Religious Exemptions

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I. Introduction

The First Amendment protects the free exercise of religion, so when religious beliefs conflict with laws prohibiting discrimination based on sex or sexual orientation, courts must balance freedom of religion, association, and speech, with the state's interest in a more equal society. Organizations are sometimes exempted from anti-discrimination laws on religious grounds, allowing them to fire,

exclude, or deny services to women or members of the LGBT community. In 1993, Congress responded to the Supreme Court's refusal to strike down a law prohibiting the use of Peyote, even for religious purposes, by passing the Religious Freedom Restoration Act (RFRA).[1] RFRA created a two-prong balancing test: the government must not substantially burden a person's exercise of religion unless 1) in furtherance of a compelling government interest and 2) it uses the least restrictive means of furthering that interest.[2] RFRA does not discuss the ministerial exception, which remains good law, and has been expanded by a 2020 decision in *Our Lady of Guadalupe School v. Morrisey-Berru*.[3] The exception "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers."[4]

Part II of this article traces the development of religious exemptions through four major cases involving public accommodations laws. Part III reviews the ministerial exception. Part IV explores cases involving private businesses and religions exemptions. Part V and VI discusses religious exemptions to providing healthcare and housing, respectively. Finally, Part VII concludes.

II. DEVELOPMENT OF RELIGIOUS EXEMPTIONS

This section overviews A) the history of the compelling interest test, and several relevant cases including B) *Roberts v. United States Jaycees*, C) *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, D) *Boy Scouts of America v. Dale*, E) *Christian Legal Society v. Martinez*, and F) *Fulton v. City of Philadelphia*.

A. HISTORY OF THE COMPELLING INTEREST TEST

RFRA explicitly seeks to restore the compelling interest test "as set forth in prior Federal court rulings" as "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[5] The test was established in three key cases alleging that anti-discrimination laws violated the right to free speech and/or association: *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*;[6] *Roberts v. United States Jaycees*;[7] and *Boy Scouts of America v. Dale*.[8] Both *Jaycees* and *Boy Scouts of America* grapple with how the nature and purpose of an association affects the extent to which it warrants protection. Post-RFRA, the Court has maintained carve-outs like

1. "The Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1994).
2. *Id.*
3. Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049 (2020).
4. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).
5. 42 U.S.C. § 2000bb.
6. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).
7. Roberts v. United States Jaycees, 468 U.S. 609 (1984).
8. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

reduced scrutiny for "limited public forum." In *Christian Legal Society v. Martinez*, the Court acknowledged the close relationship between association and speech, ruling that college clubs are limited forums subject to reasonable restrictions on speech, which includes club membership requirements.[9]

B. ROBERTS V. UNITED STATES JAYCEES

Although *Roberts v. United States Jaycees* does not involve religious liberty claims directly, this case represents the Supreme Court's handling of challenges to public accommodation laws. In 1984 the United States Jaycees, a nonprofit group for training and networking for young men, challenged the constitutionality of the Minnesota Human Rights Act (HRA) prohibiting discrimination on the basis of sex. The group allowed women to be "associate members" only, reserving voting power and leadership positions for young men. It argued that its discriminatory membership requirements were protected by the First Amendment.

Ultimately, the Court conceded that Minnesota's regulation of the Jaycees' activities implicated First Amendment expressive rights but found that the interference was justified because 1) it served a compelling state interest and 2) it could not be achieved through less restrictive means.[10] The Court rejected the argument that Jaycees received the heightened protection afforded to intimate associations, reserving an intimate association analysis for cases involving marriage, child rearing, cohabitation, and other situations of a similarly personal character.[11] The Court also reasoned that the Jaycees did not have distinctive characteristics that safeguarded highly personal relationships from state regulations like Minnesota's HRA, due to its few membership requirements and inclusion of nonmembers of both genders in activities.[12] In ruling against the Jaycees, the Court reinforced the state's interest in combating gender discrimination and laid the foundation for the modern freedom of association test.

Interestingly, the court also found that the anti-discrimination law was "unrelated to the suppression of ideas" and that the admission of women as voting members would not "impede the organization's ability to disseminate its preferred views."[13] The Jaycees, an explicitly Christian organization, apparently did not argue, or did not argue convincingly, that the subordinate status of women *was* the idea being suppressed, and that it was both a religious belief and a "preferred view" of the organization. The Court's characterization of the Jaycees contrasts sharply with its characterization of The Boy Scouts of America in *Boy*

9. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 701 (2010).

10. *Roberts*, 468 U.S. at 609.

11. *See id.* at 618-21 (noting that family relationships, an example of intimate association, "are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the association, and seclusion from others in critical aspects of the relationship," which the Jaycees lack).

12. *See id.* at 620-21.

13. *Id.* at 627.

Scouts of America v. Dale (Nov. 2020), where a reference to being "clean" and "morally straight" in the Scout's Oath was deemed sufficient evidence that the group expressed anti-gay values,[14] and therefore that forcing the Scouts to employ a gay man would infringe on its right to free expression.

C. HURLEY V. IRISH-AMERICA GAY, LESBIAN, AND BISEXUAL GROUP OF BOSTON

After *Roberts*, the Court considered whether a public accommodation law impermissibly infringed on association rights integral to maintaining a speaker's message when it protected LGBT individuals.[15] In 1998, the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) sued the South Boston Allied War Veterans Council ("the Council"), claiming the Council violated a Massachusetts statute by preventing GLIB from marching in the Council's public St. Patrick's Day Parade. The Court avoided applying the *Roberts* test by framing the issue as one of speech rather than association,[16] concluding that the parade was a form of symbolic speech, and that choices regarding which points of view private speakers must propound "lie beyond the government's power to control."[17] It went on to say that the parade itself was separate and distinct from the place of public accommodation that hosted it, and every participating group would change the message of the private organizers' speech. Therefore, the anti-discrimination statute could not compel the Council to include GLIB.

Courts after *Hurley*, however, generally distinguished *Hurley* on its facts and continued to apply the *Roberts* balancing test.[18] However, the Court asserted that the Council's actions would survive even a Roberts analysis: "Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message."[19] Considering non-speech "benefits" might produce a different result in a case more similar to *Roberts*, since the Jaycees provided training, business development, and networking opportunities to its members. *Hurley* illustrates a situation in which the Court sought to resolve tension between public accommodation laws and freedom of speech and found that the rights to freedom of speech were so strong that an exemption to the public accommodation laws should be created.

D. BOY SCOUTS OF AMERICA V. DALE

Boy Scouts of America v. Dale was the first case in which the Court expressly held that compliance with an antidiscrimination law would violate a group's right

14. Boy Scouts of Am. v. Dale, 530 U.S. 640, 650 (2000).

15. *See* Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 90 (1998).

16. Hutchinson, *supra* note 15, at 90; *see also Hurley*, 515 U.S. at 561.

17. *Hurley*, 515 U.S. at 574-75.

18. Hutchinson, *supra* note 15, at 104; *see also Hurley*, 515 U.S. at 580-81.

19. *Hurley*, 515 U.S. at 580-81.

to expressive association. Assistant scoutmaster James Dale was expelled from the Boy Scouts for being openly gay, and brought suit in 2000 demanding re-admittance under New Jersey's public accommodation statute. The state court applied the *Roberts* test and held that the statute was constitutional. Just like the court in *Roberts* concluded that admitting women to full membership status would not impede the organization's ability to carry out its stated purpose (to "promote and foster the growth and development of young men's civic organizations"), the state court in *Dale* found that employing a gay man would not significantly affect the Boy Scouts' ability to carry out their purpose.[20] It further concluded that 1) New Jersey had a compelling interest in eliminating the "destructive consequences of discrimination from society" and 2) the statute abridged no more speech than necessary to accomplish its purpose.[21] Finally, the state court distinguished *Hurley* on the ground that Dale's reinstatement did not compel the Boy Scouts to express any message.[22] The Supreme Court reversed.

The Supreme Court relied on *Hurley* rather than *Roberts* even though this was an association case, concluding that the membership decisions of an organization constitute speech—specifically, the expression of a "public or private viewpoint."[23] The distinction between a public and a private viewpoint references the absence of any explicitly stated organizational opposition to homosexuality. The Court distinguished *Dale* from *Roberts* solely based on the level of supposed interference with the ideas the organization wanted to express.[24] Adult leaders "inculcate[d] [youth members] with the Boy Scouts' values—both expressly and by example."[25] Thus, the leadership's stance against homosexuality rendered the position a protected part of the Boy Scouts' expressive message.[26]

Thus, *Dale* applied the *Roberts* framework and required courts to first evaluate whether a group is engaged in expressive association.[27] The Court has not yet recognized preventing discrimination against LGBT individuals as a compelling state interest in First Amendment cases.[28] While these cases do not all raise the

20. Boy Scouts of Am. v. Dale, 530 U.S. 640, 640 (2000).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 648.
25. *Id.* at 649-50.
26. *Id.* at 655. The Court explained that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups." *Id.* at 648. Even if groups do not associate for the express purpose of transmitting a message, they are protected so long as they "engage in some form of expression, whether it be public or private." *Id.* Thus, the Boy Scouts would be protected even if it discouraged its leaders from disseminating views on sexual issues, and whether or not all the members agreed with the group's policy. *Id.*
27. Erica L. Stringer, *Has the Supreme Court Created a Constitutional Shield for Private Discrimination Against Homosexuals? A Look at the Future Ramifications of Boy Scouts of Am. v. Dale*, 104 W. VA. L. REV. 181, 191 (2001).
28. *See* Sara A. Gelsinger, Comment, *Right to Exclude or Forced to Include? Creating A Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 PENN ST. L. REV. 1155, 1168 (2012).

issue of religious freedom, they illustrate the Court's struggle to balance expressive association and public accommodation laws.

E. CHRISTIAN LEGAL SOCIETY V. MARTINEZ

The Court moved away from the *Dale* test in 2010, when it held that Hastings College could require all official clubs to adhere to its non-discrimination policy because the campus was a limited public forum.[29] Hastings College refused to provide funding and other benefits to the Christian Legal Society (CLS) because the club shunned homosexuality and only admitted Christians who abstained from sex before marriage.[30] CLS argued that Hastings' non-discrimination policy violated its First Amendment right to free speech and association.[31] Significantly, the Court acknowledged the close relationship between speech and association, stating "*who* speaks on [an organization's] behalf . . . colors *what* concept is conveyed."[32] Like in *Roberts* and *Dale*, CLS's membership decisions expressed certain viewpoints and beliefs to the world. The Court however, found it anomalous to apply two different tests to the same situation.[33]

Unlike in *Roberts* and *Dale* however, Hastings did not attempt to force CLS to accept members with different views; it simply declined to subsidize the club's activities. CLS operated effectively under its preferred membership criteria without school support, and was allowed to use school facilities and message boards despite its lack of official status.[34] The Court worried that strict scrutiny would invalidate that State's ability to reserve limited public forums for certain groups.[35] To address these concerns, the Court applied a limited public forum test rather than the stricter compelling interest test from *Roberts* because school clubs exist for the benefit of students only, and are not open to the general public.[36] Limited public forums are created for a specific purpose, so it is appropriate to confine the speech in that forum to the "limited and legitimate purposes for which it was created."[37] Under this test, limits must be reasonable and viewpoint neutral.[38] Hastings created official clubs to encourage all students to engage in activities and share diverse viewpoints. It is therefore reasonable and constitutional to reserve official club resources for groups that allow all students to participate, regardless of viewpoint.

The Court's decision in *Martinez* is significant because it marked a shift in analysis of speech and expressive association claims. Here, the Court essentially

29. *Id.*
30. *Id.*
31. *Id.*
32. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 680 (2010).
33. *Id.* at 680-82.
34. *Id.* at 665.
35. *Id.* at 681.
36. *Id.*
37. *Id.*
38. *Id.*

treated a freedom of association claim as a freedom of speech claim. In doing so, the Court applied a limited public forum analysis, which required the Court to inquire into only the reasonableness of the policy. Since the *Martinez* decision, many cases involving freedom of speech and expressive association have been resolved using the limited public forum test. More importantly, it showed that the Court was willing to protect nondiscrimination policies even at the expense of the religiously motivated.

F. FULTON V. CITY OF PHILADELPHIA

Fulton v. City of Philadelphia was argued before the Supreme Court on November 4, 2020.[39] The major petitioner in the case, Catholic Social Services (CSS), was under contract with the City of Philadelphia, and worked on placing foster children.[40] When a reporter called the City's Department of Human Services to report that CSS would only place children with opposite-sex couples,[41] the department told CSS, based on Philadelphia's non-discrimination laws, that City would no longer refer foster children to CSS. CSS sued the City under the First Amendment and Pennsylvania's Religious Freedom Protection Act. CSS asked for an order requiring the City to renew its contract with CSS, while allowing CSS to not refer foster children to same-sex families.[42] The district court denied the request.[43] The Third Circuit affirmed, ruling that Philadelphia's rule was constitutional under *Employment Division v. Smith*, which held neutral laws of general applicability may prohibit or compel action contrary to religious belief without violating the First Amendment.[44] The Supreme Court granted certiorari in February 2020 and the case is pending before the Court.[45]

Petitioners argued that Philadelphia violated the First Amendment by limiting their speech and religious expression. They claimed laws infringing on religious liberty should be held to strict scrutiny.[46] To renew their contract with the City, CSS argued that they would have had to write a letter "endorsing same-sex" partnerships. This requirement, they claim, infringed on their free speech rights,

39. Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019), *cert. granted sub nom.*, 140 S. Ct. 1104 (2020).

40. Sharonell Fulton was a previous foster mother through CSS and was listed as a plaintiff along with several other foster mothers. *Id.* at 150.

41. The editors of this article understand that references to gay, straight, or same-sex marriages often ignore the complexities of gender, sexuality, and partnerships. Referring to "straight couples," for example, might be a misnomer based on assumptions that people in a same-sex relationship are straight, and not bisexual or gender-nonconforming, for example. This article copies terms used in the cases and briefs but acknowledges this shortcoming.

42. *Fulton*, 922 F.3d at 151.

43. *Id.*

44. *Id.* at 147.

45. *Fulton v. City of Philadelphia*, Oyez, https://www.oyez.org/cases/2020/19-123 (last visited Feb 25, 2021).

46. Reply Brief for Petitioners at 2, *Fulton*, 140 S. Ct. 1104 (2020) (No. 19-123), 2020 WL 5578834, at *4-6.

required them to choose between forced speech, in "speak[ing] Philadelphia's preferred message on marriage," or forced silence, by no longer providing foster care.[47] Petitioners also claimed the City did not have neutral laws, evidenced by hostility toward CSS and the city's selective choice and application of policies to CSS, which petitioners felt targeted their religious beliefs.[48] Neutral laws or not, petitioners argued that the Court should overturn *Smith* and apply strict scrutiny to any challenge to religious liberty.[49]

Respondents argued that the City's non-discrimination requirement is a neutral policy that did not infringe on the free exercise or free speech clause rights of CSS.[50] Respondents claimed that they acted in a managerial position in regards to CSS, giving the City greater discretion to balance competing interests.[51] Additionally, CSS was only restricted as a government contractor, not privately by the government.[52] The City took issue with CSS's assessment that they had to be silent or endorse all marriages; respondents alleged this was a misunderstanding of state law, and therefore they did not force CSS to do or say anything contrary to their religious beliefs.[53]

If the Court rules for Fulton, respondents argue, government functions could be encumbered with agents "perform[ing] their jobs as they see fit."[54] The ACLU warns that government-funded agencies could "deny services to people who are LGBTQ, Jewish, Muslim, or Mormon."[55] But petitioners claim a ruling for Philadelphia would "eliminate[] First Amendment protection for anyone who contracts with the government."[56] Particularly if *Smith* is re-examined, a ruling for petitioners would shift American jurisprudence further away from one of its original precepts: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[57] Courts would instead continue to move to petitioner's view that "[t]he Free Exercise Clause safeguards an affirmative right for believers to *practice* their religion, not just hold particular religious beliefs."[58]

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47. *Id*. at 31.
48. *Id*. at 4-5.
49. *Id*. at 25.
50. Brief for City Respondents at 28, *Fulton*, 140 S. Ct. 1104 (No. 19-123).
51. *Id*. at 16.
52. *Id*. at 24.
53. *Id*. at 44-46.
54. *Id*. at 11.
55. *Fulton v. City of Philadelphia*, ACLU (Aug. 20, 2020), https://www.aclu.org/cases/fulton-v-city-philadelphia.
56. Reply Brief for Petitioners, *supra* note 46, at 18.
57. Reynolds v. United States, 98 U.S. 145, 166 (1878). This concept continued to *Smith*: "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Emp. Div. v. Smith, 494 U.S. 872, 877 (1990).
58. Reply Brief for Petitioners, *supra* note 46, at 42; *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1721-22 (2018).

Oral arguments for *Fulton* were presented to the Court on November 4, 2020.[59] Based on these arguments, it is likely that the Court will rule for CSS and reverse the Third Circuit.[60] But respondents will probably not (yet) have to deal with the dire consequences they predicted would come from a ruling in favor of Fulton. Analyzing the oral arguments, Amy Howe on SCOTUSblog reported that "it appeared that CSS and the foster parents likely would be able to garner at least five votes for a ruling in their favor, even if it wasn't clear what the basis for such a ruling might be."[61] Justices Roberts and Kagan asked questions regarding the latitude of government agencies to deal with government contractors, suggesting some sympathy for Fulton. Justice Thomas, however, suggested the relationship between Fulton and CSS was one that dealt with licensing and contracts, which would give the government less flexibility in determining its relationship with CSS.[62] The Justices also focused on whether Fulton's anti-discrimination law was a "neutrally applicable law" under *Smith*. Even if the Court rules in favor of CSS, it is unlikely to overturn *Smith*; Justice Alito alone seemed amenable to that idea.[63] The court may rule on grounds almost as narrow as it did in *Masterpiece Cakeshop*, or it may make a more sweeping ruling.[64] But that ruling will likely be for CSS.

III. THE MINISTERIAL EXCEPTION

The ministerial exception precludes the application of civil rights and employment discrimination laws to religious institutions and their employees under the First Amendment's religious freedom clauses.[65] The Court formulated this principle in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, but the justices gave different interpretations regarding which employees count as "ministerial."[66] Employers have increasingly relied on the ministerial exception as an affirmative defense to employment discrimination and civil rights claims.

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59. *See* Transcript of Oral Argument, *Fulton*, 140 S. Ct. 1104 (No. 19-123).

60. Amy Howe, *Argument analysis: Justices sympathetic to faith-based foster-care agency in anti-discrimination dispute*, SCOTUSBLOG (Nov. 4, 2020), https://www.scotusblog.com/2020/11/argument-analysis-justices-sympathetic-to-faith-based-foster-care-agency-in-anti-discrimination-dispute/.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1719 (2018).

65. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012); Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 409 (6th Cir. 2010); McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc., 304 F. Supp. 3d 514, 519 (N.D. Miss. 2018).

66. *Hosanna-Tabor*, 565 U.S. at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister."), 196 (Thomas, J., concurring) ("[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister."), 199 (Alito, J., concurring) ("The 'ministerial' exception should be tailored to this purpose. It should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.").

Recently, in *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit suggested a limit on qualifying institutions to those institutions with "clear and obvious" religious characteristics.[67] The Supreme Court consolidated the *E.E.O.C. v R.G. & G.R. Harris Funeral Homes* appeal into *Bostock v. Clayton County*, but did not address the religious liberty issues.

This section discusses the ministerial exception in the context of A) *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, B) *EEOC v. R.G. & G. R. Harris Funeral Homes, Inc.*, and C) *Our Lady of Guadalupe School v. Morrisey-Berru*.

A. HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL V. EEOC

The Court defined its stance on the balance between nondiscrimination and religiously motivated discrimination in its recent recognition of the ministerial exemption. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court recognized a ministerial exception for the first time in the Religion Clauses of the Constitution.[68] This exception may allow religious organizations to bar any employment discrimination suits brought by any employee considered a "minister."[69] In *Hosanna-Tabor*, a teacher sued her employer for unlawful dismissal under the Americans with Disabilities Act.[70] The Supreme Court held that the Establishment and Free Exercise Clauses of the First Amendment prevented her from bringing an employment discrimination suit against her employer.[71] The Court reasoned that because she was a "minister" under the ministerial exception's definition, her employer could use the ministerial exception as an affirmative defense in employment suits.[72]

While the Court did not set out an explicit standard to define which employees qualify as ministers, it did discuss a few factors lower courts could consider when determining whether an employee is a minister, such as an employee's title, level of religious training, leadership role in faith, and performance of religious duties.[73] However, Justices Thomas, Alito, and Kagan's concurrences all set out different standards and factors to determine an employee's status as a minister.[74]

The breadth of the Court's decision in *Hosanna-Tabor* remains unclear as lower courts rule on who is a minister and which organizations may use the ministerial exception. In *Dias v. Archdiocese of Cincinnati*, a female employee brought claims of pregnancy discrimination and breach of contract after being

67. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 582 (6th Cir. 2018) (quoting Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004)).

68. *See Hosanna-Tabor*, 565 U.S. at 188.

69. *See id.*

70. *Id.* at 179.

71. *Id.* at 194.

72. *Id.*

73. *Id.* at 191-92.

74. *Id.* at 197-204.

fired for being pregnant out of wedlock and through artificial insemination.[75] The court found that the employee was not a minister under the ministerial exception and thus allowed her to retain her causes of action under Title VII.[76] In *Sterlinski v. Catholic Bishop of Chicago*, the court found that the ministerial exception applied to a music director who supervised all music at liturgical celebrations.[77] Thus, lower courts have relied on the factors laid out in *Hosanna-Tabor* to determine whether an employee qualifies as a minister under the ministerial exception, but they have not come to consensus as to which factors and to what degree to rely on *Hosanna-Tabor*'s majority decision.

Despite the flexibility offered by the majority decision in *Hosanna-Tabor*, lower courts have also been careful not to apply an overly broad reading of the *Hosanna-Tabor* factors. In *Richardson v. Northwest Christian University*, the court found that the ministerial exception did not apply to a nonprofit Christian university because the employee bringing suit "was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer."[78] Similarly, in *Morgan v. Central Baptist Church of Oak Ridge*, the district court found that the ministerial exception did not extend to a church secretary because the church did not hold her out as a minister, give her a religious title or commission, charge her with teaching the faith, provide her with religious training, or require her participation at religious services.[79] Because the employee's duties were primarily secular, the court found that the ministerial exception did not apply.[80]

Nor does the ministerial exception exempt ministers from all discrimination claims. In *Demkovich v. St. Andrew*, the Seventh Circuit limited the ministerial exception to an *employer's* selection and control of its ministers.[81] In doing so, the court rejected the ministerial exception as a defense to a hostile work environment claim brought by a former minister because the conduct underlying this claim was tortious and did not relate to the selection or control of ministers.[82] Moreover, that court also limited assertion of the ministerial exception to religious employers, not supervisors within the religious organization, further limiting the scope of the ministerial exception.[83]

Elvig v. Calvin Presbyterian Church demonstrates the role of "selection and control" in applying the ministerial exception. In that case, the Ninth Circuit found that the ministerial exception applied to the church's decision to terminate

75. *See* Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165, at *1-2 (S.D. Ohio Mar. 29, 2012).

76. *Id.* at *8.

77. *See* Sterlinski v. Catholic Bishop of Chi., 203 F. Supp. 3d 908, 916 (N.D. Ill. 2016).

78. Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132, 1145 (D. Or. 2017).

79. *See* Morgan v. Cent. Baptist Church of Oak Ridge, No. 3:11-CV-124-TAV-CCS, 2013 WL 12043468, at *20 (E.D. Tenn. Dec. 13, 2013).

80. *Id.*

81. *See* Demkovich v. St. Andrew the Apostle Parish, 973 F.3d 718, 727, 729 (7th Cir. 2020).

82. *Id.* at 729.

83. *Id.* at 729-30.

plaintiff's employment and bar her from seeking future employment in other Presbyterian parishes because such decisions implicate the church's selection of its ministers.[84] But the court also held that the ministerial exception did not bar plaintiff's sexual harassment and retaliation claims because, unlike tangible employment decisions such as hiring and firing, sexual harassment and retaliation are not protected employment decisions and are not subject to the ministerial exception unless the church shows such conduct is consistent with the church's religious doctrine.[85] Ultimately, the ministerial exception seems to provide religious institutions some, but not unlimited, room to discriminate against their employees for reasons typically prohibited by anti-discrimination and employment laws.

B. EEOC V. R.G. & G.R. HARRIS FUNERAL HOMES, INC.

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, a transgender woman brought claims of sex discrimination against her employer after she was fired for dressing like a woman.[86] The employer argued that it qualified for the ministerial exception to Title VII and that enforcing Title VII against it would violate its religious beliefs under the Religious Freedom Restoration Act (RFRA).[87] The Sixth Circuit found that discrimination on the basis of transgender status is discrimination on the basis of sex, relying on *Price Waterhouse v. Hopkins*.[88] The court reasoned that the employee would not have been fired if she were a cisgender woman who complied with the dress code, and thus the employee's sex motivated the employer to fire her.[89] In addition, the court held that the employer cannot raise the ministerial exception as an affirmative defense because, though the employer need not be a church or diocese to qualify for the exception, the employer must have "clear or obvious religious characteristics," and the employer in the case had virtually no religious characteristics.[90] The court also found that the employee was not a minister under the ministerial exception in accordance with *Hosanna-Tabor* factors.[91] When the Supreme Court ruled on this case in the consolidated appeal *Bostock v. Clayton County*, the Court did not address any of the religious liberty claims.

Despite the general protections afforded to the LGBTQ community by the Court's interpretation of Title VII in *Bostock v. Clayton County*, Gorsuch's majority opinion leaves the door open for discrimination in the name of religious liberty. In addition to the ministerial exception, Gorsuch's majority opinion also noted that § 2000e–1(a) of Title VII included a direct statutory exception for

84. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 958 (9th Cir. 2004).
85. *Id.* at 963-65.
86. *See* 884 F.3d 560, 569 (6th Cir. 2018).
87. *Id.* at 567, 581.
88. *Id.* at 574.
89. *Id.* at 575.
90. *Id.* at 582.
91. *Id.* at 582-83.

religious organizations.[92] He added that RFRA operates as a super statute that could overcome Title VII requirements.[93] Gorsuch reasoned that because Harris Funeral Homes did not raise any religious liberty claims in its petition for certiorari, and because no other religious liberty claims were present before the Court, the Court did not need to decide such issues.[94] Gorsuch added that, if such claims were brought in the future, they would "merit careful consideration."[95] Unlike the majority opinion, Alito's dissent argued that the ministerial exception was raised on appeal.[96] Moreover, Alito speculated that Title VII might permit discrimination even against employees that do not fall under the ministerial exception.[97] While the Court in *Bostock* punted on the issue of religious liberty in the context of employment discrimination, Gorsuch's majority opinion and Alito's dissent suggest that some members of the Court are willing to consider a more expansive reading of the ministerial exception and other religious liberty defenses in future cases.

C. OUR LADY OF GUADALUPE SCHOOL V. MORRISEY-BERRU

Recently, the Court expanded the ministerial exception when it heard two cases consolidated under *Our Lady of Guadalupe School v. Morrisey-Berru*. In each case, teachers sued their employers, religious schools, alleging discrimination.[98] In the first case, Agnes Morrisey-Berru, a fifth- and sixth-grade teacher, alleged that Our Lady of Guadalupe (OLG) School discriminated against her on the basis of her age.[99] She taught all subjects, including religion, and in 2014, she was asked to move from a full-time to a part-time position.[100] The following year the school declined to renew her contract.[101] In the Central District of California, OLG obtained summary judgment by relying on *Hosanna-Tabor* and the ministerial exception;[102] the Ninth Circuit reversed, and held that Morrisey-Berru was not a "minister" for purposes of the exception.[103]

In the second case, Kristen Biel, a first- and fifth-grade teacher,[104] alleged that St. James School declined to renew her contract because she had requested a leave of absence to obtain treatment for breast cancer.[105] Like Morrisey-Berru,

92. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1781 (Alito, J., dissenting).
97. *Id.*
98. Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049, 2055 (2020).
99. *Id.* at 2056-58.
100. *Id.*
101. *Id.* at 2058.
102. *Id.*
103. Morrisey-Berru v. Our Lady of Guadalupe Sch., 769 F. App'x 460, 461 (9th Cir. 2019), *cert. granted*, 140 S. Ct. 679 (2019), *rev'd and remanded*, 140 S. Ct. 2049 (2020).
104. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2058.
105. *Id.* at 2059.

Biel taught all subjects, including religion.[106] St. James obtained summary judgment in the Central District of California under the ministerial exception.[107] The Ninth Circuit reversed.[108]

The Supreme Court reversed both Ninth Circuit decisions, holding that anyone who performs "vital religious duties" qualifies for the exemption—which includes teachers who are responsible for "educating the young in the faith."[109] The Court said that the Ninth Circuit erred by relying too much on the specific factors cited in *Hosanna-Tabor*, and called on lower courts not to apply a "rigid formula" but instead "take all relevant circumstances into account" to determine whether a given employee's responsibilities "implicated the fundamental purposes" of the ministerial exception.[110] The Court declined to lay out a specific test, noting the variety of religious structures and practices in the United States.[111]

While this opinion certainly expands the ministerial exception in its call for judges to apply a holistic analysis to each claim to determine whether a given employee falls within the exception's bounds,[112] the majority's decision not to provide more specific guidance to lower courts makes it difficult to predict how the exception will be applied moving forward. The opinion explicitly removes protections for any teacher in a religious school who teaches religion, about half of the total lay teachers in religious schools, but it is not clear whether the exception applies to those who teach only secular subjects.[113] It undeniably created a strong incentive for religious leaders hoping to escape potential liability to characterize most or all of their employees as performing "vital religious duties," given the deference that the majority's opinion affords to employers' own characterizations of their employee's responsibilities.[114]

IV. PRIVATE BUSINESSES' RELIGION-BASED COMPLAINTS AGAINST STATE AND FEDERAL STATUTES

Following *Burwell v. Hobby Lobby*, closely-held corporations can allege RFRA claims alongside non-profit corporations and individuals. This means that such corporations can be exempt from neutral and generally applicable laws that substantially burden their owners' religious beliefs, such as the contraceptive

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 2066.
110. *Id.* at 2066-67.
111. *Id.* at 2064-66.
112. *See* Robert Barnes, *Supreme Court affirms 'ministerial exception' that protects religious organizations from some lawsuits*, WASH. POST (July 8, 2020, 5:03 PM), washingtonpost.com/politics/courts_law/supreme-court-affirms-ministerial-exception-that-protects-religious-organizations-from-some-lawsuits/2020/07/08/2075fe7c-c123-11ea-b4f6-cb39cd8940fb_story.html.
113. *See id.*
114. Serena Mayeri, *SCOTUS rules on Our Lady of Guadalupe School v. Morrissey-Berru, Law School faculty react*, UNIV. PA. L. SCH. (July 8, 2020), https://www.law.upenn.edu/live/news/10220-scotus-rules-on-our-lady-of-guadalupe-school-v.

mandate of the Patient Protection and Affordable Care Act, if the law is not narrowly tailored. The scope of *Hobby Lobby* and whether publicly-traded corporations can allege similar claims are yet to be determined. Additionally, following *Masterpiece Cakeshop*, business owners who reject on religious grounds to performing specific services (such as creating custom wedding cakes, floral arrangements, or invitations for same-sex weddings) are entitled to neutral and respectful consideration by government bodies seeking to enforce public accommodations laws. The *Masterpiece Cakeshop* standard offers little clarity for whether a state that compels businesses to follow public accommodations laws violates business owners' First Amendment freedoms to free exercise of religion and from government-compelled speech.

This section discusses the jurisprudence surrounding private businesses' religion-based complaints in A) *Burwell v. Hobby Lobby Stores, Inc.* and B) *Masterpiece Cakeshop v. Colorado Civil Rights Commission.*

A. BURWELL V. HOBBY LOBBY STORES, INC.

Burwell v. Hobby Lobby Stores, Inc. is a landmark case on religious exemption claims by private businesses.[115] In *Hobby Lobby*, a private business refused to offer contraceptive coverage to its female employees based on the business owners' personal religious beliefs.[116] Although the Court did not reach the constitutional question, instead deciding the case under the RFRA statute, *Hobby Lobby* is indicative of how the Court may decide future religious exercise claims. The Court held that business corporations are within the RFRA's definition of "persons," and thus can "exercise religion" under the Act.[117] Therefore, Hobby Lobby, Inc. can claim an exemption from the portion of the Patient Protection and Affordable Care Act that requires employers with fifty or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage," including contraceptive methods, sterilization procedures, and patient education and counseling.[118] Hobby Lobby, Inc.[119] objected to four of the mandated methods of contraception based on its owners' religious convictions.[120] The parties thus sought an exemption from the mandate,[121] arguing that corporations were "persons" under RFRA and that the mandate burdened their "exercise of religion."[122]

115. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
116. *Id.* at 702-03.
117. *Id.* at 708-10.
118. *Id.* at 696-98.
119. The two for-profit corporations cases, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) and *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), were consolidated into *Burwell v. Hobby Lobby Stores, Inc.* after the grant of certiorari. Both corporations raised the same objection.
120. *See Hobby Lobby*, 573 U.S. at 691.
121. *Id.* at 703-04.
122. *Id.* at 704.

In the principal dissent, Justice Ginsburg raised the concern that employers might use religious beliefs as an excuse for discrimination. She noted religious freedom challenges brought in the past by a restaurant chain owner who objected to serving Black patrons, a business that did not want to hire women who did not have their husband's or father's consent to work outside the home, and a photography studio that wished to avoid photographing a same-sex wedding.[123] The majority decision downplayed those concerns by acknowledging "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," but stated its decision "provides no such shield."[124]

Hobby Lobby centered on an enduring legal debate: whether to treat for-profit corporations as the property of shareholders, which thus could not "exercise religion," or as a social institution created by law to provide certain social benefits in the long-term, which could have religious beliefs and moral principles.[125] This debate has the potential to split courts in the practical implementation of the *Hobby Lobby* opinion. Both businesses in *Hobby Lobby* are closely-held corporations and their shareholders and directors practice the same religion.[126] A lower court would have difficulty deciding what religious values a corporation holds in situations where the corporation bringing a RFRA claim has a large shareholder base with diverse religious beliefs. Tasked with this, a lower court may exempt the corporation from a generally applicable law based on the religion of the majority of shareholders. However, controlling shareholders in closely-held corporations owe fiduciary duties to minority shareholders.[127] For its part, the *Hobby Lobby* majority expressed skepticism of such a case arising, claiming that it seems "unlikely" and "improbable" for publicly-traded corporate giants with diverse shareholders to assert RFRA claims, but importantly did not deny the possibility.[128]

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, decided in June 2020, the Court reframed *Hobby Lobby*'s religious exemption for closely held for-profit corporations as an exemption for "religious entities with complicity-based objections."[129] It is not yet clear whether this recharacterization effectively expands *Hobby Lobby*'s exemption beyond closely-held corporations. *Hobby Lobby*'s reach may be curtailed at present to the facts of a closely-held

123. *Id*. at 770 (Ginsburg, J., dissenting) (discussing *Elane Photography LLC v. Willock*, discussed in Section IV.B *infra*).

124. *Id*. at 733.

125. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264-65 (1992).

126. *Hobby Lobby*, 573 U.S. at 717.

127. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 26 (Del. Ch. 2010).

128. *Hobby Lobby*, 573 U.S. at 717; *see also* Paul Horowitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 183 (2014).

129. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2377 (2020).

company where controlling shareholders both serve the function of the executive board and practice the same religion, but its future is uncertain.

B. MASTERPIECE CAKESHOP LTD. V. COLORADO CIVIL RIGHTS COMMISSION

State courts take divergent approaches to the question of whether a business owner is free to turn away customers due to the owner's sincerely held religious beliefs. This most often as arises when wedding vendors object to providing services same-sex couples. Before the Supreme Court ruled on the issue in *Masterpiece Cakeshop*, the New Mexico Supreme Court addressed it in *Elane Photography, LLC v. Willock*, where the court found that a wedding photographer who objected to photographing a lesbian commitment ceremony violated the state's Human Rights Act (HRA) as applied to public accommodations.[130] After concluding that the photography business was subject to the HRA because it "offers its services to the public, thereby increasing its visibility to potential clients,"[131] the New Mexico Supreme Court found that the HRA did not violate "free speech guarantees, because the [HRA] does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."[132] The court decided that conveying clients' messages did not constitute compelled speech, because Elane Photography conveys only a "message-for-hire."[133] While Elane Photography can post on its website that it opposes same-sex marriage, it is still required to comply with the HRA as a public accommodation.[134] Finding that creative businesses like Elane Photography are conduits of client speech is one way for courts to enforce public accommodations laws against such businesses, as doing so lowers the level of protection given to speech distinct from that of the business itself.[135] Elane Photography sought certiorari after the New Mexico Supreme Court's decision but was denied in 2014.[136]

After *Elane Photography*, the public hoped to see the Court address the tangled debate about free speech, religious exercise, and equal treatment in the public square in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[137] The case arose from an encounter in 2012, when Charlie Craig and David Mullins went to Masterpiece Cakeshop in Colorado to order a cake to celebrate their upcoming wedding.[138] Jack Phillips, the owner of the bakery and a devout Christian, refused the couple's request because he was not willing to design custom cakes that conflicted with his religious beliefs.[139] The Colorado Civil Rights

130. Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).
131. *Id.*
132. *Id.*
133. *Id.* at 66, 72.
134. *Id.* at 59.
135. *See* Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1516 (2012).
136. Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014), *cert denied.*
137. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1721 (2018).
138. *Id.* at 1724.
139. *Id.*

Commission ruled that Phillips had violated the Colorado Anti-Discrimination Act (CADA) and told him that if he wanted to make cakes for opposite-sex weddings, he would have to do the same for same-sex weddings.[140] After a Colorado court upheld that ruling, the Supreme Court granted Phillips' petition for certiorari.[141]

Phillips raised two constitutional claims. First, he argued that interpreting CADA to require him to create a cake for a same-sex wedding violated his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed.[142] Second, he argued that requiring him to create cakes for same-sex weddings violated his right to the free exercise of religion, also protected by the First Amendment.[143] Phillips claimed using his artistic skills to make an expressive statement, thereby endorsing the wedding in his own voice and of his own creation, had a significant First Amendment speech component and implicated his deep and sincere religious beliefs.[144] The customers' rights to goods and services became "a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs."[145]

The Court avoided ruling broadly on the intersection of anti-discrimination laws and rights to free exercise. It declined to rule on the "freedom of speech" argument. It merely stated that because (at that time) Colorado did not allow gay marriages in the state, "there is some force in the argument that the baker was 'not unreasonable' in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State."[146] In the majority opinion, Justice Kennedy acknowledged that while religious and philosophical objections to gay marriage are protected under the First Amendment, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[147]

Instead of adjudicating whether the baker's behavior violated the law, the majority opinion decided that the Colorado Civil Rights Commission failed to give "neutral and respectful consideration" to the baker's claims and beliefs in all the circumstances of the case.[148] Justice Kennedy cited the comments of one

140. *Id*. at 1726.
141. *Id*. at 1727.
142. *Id*. at 1726.
143. *Id*.
144. *Id*. at 1728.
145. *Id*.
146. *Id*.
147. *Id*. at 1727.
148. *Id*. at 1729.

commissioner, who said religion had been used to justify all kinds of discrimination throughout history, including slavery and the Holocaust.[149] Justice Kennedy said those comments disparaged Phillips' religion in at least two distinct ways: by describing it as despicable and also by characterizing it as merely rhetorical.[150] Therefore, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.[151]

In her concurrence, Justice Kagan, joined by Justice Breyer, warned lower courts that discrimination against messages is not religious discrimination.[152] Justice Thomas, joined by Justice Gorsuch, wrote separately to say that the case should have been decided on free-speech grounds.[153] In her dissent, Justice Ginsburg said she did not see a problem with the proceedings of the Colorado Civil Rights Commission: Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it.[154] She saw "no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins."[155]

The decision in *Masterpiece Cakeshop* provides limited guidance for lower courts facing similar cases, as it based its ruling on a very narrow ground—that the Colorado Civil Rights Commission treated Phillips unfairly by being too hostile to his sincere religious beliefs during its consideration of the case. The majority opinion stated that determination of "the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power" required an adjudication "in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach," and *Masterpiece Cakeshop* does not meet such requirement.[156] As Justice Kennedy said, "in this case the adjudication concerned a context that may well be different going forward."[157] Therefore, "the outcome of cases like this in other circumstances must await further elaboration in the courts."[158]

A handful of state courts have already wrestled with how to apply *Masterpiece Cakeshop*. In *State v. Arlene's Flowers, Inc*., the state of Washington filed claims against a flower shop owner and her corporation when she refused to sell wedding flowers to a same-sex couple based on religious objections.[159] The lower state court granted summary judgment in favor of the state and the same-sex couple,

149. *Id.*
150. *Id.*
151. *Id.* at 1729.
152. *Id.* at 1734 (Kagan, J., concurring).
153. *Id.* at 1740-48 (Thomas, J., concurring).
154. *Id.* at 1751 (Ginsburg, J., dissenting).
155. *Id.*
156. *Id.* at 1723.
157. *Id.* at 1732.
158. *Id.*
159. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1212 (Wash. 2019).

and the state supreme court affirmed.[160] The Supreme Court granted the shop owner's petition for certiorari in June 2018, vacating and remanding in light of the *Masterpiece Cakeshop* decision released that same summer.[161] On remand, the Washington Supreme Court affirmed the original state courts' judgments because it found no hostility to the shop owner's religious views in the previous decisions.[162] It therefore held that the shop owner discriminated in violation of state law by refusing to provide custom floral arrangements for the same-sex couple, and that the state law did not violate the shop owner's First Amendment rights to religious free exercise, free association, and freedom from compelled speech.[163]

The Supreme Court vacated and remanded one other state case in light of *Masterpiece Cakeshop*. In *Klein v. Oregon Bureau of Labor and Industries*, bakery owners sought judicial review of a state order that their refusal to provide a wedding cake to a same-sex couple violated state public accommodations laws.[164] The Oregon Court of Appeals affirmed the finding that the bakery owners had violated state law and rejected their claims that the state order compelled the bakery owners' speech or impermissibly burdened their free exercise rights in violation of the First Amendment.[165] After the Oregon Supreme Court denied review,[166] the Supreme Court vacated judgment and remanded to the Oregon Court of Appeals in June 2019.[167] The state court heard oral argument on remand but has not yet announced a decision.[168] Unlike in *Arlene's Flowers*, the business owners may succeed here under *Masterpiece Cakeshop*'s hostility standard because one of the state commissioners involved with the case posted on social media and commented in an interview for a local paper during the proceedings that religion does not provide a "right to discriminate."[169]

One of the first state decisions to cite *Masterpiece Cakeshop* was *Brush & Nib Studio v. City of Phoenix*, where wedding design business owners brought a pre-enforcement action challenging the constitutionality of the city's public accommodations ordinance.[170] The intermediate state court's decision in favor of the city favorably cited language from *Masterpiece Cakeshop*'s majority opinion that

160. State v. Arlene's Flowers, Inc., 389 P.3d 543, 548 (Wash. 2017), *vacated sub nom* Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).

161. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).

162. *Arlene's Flowers*, 441 P.3d at 1209.

163. *Id.*

164. Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1056-57 (Or. Ct. App. 2017), *vacated*, 139 S. Ct. 2713 (2019).

165. *Id.* at 1057.

166. Klein v. Or. Bureau of Lab. & Indus., 434 P.3d 25 (Or. 2018).

167. Klein v. Or. Bureau of Lab. & Indus., 139 S. Ct. 2713 (2019).

168. Tess Riski, *Oregon Court Revisits Case of Cake Shop Owners who Refused to Sell Cake to Lesbian Couple in 2013*, WILLAMETTE WEEK (Jan. 9, 2020), https://www.wweek.com/news/2020/01/09/oregon-court-revisits-case-of-cake-shop-owners-who-refused-to-sell-cake-to-lesbian-couple-in-2013/.

169. *Klein*, 410 P.3d at 1079.

170. Brush & Nib Studio, LC v. City of Phx., 418 P.3d 426, 431 (Ariz. Ct. App. 2018), *rev'd*, 448 P.3d 890 (Ariz. 2019).

"gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth" and "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[171] The intermediate court, like the court in *Elane Photography*, suggested that the shop owners "may post a statement endorsing their belief that marriage is between a man and a woman and may post a disclaimer explaining that, notwithstanding that belief, [state law] requires them to provide goods and services to everyone regardless of sexual orientation."[172]

However, the Arizona Supreme Court reversed this decision in September 2019, holding that the city could not apply its Human Relations Ordinance to force the business owners to create custom wedding invitations for a same-sex wedding in violation of their sincerely held religious beliefs.[173] Such an application would violate both the Arizona Constitution and Arizona's Free Exercise of Religion Act.[174] The court cited *Hobby Lobby* to reject a reasonableness analysis of the business owners' sincerely held beliefs.[175] Interpreting *Masterpiece Cakeshop*'s holding, the court wrote: "Likewise, *Masterpiece Cakeshop* did not hold that public accommodations laws were *immune* from free exercise exemptions; rather, it clearly contemplated that *some* exemptions, if narrowly confined, were permissible."[176] And because "bona fide religious organizations" are exempt from Arizona's public accommodations ordinance, the state does not have a compelling interest in requiring the owners' for-profit business here to comply.[177] The court directed summary judgment in favor of the business owners "with respect to the creation of custom wedding invitations that are materially similar to the invitations in the record," although it refused to extend that ruling to all of the business owners' products.[178] Three judges dissented, citing *Masterpiece Cakeshop*'s language that allowing vendors of wedding goods and services to refuse similar services for gay persons would result in "a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[179]

Academics have vigorously debated how *Masterpiece Cakeshop* should be interpreted. Some, like Joseph William Singer, take the *Masterpiece Cakeshop* majority's citation of *Newman v. Piggie Park Enterprises*, a Supreme Court case rejecting a restaurant owner's "patently frivolous" religious objection to serving

171. *Id.* at 434 (quoting Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

172. *Id.* at 439-40; *see also* Elane Photography, LLC v. Willock, 309 P.3d 53, 59 (N.M. 2013).

173. Brush & Nib Studio, LC v. City of Phx., 448 P.3d 890, 895 (Ariz. 2019).

174. *Id.*

175. *Id.* at 921.

176. *Id.* at 924.

177. *Id.* at 924-25.

178. *Id.* at 926.

179. *Id.* at 935 (Bales, J., dissenting) (quoting Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

Black and white patrons together, to affirm that "religious belief cannot be a reason for a constitutionally based exemption from an antidiscrimination law and that this same truth applies to cases of discrimination based on sexual orientation."[180] Civil rights commissions and judges enforcing civil rights laws simply have a duty "to justify their decisions in ways that do not express hostility to the religious beliefs of business owners who object to complying with antidiscrimination laws."[181] Douglas NeJaime and Reva Siegel suggest that the *Masterpiece Cakeshop* opinion offers even more guidance on the relationship between religious exemptions and antidiscrimination law; they claim that *Masterpiece Cakeshop* assimilates sexual orientation into existing antidiscrimination framework alongside protected identities like race, reaffirms public accommodations law, and authorizes limits on "religious exemptions to prevent harm to other citizens who do not share the objectors' beliefs."[182] They disagree with the interpretation that *Masterpiece Cakeshop*'s requirement that religious claimants be afforded neutral and respectful consideration translates into an obligation to provide the religious claimant an exemption from the public accommodations law.[183]

Ultimately, the dicta that accompanies *Masterpiece Cakeshop*'s narrow holding and correspondingly limited precedential value have confused lower courts and scholars alike. Until the Supreme Court decides a case like *Masterpiece Cakeshop* on its merits, this area of law is destined to remain muddled, frustrating religious business owners and LGBTQ+ consumers alike.

V. RELIGIOUS EXEMPTIONS TO PROVIDING HEALTHCARE

Besides religious exemptions for private businesses, religious exemptions have developed in healthcare as well. Religious exemptions in healthcare permit healthcare providers to refuse to provide services that violate their religious or moral beliefs without facing legal or professional consequences.[184] Religious exemptions for healthcare providers first became prevalent in response to *Roe v. Wade* in 1973. A few months after *Roe v. Wade*, Congress passed a law stating that institutions and individuals providing healthcare and receiving federal funds cannot be required to perform abortions or sterilizations if these procedures are

180. Joseph William Singer, *Religious exemption to public accommodation laws rejected by Supreme Court while those laws cannot be administered in a way that demonstrates hostility to religion or that unfairly discriminates among religious beliefs*, HARV. L. SCH. (June 9, 2018), https://scholar.harvard.edu/jsinger/blog/religious-exemption-public-accommodation-laws-rejected-supreme-court-while-those-laws.

181. *Id.*

182. Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, YALE L.J.F. 201, 204 (Sept. 14, 2018), https://www.yalelawjournal.org/pdf/NeJaimeSiegel_t7ffwsct.pdf.

183. *Id.* at 218.

184. *See, e.g.*, 42 U.S.C. § 300a-7(b)-(e); 42 U.S.C. § 238n; *see Refusing to Provide Health Services*, GUTTMACHER INST. (Jan. 1, 2021), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services.

contrary to the institution's or individual's religious beliefs.[185] Since then, a number of state statutes have delineated which institutions may refuse to provide abortions; whether individual providers, pharmacists, or institutions may refuse to provide contraception; and whether individual providers and institutions may refuse to provide sterilization.[186]

Religious exemptions for healthcare providers have emerged at the forefront again with regard to providing healthcare for LGBTQ+ people, particularly those who identify as transgender.[187] Religiously-based hospitals have relied on sterilization-exemption laws to deny transgender people access to transition-related treatments, such as gender-affirming surgeries and various hormone treatments.[188] Eighteen states allow some healthcare providers to refuse to provide these sterilization services.[189] Mississippi currently holds one of the broadest healthcare refusal laws; under this law, healthcare providers may decline to provide *any* treatment to transgender individuals, including, but certainly not limited to, sterilization procedures.[190]

At the federal level, Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits discrimination on the basis of sex in federally funded and federally administered health programs.[191] In 2016, the Department of Health and Human Services (HHS) issued a rule clarifying that Section 1557's ban on

185. *See* 42 U.S.C. § 300a-7; Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 186 (2015).

186. *See, e.g.,* ARIZ. REV. STAT. ANN. § 36-2154 (2009) (exempting pharmacies, hospitals, and health professionals from facilitating or participating in the provision of an abortion, abortion medication, emergency contraception or any medical device intended to inhibit or prevent implantation of a fertilized ovum on moral or religious grounds); CAL. HEALTH & SAFETY CODE § 123420(c) (West 2014) (exempting only nonprofit hospitals, facilities, or clinics organized or operated by a religious corporation or other religious organization from providing abortions for moral, ethical, or religious reasons); FLA. STAT. § 381.0051 (2012) (exempting any individual from providing contraceptive or family planning service, supplies, or information for religious or medical reasons); MASS. GEN. LAWS ch. 112 § 121 (2018) (exempting privately controlled hospitals or health facilities from providing abortions for religious or moral principles). Some states previously required pharmacists to dispense emergency contraceptives in spite of sincerely held religious beliefs, but federal courts have struck down these laws as violations of the Free Exercise and Equal Protection Clauses. *See* Menges v. Blagojevich, 451 F. Supp. 2d 992, 1002, 1005 (C.D. Ill. 2006); Stormans Inc. v. Selecky, 844 F. Supp. 2d 1172, 1199-1200 (W.D. Wash. 2012).

187. *See* MOVEMENT ADVANCEMENT PROJECT & NAT'L CTR. FOR TRANSGENDER EQUAL., RELIGIOUS REFUSALS FOR HEALTHCARE: A PRESCRIPTION FOR DISASTER 7-8 (2018), https://www.lgbtmap.org/file/Healthcare-Religious-Exemptions.pdf.

188. *See* Minton v. Dignity Health, 252 Cal. Rptr. 3d 616, 618 (Cal. Ct. App. 2019); *see also* Claudia Buck & Sammy Caiola, *Transgender patient sues Dignity Health for discrimination over hysterectomy denial*, THE SACRAMENTO BEE (Apr. 20, 2017, 11:30 AM), https://www.sacbee.com/news/local/health-and-medicine/article145477264.html.

189. *Refusing to Provide Health Services*, *supra* note 184.

190. *See* H.B. 1523, 2016 Leg., 135th Sess. (Miss. 2016); Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017) (reversing lower court's grant of preliminary injunction in favor of the LGBTQ+ plaintiffs holding that "stigmatic injury alone" is insufficient cause to generate the proper standing to challenge the law as discriminatory); *see also* MOVEMENT ADVANCEMENT PROJECT & NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 187.

191. Affordable Care Act, 42 U.S.C. 18116 § 1557(a) (2010).

discrimination based on sex included discrimination based on gender identity.[192] Subsequent cases at the district court and circuit court levels made the rule's legality unclear,[193] and a subsequent rule issued in June 2020 repealed the 2016 rule's inclusive interpretation of sex.[194] Litigation surged from plaintiffs seeking to restore the 2016 definition of discrimination based on sex following the decision in *Bostock v. Clayton County* as early as three days after HHS finalized the 2020.[195] Two injunctions reviving the 2016 rule's definition of gender identity and sex stereotyping have already been issued.[196]

In January 2021, the United States District Court for the District of North Dakota issued a ruling permanently enjoining enforcement of HHS's current interpretation of Section 1557 (per the 2020 rule and existing injunctions) against a collection of Catholic plaintiffs because the interpretation would have required plaintiffs to perform and provide insurance coverage for gender-affirming procedures.[197] The court dismissed similar claims regarding abortions and Administrative Procedure Act (APA) procedural challenges, but held that enforcement of Section 1557 and Title VII of the Civil Rights Act to require the Catholic plaintiffs to perform and provide insurance coverage for gender-affirming procedures would violate RFRA.[198]

This section discusses healthcare religious exemptions regarding A) the Church, Coats-Snowe, and Weldon Amendments and B) the refusal to fill prescriptions.

A. THE CHURCH, COATS-SNOWE, AND WELDON AMENDMENTS

After *Roe v. Wade* recognized a fundamental right to privacy that protected women's right to abortion,[199] Congress enacted statutory protection—the Church, Coats-Snowe, and Weldon Amendments—for healthcare providers who refuse to perform abortions for primarily religious reasons.[200] Congress passed the Church Amendments in 1974, protecting individuals and entities from being denied federal funding for refusing to perform abortions or sterilizations based on religious

192. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,388 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

193. *See* Flack v. Wis. Dept. of Health Servs., 328 F. Supp. 3d 931 (W.D. Wis. 2018); Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016); Tovar v. Essential Health, 342 F. Supp. 3d 947, 953 (D. Minn. 2018).

194. Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 37,162 (June 19, 2020).

195. *See* Religious Sisters of Mercy v. Azar, No. 3:16-cv-00386, 2021 WL 191009, at *8 (D.N.D. Jan. 19, 2021).

196. *Id.*

197. *Id.* at 27.

198. *Id.* at 26-27.

199. Roe v. Wade, 410 U.S. 113, 153-54 (1973).

200. *See* 42 U.S.C. § 300a-7; 42 U.S.C. § 238n; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 § 507 (2)(d)(1) (2018) (Weldon Amendment).

beliefs or moral convictions.[201] Federal funding also may not be contingent on the entity making its facilities or personnel available for performing abortions or sterilizations.[202] Entities receiving federal funds may not discriminate in employment, or any other employment-related privileges, against individuals who choose not to perform abortions or sterilizations.[203] Most significantly, the Church Amendments affirmed that "no individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the [Secretary of Health and Human Services]" if their performance or assistance in such a program or activity "would be contrary to [their] religious beliefs or moral convictions."[204]

In 1996, Congress enacted the Coats-Snowe Amendment. The Coats-Snowe Amendment forbids government entities that receive federal financial assistance from discriminating against any healthcare entity that refuses to undergo, require, or provide training for abortions; perform abortions; or provide referrals for such training or abortion.[205] Governments may not deny a legal status, such as a license or certificate, or financial assistance to a healthcare entity that would be accredited but for the accrediting agency requiring a healthcare entity to perform or train to perform abortions.[206] Congress passed another similar provision in 2005 under the Weldon Amendment, which restricts access to HHS appropriations for state/local governments, federal agencies, and programs that discriminate against healthcare entities on the basis of whether the healthcare entity performs, pays for, or provides coverage or referrals for abortions.[207]

1. Trump Era Religious Exemption Regulation: Protecting Statutory Conscience Rights in Healthcare

Under the Trump Administration, HHS finalized a rule on May 21, 2019 entitled "Protecting Statutory Conscience Rights in Health Care."[208] This rule upholds and expands the types of healthcare providers protected under the Church, Coats–Snowe, and Weldon Amendments and further widens the scope of abortion-related religious exemptions.[209] For example, the rule explicitly defines "referral" as including the "provision of information in oral, written, or electronic form (including names, addresses, phone numbers, email or web

201. 42 U.S.C. § 300a-7.
202. *Id.*
203. *Id.*
204. *Id.*
205. 42 U.S.C. § 238n.
206. *Id.*
207. § 507 (2)(d)(1); *see also* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 45 C.F.R. § 88 (2019) ("The Weldon Amendment (or "Weldon") was originally adopted in 2004 and has been readopted (or incorporated by reference) in each subsequent appropriations act for the Departments of Labor, Health and Human Services, and Education.").
208. Protecting Statutory Conscience Rights in Healthcare, 45 C.F.R. § 88 (2019).
209. *See id.* at § 88.1.

addresses, directions, instructions, descriptions, or other information resources)."[210] The rule also provides an expansive list of entities that qualify as healthcare entities, including postgraduate physician training programs, laboratories, provider-sponsored organizations, third-party administrators, pharmacies, and any other kind of healthcare organization, facility, or plan.[211] Additionally, the proposed rule defines "[a]ssist in the performance" of a health service as taking an action "that has a specific, reasonable and articulable connection to furthering a procedure or a part of a health service program, or research activity."[212]

The rule's new definitions broaden the scope of people, entities, and exemptions protected by the Church, Coats-Snowe, and Weldon Amendments. Actions previously permitted in certain states due to ambiguous definitions are explicitly restricted under the new rule. For example, Iowa currently requires healthcare providers to take "all reasonable steps to transfer the patient to another health care provider" even when there is an objection based on "religious beliefs, or moral convictions."[213] The rule's new definition of "referral" means that the Coats-Snowe and Weldon Amendments would override Iowa's statute because "transfer[ing] the patient to another health care provider" would constitute a "referral" that entities have a right to refuse to provide.[214] This rule highlights the Trump Administration's commitment to widening conscience–based protections for the purpose of protecting religious freedoms.[215]

Three challenges to this rule were raised in federal court in 2019.[216] Most relevant is *New York v. United States Department of Health and Human Services*, where nineteen states, Washington D.C., three local governments, and several healthcare provider associations are the plaintiffs seeking invalidation of the rule.[217] Plaintiffs argued that the rule was issued in violation of the APA as it exceeds HHS's statutory authority, was not adopted in accordance with law, is arbitrary and capricious, and violated the APA's procedural requirements.[218] Further, plaintiffs argued that the rule was in conflict with the Constitution specifically under the Spending and Establishment Clauses and in violation of the Separation of Powers clause.[219]

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210. *Id.* at § 88.2.

211. *Id.*

212. *Id.*

213. IOWA CODE ANN. § 144D.3(5) (West 2012).

214. *Id.*; *see* 42 U.S.C. § 238n; Protecting Statutory Conscience Rights in Healthcare, 45 C.F.R. § 88 (2019); 83 Fed. Reg. 3880, 3924 (Jan. 26, 2018).

215. *See* 83 Fed. Reg. 3880, 3880-81.

216. *See* Washington v. Azar, 426 F. Supp. 3d 704, 708 (E.D. Wash. 2019); City & Cty. of San Francisco v. Azar, 411 F. Supp. 3d 1001, 1005 (N.D. Cal. 2019); New York v. United States Dep't of Health & Hum. Servs., 414 F. Supp. 3d, 475, 496 (S.D.N.Y. 2019).

217. *New York*, 414 F. Supp. 3d at 496-97.

218. *Id.* at 497.

219. *Id.*

In a 147-page opinion, the court found that the APA violations in the present rulemaking process were "numerous, fundamental, and far-reaching."[220] The court found, *inter alia*, that HHS lacked substantive rule-making authority over a majority of the core conscience provisions which "nullifies the heart of the Rule as to these statutes."[221] Further, it found the rule to be unconstitutionally coercive in regard to the spending power, citing *National Federation of Independent Businesses v. Sebelius* as precedent, making it the second finding of unconstitutionally coercive use of the spending power by a U.S. court.[222] Here, the rule threatens "not a small percentage of the States' federal healthcare funding, but literally *all* of it."[223] Accordingly, the court granted plaintiffs' motion for summary judgment and vacated HHS's 2019 rule in its entirety.[224] The case is now on appeal in the Second Circuit.[225]

These cases are unlikely to be the last word over the battle for conscience regulations, especially considering the newly cemented 6-3 conservative majority on the Supreme Court.[226] Additionally, though the 2019 rule has been struck down, the Church, Coats-Snowe, and Weldon Amendments remain. These and other laws permitting and protecting healthcare providers who refuse to provide health services due to religious beliefs or moral convictions will continue to disproportionately affect LGBTQ+ people and women as a result. Two recent cases, discussed below, involving a transgender man being denied gender affirmation surgery and a woman being denied reproductive surgery serve as examples of the impact of the current state of religious exemption law. Dignity Health is the defendant in both cases and, notably, is the fifth largest healthcare system in the country.[227]

2. Minton v. Dignity Health

Evan Minton, a transgender man, was scheduled to receive a hysterectomy in August 2016 at Mercy San Juan Medical Center (MSJMC), a healthcare service provider owned by Dignity Health.[228] Minton sought a hysterectomy as part of his gender transition and treatment for gender dysmorphia.[229] Two days before

220. *Id.* at 577.

221. *Id.*

222. *Id.* at 570-571; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580-81 (2012).

223. *New York*, 414 F. Supp. 3d at 570.

224. *Id.* at 580.

225. Press Release, *Christian doctors continue the fight for conscience protections*, BECKET (Dec. 19, 2019), https://www.becketlaw.org/media/christian-doctors-continue-fight-conscience-protections/.

226. *See* Leah Litman & Melissa Murray, *Shifting from a 5-4 to a 6-3 Supreme Court majority could be seismic*, WASH. POST (Sept. 25, 2020, 12:13 PM), https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html.

227. *Minton v. Dignity Health*, ACLU (July 28, 2020), https://www.aclu.org/cases/minton-v-dignity-health.

228. First Amended Verified Complaint for Declaratory and Injunctive Relief at 1, Minton v. Dignity Health, 252 Cal. Rptr. 3d 616 (Cal. Ct. App 2019).

229. *Id.*

the procedure, Minton notified MSJMC personnel that he is transgender.[230] The hospital canceled the appointment the next day.[231] MSJMC is a Catholic hospital that proclaims to follow its sincerely-held belief in Catholic doctrine in its provision of medical care and thus denied Minton a hysterectomy.[232] Notably, MSJMC permits physicians to perform hysterectomies for patients with diagnoses other than gender dysphoria.[233] Minton's surgeon and Dignity Health did help him obtain his surgery three days later at a non-Catholic Dignity Health hospital.[234] Minton brought suit, alleging that Dignity Health violated the Unruh Civil Rights Act—which provides individuals protection from discrimination by all business establishments in the state[235]—by denying medical services for Minton on the basis of his gender identity.[236] The trial court dismissed Minton's complaint after the court sustained Dignity's demurrer without leave to amend.[237] On appeal, the California Court of Appeals reversed and remanded finding, in pertinent part, that Minton had stated a cognizable claim and that the health organization's constitutional rights to religious freedom and freedom of expression did not preclude the patient's Unruh Act discrimination claim.[238] Dignity Health filed a petition for a writ of certiorari to the Supreme Court, which has not yet granted or denied certiorari. In their petition for certiorari, Dignity Health argued that this case "represents a profound threat to religious healthcare providers' ability to carry out their healing ministries in accordance with the principles of their faith" and is also a significant infringement on their First Amendment rights.[239]

3. Chamorro v. Dignity Health

Rebecca Chamorro was a pregnant woman scheduled to give birth by cesarean section.[240] Since Chamorro did not want to become pregnant again, she looked into tubal ligation procedures to potentially undergo immediately after her cesarean section.[241] Mercy Medical Center in Redding (MMCR) refused to permit Chamorro's obstetrician to perform the tubal ligation procedure due to its

230. *Id.*

231. *Id.*

232. *See* Defendant's Memorandum of Points and Authorities in Support of Demurrers to First Amended Verified Complaint at 1, *Minton*, 252 Cal. Rptr. 3d.

233. *See* First Amended Verified Complaint for Declaratory and Injunctive Relief, *supra* note 228 at 1; Defendant's Memorandum of Points and Authorities in Support of Demurrers to First Amended Verified Complaint, *supra* note 232 at 1.

234. *See* Defendant's Memorandum of Points and Authorities in Support of Demurrers to First Amended Verified Complaint, *supra* note 232 at 1.

235. *Public Access Discrimination and Civil Rights Fact Sheet*, DEP'T OF FAIR EMP. (Dec. 2020), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/DFEH_UnruhFactSheet.pdf.

236. First Amended Verified Complaint for Declaratory and Injunctive Relief, *supra* note 228 at 4-5.

237. Minton v. Dignity Health, 252 Cal. Rptr. 3d 616, 618-19 (Cal. Ct. App 2019).

238. *Id.* at 619.

239. Petition for Writ of Certiorari at 14-15, Dignity Health v. Minton (No. 19-1135).

240. First Amended Verified Complaint for Declaratory and Injunctive Relief, *supra* note 228 at 2, Chamorro v. Dignity Health, No. CGC 15-549626 (Calif. Super. Ct. Dec. 28, 2015).

241. *Id.*

sterilization policy and the Ethical Religious Directives for Catholic Health Services (the ERD's).[242] The ERD's prohibit "direct sterilization," which is defined as sterilization for the purpose of contraception and is viewed by the medical center as "intrinsically evil."[243] Rebecca Chamorro and Physicians for Reproductive Health sued, alleging that Dignity Health violated the Unruh Act by denying medical services for Chamorro on the basis of sex.[244] The Superior Court of California for the County of San Francisco decided that the hospital was not obligated to perform a tubal ligation for Chamorro because its religion-based policy against sterilization would apply equally to a man seeking sterilization.[245] The court also pointed out that Chamorro could have obtained the procedure at another hospital.[246] Americans United for the Separation of Church and State, a nonpartisan organization working to protect the religious liberties of all people, said of this opinion that rules such as these might have once been relatively unobjectionable when the typical Catholic hospital was a small facility mostly geared toward caring for local church members.[247] But that is simply no longer the case as "Catholic healthcare systems receive billions of dollars in . . . taxpayer funds and dominate some communities' health landscapes."[248] Protections permitting healthcare providers to refuse providing abortions, sterilizations, and other health services for religious or moral reasons have created tension with non-discrimination laws and access to healthcare.

B. REFUSALS TO FILL PRESCRIPTIONS

Adding to the tension between religious freedom and reproductive rights, some pharmacies and pharmacists have denied women access to emergency contraceptives based on moral or religious objections.[249] Most states do not have laws regulating these disputes. Of the states that have legislated in this area, only eight states explicitly require pharmacies to provide emergency contraception to patients,[250] and six states have laws permitting pharmacies to refuse to provide contraception on religious or moral grounds.[251] Most of these states allow refusal

242. *Id.*

243. *Id.* at 3.

244. *Id.* at 5-6.

245. Chamorro v. Dignity Health, No. CGC 15-549626, 2016 WL 270082, at *1 (Cal.Super. Jan. 14, 2016).

246. *Id.*

247. *Catholic Hospital In Calif. Doesn't Have to Provide Sterilizations, Court Rules*, AMS. UNITED FOR THE SEPARATION OF CHURCH & STATE (Mar. 2016), https://www.au.org/church-state/march-2016-church-state/people-events/catholic-hospital-in-calif-doesn-t-have-to.

248. *Id.*

249. *See Pharmacy Refusals 101*, NAT'L WOMEN'S L. CTR. (Dec. 28, 2017), https://nwlc.org/wp-content/uploads/2015/08/pharmacy_refusals_101_7_24_15_final_clean_0.pdf.

250. These states are California, Illinois, Maine, Massachusetts, Nevada, New Jersey, Washington, and Wisconsin. *Id.*

251. These states are Arizona, Arkansas, Georgia, Idaho, Mississippi, and South Dakota. *Pharmacy Refusals 101*, *supra* note 249; *see also Religious Refusals in Health Care: A Prescription for Disaster*, MOVEMENT ADVANCEMENT PROJECT 2 (Mar. 2018), https://www.lgbtmap.org/file/Healthcare-

without critical protections for patients such as requirements to transfer prescriptions.[252]

The most instructive jurisprudence in this area comes from Washington state. In *Stormans, Inc. v. Selecky*, the Ninth Circuit held that the State Board of Pharmacy's rules requiring pharmacies to stock and deliver all lawfully prescribed medications to patients were neutral and generally applicable, and therefore religious exercise claims were to be decided on a rational basis standard of review.[253] Operatively, the rules require pharmacies to stock and dispense emergency contraceptives, despite moral or religious objections of the owners.[254] The rules, however, do not require individual pharmacists to provide emergency contraceptives if doing so would conflict with the individual's personal beliefs.[255] A pharmacy may accommodate an objecting pharmacist by making another pharmacist available in person or by telephone.[256] The court found the rules were facially neutral, as they "make no reference to any religious practice, conduct, or motivation."[257] The court found the rules operated neutrally, as they prohibit any refusal to dispense medication, whether the refusal is motivated by religion or any other reason.[258] The court reasoned that neutrality is not negated "even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct."[259] Similarly, the court held the rules were generally applicable because they were not substantially under-inclusive.[260] The court explained that the exceptions to the rules, such as a customer's inability to pay, were narrow and merely allowed a pharmacy to maintain its business.[261] Because the court was deciding on an appeal from a preliminary injunction, the court remanded to the district court to determine whether the rules were rationally related to a legitimate government purpose.[262]

After a twelve-day bench trial, the district court found that the rules were neither neutral nor generally applicable and did not survive a strict scrutiny analysis.[263] The case was again appealed to the Ninth Circuit and proceeded as *Stormans, Inc. v. Wiesman*.[264] The court again held that the rules were both

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Religious-Exemptions.pdf. Note, as well, that some states give pharmacists broader exemptions beyond just contraception. Georgia, for example, allows pharmacists to "refuse to fill any prescription based on professional judgment or ethical or moral beliefs," which could include HIV medication, hormone therapy for gender dysphoria, etc. *Id*. at 2-3.

252. *Religious Refusals in Health Care: A Prescription for Disaster*, *supra* note 251.
253. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1109 (9th Cir. 2009).
254. *See id*. at 1116-17.
255. *Id*. at 1116.
256. *Id*.
257. *Id*. at 1130.
258. *Stormans, Inc.,* 586 F.3d at 1131.
259. *Id*.
260. *Id*. at 1134.
261. *Id*. at 1134-35.
262. *Id*. at 1137-38.
263. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1074 (9th Cir. 2015).
264. *See id*. at 1075.

facially neutral and neutral in operation, and were generally applicable.[265] The court concluded, "[t]he rules are rationally related to Washington's legitimate interest in ensuring that its citizens have safe and timely access to their lawfully prescribed medications."[266]

Although the case was denied certiorari, Justice Alito, with whom Justice Roberts and Justice Thomas joined, dissented from the denial.[267] The dissent signaled those Justices' beliefs that "the impetus for the adoption of the regulations was hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the state."[268] Justice Alito opined that the rules were under-inclusive because they allow pharmacies to decline to fill prescription for financial reasons, including non-acceptance of Medicaid or Medicare.[269] In this respect, Justice Alito found the exemptions to be quite broad and in conflict with *Church of Lukumi Babylu Aye, Inc. v. City of Hialeah*,[270] which established the state cannot allow secular refusals while prohibiting religious refusals.[271] Moreover, Justice Alito emphasized that the pharmacy's practice of referring those in need of emergency contraception to another nearby facility did not "pose a threat to timely access to lawfully prescribed medications."[272] According to Justice Alito, this alternative further suggested the regulations improperly conflicted with religious freedoms.

A similar conflict also arose in Illinois, but the state court decided the issue without reaching the constitutional question of free exercise.[273] In *Morr-Fitz v. Quinn*, the court found that the "executive branch decided to make Plan B available over any pharmacist's religious concerns, while the legislative branch decided to protect healthcare personnel and healthcare facilities from having to provide health care against their conscience or religious beliefs."[274] In this inter-branch conflict, the legislature prevailed, allowing the court to avoid addressing whether the administrative rules violated the free exercise clause.[275]

VI. RELIGIOUS EXEMPTIONS TO PROVIDING HOUSING

Religious freedoms often conflict with the rights of the LGBTQ+ community in the area of housing. Mary Walsh and Beverly Nance—an aging, legally married lesbian couple in Missouri—were recently denied housing at a senior community on the basis that its "Cohabitation Policy" defines marriage as "the union

265. *Id.* at 1084.
266. *Id.*
267. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (denying the petition for a writ of certiorari).
268. *Id.* at 2433.
269. *Id.* at 2439.
270. 508 U.S. 520 (1993).
271. *Stormans, Inc.*, 136 S. Ct. at 2438.
272. *Id.* at 2435.
273. *See* Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160, 1176 (Ill. App. Ct. 2012).
274. *Id.* at 1171.
275. *Id.* at 1176.

of one man and one woman, as [it] is understood in the Bible."[276] The couple first filed a complaint with the federal Department of Housing and Urban Development, which they later withdrew to pursue recourse in federal courts.[277] Their case was heard in the first instance by a district court in Missouri.[278] The complaint alleges that the senior community, Friendship Village, discriminated on the basis of sex in violation of the federal Fair Housing Act (FHA) and the Missouri Human Rights Act.[279] The complaint states that, "each Plaintiff was denied housing at Friendship Village because of her own sex (female) and because of the sex of her spouse (female), because if either Plaintiff had been married to a man, they would not have been denied housing."[280] The complaint argues that the "Cohabitation Policy" discriminates on impermissible sex-based stereotypes, namely that a woman's spouse should be a man.[281]

This case generated a fair amount of publicity and its trajectory is important, particularly in light of recent developments in the field. New York Times journalist Paula Span asks, "[i]f a baker can refuse to make a wedding cake for a gay couple (and have the Supreme Court agree, albeit on narrow grounds), can a [senior community] refuse admission to Mary Walsh and Beverly Nance?"[282] The district court rejected all of the plaintiffs' arguments granting Defendant's motion for judgment on the pleadings.[283] The court held, in pertinent part, that the plaintiffs' claim concerning sexual orientation was not protected under the FHA nor was their discrimination claim under a sex stereotyping theory actionable under the FHA.[284]

In an unreported, two sentence opinion, the Eighth Circuit granted the Appellees' motion to vacate judgment and remand, instructing the district court to conduct further proceedings in light of *Bostock v. Clayton County*.[285] Pertinent to *Walsh*, the dissenting justices in *Bostock* point out that the Court's decision will have far-reaching consequences in "over 100 federal statutes [that] prohibit discrimination because of sex," including the FHA.[286] To the dissent, this was an overly-broad interpretation of the meaning of "because of sex,"[287] but to the LGBTQ+ community this represents a win in the fight for equal rights.

276. Complaint at 2, Walsh v. Friendship Vill. of S. Cty., 352 F. Supp. 3d 920 (E.D. Mo. 2019) (No. 4:18-cv-1222), 2018 WL 3569178.

277. *Id*. at 60-62.

278. *See id*. at 20-24.

279. *Id*. at 15-19.

280. *Id*. at 15, 17.

281. Complaint at 16-18, Walsh v. Friendship Vill. of S. Cty., 352 F. Supp. 3d 920 (E.D. Mo. 2019) (No. 4:18-cv-1222), 2018 WL 3569178.

282. Paula Span, *A Retirement Community Turned Away These Married Women*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/health/lgbt-discrimination-retirement.html.

283. Walsh v. Friendship Vill. of S. Cty., 352 F.Supp.3d 920, 928 (E.D. Mo. 2019).

284. *Id*. at 926-27.

285. Walsh v. Friendship Vill. of S. Cty., No. 19-1395, 2020 WL 5361010, at *1 (8th Cir. July 2, 2020).

286. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).

287. *See id*.

Especially if, as the dissent feared, the opinion is interpreted broadly so as to affect all federal statutes pertaining to sex, including the FHA.[288] The Eighth Circuit adopted that broad understanding in remanding *Walsh* for further consideration in light of *Bostock*,[289] lending credence to the belief that this could be one of the most pivotal decisions for LGBTQ+ rights in recent years.

VII. CONCLUSION

In the year 2021, Americans are faced with a patchwork of decisions on religious exemptions for healthcare and housing. Justice Alito wrote, "[i]f the [*Stormans, Inc. v. Wiesman* decision] is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern."[290] At the same time, Mary Walsh and Beverly Nance are shocked and angry at the possibility they will not be able to age with dignity in a community of their friends and peers; individuals like Evan Minton and Rebecca Chamorro are degraded by lack of access to autonomy over their own bodies and medical treatments; and countless women are humiliated, and endangered, by denial of their emergency birth control prescriptions. This conflict of fundamental rights will continue to surface in the following years, as the Trump Administration has infused a renewed sense of religious liberty into the public through the added religious legal protections like those discussed above and through the appointment of judges to the federal bench committed to conservative, Christian jurisprudence.[291] For instance, discrimination on the basis of sexual orientation is rampant in senior housing facilities, and LGBTQ+ organizations have often argued that there are not enough protections for LGBTQ+ seniors. However, the explicit and blatant refusal of Mary Walsh and Beverly Nance poses the question as to whether this is considered discrimination at all.[292] While the Eighth Circuit did remand the case for further proceedings in light of *Bostock*, the extent of legal contours of the decision are not yet fully explored, and it is still possible that the broad decision will yet be curtailed. Moreover, as made clear in the arguments and decision in *Hobby Lobby*, the Court has shifted from analyzing exemption cases as free speech and association claims to now analyzing similar cases under free exercise claims. Even though the Court has used the free exercise analysis to reach narrow decisions, as was the case in *Masterpiece Cakeshop*, this trend still suggests a growing jurisprudence of

288. *See id.*

289. *Walsh*, 2020 WL 5361010, at *1.

290. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (denying the petition for a writ of certiorari).

291. *See* Masood Farivar, *Trump's Lasting Legacy: Conservative Supermajority on the Supreme Court*, VOICE OF AM. (Dec. 24, 2020, 6:48 PM), https://www.voanews.com/usa/trumps-lasting-legacy-conservative-supermajority-supreme-court; *see also* Sarah Posner, *Trump's Christian Judges March On*, ROLLING STONE (Oct. 9, 2020), https://www.rollingstone.com/politics/politics-features/trump-christian-judges-supreme-court-1072773/.

292. *See* Paula Span, *A Retirement Community Turned Away These Married Women*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/health/lgbt-discrimination-retirement.html.

potential conflict between religious liberty and access to services and accommodations. On the other hand, the Court's ruling in *Bostock* is expected by some legal scholars to have profound impacts on the LGBTQ+ community in all areas from employment to education to healthcare to housing.[293] It could perhaps pave the way toward a more balanced approach of protecting conscientious religious beliefs without infringing on the rights and liberties of LGBTQ+ individuals and women. It is likely there will be more occasions for the courts to flesh out this question in the coming years, and all eyes are on the new 6-3 conservative majority Supreme Court bench.

Finally, it is likely that the newly inaugurated President Biden can be expected to be proactive on these issues. President Biden has said that the passage of the Equality Act, which would extend comprehensive anti-bias protections across the entire country, is one of his top priorities.[294] The Act would cover the housing sector so its passage could be a legislative fix to Mary Walsh and Beverly Nance's housing discrimination claim.[295] The coming administration may chart a different course than the newly-minted 6-3 majority on the Supreme Court, guaranteeing that religious exemptions will continue to be a hotly-debated issue across numerous aspects of public and private life for years to come.

293. Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/.

294. David Crary & Elana Schor, *Biden plans swift moves to protect and advance LGBTQ rights*, OPB (Nov. 28, 2020, 2:43 PM), https://www.opb.org/article/2020/11/28/president-elect-joe-biden-lqbtq-community-rights/.

295. *See id.*