RELIGIOUS EXEMPTIONS

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I. INTRODUCTION

The First Amendment protects the free exercise of religion; when religious beliefs conflict with laws prohibiting discrimination based on sex or sexual orientation, courts must balance freedoms of religion, association, and speech with the government'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 and members of the LGBTQIA+ 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]

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 (West, Westlaw through Pub. L. No. 118-39). *See also* Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

RFRA created a two-prong balancing test: the government must not substantially burden a person's exercise of religion unless (1) it is in furtherance of a compelling government interest and (2) it uses the least restrictive possible means of furthering that interest.[2] RFRA does not discuss the ministerial exception, which "precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers."[3] The exception was expanded by the 2020 decision in *Our Lady of Guadalupe School v. Morrisey-Berru*.[4]

Part II of this Article traces the development of religious exemptions through major cases involving public accommodations laws. Part III reviews the ministerial exception. Part IV explores cases involving private businesses and religious exemptions. Parts V and VI discuss religious exemptions to providing healthcare and housing, respectively. Finally, Part VII provides a conclusion and forecasts the future development of the law in this area.

II. DEVELOPMENTS IN RELIGIOUS EXEMPTIONS

Fulton v. City of Philadelphia was argued before the Supreme Court on November 4, 2020.[5] The major petitioner in the case, Catholic Social Services (CSS), was under contract with the city of Philadelphia to find placements for foster children.[6] After a newspaper reported that that CSS would only place children with opposite-sex couples,[7] leading to criticism from several branches of the city government, Philadelphia's Department of Human Services told CSS that, based on Philadelphia's non-discrimination laws, the city would no longer refer foster children to CSS unless it began certifying same-sex couples.[8] CSS then sued the city under the First Amendment, asking for an order requiring Philadelphia to renew its contract and allowing CSS to refuse to refer foster children to same-sex families.[9] The district court denied the request.[10] The Third Circuit affirmed, ruling that Philadelphia's policy was constitutional under *Employment Division v. Smith*, which held that neutral laws of general applicability may prohibit or

2. 42 U.S.C. § 2000bb-1.

3. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012). Additionally, RFRA's reach was limited by the majority opinion for *City of Boerne v. Flore*s, in which the Court held that RFRA's application to the states was an unconstitutional overreach of Congressional power. The statute only binds the federal government. City of Boerne v. Flores, 521 U.S. 507, 508 (1997). *See also* Holt v. Hobbs, 574 U.S. 352, 357 (2015).

4. Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049 (2020).

5. Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

6. *Id.* at 1874. Sharonell Fulton was a previous foster mother through CSS and was listed as a plaintiff along with several other foster mothers. *Id.* at 1886–87

7. 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 an opposite-sex relationship are straight, and not bisexual or gender-nonconforming. This Article applies terms as used in the cases and briefs while acknowledging this shortcoming.

8. *Fulton*, 141 S. Ct. at 1875–76.

9. *Id.* at 1876.

10. *Id.*

compel action contrary to religious belief without violating the First Amendment.[11] The Supreme Court granted certiorari in 2020.[12]

Petitioners argued that Philadelphia violated the First Amendment by limiting their speech and religious expression.[13] They claimed laws infringing on religious liberty should be assessed under the strict scrutiny standard of review.[14] CSS argued that, to renew their contract with the city, they would have to choose between forced speech, e.g. "speak[ing] Philadelphia's preferred message on marriage," or forced silence, e.g. no longer providing foster care.[15] Petitioners also claimed that Philadelphia did not have neutral laws, evidenced by hostility toward CSS and the city's selective application of policies to CSS, which petitioners felt targeted their religious beliefs.[16] Neutral laws or not, petitioners argued that the Court should overturn *Smith* and apply strict scrutiny to any challenge to religious liberty.[17]

Respondents argued that Philadelphia's non-discrimination requirement is a neutral policy that did not infringe on the free exercise or free speech clause rights of CSS.[18] Respondents claimed that they acted in a managerial position with regards to CSS, giving the city greater discretion to balance competing interests.[19] Additionally, CSS was only restricted as a government contractor, not restricted privately by the government.[20] Philadelphia 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, which did not force CSS to do or say anything contrary to their religious beliefs.[21] If the Court ruled for Fulton, respondents argued, government functions could be encumbered with agents "perform[ing] their jobs as they see fit."[22] The American Civil Liberties Union warned that government-funded agencies could "deny services to people who are LGBTQ, Jewish, Muslim, or Mormon."[23] But petitioners claimed a ruling for Philadelphia would "eliminate First Amendment protection for anyone who contracts with the government."[24]

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11. *Id.*
12. *Id.* at 1876.
13. Brief for Petitioners, *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (No. 19-123), 2020 WL 2836494, at *17.
14. *Id. at* *33–36, 50.
15. *Id.* at *31.
16. *Fulton,* 141 S. Ct. at 1875.
17. *Id.* at 1876.
18. Brief for City Respondents, *Fulton v. City of Phila.*, 140 S. Ct. 1104 (No. 19-123), 2020 WL 4819956, at *28
19. *Id.* at *16.
20. *Id.* at *24–28.
21. *Id.* at *44–46.
22. *Id.* at *11.
23. *Fulton v. City of Phila.*, AM. C.L. UNION, https://perma.cc/CKM7-NQJH.
24. Reply Brief for Petitioners, *Fulton v. City of Phila.*, 140 S. Ct. 1104 (2020) (No. 19-123), 2020 WL5578834, at *18.

The Court ruled for CSS and reversed the Third Circuit,[25] re-examining *Smith* and shifting American jurisprudence further away from one of its long-standing precepts: "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[26] This decision signals the Court's increasing support for the 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."[27] The Court found that the city's interest in promoting equality was "important" but not "compelling" enough to deny CSS's ability to secure and approve foster-care parents.[28] Thus, the city's policy of refusing to contract with CSS unless it approved same-sex and unmarried couples as foster families failed strict scrutiny.[29] The structural consequences of this ruling in favor of CSS remain to be seen.

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.[30] The Court formulated this principle in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, but the Justices offered different interpretations regarding which employees count as "ministerial."[31] Employers have increasingly relied on the ministerial exception as an affirmative defense to employment discrimination and civil rights claims. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit suggested a limit on qualifying institutions to those with "clear or obvious" religious characteristics.[32] The Supreme Court consolidated the *EEOC v R.G. & G.R. Harris Funeral Homes* appeals in *Bostock v. Clayton County* but did not address the religious liberty issues.[33]

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25. Fulton v. City of Phila., 141 S. Ct. 1868, 1883 (2021).

26. 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).

27. *See* Brief for Petitioners, *supra* note 13, at *42; *see also* Masterpiece Cakeshop, Ltd. v. Colo. C. R. Comm'n, 138 S. Ct. 1719, 1721–22 (2018).

28. *Fulton*, 141 S. Ct. at 1881–82.

29. *Id.* at 1882.

30. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 188; Gen. Conf. 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).

31. *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.").

32. 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)).

33. Bostock v. Clayton Cty, 140 S. Ct. 1731 (2020).

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 non-discrimination and religiously motivated discrimination in its recognition of the ministerial exemption in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. There, the Supreme Court recognized a ministerial exception for the first time in the Religion Clauses of the Constitution.[34] This exception may allow religious organizations to bar any employment discrimination suits brought by any employee considered a "minister."[35]

In *Hosanna-Tabor*, a teacher sued her employer for unlawful dismissal under the Americans with Disabilities Act.[36] 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.[37] The Court reasoned that because she was a "minister," her employer could use the ministerial exception as an affirmative defense in employment suits.[38] 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.[39] However, concurrences by Justices Thomas, Alito, and Kagan all set out different standards and factors to determine an employee's status as a minister.[40]

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 who worked as a technology coordinator brought claims of pregnancy discrimination and breach of contract after being fired for being pregnant out of wedlock through artificial insemination.[41] The district 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.[42] In *Sterlinski v. Catholic Bishop of Chicago*, the district court found that the ministerial exception applied to a music director who

34. *See Hosanna-Tabor*, 565 U.S. at 188.
35. *See id.*
36. *Id.* at 179.
37. *See Hosanna-Tabor*, 565 U.S. at 194.
38. *Id.*
39. *Id.* at 191–92.
40. *Id.* at 197–204.
41. *See* Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165, at *1–2 (S.D. Ohio Mar. 29, 2012).
42. *Id.* at *5.

supervised all music at liturgical celebrations.[43] 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 reached a consensus as to which factors and to what degree to rely on in *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 district 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."[44] 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.[45] Since the employee's duties were primarily secular, the court found that the ministerial exception did not apply.[46]

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 as a woman.[47] 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 RFRA.[48] 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*.[49] 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.[50] 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.[51] The court also found that the employee was not a minister under the

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

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

45. *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).

46. *Id.*

47. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 569 (6th Cir. 2018).

48. *Id.* at 567, 581.

49. *Id.* at 574.

50. *Id.* at 575.

51. *Id.* at 582.

ministerial exception in accordance with *Hosanna-Tabor* factors.[52] When the Supreme Court ruled on this case in the consolidated appeal *Bostock v. Clayton County*; however, the Court did not address any of the religious liberty claims.[53]

Despite the general protections afforded to the LGBTQ community by the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County*, Justice 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 Section 2000e-1(a) of Title VII included a direct statutory exception for religious organizations.[54] He added that RFRA operates as a "super statute" that could overcome Title VII requirements.[55] He reasoned that because Harris Funeral Homes did not raise any religious liberty claims in its petition for certiorari and no other religious liberty claims were present before the Court, the Court did not need to decide such issues.[56] Gorsuch also said that if such claims were brought in the future, they would "merit careful consideration."[57]

Justice Alito's dissent; however, argued that the majority opinion should have directly considered the implications that its holding would have for the application of the ministerial exception by lower courts.[58] Moreover, Alito speculated that Title VII might permit discrimination even against employees that do not fall under the ministerial exception.[59] While the Court in *Bostock* left the issue of religious liberty in the context of employment discrimination to future litigation, both 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*

In 2020, 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.[60] 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.[61] She taught all subjects, including religion.[62] In 2014, OLG asked her to move from a full-time to a part-time position.[63] The following year, the

52. *Id.* at 582–83.
53. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Bostock*, 140 S. Ct. at 1781 (Alito, J., dissenting).
59. *Id.*
60. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055.
61. *Id.* at 2056–58.
62. *Id.* at 2056.
63. *Id.*

school declined to renew her contract.[64] In the Central District of California, OLG obtained summary judgment by relying on *Hosanna-Tabor* and the ministerial exception.[65] The Ninth Circuit reversed and held that Morrisey-Berru was not a "minister" for purposes of the exception.[66]

In the second case, Kristen Biel, a first- and fifth-grade teacher,[67] alleged that St. James School declined to renew her contract because she had requested a leave of absence to obtain treatment for breast cancer.[68] Like Morrisey-Berru, Biel taught all subjects, including religion.[69] St. James obtained summary judgment in the Central District of California under the ministerial exception.[70] The Ninth Circuit reversed.[71]

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."[72] 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.[73] The Court declined to lay out a specific test, noting the variety of religious structures and practices in the United States.[74]

Although this opinion certainly expands the ministerial exception by directing judges to evaluate claims to this exception through a holistic analysis,[75] 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, which accounts for 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.[76] 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.[77]

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64. *Id*. at 2058.
65. *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2058.
66. *Id*.
67. *Id*.
68. *Id*. at 2059.
69. *Id*. at 2058.
70. *Our Lady of Guadalupe Sch*., 140 S. Ct. at. at 2059.
71. *Id*.
72. *Id*. at 2066.
73. *Id*. at 2066–67.
74. *Id*. at 2069.
75. *See* Robert Barnes, *Supreme Court affirms 'ministerial exception' that protects religious organizations from some lawsuits*, WASH. POST (July 8, 2020, 5:03 PM), https://perma.cc/2TQH-A8T7.
76. *See id.*
77. 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://perma.cc/T637-MRYG.

Following the Supreme Court's decision in *Our Lady of Guadalupe*, the Massachusetts Supreme Judicial Court held that the ministerial exception does not apply to a professor of social work at a Christian college because she was not a minister.[78] She did not teach religion or lead religious services, never held herself out as a minister, obtained no religious training, and her "responsibility to integrate her Christian faith into her teaching and scholarship" was "different in kind, and not degree," from the religious instruction in *Hosanna-Tabor* and *Our Lady of Guadalupe*.[79] The Supreme Court denied a writ of certiorari, but in a dissenting statement, four justices attributed this denial to procedural issues and suggested that the professor's responsibility to integrate faith into her teaching may indeed make her work ministerial.[80] In *Starkey v. Roman Catholic Diocese of Indiana*, a Seventh Circuit panel directly applied the ministerial exception to a question of discrimination on the basis of sexual orientation.[81] The court held that a guidance counselor at a religious school fell within the ministerial exception because, notwithstanding her protestations that she did not engage in religious matters during work, the school itself identified "faith formation" as part of her formal job description.[82] The school had fired the counselor for engaging in a same-sex union.[83] Because the court considered her a minister, she could not bring a Title VII claim for employment discrimination against the school.[84] The panel cited *Our Lady of Guadalupe*, declaring that this case had deemphasized the factors discussed by the *Hosanna-Tabor* majority in favor of a more direct focus on the employer's explanation of the duties that the claimant performed for them.[85]

The Seventh, Ninth, and Tenth Circuits have also decided cases on whether the ministerial exception exempts religious organizations from all discrimination claims. In *Demkovich v. St. Andrew*, on interlocutory appeal, a Seventh Circuit panel limited the ministerial exception to the employer's selection and control of its ministers.[86] The panel rejected the ministerial exception as a defense to a hostile work environment claim because the conduct underlying the claim was tortious and did not relate to the selection or control of ministers.[87] However, the *en banc* decision of the Seventh Circuit reversed the panel's decision and held that the ministerial exception precludes all discrimination claims raised by ministers against a religious organization's employment decisions.[88] Because "[r]eligion permeates the ministerial workplace" and "ministerial employment differs from

78. DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000, 1002 (Mass. 2021).
79. *Id.* at 1002, 1017.
80. Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 954–55 (2022).
81. Starkey v. Roman Cath. Diocese of Indianapolis, Inc., 41 F.4th 931, 938 (7th Cir. 2022).
82. *Id.* at 941.
83. *Id.*
84. *Id.* at 942.
85. *Id.* at 939–40.
86. *See* Demkovich v. St. Andrew the Apostle Parish, 973 F.3d 718, 727, 729 (7th Cir. 2020).
87. *Id.* at 729.
88. *See* Demkovich v. St. Andrew the Apostle Parish, 3 F.4th 968, 980 (7th Cir. 2021).

nonreligious employment," the court found that employment claims involving ministers should be treated differently and the ministerial exception should extend to claims related to the supervision and work environment of ministers.[89] Similarly, the Tenth Circuit held all Title VII employment claims by ministers are barred by the ministerial exception because allowing such claims to proceed could involve "gross . . . entanglement" with the church's autonomy and interfere with the church's selection and control of ministers.[90]

In contrast, in *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit found that the ministerial exception applied to the church's decision to terminate plaintiff's employment but not the plaintiff's sexual harassment and retaliation claims.[91] The court reasoned that, unlike tangible employment decisions such as hiring and firing, sexual harassment and retaliation are not protected employment decisions subject to the ministerial exception, unless the church shows such conduct is consistent with the church's religious doctrine.[92] However, the Ninth Circuit recently held that a Christian school principal's claims for racial harassment, hostile work environment, and wrongful termination were barred by the ministerial exception because the allegations were "so intertwined with the employment decisions."[93] 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.

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

Following *Burwell v. Hobby Lobby*, closely-held corporations, like non-profit corporations and individuals, can allege RFRA claims.[94] 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 mandate of the Patient Protection and Affordable Care Act ("ACA"), if the law is not narrowly tailored.[95] 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 object on religious grounds to performing specific services (such as creating custom cakes, floral arrangements, or invitations for same-sex weddings) are entitled to neutral and respectful

89. *Id*. at 978–79.

90. Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245–46 (10th Cir. 2010). *See also* Tucker v. Faith Bible Chapel Int'l, 36 F.4th 1021, 1055 (2022) (citing *Skrzypczak* approvingly and declaring its consonance with the Supreme Court's later precedent in *Our Lady of Guadalupe*).

91. *See* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 958 (9th Cir. 2004).

92. *Id*. at 963–64.

93. Orr v. Christian Bros. High Sch., Inc., No. 21-15109, 2021 WL 5493416, at *2 (9th Cir. Nov. 23, 2021).

94. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683 (2014).

95. *Id*. at 691.

consideration by government bodies seeking to enforce public accommodations laws.[96] 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.[97] In *Hobby Lobby*, a closely held, for-profit corporation refused to offer contraceptive coverage to its employees, claiming that the federal law mandating this coverage violated the owner's personal religious beliefs.[98] The Supreme Court held that business corporations are within RFRA's definition of "persons," and thus can "exercise religion" under the Act.[99] Therefore, Hobby Lobby, Inc., can claim an exemption from the portion of the ACA 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.[100] Although the Court did not reach the constitutional question, instead deciding the case under the RFRA statute, *Hobby Lobby* may be indicative of how the Court could decide future religious exercise claims.

In the principal dissent, Justice Ginsburg raised the concern that employers might use religious beliefs as an excuse for discrimination that is otherwise unlawful.[101] She noted several unsuccessful religious freedom challenges to anti-discrimination laws brought by commercial enterprises, including by a restaurant chain owner who refused to serve Black patrons,[102] a business that refused to hire women who lacked consent from their husband or father to work outside the home,[103] and a photography studio that refused to photograph a same-sex

96. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1721 (2018).

97. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

98. *Id.* at 702–03. 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 *Hobby Lobby* after the grant of certiorari. Both corporations raised the same objection.

99. *Id.* at 708–10.

100. *See id.* at 696–98, 736.

101. *Id.* at 769–70 (Ginsburg, J., dissenting).

102. *Id.* at 770 (Ginsburg, J., dissenting) (discussing Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400 (1968)).

103. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 770 (2014) (Ginsburg, J., dissenting) (discussing Minnesota *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985)).

wedding.[104] In his majority opinion, Justice Alito downplayed those concerns; while acknowledging "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction," he insisted that the decision "provides no . . . shield" for such behavior.[105]

Hobby Lobby centered on an enduring legal debate: whether laws affecting corporations, which exist as distinct legal entities separate from their members, may nevertheless burden the "free exercise of religion" enjoyed by these members.[106] This debate has the potential to split courts over the implementation of *Hobby Lobby*. Both businesses in *Hobby Lobby* are closely-held corporations, with each overseen by a single family united by a shared religious commitment.[107] A lower court would have difficulty deciding what religious values a corporation holds in situations where the corporation bringing an RFRA claim has a large shareholder base with diverse religious beliefs. This lower court might 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.[108] Though the *Hobby Lobby* majority dismissed the prospect of publicly traded behemoths bringing RFRA claims as "improbable," if only due to the opposition of diverse shareholders to corporate religiosity, it did not deny the possibility.[109]

In *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, decided in June 2020, the Court revisited the *Hobby Lobby* decision's religious exemption for employers.[110] In *Little Sisters*, an order of Catholic sisters had originally objected to an Obama-era "self-certification" process that would allow their organization to opt out of contraceptive coverage for employees and leave the provision of this care to be worked out between the insurer and the federal government.[111] The Trump administration then promulgated a rule that broadened the religious exemption for employer-based contraceptive coverage.[112] Going forward, both nonprofit and for-profit entities could opt out of not only contraceptive coverage but also the "self-certification" accommodation.[113] Because the majority cabined its decision to issues of rule-making, it did not directly address the religious order's original claim that the "self-certification"

104. *Id*. at 769–70 (Ginsburg, J., dissenting) (discussing Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), also analyzed *infra* in Section IV.B).

105. *Id*. at 733.

106. *See* Adam Winkler, *Corporate Personhood and Constitutional Rights for Corporations*, 54 N. ENG. L. REV. 23, 40–42 (2019).

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

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

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

110. *Little Sisters of the Poor*, *infra* note 104, at 2370.

111. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2375–76 (2020).

112. *Id*. at 2377–78.

113. *Id*. at 2377–78.

process violated their free exercise of religion.[114] Justice Alito, however, wrote a concurrence, joined by Justice Gorsuch, expounding his conclusion that this accommodation had in fact violated the RFRA.[115] It is not clear if there is indeed a majority on the Court in 2024 would sign onto Alito's opinion, and if they did, how broadly they would define the class of "religious employers'' burdened by "self-certification." In January 2023, the Biden administration proposed a new rule that would preserve the religious exemption while rescinding the Trump administration's exemption allowing employers to refuse to provide contraceptive coverage due to moral objections.[116] Additionally, while it could maintain the "self-certification" accommodation as an optional program, it would also create a separate process for employees to access contraception without requiring any entanglement with their objecting employers.[117] Comments on the proposed rule were due in April 2023,[118] but as of early 2024, it doesn't appear that there has been any additional movement.

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. Prominent cases addressing this issue have often originated with wedding vendors refusing services to same-sex couples. Before the U.S. Supreme Court ruled on the issue in *Masterpiece Cakeshop* and *303 Creative*, 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.[119] 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,"[120] 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."[121] The court decided that conveying clients' messages did not constitute compelled speech, because Elane Photography conveys only a "message-for-hire."[122] While Elane Photography can post on its website that it opposes same-sex marriage, it is still required to

114. *Id*. at 2387 (Alito, J., concurring).

115. *Id*. at 2389–95 (Alito, J., concurring).

116. Tami Luhby & Jacqueline Howard, *First on CNN: Biden Administration to Strengthen Obamacare Contraceptive Mandate in Proposed Rule*, CNN (Jan. 30, 2023), https://perma.cc/RHN9-RK9C.

117. *Id*.

118. Coverage of Certain Preventative Services Under the Affordable Care Act, 88 Fed. Reg, 7236 (proposed Feb. 2, 2023).

119. Elane Photography, LLC v. Willock, 309 P.3d 53, 58–59 (N.M. 2013).

120. *Id*.

121. *Id*.

122. *Id*. at 66, 72.

comply with the HRA as a public accommodation.[123] Finding that creative businesses like Elane Photography are conduits of client speech was one way for courts to enforce public accommodations laws against such businesses, as doing so would avoid triggering the stronger First Amendment safeguards attaching to compulsion of the business's own speech.[124] Elane Photography sought certiorari after the New Mexico Supreme Court's decision but was denied in 2014.[125]

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission arose from a 2012 encounter where Charlie Craig and David Mullins went to Masterpiece Cakeshop in Colorado to order a cake to celebrate their upcoming wedding.[126] 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.[127] The Colorado Civil Rights 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.[128] After a Colorado court upheld that ruling, the U.S. Supreme Court granted Phillips' petition for certiorari.[129]

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.[130] 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.[131] 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.[132] 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."[133]

The Court avoided ruling broadly on the potential conflict between anti-discrimination laws and rights to free exercise and free speech. In the majority opinion, Justice Kennedy declined to evaluate Phillips' actions directly, observing equivocally that, because Colorado at that time did not permit same-sex marriages, "there is some force in the argument that the baker was 'not unreasonable'

123. *Id.* at 59.

124. *See* Susan Nabet, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1524 (2012).

125. Elane Photography, LLC v. Willock, 134 S. Ct. 1787 (2014), *cert denied*.

126. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

127. *Id.*

128. *Id.* at 1726.

129. *Id.* at 1727.

130. *Id.* at 1726.

131. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

132. *Id.* at 1728.

133. *Id.*

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."[134] Nevertheless, Kennedy tempered this observation by acknowledging that although the First Amendment protects religious and philosophical objections to gay marriage, "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."[135]

Indeed, the majority sidestepped the question of whether the baker's First Amendment claim was enough to trump anti-discrimination laws like Colorado's, instead narrowly focusing on the Colorado Civil Rights Commission's alleged failure to give "neutral and respectful consideration" to the baker's claims and beliefs in all the circumstances of the case.[136] Justice Kennedy cited the comments of one commissioner, who said religion had been used to justify all kinds of discrimination throughout history, including slavery and the Holocaust,[137] and argued that those comments disparaged Phillips' religion in at least two distinct ways: by describing it as despicable and also by characterizing it as merely rhetorical.[138] As a result, Kennedy found that 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.[139]

In her concurrence, Justice Kagan, joined by Justice Breyer, warned lower courts that absent the specific hostility that the Court found in the present case, state laws prohibiting discrimination on the basis of sexual orientation will not necessarily qualify as religious discrimination.[140] Justice Thomas, joined by Justice Gorsuch, wrote separately to say that the case should have been decided on free-speech grounds.[141] 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.[142] 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."[143]

134. *Id.*
135. *Id.* at 1727.
136. *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1731–32.
137. *Id.* at 1729.
138. *Id.* at 1729.
139. *Id.*
140. *Id.* at 1734 (Kagan, J., concurring).
141. *Masterpiece Cakeshop*, 138 S. Ct. at 1740–48 (Thomas, J., concurring).
142. *Id.* at 1751 (Ginsburg, J., dissenting).
143. *Id.*

Alone, the decision in *Masterpiece Cakeshop* provides limited guidance for lower courts facing similar cases, primarily due to the narrowly specific grounds on which the majority ruled: that the Colorado Civil Rights Commission treated Phillips unfairly by expressing hostility towards 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," a requirement *Masterpiece Cakeshop* failed to meet.[144] As Justice Kennedy said, "in this case[,] the adjudication concerned a context that may well be different going forward."[145] Therefore, "the outcome of cases like this in other circumstances must await further elaboration in the courts."[146]

A handful of state courts then wrestled with potential applications of *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.[147] The lower state court granted summary judgment in favor of the state and the same-sex couple, and the state supreme court affirmed.[148] 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.[149] 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.[150] 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.[151]

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.[152] 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

144. *Id*. at 1724.
145. *Id*. at 1732.
146. *Id*.
147. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1212 (Wash. 2019).
148. 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).
149. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).
150. *Arlene's Flowers*, 441 P.3d at 1209.
151. *Id*. at 1228.
152. Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051, 1056–57 (Or. Ct. App. 2017), *vacated*, 139 S. Ct. 2713 (2019).

violation of the First Amendment.[153] After the Oregon Supreme Court denied review,[154] the U.S. Supreme Court vacated judgment and remanded to the Oregon Court of Appeals in June 2019.[155] The state court heard oral argument on remand and ultimately reaffirmed its earlier decision that the Kleins' invocation of free speech and free exercise did not supersede Oregon's public accommodations law.[156] Nevertheless, unlike in *Arlene's Flowers*, the business owners could succeed under *Masterpiece Cakeshop*'s hostility standard because during the process of awarding damages for this dispute, the state's Civil Rights Commission did not demonstrate "strict neutrality towards religion."[157] Once again, however, the Oregon Supreme Court denied review, only for the U.S. Supreme Court to vacate judgment and remand the case to the Oregon Court of Appeals in June 2023—this time, in light of its decision in *303 Creative LLC v. Elenis*.[158]

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.[159] The intermediate state court's decision in favor of the city favorably cited language from *Masterpiece Cakeshop*'s majority opinion that "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."[160] 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."[161]

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 because such an application would violate both the Arizona Constitution and Arizona's Free Exercise of Religion Act.[162] The court cited *Hobby Lobby* to reject a reasonableness analysis of the business owners'

153. *Id*. at 1057.

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

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

156. Klein v. Or. Bureau of Lab. & Indus., 506 P.3d 1108, 1113–14 (Or. Ct. App. 2022).

157. *Id*. at 1127.

158. Klein v. Or. Bureau of Lab. & Indus., 369 P.3d 119 (Or. 2022), *vacated and remanded,* 143 S. Ct. 2686 (2023).

159. 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).

160. *Id*. at 434 (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727).

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

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

sincerely held beliefs.[163] The court continued: "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."[164] Furthermore, the court held that 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, which similarly "operate[s] to promote certain religious principles," to comply.[165] 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.[166] 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."[167]

Academics have vigorously debated how *Masterpiece Cakeshop* should be interpreted. Some take the majority's citation of *Newman v. Piggie Park Enterprises*, a Supreme Court case rejecting a restaurant owner's "patently frivolous" religious objection to serving 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."[168] 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 anti-discrimination laws."[169] Douglas NeJaime and Reva Siegel suggest that the *Masterpiece Cakeshop* opinion offers even more guidance on the relationship between religious exemptions and anti-discrimination law; they claim that *Masterpiece Cakeshop* assimilates sexual orientation into the existing anti-discrimination 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."[170] They disagree with interpretations of *Masterpiece Cakeshop* that automatically translate its requirements that religious claimants be afforded neutral and

163. *Id.* at 921.

164. *Id.* at 924.

165. *Id.* at 924–25.

166. *Id.* at 926.

167. *Id.* at 935 (Bales, J., dissenting) (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727).

168. 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://perma.cc/2XZW-57SQ.

169. *Id.*

170. *See* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, YALE L. J. F. 201, 204 (Sept. 14, 2018), https://perma.cc/UHW4-LUKY.

respectful consideration into an obligation to exempt any religious claimant from the public accommodations law.[171]

Ultimately, the dicta that accompanies *Masterpiece Cakeshop*'s narrow holding and correspondingly limited precedential value has confused lower courts and scholars alike. As detailed below, however, even the Court's decision directly addressing the conflict between Colorado's anti-discrimination law and anti-gay beliefs held by business proprietors in *303 Creative* has not yet yielded a clear answer on the scope of exemptions.[172]

C. *303 CREATIVE, LLC V. ELENIS*

A subsequent significant case on religious exemptions that came before the Supreme Court was *303 Creative v. Elenis*, which was argued on December 5, 2022.[173] The central petitioner was Laurie Smith, the Colorado proprietor of 303 Creative, a business offering website and graphic design, along with assistance in marketing and social media management.[174] Smith claimed that her desire to expand her business to include custom designs for wedding websites had been thwarted by the existence of the Colorado Anti-Discrimination Act ("CADA").[175] She argued that the law's anti-discrimination provisions for public accommodations would prevent her from turning away gay couples who sought to use her services for a wedding website.[176] Smith believed, per her own profession of the Christian faith, that marriage could only exist between a man and a woman and that being compelled to design websites celebrating a same-sex wedding would force her to express an opinion contrary to her beliefs.[177] Although she had not yet been charged with violating CADA or assigned any of the fines or anti-discrimination training that accompany proven CADA violations, she preemptively sued to enjoin enforcement of the law against her.[178] In support of her suit, she invoked the First Amendment's Free Speech Clause, declaring that, through CADA, Colorado was compelling her to speak in support of same-sex marriage.[179] Both the district court and the Tenth Circuit ruled against Smith.[180] Although the Tenth Circuit panel conceded that CADA was impinging on Smith's freedom of speech, it also concluded that the law in this instance survived strict scrutiny.[181] The state had a compelling interest in preventing discrimination against gay couples, and there was no means more narrowly tailored for

171. *Id.* at 218.
172. *See infra* Section IV, Pt. C.
173. 303 Creative LLC. v. Elenis, 143 S. Ct. 2298 (2023).
174. *Id.* at 2308.
175. *Id.* at 2308–9.
176. *Id.*
177. *Id.* at 2308.
178. *Id.* at 2308–9.
179. *303 Creative LLC*, 143 S. Ct. at 2308.
180. *Id.* at 2310.
181. *Id.*

achieving this end than compelling Smith not to turn away gay couples seeking wedding websites due to their sexual orientation.[182]

In a 6-3 decision penned by Justice Gorsuch, however, the Supreme Court ruled in favor of Smith.[183] The majority opinion declares that, whatever the value of state public accommodations laws, they cannot trump the First Amendment's constitutional protections for speech.[184] Gorsuch dismisses Colorado's argument that Smith's wedding websites designs should be treated as conduct or a commercial product, pointing to the state's earlier stipulation that the designs qualified as expressive content.[185] He then compares Smith's work to that of movie directors and muralists, arguing that just as a state government cannot force these artists to accept commissions that betrayed their own beliefs, neither can that government compel a wedding website designer to do the same.[186] The protected status of same-sex couples in Colorado state law must yield to the First Amendment speech protections.[187]

In her dissent, Justice Sotomayor stresses the historic nature of this decision: "Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[188] She reflects on *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n* (2018), in which the Court had quite recently acknowledged the "stigma" that came from such denials of service and the "general rule" that "religious and philosophical objections to gay marriage" do not grant business owners an exemption from generally applicable public accommodations laws.[189] Sotomayor recognizes the burden that CADA places on speech, but she argues that this burden is incidental to the law's true purpose, which is to regulate conduct so that Coloradans are not excluded from the "public market" on account of their protected status.[190] Sotomayor closes with her fear that the Court is helping reverse the hard-won gains of the LGBTQIA+ rights movement, and a reminder that, despite the majority's deference to speech, anti-discrimination laws are also integral to a "free and democratic society."[191]

Several conservative legal commentators hailed the decision as a victory for individual liberty against government coercion.[192] Some also noted that the

182. *Id.*
183. *Id.* at 2321.
184. *Id.* at 2315.
185. *303 Creative LLC.*, 143 S. Ct. at 2315–16.
186. *Id.* at 2313–14.
187. *Id.*
188. 303 Creative LLC. v. Elenis, 143 S. Ct. 2298, 2322 (Sotomayor, J., dissenting) (2023).
189. *Id.*
190. *Id.* at 2338, 2343.
191. *Id.* at 2341–43.
192. *See A Huge Win for the First Amendment*, NAT. REV. (June 30, 2023, at 5:01 PM), https://perma.cc/GS9F-WQXU; Robert Barnes & Anne E. Marimow, S*upreme Court Protects Website Designer Who Won't Do Gay Wedding Websites*, WASH. POST (June 30, 2023, at 5:09 PM) https://perma.cc/58ER-LQUM; Mia Gingerich, *Some Right-Wing Admit Eliminating Civil Rights Protections is*

decision's grounding in Free Speech doctrine also broadened the scope of possible religious exemptions to anti-LGBTQIA+ discrimination laws: now, dissenting individuals might not be compelled to portray their objections as sincerely religious in order to find relief.[193] Critics of the decision argued that the preemptive nature of Smith's challenge, and the consequent lack of a record, left it unclear exactly what kinds of business could qualify as performing expressive speech, and thus also would be exempted from laws like CADA.[194] Critics also echoed Sotomayor's concern that this decision would embolden business owners to seek such exemptions, with members of the LGBTQIA+ community and even members of other protected groups possibly being turned away in increasing numbers.[195] Not less than two weeks after the decision, a hair salon in Michigan gained national attention for a Facebook post excluding trans and gender-nonconforming people from its premises.[196] The post cited free speech as a trump against Michigan's anti-discrimination statute.[197] The fall-out from the *303 Creative* decision remains to be seen, and will depend greatly on how lower courts interpret discriminatory actions such as this in light of the majority's wide latitude for free speech claims.

V. RELIGIOUS EXEMPTIONS TO PROVIDING HEALTHCARE

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.[198] Religious exemptions for healthcare providers first became prevalent in response to the Supreme Court's recognition of abortion rights in its 1973 *Roe v. Wade* decision.[199] A few months after *Roe*, 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 contrary to the institution's or individual's religious beliefs.[200] Since then, a number of state statutes have delineated which institutions may refuse

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the Goal of anti-LGBTQ Supreme Court Cases, MEDIA MATTERS (July 7, 2023, at 12:57 PM) https://perma.cc/X5FW-XNXW.

193. *A Huge Win for the First Amendment*, *supra* note 192.

194. *See, e.g.*, Elie Mystal, *The Supreme Court Has Kicked the Door Wide Open to Jim Crow–Style Bigotry*, THE NATION (July 3, 2023), https://perma.cc/LZ65-2XQW.

195. *See, e.g.*, Lily Moore-Eissenberg, *The Supreme Court's Blow to Anti-Discrimination Hurts Families Like Mine*, N.Y. TIMES (June 30, 2023), https://perma.cc/65DG-GTC4.

196. Jordan Rubin, *The Predictable Discrimination After the* 303 Creative *Ruling is Just Getting Started*, NBC NEWS (July 13, 2023), https://perma.cc/S8E6-ZCWW.

197. *Id.*

198. *See, e.g.*, 42 U.S.C. §§ 300a-7(b)–(e) (West, Westlaw through Pub. L. No. 118-39); 42 U.S.C. § 238n (West, Westlaw through Pub. L. No. 118-39); *see also Refusing to Provide Health Services*, GUTTMACHER INST., https://perma.cc/6G2H-N7D6.

199. *See* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

200. *See* 42 U.S.C. § 300a-7 (West, Westlaw through Pub. L. No. 118-39); Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J. L. & GENDER 177, 186 (2015).

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.[201]

Religious exemptions for healthcare providers remain in the fore in cases involving providing gender-affirming care to transgender patients.[202] Physicians and hospitals claiming religious objections have relied on sterilization-exemption laws to deny transgender people access to transition-related treatments, such as gender-affirming surgeries and various hormone treatments.[203] Eighteen states allow some healthcare providers to refuse to provide these services.[204] Additionally, seven states have broad laws allowing healthcare providers to refuse prospective patients on the basis of conscience.[205] Although these laws do not specifically designate a patient's gender identity as grounds for such a refusal, opponents of these laws argue that such exemptions will only further reduce healthcare access for trans people.[206]

At the federal level, Section 1557 of the ACA prohibits discrimination on the basis of sex in federally funded and federally administered health programs.[207] In 2016, the Department of Health and Human Services ("HHS") under President Obama issued a rule clarifying that Section 1557's ban on discrimination based on sex included discrimination based on gender identity.[208] Cases at the district

201. *See, e.g.,* ARIZ. REV. STAT. ANN. § 36-2154 (West, Westlaw through the 1st Reg. Sess. of the 56th Legis. (2024)) (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, Westlaw through Ch. 1 of 2024 Reg. Sess.) (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. ANN. § 381.0051 (West, Westlaw through the 2023 1st Reg. Sess. & Spec. B Sess.) (exempting any individual from providing contraceptive or family planning services, supplies, or information for religious or medical reasons); MASS. GEN. LAWS ch. 112 § 12I (West, Westlaw through Ch. 76 of the 2023 1st Ann. Sess.) (exempting medical staff from assisting with abortion or sterilization procedures, so long as they state the moral or religious grounds for their objection). 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).

202. *See Religious Refusals for Healthcare: A Prescription for Disaster*, MOVEMENT ADVANCEMENT PROJECT 7–8 (Mar. 2018), https://perma.cc/QSS7-RJ5C.

203. *Id.*

204. *Refusing to Provide Health Services*, *supra* note 198.

205. Jo Yurcaba, *More than 1 in 8 LGBTQ People Live in States Where Doctors Can Refuse to Treat Them*, NBC NEWS (July 28, 2022, 8:40 AM), https://perma.cc/7E9W-576T.

206. *See id.*; Protecting Freedom of Conscience from Government Discrimination Act, MISS. CODE ANN. § 11-62-1 (West, Westlaw through 2024 1st Extra. Sess.); 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 Religious Refusals for Healthcare: A Prescription for Disaster*, *supra* note 202.

207. Affordable Care Act, 42 U.S.C. 18116 § 1557(a) (West, Westlaw through Pub. L. No. 118-39).

208. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31388 (May 18, 2016) (codified at 45 C.F.R. § 92 (2023)).

court and circuit court levels made the rule's legality unclear,[209] and a subsequent rule issued by the Trump Administration in June 2020 repealed the 2016 rule's inclusive interpretation of sex.[210] Just three days after this reversal, however, the Supreme Court read Title VII's employment discrimination provisions to include discrimination on the basis of sexual orientation and gender identity as part of the broader phenomenon of discrimination on the basis of sex.[211] This sign of support from the Court in turn prompted several transgender patients seeking non-discriminatory healthcare to initiate litigation seeking to restore the 2016 rule.[212]

In January 2021, the U.S. District Court of North Dakota issued a ruling permanently enjoining HHS from interpreting or enforcing Section 1557 against a collection of Catholic plaintiffs in a manner that would require plaintiffs to perform and provide insurance coverage for gender-affirming procedures.[213] While the court dismissed similar claims regarding abortions and Administrative Procedure Act ("APA") procedural challenges, it held that interpretation and enforcement of Section 1557 and Title VII of the Civil Rights Act to require the Catholic plaintiffs to provide insurance coverage for gender-affirming procedures would violate the RFRA.[214] In 2022, however, HHS issued a rule restoring the regulatory protections of Section 1557 that were limited by the 2020 rule and reaffirming the prohibition against discrimination on the basis of sexual orientation and gender identity.[215]

Still, the argument over Section 1557 shows no signs of slowing, as a federal district judge in Texas enjoined enforcement of Biden's proposed rule in 2022.[216] 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* found a fundamental right to privacy constitutionally protected access to abortion,[217] Congress enacted statutory protections—the Church, Coats-Snowe, and Weldon Amendments—for healthcare providers who refuse to

209. *See* Flack v. Wis. Dept. of Health Servs., 328 F. Supp. 3d 931, 955 (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, 952–53 (D. Minn. 2018).

210. Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37160, 37194 (June 19, 2020).

211. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

212. *See* Katie Keith, *Another Court Vacates LGBTQ-Specific Rollbacks From New 1557 Rule*, HEALTH AFFAIRS (Sept. 4, 2020), https://perma.cc/5AJP-JSLF.

213. *See* Religious Sisters of Mercy v. Azar, 513 F Supp. 3d 1113, 1153–54 (D.N.D. 2021).

214. *Id.*

215. 45 C.F.R. § 92 (2023); *see also HHS Announces Proposed Rule to Strengthen Nondiscrimination in Health Care*, HHS PRESS OFF. (July 25, 2022), https://perma.cc/C9XX-NEGK.

216. *See* Neese v. Becerra, No. 2:21-CV-163-Z, 2022 WL 16902425, at *4 (N.D. Tex. Nov. 11, 2022).

217. 410 U.S. 113, 153–54 (1973), *overruled by* 142 S. Ct. 2228.

perform abortions for primarily religious reasons.[218] 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 beliefs or moral convictions.[219] Federal funding also may not be contingent on the entity making its facilities or personnel available for abortions or sterilizations.[220] 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.[221] 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 HHS if their performance or assistance in such a program or activity "would be contrary to [their] religious beliefs or moral convictions."[222]

Congress enacted the Coats-Snowe Amendment in 1996, forbidding 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 services.[223] 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.[224] Congress passed a similar provision in 2005 under the Weldon Amendment, which restricts access to HHS appropriations for state and 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.[225]

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

On May 21, 2019, under the Trump Administration, HHS finalized a rule entitled "Protecting Statutory Conscience Rights in Health Care."[226] This rule upheld and expanded the types of healthcare providers protected under the Church, Coats-Snowe, and Weldon Amendments and further widened the scope of

218. *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) [hereinafter Weldon Amendment].

219. 42 U.S.C. § 300a-7.

220. *Id.*

221. *Id.*

222. *Id.*

223. 42 U.S.C. § 238n.

224. *Id.*

225. Weldon Amendment § 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.").

226. Protecting Statutory Conscience Rights in Healthcare, 45 C.F.R. § 88 (2019).

abortion-related religious exemptions.[227] For example, the rule explicitly defined "referral" as including the "provision of information in oral, written, or electronic form (including names, addresses, phone numbers, email or web addresses, directions, instructions, descriptions, or other information resources)."[228] The rule also provided an expansive list of structures 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.[229] Additionally, the rule defined "[a]ssist[ing] 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."[230]

The rule's definitions broadened the scope of people, entities, and exemptions protected by the Church, Coats-Snowe, and Weldon Amendments, explicitly restricting actions previously permitted in certain states. For example, Iowa 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."[231] The rule's definition of "referral" meant that the Coats-Snowe and Weldon Amendments would override Iowa's statute, because "transfer[ring] the patient to another health care provider" would constitute a "referral" that entities have a right to refuse to provide.[232] This rule highlights the Trump Administration's commitment to widening conscience-based protections for the purpose of protecting religious freedoms.[233]

Three challenges to this rule were raised in federal court in 2019.[234] Most relevant is *New York v. United States Department of Health and Human Services* in which plaintiffs were nineteen states, the District of Columbia, three local governments, and several healthcare provider associations seeking invalidation of the rule.[235] Plaintiffs argued that the rule was issued in violation of the APA, because it exceeded HHS's statutory authority, was not adopted in accordance with law, was arbitrary and capricious, and violated the APA's procedural requirements.[236] Further, plaintiffs argued that the rule was in conflict with the Constitution under the Spending and Establishment Clauses and the Separation of Powers Clause.[237]

227. *See id*. at § 88.1.
228. *Id*. at § 88.2.
229. *Id*.
230. *Id*.
231. IOWA CODE ANN. § 144D.3(5) (West, Westlaw through 2023 Reg. Sess.).
232. *Id*.; *see* 42 U.S.C. § 238n; 45 C.F.R. § 88.2.
233. *See* 45 C.F.R. § 88.1.
234. *See* Washington v. Azar, 426 F. Supp. 3d 704, 708 (E.D. Wash. 2019); City & Cnty. of S.F. v. Azar, 411 F. Supp. 3d 1001, 1005 (N.D. Cal. 2019); New York v. U.S. Dep't of Health & Hum. Servs., 414 F. Supp. 3d 475, 496 (S.D.N.Y. 2019).
235. *New York*, 414 F. Supp. 3d at 496–97.
236. *Id*. at 497.
237. *Id*.

In a 147-page opinion, the court in *New York v. United States Department of Health and Human Services* found that the APA violations in the present rule-making process were "numerous, fundamental, and far-reaching."[238] 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."[239] 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 this the second finding of unconstitutionally coercive use of the spending power by a U.S. court.[240] The rule threatened "not a small percentage of the States' federal healthcare funding, but literally *all* of it."[241] Accordingly, the court granted plaintiffs' motion for summary judgment and vacated HHS' 2019 rule in its entirety.[242] Although the Trump administration initiated an appeal of this decision, the new HHS leadership under the Biden administration successfully withdrew this appeal in 2022.[243]

These cases are unlikely to be the last word over the battle for conscience regulations, especially considering the conservative majority on the Supreme Court in 2023.[244] In December 2022, the Biden administration released a new proposed rule concerning conscience to replace the one recently struck down.[245] Per the administration, this new rule would reinforce existing processes for religious professionals to voice personal objections to certain forms of care, while also protecting the rights of patients by ending the Trump administration's threat to enforce such religious exemptions through sequestration of federal funds appropriated for medical facilities.[246] Additionally, though the HHS regulations may be in flux, the Church, Coats-Snowe, and Weldon Amendments remain on the books. 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 LGBTQIA+ people and women as a result. Two recent cases, discussed below, that involve 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, the defendant in both cases, is, notably, the fifth-largest healthcare system in the country.[247]

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238. *Id.* at 577.

239. *Id.*

240. *Id.* at 570–71; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–82 (2012).

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

242. *Id.* at 580.

243. New York v. United States Dep't of Health & Hum. Servs., No. 19-4254, 2022 WL 1974424 at *1 (2d Cir. Dec. 8, 2022).

244. *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://perma.cc/L5NN-EAXL.

245. Ian Lopez, *Tensions Flare on Abortion, Doctor Rights in HHS Conscience Plan*, BL (Jan. 4, 2023, 1:40 PM), https://perma.cc/P2B2-98FL.

246. *Id.*; 88 Fed. Reg. 820, 825–26 (Jan. 5, 2023).

247. *Minton v. Dignity Health*, AM. C.L. UNION (July 28, 2020), https://perma.cc/9629-7KQ2.

2. *Minton v. Dignity Health*

Evan Minton, a transgender man, was scheduled to receive a hysterectomy in August of 2016 at Mercy San Juan Medical Center ("MSJMC"), a healthcare service provider owned by Dignity Health.[248] Minton sought a hysterectomy as part of his gender transition and treatment for gender dysphoria.[249] Two days before the procedure, Minton notified MSJMC personnel that he is transgender.[250] The hospital canceled the appointment the next day.[251] MSJMC is a Catholic hospital that professes to follow its sincerely-held belief in Catholic doctrine in its provision of medical care.[252] Notably, MSJMC permits physicians to perform hysterectomies for patients with diagnoses other than gender dysphoria.[253] Minton's surgeon and Dignity Health did help him obtain his surgery three days later at a non-Catholic Dignity Health hospital.[254] Minton brought suit, alleging that Dignity Health violated the Unruh Civil Rights Act—which protects individuals from discrimination on the part of all business establishments in the state[255]—by denying medical services for Minton on the basis of his gender identity.[256] The trial court dismissed Minton's complaint after the court sustained Dignity Health's demurrer without leave to amend.[257] 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.[258] In its petition for certiorari to the Supreme Court, 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.[259] The Court denied certiorari.[260] Justices Thomas, Alito, and Gorsuch would have granted review.[261]

3. *Chamorro v. Dignity Health*

Rebecca Chamorro was a pregnant woman scheduled to give birth by caesarean section.[262] Since Chamorro did not want to become pregnant again, she

248. Minton v. Dignity Health, 252 Cal. Rptr. 3d 616, 619 (Ct. App. 2019).
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 620.
253. 252 Cal. Rptr. 3d at 622.
254. *Id.* at 620.
255. *Id.* at 618–19; *Public Access Discrimination and Civil Rights Fact Sheet*, Dep't of Fair Emp. (Dec. 2020), https://perma.cc/QA93-KUCU.
256. Minton v. Dignity Health, 252 Cal. Rptr. 3d at 618–19.
257. *Id.*
258. *Id.* at 619.
259. Petition for Writ of Certiorari at 14–15, Dignity Health v. Minton (No. 19-1135).
260. Dignity Health v. Minton, 142 S. Ct. 455 (2021).
261. *Id.*
262. Complaint at 1, Chamorro v. Dignity Health, No. CGC 15-549626 (Cal. Super. Ct. Dec. 28, 2015), *available at* https://perma.cc/DB5M-9ZX5.

researched tubal ligation procedures to potentially undergo immediately following her caesarean section.[263] Mercy Medical Center in Redding, CA refused to permit Chamorro's obstetrician to perform the tubal ligation procedure due to its sterilization policy and the Ethical Religious Directives for Catholic Health Services ("ERDs").[264] The ERDs prohibit "direct sterilization," which is defined as sterilization for the purpose of contraception and is viewed by the medical center as "intrinsically evil."[265] Chamorro and Physicians for Reproductive Health sued, alleging that Dignity Health violated the Unruh Act by denying medical services to Chamorro on the basis of sex.[266] 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.[267] The court also pointed out that Chamorro could have obtained the procedure at another hospital.[268] Americans United for the Separation of Church and State, a nonpartisan organization dedicated solely to assuring that religion and government remain separate, argued 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,[269] 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."[270] Thus, protections permitting healthcare providers to refuse to provide abortions, sterilizations, and other health services for religious or moral reasons have created tension with non-discrimination laws, access to healthcare, and the distribution of public funding.

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.[271] Most states do not have laws regulating these disputes. Of the states that have legislated in this area, only eight explicitly require pharmacies to provide emergency contraception to patients,[272] and seven have laws permitting pharmacies to refuse to provide contraception on

263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 11–12.
267. Chamorro v. Dignity Health, No. CGC 15-549626, 2016 WL 270082, at *1 (Cal. Super. Ct. Jan. 14, 2016).
268. *Id.*
269. *Catholic Hospital In Calif. Doesn't Have To Provide Sterilizations, Court Rules*, AMS. UNITED FOR THE SEPARATION OF CHURCH & STATE (Mar. 1, 2016), https://perma.cc/564P-EE5V.
270. *Id.*
271. *See Pharmacy Refusals 101*, NAT'L WOMEN'S L. CTR. (Dec. 28, 2017), https://perma.cc/N3Z3-K493.
272. These states are California, Illinois, Maine, Massachusetts, Nevada, New Jersey, Washington, and Wisconsin. *Id.*; *see also Refusing to Provide Health Services*, *supra* note 198.

religious or moral grounds as of August, 2023.[273] Most of these states allow refusal without critical protections for patients such as requirements to transfer prescriptions.[274]

Instructive jurisprudence in this area comes from Washington State. In *Stormans, Inc. v. Selecky*, the Ninth Circuit held that the Washington 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 against them were to be decided on a rational basis standard of review.[275] Operatively, the rules require pharmacies to stock and dispense emergency contraceptives, despite moral or religious objections of the owners.[276] However, the rules do not require individual pharmacists to provide emergency contraceptives if doing so would conflict with the individual's personal beliefs.[277] A pharmacy may accommodate an objecting pharmacist by making another pharmacist available in person or by telephone.[278] The Ninth Circuit found the rules were facially neutral, as they "make no reference to any religious practice, conduct, or motivation."[279] The court also found that the rules operated neutrally, as they prohibit any refusal to dispense medication, whether the refusal is motivated by religion or any other reason.[280] Reasoning that neutrality is not negated "even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct,"[281] the court held the rules were generally applicable because they were not substantially under-inclusive.[282] The Ninth Circuit 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.[283] 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.[284]

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.[285] The case was again appealed to the Ninth Circuit and proceeded as *Stormans, Inc. v. Wiesman*.[286] The court again held that the rules were both

273. These states are Arizona, Arkansas, Georgia, Idaho, Indiana, Mississippi, and South Dakota. *See Refusing to Provide Health Services*, *supra* note 198. Six additional states have broad refusal clauses that do not specifically include pharmacists, but may apply to them. *Id.*

274. *Pharmacy Refusals 101*, *supra* note 271.

275. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1109 (9th Cir. 2009).

276. *See id.* at 1116–17.

277. *Id.* at 1116.

278. *Id.*

279. *Id.* at 1130.

280. *Id.* at 1131.

281. 586 F.3d. 1109.

282. *Id.* at 1134.

283. *Id.* at 1134–35.

284. *Id.* at 1137–38.

285. Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1074 (9th Cir. 2015).

286. *See id.* at 1075.

facially neutral and neutral in operation, and were generally applicable.[287] 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."[288]

Although the Supreme Court denied certiorari, Justice Alito, with whom Justice Roberts and Justice Thomas joined, dissented from the denial.[289] The dissent signaled the 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."[290] Justice Alito opined that the rules were under-inclusive in allowing pharmacies to decline to fill prescriptions for financial reasons, including non-acceptance of Medicaid or Medicare.[291] In this respect, Justice Alito found the exemptions to be quite broad and in conflict with *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[292] which established the state cannot allow secular refusals while prohibiting religious refusals.[293] 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."[294] According to Justice Alito, this alternative further suggested that the regulations improperly conflicted with religious freedoms.

A similar conflict arose in Illinois, where the state court decided the issue without reaching the constitutional question of free exercise.[295] 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."[296] In this inter-branch conflict, the legislature prevailed, allowing the court to avoid addressing whether the administrative rules violated the free exercise clause.[297]

VI. RELIGIOUS EXEMPTIONS TO PROVIDING HOUSING

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

287. *Id.* at 1084.
288. *Id.*
289. Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (denying the petition for a writ of certiorari).
290. *Id.* at 2433.
291. *Id.* at 2439.
292. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537–38 (1993).
293. *Stormans, Inc.*, 136 S. Ct. at 2438.
294. *Id.* at 2435.
295. *See* Morr-Fitz, Inc. v. Quinn, 976 N.E.2d 1160, 1176 (Ill. App. Ct. 2012).
296. *Id.* at 1171.
297. *Id.* at 1176.

man and one woman, as [it] is understood in the Bible."[298] 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.[299] Their case, alleging that 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,[300] was heard in the first instance by a district court in Missouri.[301] 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."[302] The complaint argues that the "Cohabitation Policy" discriminates on impermissible sex-based stereotypes, namely that a woman's spouse should be a man.[303]

The resulting court case, *Walsh v. Friendship Village of South County*, generated publicity and has been important to recent developments in the field of housing and religious exemptions. New York Times journalist Paula Span asked, "[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?"[304] The district court rejected all of the plaintiffs' arguments and granted the defendant's motion for judgment on the pleadings,[305] holding, in pertinent part, that the plaintiffs' claim concerning sexual orientation was not protected and their sex stereotyping theory did not present an actionable discrimination claim under the FHA.[306]

In an unreported, two-sentence opinion, the Eighth Circuit granted the appellees' motion to vacate and remand, instructing the district court to conduct further proceedings in light of *Bostock v. Clayton County*,[307] in which the dissenting Justices argued that the court's decision would have far-reaching consequences in "over 100 federal statutes [that] prohibit discrimination because of sex," including the FHA.[308] To the dissent, this was an overly-broad interpretation of the meaning of "because of sex."[309] To the LGBTQIA+ community, however, it represented a win in the fight for equal rights—especially if, as the dissent feared, the opinion is interpreted so broadly as to affect all federal statutes pertaining to

298. Walsh v. Friendship Vill. of S. Cnty., 352 F. Supp. 3d 920, 923–24 (E.D. Mo. 2019).
299. *Id.* at 923–24.
300. *Id.* at 924.
301. *Id.*
302. *Id.*
303. *Id.*
304. *See* Paula Span, *A Retirement Community Turned Away These Married Women*, N.Y. TIMES (Aug. 17, 2018), https://perma.cc/GN8C-B6JN.
305. Walsh v. Friendship Vill. of S. Cnty., 352 F. Supp. 3d 920, 928 (E.D. Mo. 2019).
306. *Id.* at 926–27.
307. Walsh v. Friendship Vill. of S. Cnty., No. 19-1395, 2020 WL 5361010, at *1 (8th Cir. July 2, 2020).
308. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).
309. *See id.*

sex, including the FHA.[310] The Eighth Circuit's adoption of that broad understanding in remanding *Walsh v. Friendship Village* for further consideration[311] lends credence to the belief that *Bostock* could be one of the most pivotal decisions for LGBTQIA+ rights in recent years. *Walsh v. Friendship Village* ended with the parties reaching a settlement.[312]

VII. CONCLUSION

As of 2024, Americans face a patchwork of decisions on religious exemptions for healthcare and housing. Justice Alito wrote that if 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."[313] At the same time, Mary Walsh and Beverly Nance in *Walsh v. Friendship Village* faced the possibility they would not be able to age with dignity in a community of friends and peers; individuals like Evan Minton in *Minton v. Dignity Health* and Rebecca Chamorro in *Chamorro v. Dignity Health* were denied autonomy over their own bodies; and countless people continue to be humiliated, and endangered, by denials of their emergency birth control prescriptions. This conflict of fundamental rights is likely to continue to surface in the post-*Dobbs* landscape,[314] as the Trump Administration publicly elevated the claims of certain religious actors through added legal protections and the appointment of federal judges committed to conservative, Christian jurisprudence.[315]

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 and towards analyzing such cases as free exercise claims. Even though the Court has used the free exercise analysis to reach narrow decisions, as in *Masterpiece Cakeshop*, this trend still suggests a growing jurisprudence of potential conflict between religious liberty and access to services and accommodations. This tension continues to rise in light of the Court's 2023 decision in *303 Creative*. On the other hand, the Court's ruling in *Bostock* is expected by some legal scholars to have profound impacts on the LGBTQIA+ community in areas from employment to education to healthcare to housing,[316] perhaps paving the way toward a more balanced approach to protecting conscientious religious beliefs without infringing on the rights and liberties of LGBTQIA+ individuals and women.

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310. *See id.*

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

312. *See* Stipulation of Dismissal by Plaintiffs, *Walsh*, 2020 WL 5361010, https://perma.cc/YK29-47TF.

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

314. *See* 142 S. Ct. 2228 (holding that the federal Constitution does not provide a previously recognized right to abortion).

315. *See* Masood Farivar, *Trump's Lasting Legacy: Conservative Supermajority on the Supreme Court*, VOICE OF AM. (Dec. 24, 2020, 6:48 PM), https://perma.cc/L78X-7ECG; *see also* Sarah Posner, *Trump's Christian Judges March On*, ROLLING STONE (Oct. 9, 2020, 9:00 AM), https://perma.cc/4FRD-CV8X.

316. Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), https://perma.cc/76MS-HM37.