking, where possible, for win-win answers.").

the couple and determine whether they are qualified to foster a child. The couple would walk in the door and find a receptionist who might look from one to the other and then shake her head, confirming that they are a same-sex couple and explaining that the agency is Catholic but that she could give the couple a list of other agencies that would serve a same-sex couple.

"What's the problem?", one member of the hypothetical couple would ask, while the other remembers how things were not so long ago, when bullying queer people was even more widely accepted and prevalent. This member of the couple feels herself returning to earlier traumas but tries to remain present. Maybe she and her partner are the wrong age? The receptionist confirms their worst fears and says the agency would not evaluate them as foster parents because they are a same-sex couple. The first woman assures the receptionist that the two of them are eager to take good care of a child in need, that they have a peaceful and loving home, a big yard where the child could play, and a marvelous kitchen for baking cookies and cupcakes and preparing healthier snacks as well. And the child would have a dog, a lab-shepherd mix who has qualified as an emotional support animal and is gentle and friendly and playful.

The receptionist begins to look bored. She explains that none of those things matter. What matters is that the couple is made up of two women, and under Catholicism, only people of the opposite sex are supposed to marry and form a sacred union, not two people of the same sex.

The hypothetical receptionist at this point might once again offer to direct the couple to an agency that does not regard same-sex relationships as sinful and disqualifying. The couple leaves, dejected. They had believed things had changed.

The same-sex couple is warm, kind, and everything else a child could want in foster parents and, indeed, in permanent parents. An agency committed fully to the function delegated to it would have moved with alacrity to get the process moving so that a child in need could find comfort, safety, and happiness, perhaps for the first time in her life. And note that just as Philadelphia did not even consider granting CSS an exemption from the anti-discrimination requirement, CSS did not even consider making an exception to its rule against reviewing same-sex couples for people who would have offered a child a wonderful home and everything that a child could wish for.

CSS, moreover, did arguably offer a different exception to its rule rejecting sinful families. The exception would have applied to virtually every

couple that failed to embrace a Catholic lifestyle in some way other than living with an opposite-sex partner, without benefit of marriage, or living with a same-sex partner with or without the benefit of marriage. And what exactly would have violated the agency's Catholic faith about evaluating a same-sex couple? Saying that the couple is qualified under the rules to foster a child? Treating two women as though they could give a child a safe and supportive environment?

Consider a parallel to the Court's focus on what the hypothetical same-sex couple (represented by the City of Philadelphia) could have done instead of insisting on being evaluated by the Catholic Agency. Think instead about CSS's alternative course of action. In place of refusing to evaluate any same-sex couples, CSS could have completed an evaluation and then written on the qualification form that CSS, as a matter of its religion, rejects the practice of same-sex marriage. Then no one would make the mistake of attributing endorsement or even tolerance of different lifestyles to CSS. Picking up on a proposal in the city's brief, Justice Breyer made this suggestion to CSS's attorney during oral argument,[73] but the lawyer rejected the proposed compromise out of hand.[74] And in the majority opinion, the Court said that CSS believed that approving a home for foster children constituted an endorsement of the couple's relationship, a view that the Chief Justice said we must accept even if it is illogical; a view that seemed to manifest the very sort of rigidity and unwillingness to compromise that the Court identified with the City of Philadelphia.[75]

The Court apparently believed as well that a same-sex couple's ability to go to a different agency, and CSS's willingness to assist them in doing so, neutralized any discrimination. But is that a reasonable belief? Would a foster care agency that barred African American couples or mixed-race couples be treating such couples neutrally and equally just so long as the discriminating

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[73] *Id.* at 0:06:48–07:00 (Breyer, J.) (referring to the city's brief and telling CSS's lawyer that CSS could "add something onto any response you make and say that you do not endorse same-sex marriages").

[74] *See id.* at 0:07:24–07:45 (response of Lori. H. Windham) (pointing to the lower court record to assert that from the perspective of CSS, "a home study is essentially a validation of the relationships in the home").

[75] *Fulton*, 141 S. Ct. at 1876 ("CSS believes that certification is tantamount to endorsement. And 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" (quoting Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981)).

agency was willing to direct them to an agency that did not discriminate? Does discrimination only "count" when everyone discriminates?

Furthermore, if CSS truly believed that its religion prevented it from evaluating the foster-parent qualifications of people who violate Catholic religious dogma, then why did it single out same-sex couples? After all, most people—and therefore, probably, most people who seek to become foster parents—are not Catholic or at least do not obey the requirements of Catholicism in their homes. Did CSS refuse to evaluate lapsed Catholics, religious Protestants, Jews, Muslims, Hindus, Buddhists, and atheist couples because they do not observe Catholic rules of conduct or believe what Catholics are supposed to believe?

How about mixed Catholic/non-Catholic couples? And couples who slept together before they were married? What of couples that include a woman who made the decision to terminate a pregnancy and stands by that decision? And couples in which the male masturbates from time to time, thereby spilling his seed in violation of Biblical law?[76] How about heterosexual couples that engage in sodomy? And if CSS would not know which couples were sinful because their sins were hidden, then did CSS at least hand people a list and ask that if they answered "yes" to any of the questions ("Does the would-be foster father masturbate? Does the would-be foster mother have in her possession the morning-after pill?")? Do they suggest another agency to evaluate those sinners?

I suspect that CSS did not hand out a list of this kind. Why not? Because somehow, out of all the sins of married potential foster parents in which CSS would allegedly be complicit by evaluating their qualifications to be foster parents, only same-sex marriages made the cut. Applying the most-favored-nation approach symmetrically would thus lead to the conclusion that CSS was not evenhandedly applying its religious tenets but rather disfavoring—discriminating against—same-sex couples, treating them as a "least favored nation."

There exist, it turns out, state laws that function—within this argument about selective (discriminatory) religious practice—as a double-edged sword: they bring into sharp relief the comparative dishonesty of CSS's policy regarding same-sex couples, but they also unveil the shocking

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[76] *Genesis* 38:9–10 (King James), https://www.bible.com/bible/1/GEN.38.9-10.KJV ("And Onan knew that the seed should not be his; and it came to pass, when he went in unto his brother's wife, that he spilled it on the ground, lest that he should give seed to his brother. And the thing which he did displeased the LORD: wherefore he slew him also.").

potential of what the Supreme Court has now blessed for religious people who contract with the government to carry out government functions like the evaluation of would-be foster parents.

As of 2019, eight states had laws in place that allowed contracting agencies to use an expansive list of religious criteria to exclude foster-parent applicants, criteria that were not always Catholic-friendly.[77] In South Carolina, for instance, a private agency screened out Catholics, Muslims, Buddhists, Hindus, atheists, agnostics, and Jews.[78] Not a model of subtlety, the initial screening form asked for "contact information of your pastor" along with the potential parent's "testi[mony] to [her] salvation."[79]

The potential breadth of complicity-based refusals to serve a couple wishing to foster a child thus goes well beyond LGBTQ+ people and reaches even those who practice the same religion that the Court in *Fulton* bent over backwards to accommodate. In one respect, such agencies are therefore even worse than CSS, which only refuses queer couples, because it excludes so many more people. But in another respect, CSS is worse because it treats similarly situated parties—those whose family lives conflict with the dictates of Catholicism—differently, with most sinners arbitrarily spared exclusion.

Treating like cases differently is the definition of discrimination. Selecting in the way that CSS did therefore manifests prejudice against sexual minorities and exposes as false the claim that excluding same-sex couples simply reflects sincere dedication to religious requirements. An empathic stance toward the same-sex couples seeking to foster a child would have, first, identified sexual-orientation-based animus in CSS for its failure to exclude most other married couples who failed to embrace the religious principles of Catholicism, and it would simultaneously have considered the potential breadth of complicity-based arguments for many groups beyond sexual minorities.

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[77] Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, JEWISH TELEGRAPHIC AGENCY (Feb. 5, 2019, 5:46 PM), https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish; *Equality Maps: Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/religious_exemption_laws (last visited July 24, 2021) (listing states with current religious exemption laws allowing state-licensed agencies to discriminate).

[78] Currie, *supra* note 78.

[79] Brief of ADL (Anti-Defamation League) and Other Organizations as Amici Curiae in Support of Respondents at 7 n.7, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (quoting Currie, *supra* note 77).

III. EXTRAVAGANT CLAIMS AND COERCION ASYMMETRY

A. The Scope of the Supreme Court's Free Exercise Perspective

We have, up until now, focused largely on the Supreme Court's discrimination analysis as applied to those enforcing Colorado Civil Rights law and those trying to enforce a contract provision prohibiting sexual orientation discrimination in Philadelphia. We have seen that when we apply the Court's standard for identifying (religious) discrimination by respondents to the parties originally charged with sexual orientation discrimination, the petitioners, we find straightforward discrimination against same-sex couples and a rather weak defense of purely religiously motivated action. It is fair, in addition to noting the drastic under-inclusiveness of MC's refusal to sell wedding cakes to, and CSS's exclusion of, LGBTQ+ couples, to ask how exactly the two entities would have transgressed against their religion by serving same-sex couples in the ways that they refused to do. In answering this question, we might consider what it would mean for the other side of each litigation to make similar demands of the religious parties, the petitioners.

Until recently, Free Exercise claims at their most robust typically identified some way in which a religious person or entity would have to commit a sin if they conformed their conduct to the law or to the requirements of a public workplace or an institutional setting. For example, a religious Jew might complain that Sunday closing laws forced him to choose between violating his Sabbath and being unable to compete with Christian vendors who work six days a week (the Jew would unfortunately lose that case under *Braunfeld v. Brown*[80] and *McGowan v. Maryland*).[81] Or a Muslim employee might want lighter tasks during the period of Ramadan or might want to be allowed to grow a beard despite a rule requiring employees to be clean-shaven. Even Hobby Lobby simply demanded the right not to offer health insurance covering contraceptives prohibited by the proprietors' religion—

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[80] 366 U.S. 599, 606 (1961) (rejecting Jewish merchants' Free Exercise challenge to a statute mandating that stores close on Sundays because the legislation "imposes only an indirect burden on the exercise of religion").

[81] 366 U.S. 420, 459, 452 (1961) (holding that a statute proscribing certain work on Sunday does not violate the Establishment Clause because the state has the power to "set one day apart from all others as a day of rest," and "[i]t would seem unrealistic . . . to require a State to choose a common day of rest other than that which most persons would select of their own accord").

morning-after birth control that they (erroneously) believed functioned as an abortifacient.[82] None of these cases involved the right of a public accommodation to refuse service to people because *those people* did not follow the dictates of the religious person's faith.[83]

To get a sense of what the religious parties' successful Free Exercise claims would look like in the hands of a nontraditional claimant, consider a person who subscribed to ethical veganism as a part of Jainism, a religion that emphasizes "ahimsa" or nonviolence.[84] Say this person, whom we'll call "Veronica," considered homosexual activity innocuous but believed the consumption of animal products like chicken, beef, or cheese to be sinful, harmful, and wrong because it requires the torture and killing of sentient living beings. Assume Veronica worked in a prison and was required to stay in the main building for most of her 12-hour shift. A sensible Free Exercise claim from Veronica might be one in which she asked her government employer to either supply her with vegan food at lunch or allow her to bring

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[82] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683, 702 (2014) (explaining that Hobby Lobby "believe[d] that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point," including, as their fellow petitioners specified, "'morning after' pills"); James Trussell, Elizabeth G. Raymond & Kelly Cleland, *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy* 6 Contempt. Readings L. & Soc Just. 7, 16 (2014) (explaining that studies show that morning-after pills, or emergency contraceptive pills, "are not abortifacient" because they "do not interrupt an established pregnancy").

[83] To be sure, Hobby Lobby was making a similar complicity argument. However, by covering insurance for contraceptives, the employer purchasing the coverage would have a better claim of having had to participate in the sinful activity (using the contraceptives) than an agency that refuses to evaluate non-sex-related attributes of two men or two women for foster parent status has of having had to participate in same-sex sexual relations or marriage. The Court in *Fulton* denies that CSS functions as a public accommodation because it is very selective rather than welcoming all comers. *Fulton*, 141 S. Ct. at 1880 (stating that "foster care agencies do not act as public accommodations in performing certifications" because "[c]ertification is not 'made available to the public' in the usual sense of the words" (quoting Phila., Pa., Code § 9-1102(1)(w) (2016))). However, the Court here describes things at too high a level of generality. The agency is supposed to welcome everyone who shows up for an evaluation. Its selectivity should happen only once the evaluation begins, and some people prove to be more qualified to serve as foster parents than others. It is not a matter of equal outcomes but of equal opportunity.

[84] M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 WIS. ENV'T L.J. 3, 22 n.181 (2002) (quoting Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RTS. L. REV. 259, 283–85 (1987)).

her own outside vegan food into the penitentiary despite, let us say, a general rule against outside food. To refuse Veronica is to compel her to violate her religion or go hungry for her entire shift.

If Veronica were like CSS, however, she might go much further and say that working in a prison and performing services with and for guards and prisoners who would be eating animal products in the building violated her religion. Veronica might explain that she, as a prison employee who sometimes had to take prisoners and guards from place to place on a bus, viewed busing prisoners to a building for a flesh-centered meal, for instance, as an endorsement of their flesh consumption in violation of her religion. She might accordingly demand that the prison serve only vegan food to prisoners.

In truth, any ethical vegan would regard this idea as wonderful, but the question here is whether it would violate the Free Exercise Clause for the government to refuse to accommodate Veronica in this extravagant way, for the prison only to give her a vegan allowance (whether by supplying vegan food to Veronica or by giving her permission to bring in her own vegan food) but for it to continue to serve flesh, eggs, and dairy to prisoners and guards. It would not even occur to any court to regard the latter as a Free Exercise violation, no matter how strongly Veronica might believe she is endorsing carnism[85] by bringing prisoners or guards to a building where they will consume the remains of slaughtered creatures and their reproductive secretions. If Veronica could not handle doing her job in a nonvegan workplace, then she would need to find another job.

In a far less ambitious program, WeWork, a commercial real estate company that designs and builds shared spaces for entrepreneurs and companies, announced in 2018 that it would no longer be serving red meat, pork, or poultry at company functions and would not reimburse employees for spending money on these foods for lunch meetings and the like.[86] Employees were still free to buy their own meat, but WeWork would not be paying for it. Still, the reaction was fast and furious.

In a New York Times article titled "Memo From the Boss: You're a Vegetarian Now," David Gelles referred to WeWork's policy as a vegetarian mandate and claimed in the first line that "WeWork is no longer a safe space

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[85] According to Dr. Melanie Joy, "[c]arnism is the belief system that conditions us to eat certain animals." MELANIE JOY, WHY WE LOVE DOGS, EAT PIGS, AND WEAR COWS: AN INTRODUCTION TO CARNISM 30 (10th Anniversary ed. 2020).

[86] Sara Ashley O'Brien, *WeWork Is Banning Meat*, CNN BUSINESS (July 13, 2018), https://money.cnn.com/2018/07/13/technology/wework-meat-ban/index.html.

for carnivores."[87] The policy did not even involve vegetarianism (fish was permissible), but "carnivores" were very upset because they felt that a third party was interfering with their choices on moral (environmental) grounds.[88] One could only imagine how people would react to the workplace veganism mandate I described above, but the backlash would surely be intense.

For similar reasons, few would tolerate an observant Jew demanding that the Post Office where he worked provide or allow only matzoh and other Kosher-for-Pesach food during the holiday of Passover. To argue that it would violate the Free Exercise Clause for the Post Office to permit bread on the premises or to serve the bread (or foods made from bread) to employees would be frivolous. No one has the right to coerce other people to abide by their religion as a matter of Free Exercise, no matter what they believe.

When a petitioner holds to a nontraditional faith, we see this point immediately. And yet, perhaps because the petitioners in *Masterpiece Cakeshop* and *Fulton* were both Christian, we (or at least our Supreme Court) could easily miss the fact that petitioners were coercing non-Christians to conduct their own lives in a Christian fashion, notwithstanding the Court's insistence that CSS "does not seek to impose [its religious] beliefs on anyone else."[89] If people may not use your government-contracted services unless they conform their conduct to the requirements of your religion, then you are engaged in religious coercion on behalf of the government. Same-sex couples seeking to become foster parents would reasonably view such conduct as coercive, and yet the Supreme Court upheld the evident coercion under the Free Exercise Clause. Seen in this light, *Masterpiece Cakeshop* and *Fulton* vindicated a right of Christians to impose traditional versions of Christianity on potential wedding cake customers (because the holding, if they had reached the merits, was rather clear) and potential foster parents.

Worse, the petitioners were not even neutrally imposing their own religion on the public. Applying the same searching approach to CSS that the Court used in assessing Philadelphia's behavior, we have seen that CSS was in fact engaged in anti-queer discrimination rather than simply in the Free Exercise of religion. CSS selectively applied its "no sinners welcome here" lifestyle restriction by failing to exclude all the other lifestyle and relationship "sinners" that applied to become foster parents.

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[87] David Gelles, *Memo from the Boss: You're a Vegetarian Now*, N.Y. TIMES (July 22, 2018), https://www.nytimes.com/2018/07/20/business/wework-vegetarian.html.

[88] *Id.*

[89] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

On top of its under-inclusiveness problem, CSS's behavior manifested over-inclusiveness by rejecting the same-sex couple outright rather than simply expressing its view of same-sex unions on the qualification form. Its preferred approach visited excessive harshness upon the fostering applicants in that way, just as Justice Kavanaugh stated during the argument (and, one suspects, a majority of the Court thought but did not include in the final opinion) that insisting on CSS's services was unnecessarily demanding and harsh given the option of going to other agencies.[90]

B. Mirror-Image Analysis of the Court's Free Exercise Perspective

What if we again employed the kind of mirror-image analysis that helped us better understand the discrimination claims that each religious party brought to the Supreme Court? That process would have us first assume arguendo that it was sensible to extend First Amendment Free Exercise protection to a religious person's or entity's prerogative to refuse service to people whose lifestyles violated the religion of that person or entity, thereby avoiding the appearance of endorsing the prohibited relationship.

In keeping with mirror-image analysis, we thus consider things from the same-sex couple's perspective in each of the two cases we have studied. What would the same-sex couples have had to want from MC and CSS, respectively, to mirror what the two religious entities successfully demanded of the couples? I would argue the following: If either of the couples was in business—for example, selling health insurance—then the couple would have had to have asked for the baker in MC or for the individuals working at CSS to marry people of the same-sex to qualify for the purchase of health insurance.

The above might sound like hyperbole but consider the following: MC refused to sell a wedding cake to a same-sex couple getting married. MC would sell other baked products to the same-sex couple,[91] but only a marrying heterosexual couple could qualify for the privilege of buying a wedding cake

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[90] *Id.* at 1886 (emphasizing that "there are at least 27 [other] agencies in Philadelphia" that would be "happy to provide . . . service" to queer couples (citing App. 171; Petition for a Writ of Certiorari, *supra* note 6, at App. 137a)).

[91] In refusing to serve them, MC told the couple "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1724 (2018) (quoting Joint Appendix at 152, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111)).

from MC. Accordingly, MC's wedding cake policy, by withholding wedding cakes from same-sex couples, pressured gay men and lesbians to marry people of the opposite sex, much in the way that one of the couples selling health insurance in our hypothetical case would be pressuring MC and CSS personnel to marry people of the same sex as a condition of purchasing insurance. No one would honor an entitlement to deny people insurance unless they form a same-sex couple. Yet MC and CSS could, with the Supreme Court's all-but-certain blessing, subject same-sex couples to traditional Christian demands that the couples likely found offensive, sexist, and homophobic, as a constitutionally protected prerequisite to service.

Similarly, CSS would not evaluate a couple for foster-parenting unless the couple consisted of a married man and woman. Single people could apply to be foster parents, to be sure, but then the "single person's" partner would not be the child's foster parent and could not fully perform the functions of an approved foster parent. Moreover, since certification as a foster parent often involves assessment of the entire household and the relationships in it, a person in a queer relationship attempting to circumvent an agency's bar against queer couples by applying to be a single foster parent might not be certified for the same reasons the agency refused to certify queer married couples to begin with.[92]

CSS was thus applying pressure to people in same-sex couples to instead marry people of the opposite sex to qualify for the privileges of foster parents. It would accordingly be parallel for one of the couples to refuse to sell health insurance to opposite-sex couples, creating pressure on straight couples to marry people of the same sex. It might be tough to identify a religion that demanded homosexuality in the way that Catholicism required heterosexuality. But an individual could have personal reasons other than religion for manifesting preferences for some people over others.

An LGBTQ+ group might refuse to sell their highly desirable wooden furniture to traditional couples, requiring that a customer manifest the

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[92] Under New York law, for instance, foster agencies will conduct background checks on all people over 18 years old residing in a foster parent's household when deciding whether to certify the foster parent or renew their certification, N.Y. COMP. CODES R. & REGS. tit. 18, § 443.8(a) (2021). Foster parents must inform agencies of marital status and family composition. *Id.* § 443.3(b)(13). Likewise, in Pennsylvania, agencies also evaluate the entire foster family and consider such factors as "community ties with family" and "[e]xisting family relationships" in certification determinations. 55 PA. CODE § 3700.64(a)(3), (b)(1) (2021). So, if an agency has homophobic biases to begin with, it is unlikely to certify a single person in a queer relationship as a foster parent, even if they do not apply as a couple.

lifestyle of a sexual minority to qualify for service. A straight couple could, of course, take their business elsewhere, to someone who did not condition service on sex-based characteristics. But the fact that not everyone made prejudiced demands would not excuse the prejudice and discrimination of those who did.

This mirror-image analysis offers us a reductio ad absurdum. No same-sex couple would dream of going into court and defending an insistence that would-be customers engage in unconventional sexual relationships as a condition of service. The very idea is ludicrous.

Indeed, no same-sex couple would even want such a thing. Despite defamatory claims to the contrary,[93] same-sex couples typically just ask for the right to have their chosen relationships without outside interference or harassment and have no interest in compelling or even persuading straight people to join the LGBTQ+ community.[94] Yet the extremity of such a hypothetical and utterly counterfactual request—or demand—exposes the extravagance of what MC and CSS were in fact successfully demanding: a Free Exercise right to force same-sex couples to act like religious Catholics (and therefore to marry people of the opposite sex) as a prerequisite to engaging in ordinary commerce at a bakery and to receiving certification as

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[93] Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians Are Harmful to Children*, 21 Duke J. Gender L. & Pol'y 125, 151 (2013); Timothy J. Dailey, *Homosexuality and Child Sexual Abuse*, THE LANTERN PROJECT, http://lanternproject.org.uk/library/general/articles-and-information-about-sexual-abuse-and-its-impact/homosexuality-and-child-sexual-abuse/ (last visited Jul. 8, 2021) (claiming that homosexuality and pedophilia are connected and that employment protection for gay teachers therefore makes children vulnerable to be "'recruited' into adopting a homosexual identity and lifestyle"); Peter Sprigg, *Homosexuality in Your Child's School*, FAMILY RESEARCH COUNCIL (2006) ("[S]ince directly promoting acceptance of homosexuality or of sexual activity by students would be controversial, pro-homosexual activists routinely deny or downplay those aspects of their agenda.").

[94] *See* Evelyn Schlatter and Robert Steinback, The Southern Poverty Law Center, *10 Anti-Gay Myths Debunked*, THE INTELLIGENCE REPORT (Feb. 2011), https://www.splcenter.org/fighting-hate/intelligence-report/2011/10-anti-gay-myths-debunked (referring to "the alleged plans of gay men and lesbians to 'recruit' in schools" as a "myth" or "fairy tale[]" that merely "provided fodder for the[] crusade" of the anti-gay right); HBO: Last Week Tonight with John Oliver, *Uganda and Pepe Julian Onziema Pt. 1*, YOUTUBE, at 12:20 (June 30, 2014), https://www.youtube.com/watch?v=G2W41pvvZs0 (showing a clip from the Ugandan NBS television show *The Morning Breeze* in which queer activist Pepe Julian Onziema stated, "there is no such thing as recruitment of young people or adults or anything like that.").

qualified foster parents by an agency contracting with the city in which the couple lived.

The closest thing to a Free Exercise right to impose one's religion on another person is what parents may do when they raise children in their chosen faith. Parents can insist that their children behave in the manner dictated by the parents' religion, and parents may also punish children who defy their parents and who refuse to conform their conduct to religious teachings. It is a right of discipline and indoctrination. In *Wisconsin v. Yoder*,[95] the Supreme Court held that Amish parents had a Free Exercise right to take their children out of public school after the eighth grade, reasoning that secondary school offered programs and embraced values that were "in sharp conflict with the fundamental mode of life mandated by the Amish religion."[96]

In a partial concurrence and partial dissent, Justice William O. Douglas pointed out that some Amish children might want to expose themselves to the ideas they would encounter in high school and that denying them that opportunity because of their parents' religion protected parental indoctrination at the expense of children's freedom.[97] Justice Douglas's vision of religious freedom—one that respected a minor's wishes notwithstanding a conflicting parental agenda—remains largely unfulfilled. Increasingly, the Court has given effect to its mirror image, and not just with respect to minors.

Notably, all the parties to the recent Free Exercise cases discussed in this article are adults. On one side, the government looked after the equality rights of adults attempting to purchase a wedding cake from a place of public accommodation and of adults trying to foster children in need without confronting discrimination based on sexual orientation. On the other side, adults asserted a religious right that encompassed discrimination against same-sex couples because the latter adults failed to adhere to the religion of the former adults. However, we might choose to handle parent-child conflicts over religion, we must recognize that no adult in this country rightfully holds an entitlement, in the name of religious freedom, to impose the demands of her faith upon another adult.

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[95] 406 U.S. 205, 235-36 (1972).

[96] *Id.* at 217.

[97] *Id.* at 245–46 (Douglas, J., dissenting in part).

CONCLUSION

The Court's Free Exercise doctrine has always allowed courts to assess the sincerity of a claimant's assertion of religious faith as a reason for their behavior. A religious group called the Neo-American Church that embraced the motto "Victory over Horseshit!" was insincere, in the estimation of a district judge who thought the group a front for people seeking to circumvent the drug laws.[98] MC's and CSS's assertions of faith as the reason for their exclusion of same-sex couples from the opportunity to buy a wedding cake and from evaluation for foster parenthood, respectively, were insincere as well. Their actions were substantially underinclusive relative to the many other people who buy wedding cakes from MC and undergo evaluation by CSS without needing to conform their conduct to MC's and CSS's religious requirements. The exclusion of same-sex couples is also overly harsh relative to the option of indicating "dissent" by, respectively, preparing only standard wedding cakes and specifying non-endorsement on the foster-parent evaluation forms, rather than refusing altogether to provide these services to same-sex couples.

If the Supreme Court had applied the definition of discrimination that it utilized for evaluating the respondents in *Masterpiece Cakeshop* and *Fulton* when assessing the religious petitioners in those cases, it would have found their Free Exercise claims meritless. There was a time when observant Catholics in the United States would have been grateful for a Free Exercise jurisprudence that protected their right to practice their religion without government interference. The fact that there are now at least six Catholic Justices[99] on the Court should not shift Free Exercise into a right to engage in the very discrimination and religious coercion that gave rise to the religion clauses in the first place.

With the right lens, we see that both MC and CSS were manifesting anti-queer bias rather than the values of tolerance and good works for which

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[98] *See* United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C. 1968).

[99] Chief Justice Roberts, Justices Thomas, Alito, Sotomayor, (maybe Gorsuch), Kavanaugh, and Barrett are all Catholic. Alyssa Murphy, *6 of the 9 Supreme Court Justices Are Catholic—Here's a Closer Look*, NAT'L CATH. REG. (Oct. 28, 2020), https://www.ncregister.com/blog/supreme-court-catholics; David Crary, Associated Press, *If Barrett Joins, Supreme Court Would Have Six Catholics*, U.S. NEWS (Sept. 26, 2020), https://www.usnews.com/news/politics/articles/2020-09-26/if-barrett-joins-supreme-court-would-have-six-catholics (noting that although Justice Gorsuch is now Protestant, he was raised Catholic).

Christianity is rightly known. We can see this truth most clearly when we take the logic that the Court used to assess the behavior of the respondents in the two cases we have studied and apply the same analysis to the behavior of the petitioners. Rather than offering a mirror image, the two sides of these cases present us with a funhouse mirror, one that distorts reality to such a degree that the Court sincerely perceived discrimination that wasn't there and failed to detect the discrimination that was.