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AMEN OVER ALL MEN: THE SUPREME COURT'S PRESERVATION OF RELIGIOUS RIGHTS AND WHAT THAT MEANS FOR *FULTON V. CITY OF PHILADELPHIA*

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I. INTRODUCTION

Learn to do right; seek justice.
Defend the oppressed.
Take up the cause of the fatherless;
Plead the case of the widow.[1]

The Constitution of the United States of America grants an enumerated list of freedoms and protections.[2] The First Amendment establishes the freedom of religion by stating: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"[3] The Fourteenth Amendment, among other things, establishes the equal protection of citizens of the United States by stating:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[4]

Both amendments are crucial to American way of life. In the simplest of terms, both amendments allow Americans to be just that: Americans. They do this by allowing us as citizens to practice religion freely and ensure citizens are treated equally. Yet, freedom of religion and equal protection constantly collide and create figurative explosions

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[1] *Isaiah* 1:17.
[2] U.S. CONST.
[3] U.S. CONST. Amend. I.
[4] U.S. CONST. Amend. XIV, § 1.

all over the political floor.[5] These "collisions" constantly take center stage at the grandest stage in the country, the United States Supreme Court. The Supreme Court has done a circuitous job in addressing what happens when these two freedoms do in fact collide. When freedom of religion is in tension with protecting equal rights, the Court tends to side with religion.[6]

In the eyes of the general public, the Supreme Court of the United States has been doing well when it comes to equity. Yet these progressive decisions such as *Bostock v. Clayton County*[7] are laced with mechanisms that can possibly create future restrictions and trouble in the future. For example, *Bostock*[8] was a major victory for the LGBTQ+ community but was laced with possible restrictions.[9] Journalist Leah Litman writes in *The Atlantic*, "For example, the opinion went out of its way to suggest that another statute, the Religious Freedom Restoration Act, might prevent Title VII from prohibiting discrimination by employers who have religious objections."[10] Litman suggests that while the decisions are absolutely progressive, the reasoning signals major conservative victories in the future.[11]

The Court also has major difficulty addressing the strain between religion and equity. As this Note will explore, when the Court is confronted with an issue where it has to choose between upholding a religion or upholding equity, it typically reasons its way to side with the Church.[12] The Court's decisions provide little substance and are filled with circular reasoning that focuses in on rather specific facts instead of addressing the big picture.[13] As the Washington Post bluntly states:

> The question we need to ask — and eventually the court will need to resolve — is whether we can settle for an incomplete win that gives both parties some room for those

[5] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1753-54 (2020).
[6] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Little Sister of the Poor Saints Peter & Paul Home v. Pennsylvania,140 S. Ct. 2367 (2020).
[7] 140 S. Ct. 1731.
[8] *Id*.
[9] Leah Litman, *Progressives' Supreme Court Victories Will Be Fleeting*, THE ATLANTIC (July 14, 2020), https://www.theatlantic.com/ideas/archive/2020/07/court-gave-progressives-hollow-victories/614101/.
[10] *Id*.
[11] *Id*.
[12] *See Masterpiece Cakeshop, Ltd*, 138 S. Ct. at 1719; *Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[13] *Id.*

> identities. Or whether creating space for the identity of one minority requires us to make total war on the other.[14]

In this upcoming term, the Supreme Court will confront these tensions between religion and equity.[15] As women and the LGBTQ community have achieved greater equality, these principles have come into conflict with religious freedom, and the Supreme Court has signaled that it will privilege religious freedom over equality.[16] In fact, the battle has been framed to suggest that religious freedom is under attack, and the issue becomes whether it is discrimination against religion to prohibit discrimination against LGBTQ individuals.[17] This battle is seen in *Fulton v. City of Philadelphia*, a case presently pending at the Court.[18] If the Court continues to privilege religious freedom, as it has in *Masterpiece Cakeshop*[19] and *Little Sisters of the Poor Saint Peters & Paul Home*,[20] then it will likely allow discrimination against LGBTQ individuals in the name of religious freedom.

II. FULTON V. CITY OF PHILADELPHIA

The City of Philadelphia currently has contracts with thirty foster care agencies.[21] One of these agencies is Catholic Social Services ("CSS"), an affiliate of the Catholic church.[22] As an affiliate of the Catholic church, CSS "sees caring for vulnerable children as a core value of the Christian faith and therefore views its foster care work as part of its religious mission and ministry."[23] As with every other foster care agency in the state of Pennsylvania, CSS is regulated by the commonwealth of Pennsylvania.[24] CSS is located in Philadelphia and because of this they also have to adhere to regulations imposed by the

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[14] Megan McArdle, *The Tension Between Anti-Discrimination Laws and Freedom of Religion*, THE WASHINGTON POST (June 6, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/06/06/the-tension-between-anti-discrimination-laws-and-freedom-of-religion/.
[15] *See* Fulton v. City of Philadelphia, 922 F.3d 140.
[16] *See Masterpiece Cakeshop, Ltd*, 138 S. Ct. at 1719; *Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[17] *Id*.
[18] *See Fulton*, 922 F.3d at 140.
[19] *Masterpiece Cakeshop, Ltd*, 138 S. Ct. at 1719.
[20] *Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[21] *Fulton*, 922 F.3d at 147.
[22] *Id*.
[23] *Id*.
[24] *Id*.

City of Philadelphia.[25] The City of Philadelphia typically issues one year contracts with all of the thirty adoption agencies it deals with.[26] These contracts contain language that prohibits CSS and other adoptions agencies "from discriminating due to race, color, religion, or national origin, and it incorporated the City's Fair Practices Ordinance, which in part prohibits sexual orientation discrimination in public accommodations."[27] This language created the conflict between the City and CSS.[28]

On March 9, 2018, a reporter from the Philadelphia Inquirer contacted the City of Philadelphia's Human Services Department and reported that CSS and another adoption agency, Bethany Christian Services, would not work with same-sex couples as foster parents.[29] Upon investigation, CSS confirmed this report with the secretary of CSS, stating "that his agency would not certify same-sex couples because it was against the Church's views on marriage and, when told this was discrimination, replied that he was merely following the teachings of the Catholic Church."[30] Upon confirmation of this news, Human Services implemented an "intake freeze," which meant that CSS would no longer be referred new foster children throughout the City.[31] This further prompted the City Council to pass a resolution that authorized the City of Philadelphia Commission on Human Relations to investigate policy that allowed the City to contract with foster agencies that potentially would discriminate against LGBTQ foster parents.[32] In response, CSS filed a lawsuit seeking a temporary restraining order and preliminary injunction.[33] CSS' proposed order would have required the City of Philadelphia to:

> resume providing foster care referrals to [CSS] and permitting children to be placed with the foster families it has certified without delay, to rescind its prior directive prohibiting any foster care referrals to [CSS,] ... to resume all dealings with [it] on the same terms as they had

[25] *Id*.
[26] *Id*.
[27] *Id*. at 148.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*. at 149.
[32] *Id*.
[33] *Id*. at 151.

> proceeded prior to March 2018, and also to resume and to continue operating under the current Contract, without breach, termination, or expiration, or to enter into a new Contract identical in all material respects to the current Contract, while this matter remains pending.[34]

The district court denied the preliminary injunctive relief.[35] The district court found that CSS' claims under the Free Exercise Clause, Establishment Clause, Freedom of Speech Clause, and the Pennsylvania Religious Freedom Act would not succeed on the merits.[36] CSS appealed on the same day.[37]

The Third Circuit affirmed the district court's denial of preliminary injunctive relief, finding CSS would not suffer irreparable harm without an injunction.[38] One by one, the Third Circuit went through each of CSS' claims.[39] The Free Exercise claim did not succeed because the City of Philadelphia non-discrimination requirements were not hostile.[40] The Establishment Clause claim failed because the City of Philadelphia still wanted to work with CSS outside of foster care.[41] The City of Philadelphia did not shun CSS and was willing to continue its business relationship.[42] The Freedom of Speech claim was unsuccessful because the City of Philadelphia did not compel CSS to approve of gay marriage and nor did it retaliate against CSS for its beliefs.[43] The City of Philadelphia was simply imposing regulations and not retaliating because CSS did not approve of gay marriage.[44] The Court, in conclusion, focused in on the fact that CSS' other functions remained unaffected, because the City of Philadelphia would still work with CSS outside of foster case ventures.[45] The Court also focused in on the fact that CSS could work in neighboring counties and that there was no real proof CSS would cease operations without the

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 165.
[39] *Id.*
[40] *Id.* at 159.
[41] *Id.* at 160.
[42] *Id.*
[43] *Id.* at 160-63.
[44] *Id.* at 162.
[45] *Id.*

foster care business.[46] In the eyes of the Third Circuit, CSS did not have a case.[47]

On July 22, 2019, CSS filed a petition for writ of certiorari.[48] On February 24, 2020, the Supreme Court petition was granted.[49] This tension would now be contested in the most important court room in the United States.[50] The Court will be posed with three question:

> (1) Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim — namely that the government would allow the same conduct by someone who held different religious views — as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held; (2) whether *Employment Division v. Smith* should be revisited; and (3) whether the government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs.[51]

The Court will have the opportunity to address the clash between religious freedom and anti-discrimination law.[52] This case could be a major win for the LGBTQ+ community and ensure foster children can be safely taken care of and eventually adopted by caring parents.[53] Yet, on the flip side, the Court can yet again side with religious freedom.[54] As this Note will explore, there is precedent suggesting that the Court will hold for the Church, which has the potential to railroad advances for LGBTQ+ people.

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[46] *Id*.
[47] *Id*.
[48] *Fulton v. City of Philadelphia*, SCOTUS BLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ (last visited Feb. 12, 2021).
[49] *Id*.
[50] *Id*.
[51] *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (finding that the free exercise clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, and thus Oregon could, consistent with free exercise clause, deny claimants unemployment compensation for work-related misconduct based on use of drug.);
Fulton v. City of Philadelphia, *supra* note 48.
[52] *Id*.
[53] *Id*.
[54] *Id*.

III. THE CASES

a. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission

A case that also addressed the tension between freedom of religion and anti-discrimination is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[55] There, a cakeshop owner refused to sell a wedding cake to a same sex couple.[56] The owner of the cakeshop, Jack Philips, was questioned by Colorado Civil Rights Commission where he claimed he was protected under the Free Exercise Clause of the United States Constitution.[57] The Commission and the Colorado Court of Appeals found that the owner discriminated against the couple by refusing to bake them a cake.[58] When this came before the Supreme Court, it gave the Court a real chance to partake in the fight against LGBTQ+ discrimination.[59] With the facts of the case working overwhelmingly in favor of the Colorado Civil Rights Commission,[60] it seemed this would be an open and shut discrimination case. Yet, the Supreme Court did not see it that way.[61]

Instead of focusing in on balancing freedom of religion and anti-discrimination law, the Court fixated in on the alleged hostility the cakeshop owner faced when in front of the Colorado Civil Rights Commission.[62] The Court held:

> For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations o n hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.[63]

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[55] 138 S. Ct. at 1719.
[56] *Id*. at 1720.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*. at 1721-22.
[62] *Id*.
[63] *Id*.

The Court found that the state of Colorado went into the hearing with an already negative view of Phillips' religious views.[64] The Court, understanding the Free Exercise Clause requires neutrality, emphasized the fact that it felt Colorado was trying to make an example of the cakeshop owner and that it was not neutral in any way.[65] The Court all together avoided this clash between anti-discrimination and religion.[66] The Court preserved the rights of a Christian while giving no real guidance as to what should occur when these two very important rights collide.[67]

In her dissent, the late Justice Ginsburg held "the fact that Phillips might sell other cakes and cookies to gay and lesbian customers was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple."[68] Justice Ginsburg found no reason as to why the Court focused more on the Commission's hostility to Phillips rather than the discriminatory actions by Phillips.[69] Justice Ginsburg even pointed out that this alleged hostility differed greatly from the case the Court was relying on.[70] The Court, relying on *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[71] found that the hostility Phillips faced echoed the precedent in *Lukumi*.[72] Yet, as Justice Ginsburg pointed out, the *Hialeah* case involved a single decision-making body violating religious neutrality.[73] In *Masterpiece*, the Colorado Court of Appeals considered the case *de novo* so Justice Ginsburg found it very questionable that the Court focused in on the alleged hostility of the Commission when this case was also heard in front of another neutral court.[74] The decision was poorly reasoned and uplifted Christian and Catholic values over equity. Although a rather lengthy decision, the Court

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[64] *Id*. at 1722.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 1750 (Ginsburg, J. dissenting).
[69] *Id*. at 1751 (Ginsburg, J. dissenting).
[70] *Id*.
[71] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).
[72] *Masterpiece Cakeshop, Ltd*, 138 S. Ct. at 1751-52 (Ginsburg, J. dissenting).
[73] *Id*.
[74] *Id*.

seemingly did not say much at all as to what should be done when religion and equity clash.[75]

So what does *Masterpiece* tell us about how the Court may rule in *Fulton*? If the Court follows the decision it made in *Masterpiece Cakeshop*,[76] this could prove to be a very troublesome decision for the LGBTQ+ community at large. Constitutional scholar Erwin Chemerinsky thinks the *Masterpiece* decision will significantly impact other cases involving this conflict.[77] Chemerinsky wrote:

> Although the Court in *Masterpiece Cakeshop* did not resolve this issue, it did indicate that claims like that of Jack Phillips and Masterpiece Cakeshop were unlikely to prevail under the free exercise clause and *Employment Division v. Smith*. Justice Kennedy's opinion suggested that the free exercise clause will not provide a basis for such refusals of service when there is not the expression of hostility to religion.[78]

In other words, if the Court were to find the "intake freeze" placed on CSS and the way CSS was treated as hostile, that could very much fuel CSS' Free Exercise claim. As Professor Chemerinsky states, "Justice Kennedy could have written the opinion in *Masterpiece Cakeshop* making it clear that businesses have no First Amendment right to discriminate against gays and lesbians. Unfortunately, he didn't, and it may be a long time before there is a majority of the Court willing to do so."[79] The *Masterpiece Cakeshop* decision could mean the *Fulton* decision will be a religious oriented decision that would uphold religious values over something as insignificant as "alleged hostility" without really even giving real weight to the constant discrimination the LGBTQ+ community is facing by religious communities.[80] Simply

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[75] *Id*.
[76] *Id*.
[77] Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/ (last visited Feb. 20, 2021).
[78] *Id*.
[79] *Id*.
[80] *Id*.

put, this could result in the City of Philadelphia being told CSS can in fact discriminate against LGBTQ+ couples.[81]

b. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania

If it was not already abundantly clear how the Court rules when Christianity and anti-discrimination collide, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*[82] further displays this favoritism towards religions.[83] In *Little Sisters of the Poor & Paul Home*, the Court tackled the question whether the United States government created lawful exemptions from a regulatory requirement implementing the Patient Protection and Affordable Care Act of 2010 ("ACA").[84] The main issue was their contraception mandate.[85] The government had "promulgated interim final rules" that required employers to provide contraception.[86] Eventually, the Departments of Health and Human Services, Labor and the Treasury "exempted certain employers who have religious and conscientious objections from this agency created mandate."[87] This exemption allowed religious employers to simply object to the "contraception mandate" simply because of their religion.[88] The State of Pennsylvania filed a lawsuit claiming the Departments did not have the authority to issue these new rules and the District Court followed a nationwide preliminary injunction, blocking the exemption-based rules.[89] When brought before the Third Circuit, the Court found the Departments "lacked statutory authority to promulgate these exceptions" and affirmed the injunction.[90] Yet again, the Supreme Court would weigh in on this tension between equity and religious freedom.[91] These exemptions would discriminate against thousands upon thousands of women employed by employers who claimed these religious exemptions.[92] Yet,

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[81] *Id*.
[82] *Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[83] *Id*.
[84] *Id*. at 2372.
[85] *Id*.
[86] *Id*. at 2373.
[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.

they reversed the decision of the Third Circuit and, yet again, chose a religion over fair treatment.[93]

In its decision, the Court focused in on statutory language above all other considerations. The Court decided to interpret the ACA's "as provided for" language and found that the guidelines were rather vague.[94] The Court stated the statute is completely silent as to what those "comprehensive guidelines" must contain, or how the Health Resources and Service Administration must go about creating them.[95] The statute does not, as Congress has done in other statutes, provide an exhaustive or illustrative list of the preventive care and screenings that must be included."[96] With this plain language in mind, the Court ruled the meaning of the ACA granted the Health Resources and Service Administration "broad discretion to define preventive care and screenings and to create the religious and moral exemptions."[97] This narrow focus on the statutory language seemingly ignored the larger issues at hand. The Court further analyzed the procedure involved in creating these exemptions, finding that yet again nothing was problematic with the exemption.[98] The Court ended its decision by holding:

> For over 150 years, the Little Sisters have engaged in faithful service and sacrifice, motivated by a religious calling to surrender all for the sake of their brother. "[T]hey commit to constantly living out a witness that proclaims the unique, inviolable dignity of every person, particularly those whom others regard as weak or worthless.". But for the past seven years, they—like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision—have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs. After two decisions from this Court and multiple failed regulatory attempts, the Federal Government has arrived at a solution that exempts

[93] *Id*.
[94] *Id*. at 2380.
[95] *Id*.
[96] *Id*.
[97] *Id*. at 2381.
[98] *Id*. at 2386.

> the Little Sisters from the source of their complicity-based concerns—the administratively imposed contraceptive mandate.[99]

The Court sympathized for the Little Sisters for having to fight for their right to not provide women with basic health care.[100] Yet again, the Court sided with the religious argument without really weighing in on the tension between religious freedom and equity.

Justice Ginsberg, this time being joined by Justice Sotomayor, dissented.[101] In the bluntest language, Justice Ginsberg wrote "Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree."[102] Justice Ginsberg emphasized the science and found that the disputed guidelines were backed by science.[103] She further found that "millions of women who previously had no, or poor quality, health insurance gained cost-free access, not only to contraceptive services but as well to, inter alia, annual checkups and screenings for breast cancer, cervical cancer, postpartum depression, and gestational diabetes."[104]

Furthermore, Justice Ginsberg pointed out the Health Resources and Services Administration directed that all women's preventative services "encompass 'all [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.'"[105] Justice Ginsberg clearly recognized the immense health benefits that were procured by the ACA and the Health Resources and Services Administration's directives. Like the Court, Justice Ginsberg took a rather textual approach and found the ACA does not authorize these agencies to create an exemption.[106] Justice Ginsberg reasoned that the HRSA was in charge of deciding what women's preventative service should be included and not who should be included in them.[107] Nowhere in any document was the Health Resources and Services Administration given the authority to choose to whom this statue

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[99] *Id*.
[100] *Id*.
[101] *Id*. at 2400 (Ginsberg, J. dissenting).
[102] *Id*. at 2400 (Ginsberg, J. dissenting).
[103] *Id*. at 2401 (Ginsberg, J. dissenting).
[104] *Id*.
[105] *Id*. (Ginsberg, J. dissenting).
[106] *Id*. at 2407 (Ginsberg, J. dissenting).
[107] *Id*. at 2406 (Ginsberg, J. dissenting).

applied.[108] Justice Ginsberg even suggested that it lacked the expertise to even decide who should and should not be included- being it was not proficient in religion and moral discrepancies.[109] Justice Ginsberg reasoned that women, who were now not going to receive contraceptive coverage, were left with two options: go to the government-funded programs or pay for it themselves.[110] With costs being too high and the government not being able to handle an influx of new uninsured women,[111] Justice Ginsberg argued the Court's decision was unacceptable and emphasized the impact it would have on American women.[112] She wrote "the expansive religious exemption at issue here imposes significant burdens on women employees. Between 70,500 and 126,400 women of childbearing age, the Government estimates, will experience the disappearance of the contraceptive coverage formerly available to them, indeed, the numbers may be even higher."[113]

The Court in *Little Sisters of the Poor & Paul Home*, yet again, chose religion over protecting women's health and safety.[114] *Little Sisters of the Poor & Paul Home* will not likely be a case the Court looks to when deciding *Fulton*.[115] Yet, it is important to see where the Court currently stands when it comes to this clash between equity and popular American religions, such as Christianity and Catholicism. This 2020 decision shows how very conservative the Court that will review *Fulton* is.[116] The Court chose to preserve American Catholicism over ensuring women's health.[117] If they could do that so easily, who is to say they would not prefer keeping children in foster homes over allowing them to be adopted by LGBTQ+ couples? *Little Sisters of the Poor & Paul Home* continues a rather frightening path where the Court, without much comprehensive justification, rules against equity and favors religious freedom arguments.[118] It continuously upholds

[108] *Id*. (Ginsberg. J. dissenting).
[109] *Id*. (Ginsberg, J. dissenting).
[110] *Id*. at 2408-10 (Ginsberg J. dissenting).
[111] *Id*. (Ginsberg J. dissenting).
[112] *Id*.
[113] *Id*. at 2408 (Ginsberg. J. dissenting).
[114] *Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[115] *See Fulton*, 922 F.3d at 140.
[116] *See Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[117] *Id*.
[118] *Id*.

the few over the many with decisions like this and a similar decision might be reflected in *Fulton*.[119]

The *Little Sisters of the Poor & Paul Home* decision also unintentionally earmarks a major change in how the Supreme Court will rule in the future.[120] Conservative decisions like this were routinely dissented by Justice Ruth Bader Ginsburg and shed a light on how possibly misguided the Court had become.[121] This dissent in *Little Sisters of the Poor & Paul Home* was the last dissent from Justice Ginsburg.[122]

IV. THE SUPREME COURT IN 2020 AND BEYOND

While the *Little Sisters of the Poor* was decided in 2020, such major circumstances have occurred since that case was decided that warrant considering the Court in its now most current form.[123] With the passing of Justice Ruth Bader Ginsburg and a contentious presidential election just taking place, all eyes turned onto the Supreme Court.[124] Cases such as *Fulton* suddenly lost a major voice in the drive to achieve equal treatment for all American citizens. Many questioned who could fill such an important seat in the Supreme Court.[125] On October 27, 2020, the American people finally got that answer when Amy Coney Barrett was confirmed by the United States Senate.[126]

Just a mere six weeks after Justice Ruth Bader Ginsburg passed, Justice Amy Coney Barrett was sworn in by Justice Clarence Thomas.[127] During her speech, Barrett swore to use an independent thought process when considering cases, which for many would be what is absolutely expected by a Supreme Court Justice.[128] Yet, many believe she will follow in the footsteps of her mentor, the late Justice Antonin Scalia, and be a champion for conservative values.[129] Justice

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[119] *See Fulton*, 922 F.3d at 140.
[120] *See Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[121] *Id*.
[122] *Id*.
[123] Nicholas Fandos*, Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES, https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html (last visited Feb. 20, 2021).
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id*.
[129] *Id*.

Barrett may potentially surprise many by being a more middle ground justice. Yet, Justice Barrett can also be problematic for *Fulton* and many other cases that deal with religious objections.

Many people, Democratic Senators included, objected to Barrett's nomination and confirmation due to the mere timing of it and argued it violated procedure.[130] Her first day on the job was only six days before the nation voted in the 2020 Presidential Election.[131] Setting aside the timing issue and focusing in on who Amy Coney Barrett is also creates reasonable objections to her nomination.[132] For example, before becoming a Supreme Court Justice, Justice Barrett served on a board of private Christian schools that "effectively barred admission to children of same-sex parents and made it plain that openly gay and lesbian teachers weren't welcome in the classroom."[133] The schools for where she served on the board have a very harsh teaching on homosexuality and the LGBTQ+ community when compared to the Catholic Church, where Pope Francis just endorsed civil unions for the first time.[134] Suzanne B. Goldberg, a professor at Columbia Law was quoted as saying, "When any member of the judiciary affiliates themselves with an institution that is committed to discrimination on any ground, it is important to look more closely at how that affects the individual's ability to give all cases a fair hearing,"[135] With all of this considered, the question then certainly becomes can one take Justice Amy Coney Barrett at her word? Will she leave her personal beliefs out of the courtroom and rule fairly? Or will she bring these rather discriminatory beliefs into the courtroom and be a vocal voice in uplifting religion while crushing equity? This all remains yet to be seen and could be rather troublesome being the *Fulton* case was one of the first Barrett heard as a Supreme Court Justice.[136]

If the nomination of Amy Coney Barrett was not enough to indicate where the Court is heading, the man who swore her in, Justice

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[130] *Id*.
[131] *Id*.
[132] Michelle R. Smith & Michael Biesecker, *Barrett was trustee at private school with anti-gay policies*, THE ASSOCIATED PRESS NEWS, https://apnews.com/article/south-bend-only-on-ap-amy-coney-barrett-minnesota-virginia-a8bbabea9ee4d2fb13c6079c09f2f075 (last visited Apr. 21, 2021).
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] Amy Howe, *Argument Analysis: Justices sympathetic to faith-based foster-care agency in anti-discrimination dispute*, SCOTUS BLOG, https://www.scotusblog.com/2020/11/argument-analysis-justices-sympathetic-to-faith-based-foster-care-agency-in-anti-discrimination-dispute/ (last visited Apr. 21, 2021).

Clarence Thomas, joined by Justice Alito, penned a another signal in his denial of certiorari of *Kim Davis v. David Emrold*.[137] Kim Davis was a county clerk in Louisiana, who was also a devout Christian.[138] As a county clerk, she granted marriage license and as a devout Christian she did not believe in gay marriage, so she would not grant those licenses.[139] She was fired, spent some time in jail, and appealed it all.[140] When this case arrived to the Supreme Court, the writ of certiorari was rejected.[141] Yet in its denial, Justice Clarence Thomas wrote a response that seemed rather troubling to the LGBTQ+ community.[142] Thomas wrote:

> In *Obergefell v. Hodges*, 576 U. S. 644 (2015), the Court read a right to same-sex marriage into the Fourteenth Amendment, even though that right is found nowhere in the text. Several Members of the Court noted that the Court's decision would threaten the religious liberty of the many Americans who believe that marriage is a sacred institution between one man and one woman. If the States had been allowed to resolve this question through legislation, they could have included accommodations for those who hold these religious beliefs. The Court, however, bypassed that democratic process. Worse still, though it briefly acknowledged that those with sincerely held religious objections to same-sex marriage are often "decent and honorable," the Court went on to suggest that those beliefs espoused a bigoted worldview.[143]

Justice Thomas, to summarize, found that *Obergefell v. Hodges* was decided inaccurately and it should have been decided by state legislatures to spare "decent and honorable" religious folk of having to deal with gay marriage.[144] In the denial of certiorari, Justice Thomas, just like the majority in *Little Sisters of the Poor*, painted religious Americans as victims who, specifically in Kim Davis' case, were being

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[137] Davis v. Ermold, 141 S. Ct. 3 (2020) (Thomas, J., dissenting from the denial of certiorari).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

asked to choose between their faith or their livelihood.[145] This is the second time in 2020 that the Court has painted religious people as victims in situations where religion conflicted with equity.[146] This decision combined with the appointment of Justice Barrett may signal that the Court will view the *Fulton* case as religious discrimination.

Furthermore, in the midst of the national coronavirus pandemic, the Court has not been shy about favoring religious values in the face of a national pandemic. In the per curium opinion of *Tandon v. Newsom*,[147] the Supreme Court blocked a California coronavirus restriction that limited home-based Bible study and prayer sessions.[148] The decision's majority implicated that religion was not being treated fairly in California and that the restrictions were unconstitutional because of such.[149] In her dissent, Justice Kagan found the exact opposite, finding that California was treating religion as well as it would treat other secular activities.[150] In this case, the Court refused to go against religion institutions even in the face of a national pandemic.[151] It is also interesting that the Court has been using its shadow docket, which is the emergency docket where decisions do not receive full standards of review, to handle multiple coronavirus related cases.[152] Through these late-night emergency decisions, the Court has been routinely favoring religious freedom in the face of the national pandemic.[153] Although these decisions are only summary decisions, it is rather jarring to see the Court uphold religious practices even if said religious practices could lead to super spreader events and the transmission of the coronavirus disease.

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[145] *Id*.
[146] *See Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[147] Tandon v. Newsom, 141 S. Ct. 1942.
[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] *Id*.
[152] *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63; High Plains v. Harvest Church v. Polis, 147 S. Ct. 527 (Mem); Robinson v. Murphy, 141 S. Ct. 972 (Mem); Valentine v. Collier, 140 S. Ct 1598 (Mem).
[153] *Id*.

V. THE ORAL ARGUMENTS & THE IMPACT OF FULTON V. CITY OF PHILADELPHIA

On November 4, 2020, the Supreme Court heard the oral argument in *Fulton v. City of Philadelphia*.[154] Immediately, it became clear the Court would heavily lean in favor of CSS.[155] It also became abundantly clear that this case would join the others in being a case where the Court cannot adequately grapple this dispute between religion and equality.[156] What was really interesting was the immediate discussion of contractual law with Lori Windham, an attorney for CSS, stressing "that CSS is not trying to tell the city how to run its internal affairs; instead, the city is trying to tell CSS how to run its internal affairs."[157] This was eventually responded to by professor Jefferey Fisher, who represented the City, replying "that because CSS was a government contractor, all that matters is whether the government's position was reasonable."[158]

The oral argument also addressed the issue of what the Court should do with *Employment Division v. Smith* in terms of this case.[159] The *Smith* decision was a case about the use of peyote for religious purposes. [160] The dispute between the two parties was about unemployment compensation and whether a state could deny unemployment benefits to a fired worker who was using illegal drugs for religious purposes.[161] The Court held that one's religious beliefs could not excuse oneself from following state law.[162] This case came up in *Fulton* because both cases had implications dealing with religious exemptions.[163] CSS believed that the City already discriminated within their foster care system by considering race and disability when placing children in the foster homes.[164] The City pushed back on this claim arguing "*Smith* did not say the mere availability in the air of individualized treatment is enough to render a law not generally applicable. What *Smith* requires is actual 'disparate treatment' of

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[154] Howe, *supra* note 136.
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] *Smith*, 494 U.S. at 872.
[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] Howe, *supra* note 136.

religion."[165] Within this line of questioning, the justices seemingly did not seem to indicate that reversing *Smith* would be the right thing, being that choice could open up a line for more discrimination down the road. [166]

The oral argument might provide some indication of how the Justices will rule in *Fulton*. Justice Sotomayor and Justice Breyer seemingly sided with the City of Philadelphia and even mentioned a hypothetical deal where CSS would not have to endorse same-sex marriage and continue doing business with the city.[167] Yet, this hypothetical deal appeared to be one of the only pro-city moments that appeared during the argument, with the other big moments being Justice Roberts and Justice Kagan mentioning that the City should be allowed to set conditions on how it runs its foster care program.[168]

As was the situation in the cases discussed throughout this Note, Justice Alito was overwhelmingly sympathetic to the church.[169] Justice Alito bluntly stated that the City of Philadelphia "can't stand the message that Catholic Social Services and the archdiocese are sending by continuing to adhere to the old-fashioned view about marriage."[170] Justice Thomas focused more on the contractual relationship between the two parties, hinting that Philadelphia did not have much leverage in this situation.[171] Justice Kavanaugh, aware of this tension, mentioned that the Court would need to somehow balance these clashes between religion and views that religious institutions do not believe in.[172] Justice Barrett and Justice Gorsuch were concerned about exemptions to Philadelphia's nondiscrimination policy and more specifically about whether the City's actions were both neutral and applicable to everyone.[173] This line of questioning lead to a discussion about race and disability, with both justices seemingly indicating that Philadelphia's treatment of Catholic Social Services was not neutral.[174] By the end, it seemed clear that Catholic Social Services would have the five votes it needed to win.[175]

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[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*

With the decision hanging in the balance at the Supreme Court, the impact of the *Fulton* decision cannot be understated.[176] While it is true that the decision will likely discuss the relationship between states and agencies, and might even make mention of government contracts, this case on its merits impacts various groups of people.[177] The Movement Advancement Project ("MAP") broke down the exact circumstances of the various potential outcomes of *Fulton*.[178] MAP breaks down three hypothetical decisions and what said decisions would do to the country we live in today.[179] The first hypothetical is a ruling in favor of the City of Philadelphia that would affirm nondiscrimination contracting requirements.[180] Like the two lower courts, the Supreme Court could possibly affirm and this would enforce nondiscrimination requirements across the board.[181] This would result in all qualified families, regardless of religion, marital status, sexual orientation, and gender identity being able to be considered as potential foster parents.[182] This would result in a bigger pool for children who need to be adopted and would ensure discrimination has no place in such an important process.[183]

The second hypothetical matches the rationale of the *Masterpiece Cakeshop* decision and is a narrow ruling that would favor CSS and thus limit options for children and families in Philadelphia.[184] This hypothetical decision would have the Court finding Philadelphia's treatment of CSS as hostile, finding that the city "unconstitutionally targeted the religious group."[185] In this decision, the Court would possibly require that Philadelphia reconsider its policy enforcing contract requirements, reinstate the contract with CSS, or remand the case for reconsideration.[186] This decision would allow CSS to continue working in the adoption world, with a full license to discriminate

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[176] *See* Movement Advancement Project, *The High Stakes in the Fulton Case: Undermining the Vital Role of Child Welfare Laws and Regulations in Protecting America's Children*, LGBT MAP (Aug. 2020), https://www.lgbtmap.org/2020-fulton-report.
[177] *Id.*
[178] *Id.*
[179] *Id.* at 4.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*

against same sex couples.[187] While the record did not indicate any showing of hostility, the Court would find that the intake freeze was in fact hostile and this would result in foster children and the LGBTQ+ paying the price.[188] Not only would children have less options for adoption, LGBTQ+ couples that could provide loving homes would be denied because of who they are.[189]

Both of the previous two hypothetical rulings are rather narrow in scope. The final hypothetical points to a broad ruling that favors CSS that could fundamentally alter the way the child welfare system functions in this country.[190] In this hypothetical, the Court could rule that "in the context of religion, requiring agencies adhere to nondiscrimination contracting terms is unconstitutional and that objecting religiously affiliated agencies must be exempt from such requirements."[191] This decision would open a "pandora's box" of discrimination throughout this country. Not only does this type of decision ensure LGBTQ+ couples are discriminated against, it ensures that children are kept in the system and not placed in loving homes.[192] This would create a model for public child welfare services receiving taxpayer money to serve the public, but would then allow these services to only serve some of the public.[193] This could lead to agencies only specifically dealing with families with similar religious beliefs and values.[194] This could also lead to agencies discriminating against single parents or unmarried couples that make up 32% of the adoptions in the country.[195] This could also be applied outside the context of foster agencies, thus impacting the way of life for the LBGTQ+ community as a whole.

This type of decision could also put foster children at a great risk. If the Court finds that Catholic Services could in fact be exempt from contract requirements, then this could lead to agencies trying to be exempt from hundreds of various rules and regulations in place to protect foster children.[196] This could lead to agencies not vaccinating

[187] *Id.* at 5.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.* at 7.
[194] *Id.*
[195] *Id.* at 8.
[196] *Id.*

the foster children they are taking care of because they do not believe in vaccines.[197] This could lead to issues with LGBTQ+ children in the foster system if the agency does not tolerate their sexuality.[198] This could lead to foster children being rejected from agencies because of who they are or could even lead to harmful conversion therapy treatments all because the agency does not believe in LGBTQ+ rights.[199] A ruling in favor of CSS leads to discrimination.[200] And most likely, that is what the Court will likely end up doing when it rules on *Fulton*.

It is hard to see such an important case be used as another punt by the Supreme Court. One would be successful in predicting that the Court will issue a narrow ruling that matches the *Masterpiece Cakeshop* decision. The Court will likely focus in on the "intake freeze" and will find that the City's contractual requirements are hostile and not neutral to groups such as CSS.[201] Justice Alito implying that CSS was the victim during the oral argument was the biggest indication of this.[202] This decision will likely give a license to discriminate while we, as American people, ponder what to do when religion and equity appear to conflict. As of right now, religion remains victorious in that battle.

VI. CONCLUSION

Whenever cases like this occur, many ask why the Court refuses to strike a balance. Many ask if these two rights keep colliding, why doesn't the Court simply just figure out a way for the two to co-exist? The late Justice Scalia seemed to hint as to why, ironically in the *Smith* case.[203] In the decision, Justice Scalia wrote:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection

[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] Howe, *supra* note 136.
[202] *Id.*
[203] *Smith*, 494 U.S. at 890.

> accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[204]

Justice Scalia further expounded that an unintentional consequence of our democratic process was the states weighing the social importance of laws against religious beliefs.[205] In this decision, Justice Scalia was basically saying that the Court could not draw the line in the sand when it comes to these collisions.[206] Justice Scalia found that this would open a pandora's box of exemptions, including exemptions having to do with vaccines and even paying taxes.[207] So maybe the Court issues narrowly tailored decisions in these battles, focused on the more nuanced facts, to not open this pandora's box. Giving deference to the legislature, while some may see it as a cop out, allows the states to handle these rather complex topics. If the Court issued a broad ruling, this would just trigger an enormous amount of litigation from both sides of this battle. The Court seems more comfortable directly telling the baker, the nuns, and the adoption agency what to do. Yet, creating an overarching rule that would apply to most scenarios is complex and something the Court could have trouble doing. Hearing these issues on a case by case basis both limits the case load and allows the Court to avoid a judgement call, despite America needing one. That is why when the *Fulton* decision comes out, it will likely be narrowly tailored in favor of CSS.[208] Narrow because the decision will only answer this set of facts and in favor of CSS because the Court has a hard time going against the church.[209] Critics will call this decision a punt and they should. They will play this case safe, as they routinely have in the past. By being comfortable and by ruling in favor of CSS, discrimination will be preserved under the guise of religious freedom.[210]

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[204] *Id.*
[205] *Id*.
[206] *Id*.
[207] *Id*. at 880.
[208] *See Masterpiece Cakeshop, Ltd*, 138 S. Ct. at 1719; *Little Sister of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2367.
[209] *Id.*
[210] *Id*.