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LGBTQIA+ PUBLIC ACCOMMODATION CASES: THE BATTLE BETWEEN RELIGIOUS FREEDOM AND CIVIL RIGHTS

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Protections for LGBTQIA+ Americans have greatly expanded since the U.S. Supreme Court recognized marriage equality in Obergefell v. Hodges, *but the debate about whether business owners can refuse to serve LGBTQIA+ couples on religious grounds has grown more bitterly divided. The free exercise of religion is a fundamental constitutional right, and it is strongly protected at both the federal and state levels. At the same time, LGBTQIA+ couples are protected from receiving unequal treatment in public places under state antidiscrimination laws.*

The clash between religion and LGBTQIA+ rights has culminated in a line of cases that present difficult questions for courts concerning the balance between these competing interests. This Note discusses the battle being waged between liberty and equality in these cases and argues that the current legal doctrine exacerbates this inherent conflict. Ultimately, this Note proposes a more streamlined test that state courts can utilize when balancing business owners' religious liberty interests against the state's interests in ensuring equality for LGBTQIA+ Americans.

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INTRODUCTION

Five years ago, the U.S. Supreme Court issued its landmark decision in *Obergefell v. Hodges*,[1] recognizing a constitutionally protected right to same-sex marriage.[2] Leading up to and following the Court's decision, various state and local governments passed new laws or revised existing laws to protect members of the LGBTQIA+[3] community from discrimination in places of public accommodation.[4] These recently enacted public accommodation laws prohibit discrimination on the basis of sexual orientation[5] and, in certain jurisdictions, marital status and gender identity.[6]

1. 576 U.S. 644 (2015).
2. *Id.* at 679–81.
3. LGBTQIA+ is an acronym for lesbian, gay, bisexual, transgender, queer, intersex, and asexual or ally. *See* Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html [https://perma.cc/KM6J-UJ2S]. The plus sign denotes all other gender and sexual identities not represented by the other categories. *Id.*
4. A place of "public accommodation" is any business that provides goods or services to members of the public. *See infra* Part I.B.2.
5. Currently, twenty-four states and the District of Columbia have laws prohibiting discrimination on the basis of sexual orientation. *See State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx#NY6 [https://perma.cc/V79E-PH7E]; *see also, e.g.*, 11 R.I. GEN. LAWS § 11-24-2 (2021) (stating that public-facing businesses shall not "directly or indirectly refuse, withhold from, or deny to any person on account of . . . sexual orientation, gender identity or expression, any of the accommodations, advantages, facilities, or privileges of that public place").
6. Currently, seventeen states have laws prohibiting discrimination based on marital status, and twenty-three states have laws prohibiting discrimination based on gender identity. *See State Public Accommodation Laws*, *supra* note 5. In addition to sexual orientation, the

While the number of Americans supporting these public accommodation laws[7] has grown substantially,[8] the debate about whether business owners can refuse to serve LGBTQIA+ couples on religious grounds has intensified.[9] In his *Obergefell* dissent, Chief Justice Roberts anticipated these rising tensions: "Hard questions [will] arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage . . . ."[10]

Religious business owners who have to choose between adhering to their religious beliefs and serving LGBTQIA+ couples have brought constitutional and state law claims seeking religious exemptions from state antidiscrimination laws.[11] For these business owners, providing goods and services in connection with a same-sex wedding would be a deeply sinful act.[12] However, when LGBTQIA+ individuals are denied goods and services, they suffer harm to their personhood and are deemed to be inferior

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District of Columbia's antidiscrimination laws include marital status and gender identity as protected classes. *Id.*

7. This Note uses "public accommodation laws" and "antidiscrimination laws" interchangeably.

8. A recent survey found that 72 percent of Americans favor laws that would protect LGBTQIA+ Americans against discrimination in places of public accommodation. *See Broad Support for LGBT Rights Across All 50 States: Findings from the 2019 American Values Atlas*, PUB. RELIGION RSCH. INST. (Apr. 14, 2020), https://www.prri.org/research/broad-support-for-lgbt-rights/#page-section-2 [https://perma.cc/U75A-GUTT].

9. *See* TJ Denley, *Balancing Burdens in Religious Freedom Claims*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 207, 209 (2020) ("What happens when two different views of religion or morality are opposed? Which belief or morality—religion or equality—trumps the other?").

10. Obergefell v. Hodges, 576 U.S. 644, 711 (2015) (Roberts, C.J., dissenting); *see also* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 209 (2010) (arguing that the recognition of same-sex marriage will exacerbate the conflicts between LGBTQIA+ rights and religious liberty); Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 846 ("[T]he biggest problem for religious liberty in our time is deep disagreements over sexual morality . . . . [including] disagreements about . . . gay rights, and same-sex marriage.").

11. This Note refers to these cases as "LGBTQIA+ public accommodation cases." For a more detailed explanation of religious exemptions, see *infra* Part I.A.

12. *See* Berg, *supra* note 10, at 215–16; *see also* Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel*, 125 YALE L.J.F. 369, 378 (2016); Brief of Christian Legal Society et al. as Amici Curiae Supporting Petitioners at 31, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005662, at *31 [hereinafter Brief of Christian Legal Society].

members of society.[13] Conceptions of liberty and equality are thus pitted against each other in LGBTQIA+ public accommodation cases.[14]

The conflict between liberty and equality in these cases is heightened due to current religious exemption law.[15] Because of its precedent in *Employment Division, Department of Human Resources of Oregon v. Smith*,[16] the Supreme Court has not fully weighed in on this conflict.[17] This was made clear in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[18] In *Masterpiece Cakeshop*, a religious baker challenged the application of Colorado's antidiscrimination law, which would have required him to make a wedding cake for a same-sex couple in violation of his sincerely held religious beliefs.[19] While the Court decided the case in favor of the baker on narrow free exercise grounds, it did not address the broader questions about how to resolve conflicts between religious freedom and LGBTQIA+ rights.[20] To consider these questions, the Court would have needed to revisit its holding in *Smith*; the Court was not explicitly asked to do this in *Masterpiece Cakeshop*.[21]

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13. *See* Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 65 (2018) (contending that the religious business owners and LGBTQIA+ couples both suffer emotional harms); Debbie Munn, *How It Feels When Someone Refuses to Make Your Son a Wedding Cake*, TIME (Oct. 27, 2017, 2:48 PM), https://time.com/4991839/masterpiece-cakeshop-supreme-court-gay-discrimination/ [https://perma.cc/2X3G-LCAM] ("I still see today how that day changed their lives. When they walk into a store, there's that nagging feeling in the back of their mind telling them that this might be the day that they get turned away again.").

14. *See* Laycock, *supra* note 10, at 866 ("[W]hat one side views as a grave evil, the other side views as a fundamental human right.").

15. *See infra* Part II.B.

16. 494 U.S. 872 (1990). Under *Smith*, religious claimants are not entitled to exemptions from facially neutral laws of general applicability under the Free Exercise Clause. *See id.* at 879. Antidiscrimination laws are neutral laws of general applicability. *See infra* Part I.B.2.

17. *See infra* Part II.A.

18. 138 S. Ct. 1719 (2018).

19. *See id.* at 1726. Because *Smith* precluded the baker from asserting a successful religious exemption claim under the Free Exercise Clause, his main argument for an exemption was on compelled speech grounds. *See infra* Part II.A.1. The baker also asserted an as-applied discrimination claim under the Free Exercise Clause; this was the basis for the Court's decision. *Id.*

20. *See* Micah Schwartzman et al., *Symposium: Religious Privilege in* Fulton *and Beyond*, SCOTUSBLOG (Nov. 2, 2020, 9:29 AM), https://www.scotusblog.com/2020/11/symposium-religious-privilege-in-fulton-and-beyond/ [https://perma.cc/GE8X-CW3M]; *see also* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 134 (2018) (commenting on how the Court in *Masterpiece Cakeshop* avoided central questions in the case).

21. Following *Masterpiece Cakeshop*, the Court was presented with two other LGBTQIA+ public accommodation cases involving wedding vendors but vacated the judgments in both cases. *See* State v. Arlene's Flowers, Inc. (*Arlene I*), 389 P.3d 543 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) (mem.); Klein v. Or. Bureau of Lab. & Indus., 410 P.3d 1051 (Or. Ct. App. 2017), *cert. granted, judgment vacated*, 139 S. Ct. 2713 (2019) (mem.). As such, *Smith* remains the controlling free exercise authority in LGBTQIA+ public accommodation cases. *See* Holly Hollman, *Court Requires Religious Exemption but Leaves Many Questions Unanswered*, SCOTUSBLOG (June 22, 2021, 3:02

The Court, however, was presented with this exact question—whether to revisit *Smith*—in *Fulton v. City of Philadelphia, Pennsylvania*.[22] In *Fulton*, the City of Philadelphia declined to renew a contractual relationship with a religious foster care agency that stated that it would certify same-sex couples as foster parents.[23] Although the foster care agency petitioned the Court to reconsider its holding in *Smith*, the Court declined to do so.[24] Instead, the Court followed a different line of free exercise cases and found the government's conduct to be unconstitutional.[25] Thus, the Court sidestepped a ripe opportunity to issue guidance on the broader conflict between religious liberty and LGBTQIA+ rights.[26]

Because of *Smith*'s constitutional barrier, religious claimants also bring religious exemption claims under state law.[27] In many states, religious exemption claims are subjected to the "compelling interest" test.[28] When applying the compelling interest test, there are disagreements among state courts and scholars over the compelling interest served by antidiscrimination laws and the extent to which the harm suffered by the LGBTQIA+ couple should be factored into the analysis.[29] Because of these disagreements, state courts reach conflicting results, which exacerbate the underlying conflict between religious liberty and LGBTQIA+ rights.[30]

LGBTQIA+ public accommodation cases are not going away; rather, they are growing more frequent and more complex.[31] As illustrated by *Fulton*, these cases are expanding into other areas beyond wedding vendors.[32] Because these cases involve fundamental questions of how to balance religious liberty against the government's interest in protecting

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PM), https://www.scotusblog.com/2021/06/court-requires-religious-exemption-but-leaves-many-questions-unanswered/ [https://perma.cc/WL7W-794P].

22. 141 S. Ct. 1868 (2021).

23. *See id.* at 1875–76.

24. *See id.* at 1877.

25. *Id.* at 1878, 1881.

26. *See id.* at 1926 (Gorsuch, J., concurring).

27. *See infra* Part II.B.2 (discussing religious exemption claims brought under state law).

28. *See* Mark L. Movsesian, Masterpiece Cakeshop *and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 715 (2019). Under the compelling interest test, the government may substantially burden a person's religious beliefs only if it has a compelling interest in doing so and the burden is the least restrictive means of achieving its compelling ends. *Id.* For a detailed discussion of the compelling interest test, see *infra* Parts I.A, II.B.2.

29. *See infra* Part II.C.

30. *See* Movsesian, *supra* note 28, at 715–16.

31. *See id.* at 716; *see also* Hollman, *supra* note 21 ("But *Fulton* and *Masterpiece* have done little to help lower courts, and the same conflicts will keep coming.").

32. *See, e.g.*, Gwen Aviles, *Christian Day Care Center Rejects Child Because She Has Lesbian Parents*, NBC NEWS (July 22, 2019, 5:50 PM), https://www.nbcnews.com/feature/nbc-out/christian-day-care-center-rejects-child-because-she-has-lesbian-n1032466 [https://perma.cc/2V9G-FXSK] (discussing LGBTQIA+ discrimination in childcare); Tresa Baldas, *Pediatrician Won't Treat Baby with 2 Moms*, USA TODAY (Feb. 18, 2015, 7:06 PM), https://www.usatoday.com/story/news/nation/2015/02/18/doctor-discrimination-baby/23642091/ [https://perma.cc/8TBM-XCB7] (discussing LGBTQIA+ discrimination in healthcare); *see also infra* Part II.A.2 (discussing the *Fulton* case).

LGBTQIA+ rights, courts would benefit from having a more concrete judicial framework when adjudicating these disputes. This Note proposes a streamlined compelling interest test that state courts can use when faced with claims for religious exemptions from state antidiscrimination laws.[33]

Part I lays out the clash between religious liberty and LGBTQIA+ rights in LGBTQIA+ public accommodation cases. Part I first introduces religious liberty and the Free Exercise Clause and then discusses the development of LGBTQIA+ civil rights and the expanded protections for LGBTQIA+ Americans under antidiscrimination laws. Part II analyzes the doctrinal challenges presented by current constitutional and statutory religious exemption law and outlines the disagreements among state courts over the analysis under the compelling interest test. To properly balance the two competing interests in LGBTQIA+ public accommodation cases, Part III proposes a judicial framework that calls for state courts to consider the harms suffered by LGBTQIA+ couples when applying the compelling interest test.

I. FREE EXERCISE OF RELIGION AND LGBTQIA+ CIVIL RIGHTS

LGBTQIA+ public accommodation cases symbolize the culmination of the inherent clash between equality and religious liberty. This part provides an overview of the key players in this conflict. Part I.A discusses religious liberty and free exercise jurisprudence. Part I.B outlines the development of LGBTQIA+ civil rights and the expanded role of state and local governments in protecting these rights through antidiscrimination laws.

A. The First Amendment and Religious Liberty

Religious liberty is a fundamental constitutional right. The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[34] More commonly known as the Establishment and Free Exercise Clauses, these provisions prohibit the government from compelling or punishing the exercise of religious beliefs.[35] Through the Fourteenth Amendment, the First Amendment's protections are made applicable to state and local governments.[36]

33. With *Smith* in place, this Note focuses on the compelling interest test under state law. However, if the Supreme Court were to overrule *Smith*, the proposed framework would be a workable standard for courts to use to analyze religious exemption claims under the Free Exercise Clause. *See infra* Part III.

34. U.S. CONST. amend. I.

35. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . ." (citations omitted)).

36. U.S. CONST. amend. XIV; *see also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

The Supreme Court first interpreted the Free Exercise Clause in *Reynolds v. United States*.[37] Although free exercise law has changed since *Reynolds*, there are two important groups of cases that dominate modern-day jurisprudence. The first group deals with claims of government hostility toward a religious group or practice.[38] The second group deals with claimants seeking religious exemptions from neutral laws of general applicability.[39] In the first set of cases, the government targets or disparately treats a certain religious group. The long-standing precedent in this area is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[40]

In *Lukumi*, members of a Florida church challenged a city ordinance that prohibited the ritual sacrifice of animals.[41] The church practiced Santeria, a West-African and Cuban religion that sacrifices animals as part of its ceremonial rituals.[42] The Court declared the ordinance to be unconstitutional because it had a clear objective of prohibiting a religious practice.[43] The Court held that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[44] In other words, a law that is hostile toward or targets a religious group or practice must withstand strict scrutiny to comply with the First Amendment's protections.[45] The city was unable to meet this burden and, therefore, the Court ruled in favor of the church.[46]

Cases like *Lukumi* where the government directly targets a specific religious group or practice are rare.[47] There are only a few other cases that

37. 98 U.S. 145 (1878). The Court upheld a federal polygamy law and a criminal charge against the defendant against his claim that he was exempt from complying with the criminal code because of his religion. *See id.* at 166.

38. *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

39. *See generally* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

40. 508 U.S. 520 (1993).

41. *Id.* at 528.

42. *Id.* at 524–25.

43. *See id.* at 545–46. While the church's religious practices were subjected to the ordinance, the conduct of other secular entities, such as restaurants, was not regulated. *See id.* at 545.

44. *Id.* at 546.

45. *See id.* Strict scrutiny is one of three levels of review that courts will apply to determine whether a law is constitutional. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 588 (6th ed. 2019). A law will be upheld under strict scrutiny if it is necessary to achieve a compelling government interest and if it is the least restrictive means to achieve that interest. *Id.* at 588–89. This Note uses "strict scrutiny" and "compelling interest test" interchangeably.

46. *See Lukumi*, 508 U.S. at 546–47. The Supreme Court has also applied strict scrutiny in cases where the government was found to have discriminated against religion generally, as compared to the ordinances in *Lukumi* that specifically targeted the Santeria religion. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (holding that Missouri's refusal to provide a grant for playground resurfacing to a religious daycare center on account of its religious status violated the Free Exercise Clause); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020) (concluding that Montana's exclusion of parochial schools from its tuition assistance program violated the Free Exercise Clause because the exclusion was based solely on the "religious character" of the schools).

47. *See* Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith*: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO.

fall on the *Lukumi* side of the free exercise spectrum.[48] However, the principle from these cases is clear: when the government generally disfavors a religious group or disparately treats a religious group, the government can prevail only by showing that its conduct is narrowly tailored to serve a compelling government interest.[49]

The second group of free exercise cases deals with claims for religious exemptions[50] from neutral laws of general applicability.[51] Unlike in *Lukumi*, where the legislation intentionally targeted the Santeria religion, in this group of cases, the legislation is neutral on its face but incidentally burdens a religious group or practice when applied.[52] *Employment Division, Department of Human Resources of Oregon v. Smith* is the controlling authority for these cases.[53]

In *Smith*, two members of a Native American church were terminated for cause and deemed ineligible for unemployment compensation because of their religious use of peyote, which was considered "misconduct" that violated Oregon's controlled substances law.[54] Justice Antonin Scalia, writing for the majority, rejected the contention that the plaintiffs were entitled to a religious exemption under the Free Exercise Clause because

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L. REV. 9, 29 (2001) ("[T]he Hialeah ordinances invalidated in [*Lukumi*] are rare examples of . . . attempts by government to persecute disfavored religions . . . .").

48. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (finding that state officials showed hostility toward the claimant's religious beliefs).

49. The *Lukumi* test demands a showing by the state of an interest "of the highest order." *Trinity Lutheran*, 137 S. Ct. at 2024 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring) ("[W]e know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it . . . can prevail only if it satisfies strict scrutiny . . . .").

50. A religious exemption is a "court ruling or statutory provision declaring that otherwise valid regulations should not be applied in ways that significantly interfere with the religious freedom of organizations or individuals." Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 105 (2015). For another insightful definition of religious exemptions, see Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686–87 (1992).

51. The government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021); *see also Lukumi*, 508 U.S. at 533 ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."). A law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Laws are also not generally applicable if they invite the government "to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Id.* (quoting Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986))); *see also* Abner S. Greene, Barnette *and* Masterpiece Cakeshop*: Some Unanswered Questions*, 13 FIU L. REV. 667, 669 (2019) (describing a neutral law of general applicability as a "nondiscriminatory" law that is not "regarding religion alone").

52. *See* Kara Loewentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 457 (2014).

53. *See* Loewentheil, *supra* note 52 at 457–58.

54. *Smith*, 494 U.S. at 874.

"an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law."[55]

Since the plaintiffs were challenging a neutral law of general applicability that incidentally burdened their religious practices, the Court concluded that it did not have to apply strict scrutiny.[56] Instead, Justice Scalia reasoned that a lower standard of scrutiny—rational basis review—was the appropriate standard to apply.[57]

Before the Court reached its conclusion that the Free Exercise Clause does not provide for exemptions from otherwise neutral and generally applicable laws, the Court addressed a handful of pre-*Smith* religious exemption cases. The first of these cases was *Wisconsin v. Yoder*.[58] In *Yoder*, the Court held that Wisconsin could not require Amish parents to send their children to high school and granted the plaintiffs an exemption from Wisconsin's compulsory schooling law under the Free Exercise Clause.[59] In granting this exemption, the Court applied strict scrutiny.[60]

In *Smith*, Justice Scalia distinguished *Yoder*, characterizing the Amish parents' religious exemption claim as a "hybrid" rights claim.[61] By contrast, the *Smith* claimants based their religious exemption claim solely on the Free Exercise Clause.[62] Despite Justice Scalia's attempt at distinguishing *Yoder*, his hybrid-rights theory did not gain much traction, and *Yoder* still stands essentially opposite *Smith* in the exemption bucket of free exercise case law.[63] Because *Yoder* has not officially been overturned, it could present interesting questions should the Supreme Court ever decide to reinstate heightened scrutiny for religious exemption claims under the Free Exercise Clause.[64]

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55. *Id.* at 878–79.

56. *Id.* at 885 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling . . . contradicts both constitutional tradition and common sense." (citation omitted)).

57. *See id.* at 886 n.3. To satisfy the rational basis test, the government need only prove that its legislative objective is related to a legitimate purpose. *See* CHEMERINSKY, *supra* note 45, at 587.

58. 406 U.S. 205 (1972).

59. *Id.* at 234.

60. *Id.* at 214 ("[I]n order for Wisconsin to compel school attendance beyond the eighth grade . . . there [must be] a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.").

61. *See Smith*, 494 U.S. at 882; *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1915 (2021) (Alito, J., concurring) ("To dispose of *Yoder*, *Smith* was forced to invent yet another special category of cases, those involving 'hybrid-rights' claims.").

62. *Smith*, 494 U.S. at 882.

63. *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 574 (2003) (noting how "hybrid rights claims have overwhelmingly failed to succeed"); *Fulton*, 141 S. Ct. at 1918 ("The 'hybrid rights' exception, which was essential to distinguish *Yoder*, has baffled the lower courts.").

64. *See Fulton*, 141 S. Ct. at 1924 (arguing that the compelling interest test from *Yoder* and *Sherbert* should replace *Smith*); *see also* Thomas Berg & Douglas Laycock, *Protecting Free Exercise Under* Smith *and After* Smith, SCOTUSBLOG (June 19, 2021, 6:37 PM),

In addition to *Yoder*, Justice Scalia wrestled with another group of free exercise exemption cases: the "*Sherbert* Quartet."[65] In these cases, the claimants terminated their existing employment for religious reasons[66] and were subsequently denied state unemployment benefits for "fail[ing], without good cause . . . to accept available suitable work when offered."[67] In all four cases, the Supreme Court applied strict scrutiny and granted the claimant's request for a religious exemption, holding that the government "could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion."[68]

In *Smith*, Justice Scalia distinguished the *Sherbert* Quartet by noting that the conduct at issue in those cases was not prohibited by law, whereas peyote consumption was prohibited by controlled substance law in Oregon.[69] Moreover, Justice Scalia pointed out that the *Sherbert* Quartet cases centered on individualized administrative determinations about what constitutes "good cause" for not working.[70] By contrast, the plaintiffs in *Smith* violated the controlled substances law by ingesting peyote and, as a result, were ineligible to receive unemployment benefits.[71]

In differentiating the *Sherbert* Quartet, Justice Scalia limited the application of strict scrutiny to a specific subset of free exercise cases.[72] Importantly, the Court in *Fulton* relied heavily on Justice Scalia's understanding of the *Sherbert* Quartet in holding that Pennsylvania officials acted improperly when they refused to contract with a religious foster care agency that stated it would not certify same-sex couples as foster parents.[73]

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https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith/ [https://perma.cc/L24D-SXMH] (same).

65. The "*Sherbert* Quartet" cases are: Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987); Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). *See* Prabha Sipi Bhandari, *The Failure of Equal Regard to Explain the* Sherbert *Quartet*, 72 N.Y.U. L. REV. 97, 98–100 (1997) (discussing the *Sherbert* Quartet cases).

66. The claimants in *Frazee*, *Hobbie*, and *Sherbert* were required to work on their Sabbath. *See Frazee*, 489 U.S. at 830; *Hobbie*, 480 U.S. at 138; *Sherbert*, 374 U.S. at 399. In *Thomas*, the claimant was transferred to a department that produced parts for military tanks, which violated his religious beliefs against the production of military weapons. *See Thomas*, 450 U.S. at 709.

67. *Sherbert*, 374 U.S. at 401 (alteration in original).

68. *Smith*, 494 U.S. at 876 (discussing the holdings of the *Sherbert* Quartet cases).

69. *Id.*

70. *Id.* at 884.

71. *See id.*

72. *See id.* at 885 ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [*Sherbert*] test inapplicable to [the claimants'] challenges."); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1277–82 (1994) (elaborating on Justice Scalia's understanding of the *Sherbert* Quartet cases and their application to unemployment insurance cases).

73. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021) ("Like the good cause provision in *Sherbert*, [the City's standard foster care contract] incorporates a system of individual exemptions, made available in this case at the 'sole discretion' of the

The Court's decision in *Smith* to adopt rational basis review—as opposed to strict scrutiny—as the new standard for religious exemption cases remains extremely controversial.[74] In the aftermath of the Court's decision, Congress enacted the Religious Freedom and Restoration Act of 1993[75] (RFRA).[76] RFRA reinstated the Court's pre-*Smith* free exercise jurisprudence and provided that the government must satisfy strict scrutiny when it substantially burdens[77] religious exercise.[78] Under RFRA, the government must satisfy strict scrutiny "even if the burden [on religion] results from a rule of general applicability."[79] The Supreme Court in *City of Boerne v. Flores*,[80] however, delivered a substantial blow to RFRA, invalidating the law as applied to the states.[81]

In response to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Person Act of 2000[82] (RLUIPA).[83] Many states followed suit, passing their own religious freedom restoration acts ("state RFRAs")[84] or interpreting their constitutions to provide additional

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Commissioner."). By applying the *Sherbert* Quartet cases in *Fulton*, the Court left *Smith* intact. *See infra* Part II.A.2 (explaining the Court's narrow ruling in *Fulton*).

74. *Compare* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410 (1990) (concluding that the Free Exercise Clause permits the granting of religious exemptions), *with* Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992) (arguing, in line with *Smith*, against religious exemptions to neutral and generally applicable laws under the Free Exercise Clause).

75. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 5 and 42 U.S.C.), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

76. *See* Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 163 (2016).

77. In LGBTQIA+ public accommodation cases, religious claimants can typically show that their religious beliefs are substantially burdened because they are being forced to choose between acting contrary to their faith or violating antidiscrimination law. *See, e.g.*, Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 920–21 (Ariz. 2019). This Note does not address the separate area of legal scholarship that closely reviews the substantial burden component under RFRA and similar state laws. *See generally* Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161 (2015).

78. "The purposes of this chapter are . . . to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b) (citations omitted).

79. 42 U.S.C. § 2000bb-1(a); *see, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–89 (2014) (applying strict scrutiny to evaluate the claimant's claim under RFRA).

80. 521 U.S. 507 (1997).

81. *See id.* at 536. RFRA, as applied to the federal government, stands. *See* Lund, *supra* note 76, at 164.

82. Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000cc to 2000cc-5).

83. *See* Lund, *supra* note 76, at 163–64. RLUIPA protects religious institutions and houses of worship from discrimination in land use and zoning laws. *See* 42 U.S.C. § 2000cc(a). RLUIPA also protects institutionalized persons from religious discrimination. *Id.* § 2000cc-1(a).

84. *See* Lund, *supra* note 76, at 164; *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 14, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/9AG5-4P6U].

protections for religious freedom.[85] Echoing RFRA and RLUIPA, state RFRAs call for strict scrutiny review when the state substantially burdens religion.[86] As a result, "the compelling-interest test discarded by *Smith* now again applies to the federal government and more than half the states."[87] The relationship between state RFRAs and *Smith* is one part of a multi-faceted battle in LGBTQIA+ public accommodation cases.[88]

B. Expanding Protections for LGBTQIA+ Americans

LGBTQIA+ civil rights stand directly opposite religious liberty in LGBTQIA+ public accommodation cases.[89] As a result of Supreme Court decisions and changes to state and local antidiscrimination laws, LGBTQIA+ civil rights have greatly expanded since the turn of the century.[90] First, this section discusses the important role the Supreme Court has played in expanding LGBTQIA+ civil rights. Second, this section addresses how state governments have promoted equality for LGBTQIA+ Americans by increasing the protections afforded by antidiscrimination laws.

1. The Supreme Court and LGBTQIA+ Constitutional Rights

Since the mid-1990s, the Supreme Court has heard only a few cases addressing the constitutional rights of LGBTQIA+ individuals, but the Court's decisions have been significant.[91] In 1996, the Court was presented with the question of whether an amendment to Colorado's state constitution, which rolled back municipal protections for LGBTQIA+ individuals, violated the Fourteenth Amendment to the U.S. Constitution.[92] The Court applied rational basis review[93] and concluded that the amendment was unconstitutional.[94]

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85. *See* Lund, *supra* note 76, at 164. Alabama is one of the states that has broadly construed the religious freedom protections in its state constitution. *See* ALA. CONST. art. I, § 3.01.

86. *See* Lund, *supra* note 76, at 164. *Compare* TENN. CODE ANN. § 4-1-407 (West 2018) ("No government entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is . . . [e]ssential to further a compelling governmental interest; and . . . [t]he least restrictive means of furthering that compelling governmental interest."), *with* 42 U.S.C. § 2000bb(b) (outlining RFRA's legislative purpose).

87. Lund, *supra* note 76, at 164; *see also* Victoria Cappucci, Note, *The Cost of Free Speech: Resolving the Wedding Vendor Divide*, 88 FORDHAM L. REV. 2585, 2592–93 (2020) (discussing the implications of RFRA, RLUIPA, and state RFRAs).

88. *See infra* Parts II.B, II.C.

89. *See* Lydia E. Lavelle, *Saving Cake for Dessert: How Hearing the LGBTQ Title VII Cases First Can Inform LGTBQ Public Accommodation Cases*, 30 GEO. MASON U. C.R.L.J. 123, 123–24 (2020).

90. *See id.* at 123, 144.

91. *See id.* at 123.

92. *See* Romer v. Evans, 517 U.S. 620, 623–25 (1996).

93. In addressing constitutional questions related to the Fourteenth Amendment, the Court uses the same standards of constitutional review applied in the First Amendment cases

LGBTQIA+ Americans secured another victory at the Supreme Court in 2003. In *Lawrence v. Texas*,[95] the Court held that state laws that criminalized private consensual sexual conduct between same-sex adults were unconstitutional.[96] Ten years later in *United States v. Windsor*,[97] the Court struck down the definition of marriage in the Defense of Marriage Act[98] (DOMA) as unconstitutional.[99] DOMA defined marriage as the "legal union between one man and one woman as husband and wife."[100] In reaching its decision, the Court noted that "[u]nder DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways."[101]

In 2015, the Court took a monumental step in recognizing a constitutionally protected right to same-sex marriage in *Obergefell v. Hodges*.[102] The Court declared that the denial to same-sex couples of the fundamental right to marry "works a grave and continuing harm" and imposes a "disability" that subordinates same-sex couples.[103] The Court solidified this right to same-sex marriage in *Pavan v. Smith*[104] when it held that both members of a same-sex couple have a constitutional right to have both of their names listed on their child's birth certificate.[105]

Despite having addressed constitutional questions about LGBTQIA+ rights only a handful of times, the Supreme Court's decisions have greatly shaped and expanded protections for LGBTQIA+ Americans.[106] As the Supreme Court has interpreted the Constitution to provide more substantive rights to LGBTQIA+ Americans, state and local governments have followed suit and looked to expand equality for the LGBTQIA+ community in their jurisdictions.

2. Public Accommodation Laws: New Protected Classes

Following the Supreme Court's example, state and local governments have taken important steps to expand protections for LGBTQIA+ Americans, mainly through the passage of new or revised public

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discussed above. *See supra* note 57 and accompanying text (discussing the requirements of rational basis review).

94. *See Romer*, 517 U.S. at 635–36 ("We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

95. 539 U.S. 558 (2003).

96. *See id.* at 578–79. The Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), a prior decision approving of such laws. *Lawrence*, 539 U.S. at 578l.

97. 570 U.S. 744 (2013).

98. Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in scattered sections of 1 and 28 U.S.C.).

99. *See Windsor*, 570 U.S. at 775.

100. 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

101. *Windsor*, 570 U.S. at 772.

102. 576 U.S. 644, 679–81 (2015).

103. *Id.* at 675.

104. 137 S. Ct. 2075 (2017) (per curiam).

105. *See id.* at 2078–79.

106. *See* Lavelle, *supra* note 89, at 124.

accommodation laws.[107] Historically, public accommodation laws have prohibited discrimination on the basis of the protected classes of race, religion, and national origin.[108] To expand protections for the LGBTQIA+ community, state[109] and local[110] governments have enlarged the list of protected classes to include sexual orientation and, in some places, gender identity.[111] Federal public accommodation law—namely Title II of the Civil Rights Act of 1964[112] ("Civil Rights Act")—does not include sexual orientation as a protected class.[113] Because there is currently no federal law that prohibits sexual orientation discrimination in places of public accommodation,[114] the passage of legislation by state and local governments has been significant.[115]

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107. *See* Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 638–39 (2016).

108. *See id.* at 635; *see also* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. L. REV. & SOC. CHANGE 215, 260–61 (1978), https://socialchangenyu.com/wp-content/uploads/2017/12/Lisa-Lerman-Annette-Sanderson_RLSC_7.2.pdf [https://perma.cc/4ZFT-BPTN].

109. *See State Public Accommodation Laws*, *supra* note 5 (listing California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin as jurisdictions that have broadened the range of protected classes). While Michigan has not officially amended its public accommodation law, the Michigan Civil Rights Commission interpreted "sex" in the state's current law as covering sexual orientation and gender identity. *See, e.g.*, *Interpretative Statement Regarding the Meaning of "Sex" in the Elliott-Larsen Civil Rights Act (Act 453 of 1976)*, MICH. C.R. COMM'N, https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf [https://perma.cc/GL97-LN5J] (last visited Aug. 9, 2021) (interpretive statement adopted on May 21, 2018).

110. As of January 2018, more than 400 cities and counties have laws in place protecting LGBTQIA+ Americans from discrimination in places of public accommodation. *See* Klint W. Alexander, *The* Masterpiece Cakeshop *Decision and the Clash Between Nondiscrimination and Religious Freedom*, 71 OKLA. L. REV. 1069, 1093 (2019) (citing *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender [https://perma.cc/JPY3-U77U] (last visited Aug. 9, 2021)).

111. *See* Sepper, *supra* note 107, at 635–36, 638.

112. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S.C.).

113. *See* Justin Muehlmeyer, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781, 784 (2013); *see also* 42 U.S.C. § 2000a(a) (prohibiting discrimination "on the ground of race, color, religion, [and] national origin").

114. The Supreme Court recently interpreted Title VII of the Civil Rights Act to prohibit discrimination in employment on the basis of sexual orientation. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020). The Court's decision expanded employment protections for LGBTQIA+ Americans but did not address the question of discrimination in places of public accommodation.

115. Congress is currently considering a bill known as the Equality Act, which would greatly expand antidiscrimination protections for LGBTQIA+ Americans at the federal level. *See* H.R. 5, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/5 [https://perma.cc/BK7W-6VLA] ("This bill prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations . . . ."). The

Drafters of antidiscrimination laws originally used "public accommodation" to refer to places "other than schools, workplaces, and homes."[116] Statutory definitions of public accommodation have broadened over time and reflect one of three basic models.[117] The first model is unique to Title II of the Civil Rights Act, which provides an exclusive list of businesses subject to antidiscrimination obligations.[118] The second model defines public accommodation generally.[119] The third model bridges the gap between the first two and usually contains some type of exclusive list, plus a catch-all provision.[120] Regardless of the model used, in most states, virtually every entity open to the public constitutes a public accommodation, and there are limited exceptions.[121] Public accommodation laws are neutral and generally applicable laws.[122]

The overall purpose of public accommodation laws has been fiercely debated,[123] and in LGBTQIA+ public accommodation cases, the question is an important one.[124] Some scholars argue that the purpose of antidiscrimination law is to expand market access to protected persons who historically have not been able to fully enjoy the goods and services of a functioning market.[125] Others dispute this position, acknowledging that

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House passed the Equality Act on February 25, 2021, and the Senate is considering the bill. *See* Grace Segers, *Senate Could Expand LGBTQ Protections with Equality Act*, CBS NEWS (June 10, 2021, 8:50 PM), https://www.cbsnews.com/news/equality-act-lgbtq-protection-bill-senate/ [https://perma.cc/DW4Y-44FA].

116. Lerman & Sanderson, *supra* note 108, at 217.

117. *See* Sepper, *supra* note 107, at 639.

118. *Id.* at 639–40; 42 U.S.C. § 2000a(b) (listing lodgings, eating establishments, gas stations, and places of exhibition or entertainment as the categories of public accommodations).

119. Sepper, *supra* note 107, at 640. For example, a public accommodation is "any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, good and services . . . ." *Id.* (quoting ARK. CODE ANN. § 16-123-102(7) (2015)).

120. *Id.* at 641–42. For example, Maine's public accommodation law contains a list of specific categories of public accommodations, followed by a broad definition encompassing "[a]ny establishment that . . . offers its goods . . . to . . . the general public." *Id.* at 642 (alteration in original) (quoting ME. STAT. tit. 5, § 4553(8) (1995)).

121. *Id.* at 642.

122. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018) (citing Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5 (1968) (per curiam)) ("[I]t is a general rule that . . . [religious] 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."). For a general discussion of neutral and generally applicable laws, see *supra* note 51 and accompanying text.

123. *Compare* Berg, *supra* note 50, at 141–42 (arguing that there are plenty of vendors available to ensure that LGBTQIA+ individuals gain access to the market as a whole), *with* Marvin Lim & Louise Melling, *Inconvenience or Indignity?: Religious Exemptions to Public Accommodations Laws*, 22 J.L. & POL'Y 705, 711 (2014) (arguing that the concept of dignity is extremely relevant to the current debate over protecting LGBTQIA+ individuals from discrimination).

124. *See infra* Part II.C.1.

125. *See* Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 133 (2006) ("Anyone who wants to extend antidiscrimination protection to a new class needs to show that the class is subject to discrimination that is so pervasive that markets will not

while public accommodation laws address the problem of market access, the fundamental purpose of these laws is to dismantle patterns of discrimination and ensure human dignity.[126]

The various aims of antidiscrimination laws have posed challenges for courts in LGBTQIA+ public accommodation cases, particularly when courts are applying strict scrutiny to determine whether a religious exemption should be granted under state law.[127] To balance the liberty and equality interests in LGBTQIA+ public accommodation cases more efficiently, courts should consider the government's goals in enacting antidiscrimination laws.[128]

II. LIBERTY, EQUALITY, AND RELIGIOUS EXEMPTION LAW

As previously discussed, public-facing businesses are prohibited under public accommodation laws from discriminating on the basis of protected classes, including sexual orientation, in many jurisdictions.[129] LGBTQIA+ public accommodation cases demonstrate the inherent tension between liberty and equality when a religious business owner denies services to a same-sex couple in violation of public accommodation law.[130] While these conflicts existed before the Supreme Court's decision in *Obergefell*,[131] the number of cases rose substantially following the Court's decision in that case.[132]

Because of *Smith*, the Supreme Court has not fully weighed in on the core conflict present in LGBTQIA+ public accommodation cases.[133] As a result, state courts have needed to reconcile the competing interests in these

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solve the problem."); *see also* Nathan Oman, *The Empirical Irony of the Conflict Between Antidiscrimination and Religious Freedom*, L. & RELIGION F. (Apr. 22, 2015), https://lawandreligionforum.org/2015/04/22/the-empirical-irony-of-the-conflict-between-antidiscrimination-and-religious-freedom/ [https://perma.cc/7S32-959X].

126. *See* Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R. & C.L. L. REV. 129, 153–54 (2015); *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2574–78 (2015); Lim & Melling, *supra* note 123, at 713 ("The primary purpose . . . is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." (omission in original) (quoting S. REP. NO. 88-872, at 2370 (1964))).

127. *See infra* Part II.C.

128. *See infra* Part III.A.

129. *See supra* Part I.B.2 (discussing the expanded protections for LGBTQIA+ Americans under state antidiscrimination laws).

130. *See infra* Part II.A.1.

131. *See generally* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013). For a discussion of the Supreme Court's decision in *Obergefell* and other cases involving LGBTQIA+ constitutional rights, see *supra* Part I.B.1.

132. *See* Sepper, *supra* note 126, at 146 ("2014 and 2015 . . . have seen renewed efforts to achieve marriage-related religious exemptions for businesses."); *see also* Berg, *supra* note 10, at 209; Alexander, *supra* note 110, at 1106 ("Since the 2015 *Obergefell* decision, U.S. courts have been working to strike the right balance between the promotion of LGBT equality and the protection of religious liberty . . . .").

133. *See* Hollman, *supra* note 21 (arguing that the Supreme Court has not addressed "whether and under what circumstances the Constitution requires an exemption to . . . nondiscrimination law more broadly").

cases under state law; this has led to inconsistent results and intensified the underlying divide in these cases.[134] Part II.A explores the Supreme Court's jurisprudence in LGBTQIA+ public accommodation cases. Part II.B delves into the challenges presented by the current body of religious exemption law by examining *Smith* and state RFRAs more closely. Part II.C outlines the disagreements among courts and scholars about the overall purpose public accommodation laws serve, as well as the applicability of the third-party harm doctrine.

A. The Supreme Court and LGBTQIA+ Public Accommodation Cases

While the Supreme Court has previously heard LGBTQIA+ public accommodation cases, it has not addressed the underlying clash between liberty and equality in these cases.[135] To reach these broader questions, the Court would need to reconsider its holding in *Smith*, which it was not specifically asked to do until *Fulton v. City of Philadelphia*.[136] Part II.A.1 explains the Court's decisions in the "wedding vendor" cases.[137] Part II.A.2 discusses the Court's missed opportunity in *Fulton* to address the conflict between religious liberty and LGBTQIA+ rights in foster care.

1. The Wedding Vendor Cases

The most well-known LGBTQIA+ public accommodation case to reach the Supreme Court is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. In this case, Jack Phillips, the owner of Masterpiece Cakeshop and a devout Christian, refused to make a wedding cake for a same-sex couple, Charlie Craig and Dave Mullins.[138] After being denied by Phillips, the couple filed an administrative complaint with the Colorado Civil Rights Commission (the "Commission").[139] The Commission found that Phillips violated Colorado's public accommodation law, which prohibits discrimination on the basis of sexual orientation.[140] Phillips challenged the antidiscrimination law as applied to his conduct of denying the couple services, claiming that the law's application violated his First Amendment free exercise and speech rights.[141] The Colorado Court of Appeals disagreed with Phillips and upheld the Commission's ruling.[142]

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134. *See infra* Part II.B.2.
135. *See* Hollman, *supra* note 21; *see also* Movsesian, *supra* note 28, at 713.
136. 141 S. Ct. 1868, 1881 (2021).
137. Since most LGBTQIA+ public accommodation cases involve a religious business owner refusing to provide goods and services for a same-sex wedding, scholars have coined the term "wedding vendor" to characterize these specific cases. *See, e.g.*, Laycock, *supra* note 13, at 50–51. However, since these cases are expanding beyond wedding vendors, the term "wedding vendor" is no longer all-inclusive. *See supra* note 32 and accompanying text.
138. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).
139. *Id.* at 1725.
140. *Id.* at 1726.
141. *Id.*
142. *Id.* at 1726–27.

The U.S. Supreme Court granted certiorari to consider Phillips's constitutional claims.[143] Phillips presented the Court with three questions: (1) whether the Commission impermissibly targeted his religious beliefs in violation of the Free Exercise Clause; (2) whether he was entitled to an exemption under the Free Speech Clause; and (3) whether he was entitled to a religious exemption under the Free Exercise Clause.[144] The U.S. Supreme Court reversed the Colorado Court of Appeals's decision and concluded that the state violated Phillips's free exercise rights when it failed to provide "neutral and respectful consideration" of his religious beliefs.[145] The Court did not discuss Phillips's request for a religious exemption under the Free Exercise Clause and only briefly considered his compelled speech exemption claim.[146] Instead, the Court focused nearly all of its attention on the Commission's conduct during its administrative review of Phillips's case.[147]

The Court scrutinized commentary made by two commissioners equating Phillips's views regarding same-sex marriage to historical instances where religion was used to justify violence and oppression.[148] Justice Kennedy, writing for the Court, described this conduct as exhibiting "elements of clear and impermissible hostility" toward Phillips's religious beliefs.[149] Turning to *Lukumi*, the Court concluded that the Commission's treatment of Phillips's religious beliefs violated the guarantee of neutrality toward religion that the Free Exercise Clause requires.[150]

To consider Phillips's claim for a religious exemption under the Free Exercise Clause, the Court would have needed to address its controversial

143. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 137 S. Ct. 2290 (2017) (mem.).

144. Brief for Petitioner at 14–16, Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762, at *14–17. Because *Smith* arguably stood in the way of Phillips's most obvious claim for a religious exemption, a majority of the briefing in the case focused on his compelled speech argument. *Id.* at 16–35. Unsurprisingly, many claimants in LGBTQIA+ public accommodation cases also present compelled speech claims. *See, e.g.*, Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 548 (W.D. Ky. 2020); State v. Arlene's Flowers, Inc. (*Arlene II*), 441 P.3d 1203, 1224–28 (Wash. 2019), *cert. denied*, No. 19-333, 2021 WL 2742795 (U.S. July 2, 2021) (mem.). While these compelled speech claims present interesting questions, this Note does not specifically address these issues.

145. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

146. Justice Thomas closely analyzed Phillips's compelled speech claim in his concurring opinion. *See id.* at 1740–48 (Thomas, J., concurring).

147. *See id.* at 1729–30 (majority opinion); *see also* Kendrick & Schwartzman, *supra* note 20, at 133 (observing that the Court in *Masterpiece Cakeshop* "focused on whether state officials treated religious objections with the proper respect and consideration").

148. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. During Phillips's administrative hearing, a commissioner stated that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust . . . ." *Id.* (quoting Transcript of Oral Argument at 12, Colo. C.R. Comm'n Meeting (May 30, 2014)).

149. *Id.*

150. *See id.* at 1730–31 (discussing the application of *Lukumi*).

holding in *Smith*.[151] While some members of the Court have suggested in other contexts that the Court should reconsider *Smith*,[152] the Court was not presented with this specific question in *Masterpiece Cakeshop*.[153] The Court, therefore, did not reach the underlying free exercise exemption issues.[154] Notably, the Court acknowledged the inherent clash between liberty and equality but did not explicitly address the question of how to balance these interests.[155]

After *Masterpiece Cakeshop*, the Court was presented with two other LGBTQIA+ public accommodation cases involving wedding vendors. In *State v. Arlene's Flowers, Inc.*[156] (*Arlene I*), Barronelle Stutzman, the owner of Arlene's Flowers, refused to sell wedding flowers to a same-sex couple, Robert Ingersoll and Curt Freed.[157] Stutzman requested an exemption from Washington's antidiscrimination law, but her request was denied by the state courts.[158] Stutzman then petitioned the U.S. Supreme Court to hear her constitutional claims.[159]

Similarly, in *Klein v. Oregon Bureau of Labor and Industries*,[160] Christian bakers Melissa and Aaron Klein refused to make a wedding cake for Rachel and Laurel Bowman-Cryer, a same-sex couple.[161] The Oregon state courts upheld the Bureau of Labor and Industries's administrative

151. *See supra* Part I.A (discussing *Smith* and its aftermath). In his concurring opinion in *Masterpiece Cakeshop*, Justice Gorsuch pointed out that *Smith* "remains controversial in many quarters." *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

152. *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019). In a concurring statement on the denial of certiorari, Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, observed that the Court's ruling in *Smith* "drastically cut back on the protection provided by the Free Exercise Clause," but in this particular case, the Court "ha[s] not been asked to revisit [*Smith*]." *Id.* at 637.

153. *See* Brief for Petitioner, *supra* note 144, at 14–16.

154. *See* Kendrick & Schwartzman, *supra* note 20, at 133–34; *see also* Movsesian, *supra* note 28, at 713 (arguing that *Masterpiece Cakeshop* "does relatively little to resolve the conflict between anti-discrimination laws and the right of business owners to decline, out of sincere religious conviction, to provide services in connection with same-sex weddings"); Alexander, *supra* note 110, at 1070.

155. Justice Kennedy opened the Court's opinion by recognizing the difficult questions related to the "proper reconciliation" of a state's authority to protect LGBTQIA+ Americans from discrimination "when they seek goods or services" and the right of "all persons to exercise fundamental freedoms under the First Amendment." *Masterpiece Cakeshop*, 138 S. Ct. at 1723. Justice Kennedy closed the Court's opinion with the following statement: "[T]hese disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market." *Id.* at 1732.

156. 389 P.3d 543 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) (mem.).

157. *Id.* at 549.

158. *Id.* at 551, 568–69.

159. Petition for Writ of Certiorari at 2–5, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (No. 17-108), 2017 WL 3126218, at *1–5.

160. 410 P.3d 1051 (Or. Ct. App. 2017), *cert. granted, judgment vacated*, 139 S. Ct. 2713 (2019) (mem.).

161. *Id.* at 1057. Rachel was "hysterical" when Klein told her that they do not make cakes for same-sex weddings. *Id.*

ruling that the Kleins violated Oregon's public accommodation law.[162] Like Stutzman and Phillips, the Kleins sought review by the U.S. Supreme Court.[163] In both cases, the Court vacated the judgments, directing the state courts to reconsider their decisions in light of *Masterpiece Cakeshop*.[164] As such, the Court did not address the broader free exercise issues.

2. Foster Care: The Supreme Court's Missed Opportunity

In its October 2020 term, the Supreme Court heard oral arguments in *Fulton v. City of Philadelphia*, an LGBTQIA+ public accommodation case involving a new challenger, a religious foster care agency.[165] The *Fulton* case presented the Court with the specific question about whether to reconsider *Smith*, but it sidestepped a ripe opportunity to address the clash between religious liberty and LGBTQIA+ rights.[166]

In *Fulton*, Catholic Social Services (CSS)[167] challenged the Fair Practices Ordinance,[168] Philadelphia's public accommodation law, on the grounds that the law, as applied, violates its rights under the Free Exercise Clause.[169] CSS is one of thirty agencies that contracts with the City of Philadelphia to provide foster and adoption services.[170] CSS's contract with the city contained language specifically incorporating the Fair Practices Ordinance, which prohibits discrimination based on sexual

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162. *See id.* at 1087.

163. Petition for Writ of Certiorari at 14, Klein v. Or. Bureau of Lab. & Indus., 139 S. Ct. 2713 (2019) (No. 18-547), 2018 WL 5308156, at *15.

164. *See generally* Klein v. Or. Bureau of Lab. & Indus., 139 S. Ct. 2713 (2019); Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018). On remand from the U.S. Supreme Court, the Washington Supreme Court reaffirmed its judgment and denied Stutzman a religious exemption. *See Arlene II*, 441 P.3d 1203, 1209–10 (Wash. 2019), *cert. denied*, No. 19-333, 2021 WL 2742795 (U.S. July 2, 2021) (mem.). The court pointed out that the Supreme Court in *Masterpiece Cakeshop* "did not reconcile" the principles of free exercise of religion and the government's interest in protecting LGBTQIA+ rights. *Id.* at 1215. Stutzman filed another petition for certiorari, which the Supreme Court denied. Arlene's Flowers, Inc. v. Washington, No. 19-333, 2021 WL 2742795 (U.S. July 2, 2021) (mem.).

165. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1871 (2021). Many scholars foreshadowed the emergence of these new types of cases. *See* Berg, *supra* note 10, at 211. These new conflicts with foster care and adoption agencies are intensifying. *See, e.g.*, Buck v. Gordon, 959 F.3d 219 (6th Cir. 2020); New Home Fam. Servs., Inc. v. Poole, 387 F. Supp. 3d 194 (N.D.N.Y. 2019), *rev'd*, 966 F.3d 145 (2d Cir. 2020).

166. *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring) ("A majority of our colleagues, however, seek to sidestep the question [of whether to overrule *Smith*].").

167. CSS is a religious nonprofit organization affiliated with the Archdiocese of Philadelphia. Fulton v. City of Philadelphia, 922 F.3d 140, 147 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021). CSS has been serving the Philadelphia community since 1917 and views its foster care work as part of its "religious mission." *Id.*

168. PHILA., PA., CODE § 9-1101 (2021).

169. *Fulton*, 922 F.3d at 152.

170. *Id.* at 147. When a child in need of foster care comes into the city's custody, the Department of Health and Human Services refers that child to one of the agencies with which it has a contractual relationship, such as CSS. *Id.*

orientation in places of public accommodation.[171] Therefore, CSS was required to certify same-sex couples as foster parents, a practice CSS argued violated its sincerely held religious beliefs.[172]

The Department of Health and Human Services ("Human Services") opened an investigation into CSS after the *Philadelphia Inquirer* reported that CSS "would not work with same-sex couples as foster parents."[173] After several attempts to resolve the underlying conflict, Human Services notified CSS that it would no longer make referrals to CSS or enter into future contracts with the agency unless CSS assured it would certify same-sex couples as foster parents.[174] CSS, along with three of its foster parents—Sharonell Fulton, Cecilia Paul, and Toni Lynn Simms-Busch—filed suit in federal court seeking injunctive relief.[175] The district court denied the agency's request for injunctive relief,[176] and the Third Circuit upheld the decision on appeal.[177]

The Third Circuit focused its inquiry on whether Human Services's administrative investigation inappropriately targeted CSS's religious beliefs.[178] In support of its claim that the city acted out of religious hostility, CSS pointed to statements made by Human Services Commissioner Cynthia Figueroa about "following the teachings of Pope Francis."[179] While CSS characterized this commentary as improper, the court found that there was no evidence that "the City treated CSS differently because of its religion."[180]

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171. *Id.* at 148. In addition to incorporating the Fair Practices Ordinance, CSS's contract contained standalone antidiscrimination provisions. *Id.* The Supreme Court closely analyzed these contractual provisions in its decision. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878–80 (2021).

172. *See Fulton*, 922 F.3d at 147–49.

173. *Id.* at 148; *see* Julia Terruso, *Two Foster Agencies in Philly Won't Place Kids with LGBTQ People*, PHILA. INQUIRER (Mar. 13, 2018, 9:02 AM), https://www.inquirer.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html [https://perma.cc/2HT8-RM77].

174. *See Fulton*, 922 F.3d at 150.

175. *Id.* at 150–51. CSS also requested a religious exemption to the city's antidiscrimination policies under the Free Exercise Clause and filed a *Masterpiece Cakeshop*-type claim alleging that Human Services impermissibly targeted its religious beliefs. *See id.* at 156–57.

176. *Id.* at 151.

177. *Id.* at 165.

178. *Id.* at 156. The Third Circuit dismissed CSS's argument that the city's antidiscrimination policies are not neutral and generally applicable. *See id.* at 158 ("The Fair Practices Ordinance has not been gerrymandered as in *Lukumi* . . . ."). The Supreme Court disagreed. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (holding that the city's actions are subject to 'the most rigorous of scrutiny'" (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))).

179. *Fulton*, 922 F.3d at 157.

180. *Id.* In this regard, the Third Circuit's decision closely mirrors *Masterpiece Cakeshop*. Although Jack Phillips asserted an exemption claim under the Free Exercise Clause and Free Speech Clause, the Supreme Court did not extensively consider his exemption claims because of *Smith*. *See supra* note 151 and accompanying text. Instead, the Court's decision centered on the state's hostility toward Phillips's religious beliefs, which is conduct barred by the Free Exercise Clause. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

Following the Third Circuit's ruling, the Supreme Court granted certiorari to hear CSS's constitutional claims.[181] In its briefing, CSS explicitly presented the Court with the question of whether *Smith* should be revisited.[182] With the *Smith* question teed up, the Court had an opportunity to consider the true conflict in LGBTQIA+ public accommodation cases but "[d]odg[ed] the question."[183] Instead, the Court concluded that "[t]his case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable."[184]

The Court closely scrutinized a provision of CSS's contract that provides the Human Services commissioner with discretionary authority to grant exceptions from the city's antidiscrimination policies.[185] Relying on the *Sherbert* Quartet, the Court concluded that the "inclusion of a formal system of entirely discretionary exceptions . . . renders the contractual nondiscrimination requirement not generally applicable."[186] The Court proceeded to apply strict scrutiny and concluded that the city failed to demonstrate a compelling reason for denying CSS a religious exemption.[187]

Because the Court in *Fulton* sidestepped the question of whether to overrule *Smith*, it missed a ripe opportunity to resolve the ongoing conflict

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181. Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020).

182. Brief for Petitioners at 37–50, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123), 2020 WL 2836494, at *37–52. CSS also asked the Court to consider whether the city's antidiscrimination policies are neutral and generally applicable. *See id.* at 20–30, 2020 WL 2836494, at *23–30.

183. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1931 (Gorsuch, J., concurring); *see also id.* at 1888 (Alito, J., concurring) ("Not only is the Court's decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions.").

184. *Id.* at 1877 (majority opinion); *see also id.* at 1883 (Barrett, J., concurring) ("[T]he government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny . . . . I therefore see no reason to decide in this case whether *Smith* should be overruled, much less what should replace it.").

185. *Id.* at 1878 (majority opinion). Section 3.21 of CSS's foster care contract provides, in relevant part, that CSS "shall not reject . . . prospective foster or adoptive parents . . . based upon . . . their . . . sexual orientation . . . unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion." *Id.*

186. *Id.* The Court adopted Justice Scalia's interpretation of the *Sherbert* Quartet from *Smith*: "[T]he unemployment benefits law in *Sherbert* was not generally applicable because the 'good cause' standard permitted the government to grant exemptions based on the circumstances underlying each application." *Id.* at 1877 (citing Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 884 (1990)); *see also supra* Part 1.A (discussing the *Sherbert* Quartet).

187. *Fulton*, 141 S. Ct. at 1881–82. Separately, the Court concluded that the Fair Practices Ordinance does not apply to foster care certification services. *Id.* at 1880. According to the Court, "[c]ertification as a foster parent . . . is not readily accessible to the public" and, therefore, does not constitute a public accommodation. *Id. But see id.* at 1927 (Gorsuch, J., concurring) (arguing that foster agencies, like public colleges and universities, qualify as public accommodations under the Fair Practices Ordinance despite engaging in "customized and selective assessment[s]"). Importantly, as Justice Alito observed, the Supreme Court's interpretation of state law is not binding on state courts. *See id.* at 1887 n.21 (Alito, J., concurring). In other words, the majority's characterization of foster care certification services is not binding precedent. *Id.*

between expanded LGBTQIA+ rights and religious liberty in LGBTQIA+ public accommodation cases.[188]

B. Religious Exemption Doctrine: A Patchwork of Problems

With the Supreme Court providing limited guidance on how to address the conflicts in LGBTQIA+ public accommodation cases, lower courts have tackled the challenging issues independently.[189] The results have been inconsistent. Exemptions have been denied in most cases[190] but granted in others.[191] These inconsistencies are a product of current religious exemption law.[192] Because *Smith* effectively blocks a religious claimant's request for an exemption under the Free Exercise Clause, lower courts are frequently presented with compelled speech claims, and some have explicitly admitted that they are unsure what framework to apply.[193] As it stands now, the doctrinal framework in place—*Smith* for constitutional exemption claims and the compelling interest test under state RFRAs—is a poor fit to balance both the liberty and equality interests in LGBTQIA+

188. *Id.* at 1931 (Gorsuch, J., concurring) ("Dodging the [*Smith*] question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer.").

189. *See generally* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

190. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53, 75 (N.M. 2013) (holding that a wedding photographer was not entitled to a religious exemption because, under *Smith*, New Mexico's antidiscrimination law is neutral and generally applicable); Gifford v. McCarthy, 23 N.Y.S.3d 422, 430 (N.Y. App. Div. 2016) (holding that a wedding catering hall was not entitled to a religious exemption because, under *Smith*, New York's antidiscrimination law is neutral and generally applicable); 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147, 1162–63 (D. Colo. 2019) (holding that a wedding website designer was not entitled to a religious exemption because, under *Smith*, Colorado's antidiscrimination law is neutral and generally applicable), *aff'd* No. 19-1413, 2021 WL 3157635 (10th Cir. July 26, 2021).

191. *See Brush & Nib Studio*, 448 P.3d at 927. The Arizona Supreme Court granted the designers of custom wedding invitations a religious exemption under Arizona's state RFRA. *Id.*; *see also* Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't, 479 F. Supp. 3d 543, 565 (W.D. Ky. 2020) (allowing the claimant to proceed on her compelled speech exemption claim but opting not to address the free exercise claim likely because of *Smith*); Telescope Media Grp. v. Lucero, 936 F.3d 740, 760 (8th Cir. 2019) (permitting the claimant's free exercise exemption claim to proceed on a hybrid rights theory in conjunction with compelled speech).

192. Scholars on both sides of the liberty-versus-equality debate have alluded to the inconsistencies in religious exemption law. *See, e.g.*, Laycock, *supra* note 10, at 845 (characterizing religious exemption law as a "confusing and rather ragtag body of law"); Movsesian, *supra* note 28, at 715–16 (noting that religious exemption law is "currently something of a patchwork").

193. *See, e.g.*, Dep't of Fair Emp. & Housing v. Miller, No. BCV-17-102855, 2018 WL 747835, at *5 (Cal. Super. Ct. Feb. 5, 2018). The court denied the claimant's request for an exemption from California's antidiscrimination law but on compelled speech grounds. The court observed that "[i]t is difficult to say what standard of scrutiny . . . should [be] use[d] to evaluate the application of the Free Exercise clause to the circumstances of this case after [*Smith*]." *Id.*

public accommodation cases.[194] Part II.B.1 discusses the challenges presented by *Smith*. Part II.B.2 outlines the obstacles created by statutory religious exemption law, specifically focusing on state RFRAs.

1. The *Smith* Hurdle

The Supreme Court in *Smith* held that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[195] As previously discussed, the Court adopted rational basis review as the level of scrutiny applicable to religious exemption claims under the Free Exercise Clause.[196] Following *Smith*, compelling interest review is only warranted when a law lacks neutrality or is not generally applicable.[197]

Under *Smith*, a claimant's request for a religious exemption from a neutral and generally applicable law usually will not be granted.[198] When courts apply rational basis review, the government almost always prevails because the burden of proof under rational basis review is substantially less demanding than the burden of proof under strict scrutiny.[199] Under rational basis review, the government must simply demonstrate that its policies are rationally related to a legitimate interest, which it can almost always prove.[200]

In LGBTQIA+ public accommodation cases, business owners' constitutional religious exemption claims are subject to rational basis review under *Smith*.[201] The *Smith* doctrine applies because the religious claimant is seeking an exemption under the Free Exercise Clause from a religion-neutral antidiscrimination law.[202] However, the application of *Smith* in these cases proves to be problematic. Since the rational basis framework is so deferential to the government's interests, the religious

194. *See* Loewentheil, *supra* note 52, at 465 ("[N]either the neutral and generally applicable standard of *Smith* nor the substantial-burden standard of [state RFRAs] asks the right questions or produces the right answers in a consistent manner.").

195. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 886 n.3 (1990).

196. *See id.* Prior to *Smith*, the Court analyzed religious exemptions claims under strict scrutiny. *See, e.g.*, Thomas v. Rev. Bd., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *see also supra* Part I.A. (explaining the standard of review under the Free Exercise Clause after *Smith*).

197. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

198. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring) ("[A] neutral and generally applicable law will usually survive a constitutional free exercise challenge."); *see also Smith*, 494 U.S. at 897–99.

199. *See* CHEMERINSKY, *supra* note 45, at 587 (explaining the government's burden of proof under rational basis review).

200. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (upholding state regulations of the sale of eyeglass frames under rational basis review).

201. *See, e.g.*, *Arlene II*, 441 P.3d 1203, 1231–32 (Wash. 2019), *cert. denied*, No. 19-333, 2021 WL 2742795 (U.S. July 2, 2021) (mem.).

202. *See id.*; *see also supra* Part I.A (discussing free exercise jurisprudence after *Smith*).

claimants almost always lose.[203] Because LGBTQIA+ public accommodation cases involve questions about fundamental religious liberty, scholars in favor of religious exemptions criticize the *Smith* framework for failing to account for the interests of the religious claimants seeking exemptions.[204]

To get around the *Smith* hurdle, religious claimants have shifted efforts toward attacking antidiscrimination statutes as not being neutral and generally applicable.[205] In doing so, religious claimants aim to convince the court that it should apply strict scrutiny under *Lukumi*.[206] To show that a law is not neutral and generally applicable, claimants will look to see whether the law has any type of existing secular exemptions.[207] Typically, the more secular exemptions a law has, the stronger the claimant's argument is that the government treats secular exemptions more favorably than religious ones.[208] The Free Exercise Clause prohibits the government from favoring secular activity over religious activity.[209]

Religious claimants in LGBTQIA+ public accommodation cases are usually unsuccessful in arguing that the government's antidiscrimination policies are not neutral and generally applicable.[210] As previously discussed, public accommodation laws apply to almost all public-facing businesses with a limited number of exceptions.[211] Courts have typically

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203. *See* Mark R. Killenbeck, *Pandora's Cake*, 72 ARK. L. REV. 769, 809 (2020) ("The highly deferential standard articulated in *Smith* is almost certainly inadequate to the task of balancing the competing interests posed by a case like *Masterpiece Cakeshop*."); *see also* Loewentheil, *supra* note 52, at 474 (discussing how *Smith* "insulate[s] from review situations in which the government could provide an accommodation that satisfies the rights of all parties, but is not required to do so").

204. *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 26 (2016) (proclaiming that First Amendment rights are fundamental and deserving of the highest level of protection); *see also* Berg, *supra* note 50, at 109 ("[F]ree exercise of religion has an elevated place in . . . the modern constitutional framework . . . .").

205. *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 628 (2003). This strategy has been termed the "key" toward bringing a successful constitutional exemption claim under the Free Exercise Clause. *Id.* at 633. While there is a separate area of legal scholarship addressing the topic of neutral and generally applicable laws, this Note discusses this topic only in the context of highlighting *Smith*'s doctrinal challenges.

206. As previously discussed, courts only apply strict scrutiny after *Smith* if the challenged law is found to lack neutrality or not be generally applicable. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

207. *See* Laycock & Collis, *supra* note 204, at 5–6.

208. *See* Lund, *supra* note 205, at 638.

209. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (holding that government regulations are not neutral and generally applicable "whenever they treat *any* comparable secular activity more favorably than religious exercise"); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam).

210. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53, 74 (N.M. 2013). *But see* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (holding that Philadelphia's "non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable").

211. *See* Sepper, *supra* note 107, at 642.

concluded that public accommodation laws are neutral laws of general applicability.[212] Further, courts have found that a small number of secular exemptions is not enough to show that the government has singled out religion for disparate treatment in its public accommodation laws.[213]

While attacking the presumption of neutrality and general applicability has worked in other free exercise cases,[214] this strategy has usually not been successful in LGBTQIA+ public accommodation cases.[215] As such, religious claimants are effectively stuck under the *Smith* umbrella when they bring constitutional religious exemption claims.[216] Therefore, the equality interest, embodied through the state's antidiscrimination laws, usually prevails over the religious liberty interest when religious exemption claims are analyzed under *Smith*.

2. The State RFRAs Hurdle

Because *Smith* makes it difficult for a claimant to succeed on a constitutional religious exemption claim, these individuals instead look to bring their religious exemption claims under state RFRAs.[217] State RFRAs are a product of the Supreme Court's decision in *City of Boerne v. Flores*, in which the Court invalidated RFRA as applied to the states.[218] Most state RFRAs mirror RFRA and reinstate the pre-*Smith* strict scrutiny test, as applied in *Yoder* and the *Sherbert* Quartet, when the government substantially burdens religion.[219] In certain jurisdictions, there are state

212. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 572 (1995) (holding that public accommodations laws do not generally violate the First Amendment); 303 Creative LLC v. Elenis, No. 19-1413, 2021 WL 3157635, at *13–14 (10th Cir. July 26, 2021); *Arlene II*, 441 P.3d 1203, 1231 (Wash. 2019), *cert. denied*, No. 19-333, 2021 WL 2742795 (U.S. July 2, 2021) (mem.).

213. *See, e.g.*, *303 Creative LLC*, 2021 WL 3157635, at *15–17; *Arlene II*, 441 P.3d. at 1229–31; Gifford v. McCarthy, 23 N.Y.S. 3d 422, 430 (N.Y. App. Div. 2016) ("The fact that some religious organizations and educational facilities are exempt from the statute's public accommodation provision does not, as petitioners claim, demonstrate that it is not neutral or generally applicable.").

214. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam); Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366–67 (3d Cir. 1999) (holding that the Newark Police Department's facial hair policy was not neutral and generally applicable because it contained exceptions for medical reasons but not religious reasons).

215. *See, e.g.*, *Arlene II*, 441 P.3d at 1229–30 (rejecting Stutzman's argument that Washington's public accommodation law is not neutral and generally applicable).

216. *See* Lund, *supra* note 205, at 628.

217. *See, e.g.*, Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 918 (Ariz. 2019) ("Here, Plaintiffs concede the [antidiscrimination] Ordinance is a facially neutral law of general applicability. . . . As a result, their free exercise [exemption] claim is based solely on [Arizona's state RFRA]." (citations omitted)); Fulton v. City of Philadelphia, 922 F.3d 140, 162 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021).

218. 521 U.S. 507, 512 (1997). For more information on the passage of RFRA and its implications, see *supra* Part I.A.

219. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 474–77 (2010).

RFRAs and public accommodation laws, which create a direct statutory conflict.[220]

When strict scrutiny is applied, the religious claimant has a greater chance of being granted an exemption, since the government must justify its conduct by showing its means are narrowly tailored to achieve a compelling interest.[221] The government's burden under strict scrutiny is significant.[222]

While the *Smith* test gives substantial deference to the state, the compelling interest test places significant weight on the religious interest and relatively little emphasis on the government's interest in protecting LGBTQIA+ rights.[223] What makes things even more complicated is courts' and scholars' disagreement over what the proper application of the test is and, more specifically, what the correct formulation of the government's compelling interest is.[224] Further, courts have different understandings of how third-party harms should factor into their analyses.[225]

C. Compelling Interests and Third-Party Harms Under State RFRAs

Expanding on the doctrinal challenges presented above, this section focuses specifically on state RFRAs and discusses the disagreement among courts and scholars over the purpose served by public accommodation law, as well as the applicability of the third-party harm doctrine. In outlining these disagreements, this section demonstrates how these different understandings affect the compelling interest test under state RFRAs and lead to inconsistent results in LGBTQIA+ public accommodation cases.[226]

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220. For example, Philadelphia has a public accommodation law that prohibits discrimination on the basis of sexual orientation. *See* PHILA., PA., CODE § 9-1106 (2021), https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-195838 [https://perma.cc/4QFK-SYKP]. Pennsylvania has a state RFRA. *See* 71 PA. STAT. AND CONS. STAT. ANN. § 2401 (West 2021). The direct clash between these two laws is illustrated in *Fulton*, as CSS also raised a religious exemption claim under Pennsylvania's state RFRA. *See Fulton*, 922 F.3d at 162–65.

221. Loewentheil, *supra* note 52, at 496 (acknowledging that strict scrutiny is an "easier standard for a religious objector to satisfy").

222. *See id.*; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 727–28 (2014) (characterizing the state's burden under RFRA as "exceptionally demanding"). Although *Hobby Lobby* involved a claim under RFRA, the Supreme Court's application of the compelling interest test is helpful to consider when thinking about state RFRAs because they closely track RFRA. *See* Lund, *supra* note 219, at 474–76.

223. Freeman, *supra* note 47, at 17 ("By applying strict judicial scrutiny . . . a preference would be given to religion over non-religion in determining whether exemptions from neutral laws of general applicability should be recognized."); *see also* Laycock, *supra* note 12, at 378 (charactering state RFRAs as having a "substantial thumb on the scale in favor of religious liberty").

224. *See* Movsesian, *supra* note 28, at 715–16 (discussing the significant difficulties presented by the compelling interest test); Killenbeck, *supra* note 203, at 809 (same); *see also infra* Part II.C.1.

225. *See infra* Part II.C.2.

226. While this section is focused specifically on state RFRAs, as discussed previously, courts also apply strict scrutiny when analyzing certain constitutional claims under the Free Exercise Clause. *See supra* Part I.A (discussing *Lukumi* and *Sherbert*).

Part II.C.1 presents the various understandings of the aims of public accommodation laws, noting how each different purpose affects the analysis under the compelling interest test. Part II.C.2 explains the third-party harm doctrine and discusses points of disagreement among courts and scholars over the role third-party harms should play in the compelling interest test.

1. Market Access or Protection of Personal Dignity: Is Your Interest Compelling?

Most state RFRAs call for the government to satisfy strict scrutiny when it substantially burdens religious exercise.[227] The government must show that the law furthers a compelling government interest and is the least restrictive means of achieving that interest.[228] In LGBTQIA+ public accommodation cases where religious claimants are seeking exemptions from antidiscrimination laws, the two-prong test is as follows: (1) whether the antidiscrimination law furthers a compelling government interest and (2) whether denying the claimant's request for a religious exemption, and applying the law uniformly to his or her conduct, is the least restrictive means of furthering the compelling governmental interest.

Regarding the compelling interest question, proponents of religious exemptions argue that the overall purpose of public accommodation laws is to ensure material access to goods and services.[229] These scholars contend that public accommodation laws are "justified where there are threats to the ability of gay citizens to participate fully and meaningfully in the market."[230] In other words, public accommodation laws are a tool for the government to increase access to consumer markets and improve economic opportunities.[231]

Others claim that antidiscrimination laws target "more than material inequality."[232] The compelling interest served by these laws goes beyond fostering access to the market and centers on eradicating the "institutionalized humiliation" that is the central harm of discrimination.[233] In support of their position, these scholars point out that the Supreme Court

227. *See, e.g.*, Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 919 (Ariz. 2019); *see also supra* Part II.B.2 (outlining the compelling interest test under state RFRAs).

228. *Brush & Nib Studio*, 448 P.3d at 919–20.

229. *See* Koppelman, *supra* note 125, at 133; *see also* Berg, *supra* note 50, at 141; Oman, *supra* note 125.

230. Oman, *supra* note 125.

231. *See* Koppelman, *supra* note 125, at 133 ("Antidiscrimination law can have a powerful effect on economic opportunity.").

232. Sepper, *supra* note 126, at 153; *see also* Kendrick & Schwartzman, *supra* note 20, at 158 (arguing that the market access position "attacks a fundamental aspect of civil rights doctrine and rejects decades of experience with public accommodations laws").

233. Sepper, *supra* note 126, at 154; *see also* Brief for Respondent Colorado Civil Rights Commission at 56–58, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838416, at *56–59 (arguing that Colorado has a compelling interest in applying its antidiscrimination law to protect against the dignitary harms that follow from denials of services based on sexual orientation).

has recognized the dignitary harm caused by discrimination in both its public accommodation[234] and LGBTQIA+ civil rights cases.[235] More importantly, the Court has long held that in light of these dignitary harms, the government has a compelling interest in enforcing public accommodation laws in a commercial setting, despite religious objections.[236]

After formulating a compelling interest, courts will turn to the second portion of the strict scrutiny test: the least restrictive means analysis.[237] If courts understand the government's compelling interest in passing antidiscrimination laws as market access, it follows that uniform enforcement of the law is not the least restrictive means of achieving the government's goals if the "same-sex couple seeking goods or services . . . can readily obtain comparable goods or services from other providers."[238] Put differently, the government would not meet its burden of proof under strict scrutiny because a less restrictive means exists—requiring the same-sex couple to find another willing provider—to further its market access goal.[239] Because of the existence of market alternatives, religious claimants contend that they should not be required to serve LGBTQIA+ couples in violation of their religious beliefs.[240]

However, if courts frame the compelling interest served by public accommodation laws as protecting individual dignity by eradicating discrimination, then the government has a stronger argument that the least restrictive means of furthering its goal is to require uniform enforcement of the public accommodation law and, thus, to deny exemptions.[241] Some

234. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (holding that the "fundamental object" of antidiscrimination law is to prevent the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments").

235. In *Masterpiece Cakeshop*, the Court clearly stated that the state has the authority to "protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services." 138 S. Ct. 1719, 1723 (2018). The Court expressed the same sentiment three years earlier in *Obergefell*, emphasizing that same-sex couples "ask for equal dignity in the eyes of the law." 576 U.S. 644, 681 (2015).

236. *See* Kendrick & Schwartzman, *supra* note 20, at 159–60; *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); *Heart of Atlanta*, 379 U.S. at 260–61; Brief of Amici Curiae Public Accommodation Law Scholars in Support of Respondents at 1–3, 27–33, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127312, at *1–4, *27–34 [hereinafter Brief of Public Accommodation Law Scholars].

237. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 919–20 (Ariz. 2019); *see also supra* Parts I.A, II.B.2.

238. *See* Brief of Douglas Laycock et al. as Amici Curiae Supporting Petitioners at 5, Obergefell v. Hodges, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, and 14-574), 2015 WL 1048450, at *5.

239. Berg, *supra* note 50, at 137; *see also* Sepper, *supra* note 107, at 669.

240. *See* Berg, *supra* note 50, at 138. *But cf.* Brief of Public Accommodation Law Scholars, *supra* note 236, at 33 ("If [the petitioner's] view [on market access] were correct, Colorado's law would apply only in those locales where alternatives are unavailable to particular protected classes—a standard that would be unworkable for businesses, customers, and courts.").

241. *See* Sepper, *supra* note 107, at 669. There is an open question of how the government can demonstrate that requiring uniformity is the least restrictive means of

scholars have taken the position that the government's interest in preventing dignitary harm is so compelling that religious exemptions should rarely, if ever, be granted.[242] To that end, the Supreme Court has acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws."[243]

2. Should Religious Exemptions Be Granted When a Third Party Is Harmed?

In addition to disagreeing about the purpose served by public accommodation laws, courts and scholars also differ in their understandings of how third-party harms[244] should factor into the strict scrutiny analysis.[245] Since the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*,[246] legal scholarship has devoted significant attention to whether, or to what extent, courts can grant religious exemptions that impose harms on third parties.[247] In *Hobby Lobby*, the majority found that when applying RFRA, "courts must take adequate account of the burdens a requested

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reaching its compelling ends. As such, each case requires a careful analysis of various factors, including the government's stated goals. *See* NeJaime & Siegel, *supra* note 126, at 2581 ("If granting a religious accommodation would harm those protected by the antidiscrimination law or undermine societal values and goals the statute promotes, then unencumbered enforcement of the statute is the least restrictive means of achieving the govern-government's [sic] compelling ends.").

242. *See, e.g.*, Louise Melling, *Religious Refusals to Public Accommodations Laws: Four Reasons to Say No*, 38 HARV. J.L. & GENDER 177, 192 (2015); Sepper, *supra* note 126, at 165 (arguing that LGBTQIA+ Americans "may face a prolonged period of continued discrimination across . . . public accommodations" if religious exemptions are continually granted); Lim & Melling, *supra* note 123, at 724 ("[Courts] should greet any calls for exemptions motivated by religious beliefs with great skepticism.").

243. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006); *see also* United States v. Lee, 455 U.S. 252, 258–59 (1982) (finding that the government's interest in "assuring mandatory and continuous participation in . . . the social security system is very high").

244. In LGBTQIA+ public accommodation cases, the third-party harm would be the harm suffered by the LGBTQIA+ couple when the religious business owner declines to provide services on religious grounds.

245. The third-party harm doctrine presents interesting Establishment Clause questions. *See, e.g.*, Mark Storslee, *Religious Accommodation, The Establishment Clause, and Third-Party Harms*, 86 U. CHI. L. REV. 871, 934 (2019). However, this Note does not address these issues.

246. 573 U.S. 682 (2014). In *Hobby Lobby*, David and Barbara Green, owners of Hobby Lobby Stores, Inc., a for-profit corporation, challenged the application of the Affordable Care Act's contraception mandate as a violation of their sincerely held religious beliefs. *Id.* at 689–90, 703–04. The Greens brought their claim under RFRA. *Id.*

247. *See* Kendrick & Schwartzman, *supra* note 20, at 157. *Compare* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 49–51 (2017) (arguing that the third-party harm doctrine is rooted in First Amendment jurisprudence), *and* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357–60 (2014) (same), *with* Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, FEDERALIST SOC'Y REV., Oct. 2016, at 50, 51 (criticizing the third-party harm doctrine), *and* Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 45–46 (2014) (same).

accommodation may impose on nonbeneficiaries,"[248] and "that consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest."[249] The concurring and dissenting justices articulated a similar principle, citing the Court's free exercise precedents.[250]

Scholars have questioned whether the Supreme Court's holding in *Hobby Lobby* creates a firm rule that religious exemptions may not be granted if nonbeneficiaries are harmed.[251] Even if there is no categorical rule that religious exemptions are prohibited when third parties are harmed, at minimum, there is support for the position that courts should consider the harm to a nonbeneficiary when deciding whether to grant a religious exemption.[252] To that end, Professors Nelson Tebbe and Frederick Mark Gedicks have proposed interesting frameworks for courts to use when considering the effect of third-party harms.[253]

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248. *Hobby Lobby*, 573 U.S. at 729 n.37 (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

249. *Id.*; *see also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines,* Hobby Lobby*'s Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323, 323–24 (Micah Schwartzman et al. eds., 2016) (outlining the Supreme Court's discussion of third-party harms in *Hobby Lobby*).

250. Justice Ruth Bader Ginsburg, joined in relevant part by Justices Breyer, Kagan, and Sotomayor, concluded that religious accommodations may "not significantly impinge on the interests of third parties." *Hobby Lobby*, 573 U.S. at 745 & n.8 (Ginsburg, J., dissenting) (first citing Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); then citing Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); and then citing *Cutter*, 544 U.S. at 720, 722). Justice Kennedy similarly concluded that religious exercise may not "unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling." *Id.* at 739 (Kennedy, J., concurring); *see also* TEBBE, *supra* note 247, at 55–59 (arguing that the third-party harm principle the Supreme Court articulated in *Hobby Lobby* is rooted in First Amendment jurisprudence).

251. *See* Gene Schaerr & Michael Worley, *The "Third Party Harm" Rule: Law or Wishful Thinking?*, 17 GEO. J.L. & PUB. POL'Y 629, 646 (2019) ("[T]he third-party harm 'rule' is not 'law' under any reasonable understanding of the word."); Berg, *supra* note 247, at 52 (pointing out that a number of "familiar, accepted religious accommodations involve clear effects on individual third parties"). *But see* Nelson Tebbe et al., *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215, 217 (Holly Fernandez Lynch et al. eds., 2017) ("But if the principle of avoiding harm to others is not absolute, that raises a crucial question: *how much* burden-shifting to third parties is constitutionally permissible?").

252. *Hobby Lobby*, 573 U.S. at 729 n.37; *see also* NeJaime & Siegel, *supra* note 126, at 2531–33 (discussing how the third-party harm principle shaped the Court's analysis in *Hobby Lobby* and how it is an "integral" part of the RFRA inquiry). In her *Hobby Lobby* dissent, Justice Ginsburg emphasized the importance of also considering third-party harms when dealing with exemption questions under the Free Exercise Clause. *Hobby Lobby*, 573 U.S. at 745 n.8 (Ginsburg, J., dissenting).

253. Professor Tebbe adopts Title VII's "undue hardship" test as the baseline for determining "how much harm to others can be tolerated before a religious accommodation becomes impermissible." Tebbe et al., *supra* note 251, at 219. Professor Gedicks, on the other hand, proposes "materiality"—derived from tort and contract law—as the appropriate standard for distinguishing third-party burdens that should preclude exemptions from burdens that should not. *See* Gedicks & Van Tassell, *supra* note 249, at 338.

However, courts are not uniformly considering third-party harms when applying strict scrutiny under state RFRAs.[254] Indeed, the biggest critique of the third-party harm doctrine is that it does not take into account the dignitary harm suffered by the religious business owners if they are forced to serve LGBTQIA+ couples.[255] The religious business owners seeking exemptions sincerely believe that they are "being asked to defy God's will," and as a result, will also suffer dignitary harm if they are forced to act contrary to their religious beliefs.[256] Opponents of the third-party harm doctrine emphasize that the compelling interest test is "ultimately a balancing test" and that courts, therefore, cannot simply consider third-party harms without addressing the harm inflicted on the business owner if an exemption is not granted.[257]

Brush & Nib Studio, LC v. City of Phoenix[258] is an LGBTQIA+ public accommodation case that clearly illustrates the doctrinal challenges in this area of the law. In *Brush & Nib Studio*, Joanna Duka and Breanna Koski, designers of custom wedding invitations, sought a religious exemption from Phoenix's Human Relations Ordinance[259] (the "Ordinance").[260] The Ordinance prohibits discrimination based on sexual orientation in places of public accommodation.[261] Duka and Koski, therefore, would have been required to create custom invitations for same-sex wedding ceremonies in violation of their sincerely held religious beliefs.[262]

Because of *Smith*, Duka and Koski based their religious exemption claim solely on Arizona's state RFRA.[263] In applying strict scrutiny under Arizona's state RFRA, the majority formulated the city's compelling interest as "eradicating discrimination."[264] However, the majority went on

254. *See* Melling, *supra* note 242, at 189 ("Less discussed, yet essential to the conversation, are the harms resulting from accommodations . . . .").

255. *See* Berg, *supra* note 247, at 57; *see also* Laycock, *supra* note 12, at 378 (arguing that proponents of the third-party harm doctrine "never acknowledge the dignitary harm on the religious side"); Brief of Christian Legal Society, *supra* note 12, at 30 ("The Court must also consider the dignitary harm to the religious objectors . . . .").

256. Laycock, *supra* note 12, at 378; Brief of Christian Legal Society, *supra* note 12, at 31.

257. Laycock, *supra* note 12, at 378. *But cf.* NeJaime & Siegel, *supra* note 126, at 2584–85 (emphasizing that courts should "examine carefully the . . . material and dignitary effects of an accommodation" when adjudicating claims under state RFRAs); Denley, *supra* note 9, at 226 (arguing that the best way to address religious exemption claims is to "weigh the burden on the one claiming the freedom of religious expression . . . against the burden on the third party").

258. 448 P.3d 890 (Ariz. 2019).

259. PHOENIX, ARIZ., CITY CODE ch. 18 (2021).

260. *Brush & Nib Studio*, 448 P.3d at 895–96.

261. *Id.* at 898. Brush & Nib Studio was considered a public accommodation under the Ordinance. *Id.* at 899.

262. *Id.* at 899–900.

263. *Id.* at 918; *see also supra* Part II.B.1 (addressing how religious claimants have looked for ways to work around *Smith*).

264. *Brush & Nib Studio*, 448 P.3d at 922. The majority did not take a firm position on the market access versus dignitary harms debate but instead concluded that the ordinance "generally" serves the compelling purpose of eradicating discrimination. *Id.* The majority

to conclude that the "interest is not sufficiently overriding to force [Duka and Koski] to create custom wedding invitations celebrating same-sex marriage in violation of their sincerely held religious beliefs" and granted the religious exemption.[265] In doing so, the court determined that uniform enforcement of the Ordinance was not the least restrictive means for the city to achieve its nondiscrimination purpose.[266] To reach this conclusion, the court relied on the premise that the same-sex couple may obtain wedding-related services from other vendors.[267]

The dissent, by contrast, formulated the city's compelling interest as preventing the couple from experiencing the dignitary harm arising from the denial of services.[268] The dissent concluded that the Ordinance's uniform application would have been the least restrictive means of furthering the city's goals and therefore would have supported the denial of the exemption.[269] In criticizing the majority's application of the compelling interest test, Judge Scott Bales proclaimed that "protections like the Ordinance have been put in place to ensure that we do not repeat the denials of access and opportunity that plagued our state in its infancy."[270]

Brush & Nib Studio highlights why current religious exemption doctrine inadequately addresses the broader questions presented in LGBTQIA+ public accommodation cases.[271] Because of the *Smith* hurdle, Duka and Koski based their religious exemption claim on state law.[272] The Arizona Supreme Court, therefore, applied strict scrutiny but ended up with polar opposite results.[273] The majority did not consider the harms suffered by the LGBTQIA+ couple in its analysis.[274] The dissent, on the other hand, emphasized the harm the couple suffered but barely addressed the harm

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did, however, rely on the premise of the market access theory as part of its least restrictive means analysis. *See id.* at 936 (Bales, J., dissenting).

265. *Id.* at 922, 926 (majority opinion).

266. *See id.* at 923 ("[T]he purpose of the Ordinance is properly served by permitting a narrow exemption for Plaintiff's creation of . . . custom wedding invitations.").

267. *See id.* at 936 (Bales, J., dissenting).

268. *Id.* ("The prohibition on discrimination not only promotes equal access, but also serves to eradicate . . . the attendant humiliation and stigma that result if businesses can selectively treat some customers as second-class citizens.").

269. *See id.* at 936–37.

270. *Id.* at 937. Judge Bales catalogued other instances where Arizonians have been denied access to goods and services "based on invidious discrimination." *Id.*

271. *See* Loewentheil, *supra* note 52, at 476.

272. *Brush & Nib Studio*, 448 P.3d at 918.

273. With or without *Smith* in place, state court judges may still reach conflicting outcomes when interpreting their own state RFRAs. However, *Brush & Nib Studio* illustrates the disagreements among courts over the purpose served by antidiscrimination laws and the significance of third-party harms. More importantly, it underscores how a more streamlined framework may help to reconcile these different positions, even if the Supreme Court decides to overturn *Smith*.

274. *See Brush & Nib Studio*, 448 P.3d at 936 (Bales, J., dissenting).

Duka and Koski would suffer if they were required to make invitations for a same-sex wedding.[275]

Because the central conflict in LGBTQIA+ public accommodation cases is how to balance religious liberty and LGBTQIA+ equality interests and because the *Smith* and state RFRA standards do not have a consistent way of reconciling these interests, a departure from the standard doctrinal framework is warranted.[276]

III. AN IMPROVED COMPELLING INTEREST TEST

In LGBTQIA+ public accommodation cases, there are two fundamental interests at stake: religious liberty and LGBTQIA+ rights.[277] Although the Supreme Court has recognized the inherent tension between religious liberty and LGBTQIA+ rights, it has not fully addressed the conflict in these cases because of *Smith*.[278] While *Fulton* presented the Court with a ripe opportunity to reconsider its decision in *Smith*, the Court sidestepped the question.[279]

Absent further guidance from the Supreme Court, the religious exemption framework in place is insufficient for balancing the competing interests in LGBTQIA+ public accommodation cases.[280] To address the inadequacies of the current framework, this part proposes a streamlined compelling interest test lower courts may use when analyzing claims for religious exemptions. By applying this test, courts can properly account for third-party harms and strike an appropriate balance between the rights of religious business owners and the rights of the LGBTQIA+ community.

Because the Supreme Court has not revisited *Smith*, this framework is specifically designed for courts applying strict scrutiny under state RFRAs.[281] Part III.A proposes that courts should formulate the state's compelling interest in passing antidiscrimination laws as protecting against dignitary harms. Part III.B argues that, in light of this compelling interest, courts should consider the degree of third-party harms in their least

275. *Id.* at 923–24 (majority opinion) ("Here, under the dissent's least restrictive means test, the City's nondiscrimination purpose simply overrides all conflicting individual rights and liberties.").

276. *See* Loewentheil, *supra* note 52, at 475–76.

277. *See supra* Part II.A (outlining the inherent clash between liberty and equality in LGBTQIA+ public accommodation cases).

278. *See supra* Part II.A.1 (discussing how the Court did not address *Smith* in *Masterpiece Cakeshop* and *Fulton*).

279. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1928 (2021) (Gorsuch, J., concurring) (critiquing the majority for "circumnavigat[ing]" the question of whether to overrule *Smith*).

280. *See* Loewentheil, *supra* note 52, at 465; *see also supra* Part II (explaining the doctrinal challenges presented by *Smith* and state RFRAs).

281. If the Supreme Court decides to overrule *Smith* and adopt heightened scrutiny for religious exemption claims under the Free Exercise Clause, courts can easily modify and apply this framework in the free exercise context as well. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 745 n.8 (Ginsburg, J., dissenting) (discussing how "[a] balanced approach is all the more in order" when religious exemption claims involve the Free Exercise Clause, as opposed to statutory protections).

restrictive means analysis, as guided by Professor Nelson Tebbe's "undue hardship" standard.[282]

A. States' Compelling Interest in Protecting LGBTQIA+ Americans

As previously discussed, claimants in LGBTQIA+ public accommodation cases typically seek religious exemptions from antidiscrimination law under state RFRAs.[283] Many state RFRAs provide that courts must analyze religious exemption claims under strict scrutiny.[284] A government policy can survive strict scrutiny "only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests."[285] In applying strict scrutiny, courts first formulate the government's compelling interest.[286]

Lower courts are currently in disagreement over what government interests public accommodation laws serve, particularly whether the laws aim to improve market access or to protect consumers from dignitary harm if they are denied services.[287] Relatedly, courts also have different understandings about whether third-party harms should be factored into the compelling interest analysis.[288] However, free exercise and RFRA jurisprudence both strongly support considering the impact of third-party harms when analyzing religious exemption claims.[289] Given that state RFRAs closely track the federal RFRA,[290] this section argues that it is indeed appropriate for courts to consider third-party harms in their compelling interest analyses.

Accordingly, courts should understand the state as having a compelling interest in preventing LGBTQIA+ Americans from dignitary harms stemming from being turned away from a place of public accommodation. While antidiscrimination laws certainly have a goal of expanding market access to individuals who historically have been denied economic opportunities, the true purpose of antidiscrimination law is rooted in protecting human dignity.[291] Both Congress and the Supreme Court have recognized this overarching goal.[292] When applying the compelling interest

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282. *See supra* note 253 and accompanying text (outlining Professor Tebbe's undue hardship framework).

283. *See supra* Part II.B.2.

284. *See* Lund, *supra* note 76, at 164.

285. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

286. *See id.*

287. *See* Sepper, *supra* note 126, at 153; *see also supra* Part II.C.1 (explaining the different ways courts formulate the state's purpose in passing antidiscrimination laws).

288. *See* Kendrick & Schwartzman, *supra* note 20, at 157; *see also supra* Part II.C.2.

289. *See supra* notes 247–53 and accompanying text.

290. Lund, *supra* note 76, at 164.

291. *See* Sepper, *supra* note 126, at 154 (arguing that the eradication of institutionalized humiliation is the "primary aim of antidiscrimination law").

292. *See* NeJaime & Siegel, *supra* note 126, at 2575 ("Just as Congress took the social meaning of refusals into consideration in fashioning antidiscrimination laws governing public accommodations, so too should the social meaning of refusals factor in judgments about whether and how to grant persons religious exemptions from laws of general

test in LGBTQIA+ public accommodation cases, courts should recognize this purpose and formulate the state's compelling interest in passing antidiscrimination laws as protecting LGBTQIA+ individuals from suffering harm to their personhood.

B. Undue Hardship: Grounds for Denying Religious Exemptions

After formulating the government's compelling interest, courts turn to the narrow tailoring portion of the strict scrutiny test.[293] Legislation is narrowly tailored if it is the least restrictive means of achieving the government's compelling interest.[294] In LGBTQIA+ public accommodation cases, courts consider whether the antidiscrimination law, as applied to the religious claimant, represents the least restrictive means of achieving the government's compelling interest.[295] In building off the compelling interest part of the test, the third-party harm doctrine should be incorporated into the narrow tailoring analysis.[296]

Professor Tebbe's "undue hardship" standard is a way for courts to incorporate the third-party harm doctrine into their least restrictive means analyses. Although Professor Tebbe did not structure his undue hardship proposal in the context of the compelling interest test, he was primarily concerned with finding a threshold standard for determining when the existence of a third-party harm outweighs extending a religious exemption.[297] Since this balancing is exactly what courts are doing when they apply strict scrutiny, Professor Tebbe's undue hardship framework is an attractive and workable standard that courts can use in this context to account for third-party harms.

Professor Tebbe derives his undue hardship framework from employment discrimination law.[298] Title VII of the Civil Rights Act requires employers to provide "reasonable accommodations" for the religious observances of their workers, unless doing so would result in "undue hardship on the conduct of the employer's business."[299] The Supreme Court interpreted the meaning of Title VII's religious

application."); *see also supra* Part II.C.1 (discussing how the Supreme Court has recognized the government's interest in protecting individual dignity rights).

293. *See supra* Parts II.B.2, II.C.1.

294. *See* Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 923 (Ariz. 2019) (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014)).

295. *See, e.g.*, Fulton v. City of Philadelphia, 922 F.3d 140, 163–64 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021).

296. *See* Loewentheil, *supra* note 52, at 495 ("If the state's compelling interest is understood to include protecting [LGBTQIA+ dignitary and equality rights], then the narrow tailoring analysis changes as well."); *see also* NeJaime & Siegel, *supra* note 126, at 2584–85.

297. *See* Tebbe et al., *supra* note 251, at 217 ("In other words, once it has been established that a third party has suffered some kind of burden as a consequence of a religious accommodation, how much of a burden is too much?").

298. *See id.*

299. *Id.* at 220 (quoting 42 U.S.C. § 2000e(j)).

accommodation provision in *Trans World Airlines, Inc. v. Hardison*.[300] There, an airline employee requested Saturdays off to observe the Sabbath, as required by his faith.[301] The airline was unable to accommodate his request, mainly because of how days off were apportioned under its collective bargaining agreement.[302] The Court explained that, for purposes of Title VII, an undue hardship imposes "more than a *de minimis* cost" on the operation of the employer's business.[303] To help discern de minimis costs, the Court considered both economic and noneconomic factors, including staffing changes, wage increases, and lost efficiency in other departments.[304] After considering these factors, the Court held that the company would incur an undue hardship if it was required to depart from its contractually mandated system to accommodate the employee's religion.[305]

In his third-party harm theory, Professor Tebbe adopts the Supreme Court's interpretation of undue hardship in *Hardison*, explaining that "the undue hardship standard . . . tracks the concern with religious accommodations that shift harms to other private citizens."[306] Professor Tebbe contends that religious accommodations should be denied if they would impose *more* than de minimis costs on third parties and, conversely, should be granted when they would impose *less* than de minimis costs on third parties.[307]

In incorporating Professor Tebbe's undue hardship framework into the least restrictive means analysis, courts should consider whether the same-sex couple experiences an undue hardship when the religious business owner refuses service. If the same-sex couple experiences an undue hardship, uniform enforcement of the public accommodation law is the least restrictive means of furthering the government's goal of protecting LGBTQIA+ Americans from suffering dignitary harm. The court should thus deny the religious exemption. On the other hand, if the same-sex couple does not experience an undue hardship, uniform enforcement is not the least restrictive means of achieving the government's interest, and the court should grant the religious exemption.

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300. 432 U.S. 63 (1977).
301. *See id.* at 67–68.
302. *Id.* at 68.
303. *Id.* at 84.
304. *See id.* at 84–85; *see also* Webb v. City of Philadelphia, 562 F.3d 256, 260 (3d Cir. 2009) ("Both economic and non-economic costs can pose an undue hardship upon employers . . . ."); Small v. Memphis Light, Gas & Water, 952 F.3d 821, 825 (6th Cir. 2020) (per curiam) (considering whether "additional accommodations would have impeded the company's operations, burdened other employees, and violated its seniority system"), *cert. denied*, 141 S. Ct. 1227 (2021).
305. *Trans World Airlines*, 432 U.S. at 83 ("TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations.").
306. Tebbe et al., *supra* note 251, at 228.
307. *See id.* at 217.

The Supreme Court's de minimis cost analysis from *Hardison*, as interpreted by Professor Tebbe, is a helpful baseline for courts to reference to determine whether a couple experiences an undue hardship.[308] To determine whether the harm to the couple amounts to an undue hardship, courts should consult both economic and noneconomic factors, focusing on "the fact as well as the magnitude of the alleged undue hardship."[309] By conducting a fact-specific inquiry, courts can properly weigh the interests of the religious claimant against the interests of the LGBTQIA+ couple.[310]

Turning first to economic factors, courts should examine the financial costs the LGBTQIA+ couple would incur in looking for an alternative provider.[311] In thinking about these costs, courts should consider the following questions: Is there another provider nearby, or would the couple need to travel to find another provider? Will the goods or services be more expensive from the other provider? Will there be additional delivery or shipping fees?[312] If the LGBTQIA+ couple can obtain the same product or service with relatively little financial burden, there is less of an undue hardship and the scales tip in favor of granting the religious business owner an exemption. But, if there is a substantial financial burden placed on the couple to find another provider, there is more of an undue hardship, which supports denial of the exemption.

However, courts should not make their decisions based on monetary costs alone; they should also consider nonmonetary factors. An important nonmonetary factor courts should consider is whether the LGBTQIA+ couple had a prior long-standing relationship with the vendor or if the LGBTQIA+ couple interacted with the vendor as part of a one-time arm's-length transaction.[313] If the LGBTQIA+ couple had a pre-existing

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308. Courts and scholars have criticized the Supreme Court's de minimis test as disfavoring religious claimants seeking accommodations under Title VII. *See, e.g.*, *Small*, 952 F.3d at 829 (Thapar, J., concurring) (observing that religious claimants are harmed by "decisions like *Hardison*"); Storslee, *supra* note 245, at 936 (arguing that "the Court in *Hardison* focused solely on the cost side of the equation with no regard for the significance of the [religious] activity"). This Note adopts Professor Tebbe's interpretation of the undue hardship standard as part of a context-specific balancing test. *See* Tebbe et al., *supra* note 251, at 223 ("Even though the Supreme Court's de minimis interpretation of the undue hardship standard sounds uncompromising, it has, in fact, been applied in ways that are more balanced.").

309. *Webb*, 562 F.3d at 260; *see also* Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981) (per curiam) (observing how courts must consider "the particular factual context of each case" when deciding whether a religious accommodation imposes an undue hardship (quoting Anderson v. Gen. Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979))).

310. *See* Tebbe et al., *supra* note 251, at 216–17. This section rejects the position set forth by certain scholars that the presence of third-party harms automatically warrants the denial of religious exemptions. *See* Melling, *supra* note 242, at 191–92.

311. The government has the burden of proof to produce evidence as to each of these monetary and nonmonetary factors.

312. Courts should consider any financial burden placed on the LGBTQIA+ couple to find a substitute provider. This list of factors is not exhaustive.

313. *See Arlene I*, 389 P.3d 543, 549 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018). Robert Ingersoll and Curt Freed were customers at Arlene's Flowers for over nine years and considered Stutzman, the owner, to be "[their] florist." *Id.* (alteration in

relationship with the vendor, it is very likely that the rejection caused greater harm, as compared to a situation where the couple did not have a personal connection with the vendor.[314]

In addition, courts should consider whether the vendor treated the LGBTQIA+ couple with any type of animus. Did the vendor clearly explain why it was denying services or simply turn the couple away?[315] Did the vendor offer to help the couple find an alternative provider?[316] Relatedly, courts can also look at whether there was backlash from the local community against the vendor, the couple, or both parties.[317]

After considering both monetary and nonmonetary factors, courts will be able to determine whether the harm to the couple results in an undue hardship. Only if the court determines that the third-party harm is not an undue hardship should it grant the religious claimant's request for an exemption. Otherwise, the exemption should be denied in favor of the uniform enforcement of the antidiscrimination law. Put another way, if the third-party harm amounts to an undue hardship, then the uniform enforcement of the law to all public-facing businesses is the least restrictive means of reaching the state's goal of protecting against dignitary harms, and the exemption should not be granted.

The compelling interest test presented above, as guided by the third-party harm doctrine and the undue hardship principle, can help to resolve the disagreements present in a case like *Brush & Nib Studio*. As previously discussed, the Arizona Supreme Court in *Brush & Nib Studio* was starkly divided over whether to grant Duka and Koski, designers of custom wedding invitations, a religious exemption from Phoenix's public accommodation law, which prohibits discrimination on the basis of sexual orientation.[318] The majority ruled that Duka and Koski were entitled to an exemption under Arizona's state RFRA.[319]

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original); *see also* Berg, *supra* note 10, at 232 (noting the significance of a long-standing relationship with a vendor as opposed to an arm's-length relationship).

314. *See* Laycock, *supra* note 12, at 377.

315. For example, a catering hall in Texas responded to an email inquiry from a LGBTQIA+ couple stating that they "shouldn't bother visiting [the venue] because a gay wedding would be against God's 'plan and design for marriage.'" Sabrina Rojas Weiss, *Wedding Venue Rejects Gay Couple, Arguing Marriage Equality Goes Against God's Plan*, HUFFINGTON POST (Jan. 29, 2019, 6:06 PM), https://www.huffpost.com/entry/the-knot-removes-texas-listing-after-venue-refuses-to-host-gaywedding_n_5c50da4ee4b0f43e410bfce5 [https://perma.cc/ECA6-4TQ4].

316. *See, e.g.*, *Arlene I*, 389 P.3d at 549; Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021) (noting that CSS would have directed the same-sex couple to "one of the more than 20 other agencies in the City . . . which currently certify same-sex couples [as foster parents]").

317. For example, Jack Phillips, the Christian baker in *Masterpiece Cakeshop*, allegedly experienced harassment and received death threats. *See* Kaitlyn Schallhorn, *Colorado Baker: Death Threats and Hate for Refusing to Make Gay Wedding Cake*, FOX NEWS (June 29, 2017), https://www.foxnews.com/politics/colorado-baker-death-threats-and-hate-for-refusing-to-make-gay-wedding-cake [https://perma.cc/N2AZ-ZVNA].

318. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 900 (Ariz. 2019).

319. *See id.* at 926.

If the majority had considered the harm suffered by the same-sex couple when formulating its compelling interest and employed the undue hardship standard in its least restrictive means analysis, it may have come to a different conclusion about whether to grant the exemption. The dissenting judges may have also reached an alternative outcome if they had both looked more closely at costs associated with the couple's search for a different wedding card designer and considered whether Duka and Koski offered to help the couple find another wedding card designer.[320]

By incorporating Professor Tebbe's undue hardship framework into the compelling interest test, courts can more equitably balance the interests of the claimants seeking religious exemptions against the interests of the LGBTQIA+ couples that are denied services. This streamlined framework also resolves the disagreements among courts about how and when to consider third-party harms in deciding whether to grant religious exemptions to antidiscrimination laws. In adopting this balanced approach, courts are better equipped to navigate the challenging questions at issue in LGBTQIA+ public accommodation cases.

CONCLUSION

LGBTQIA+ public accommodation cases represent an inherent tension between two important values in American society—liberty and equality. While the United States has a longstanding commitment to religious freedom, its Constitution also guarantees all Americans equal protection under the law. State and local governments have greatly expanded protections for LGBTQIA+ Americans, but these protections conflict with the way certain Americans choose to exercise their religious beliefs.

The Supreme Court has not yet weighed in on this conflict because of *Smith*, and it circumvented an opportunity to address the broader questions in *Fulton*. Whether or not the Supreme Court decides to overrule *Smith*, state courts should attempt to reconcile these two competing principles by incorporating third-party harms and the undue hardship framework into their compelling interest and least restrictive means analyses. While this judicial framework is not a complete solution to the underlying cultural and social conflicts in LGBTQIA+ public accommodation cases, utilizing the framework is one way for courts to attempt to balance the law's competing commitments to equality and religious freedom.

320. *See id.* at 923 (criticizing the dissent for "focusing exclusively on the impact an exemption might have on same-sex couples" and not considering Duka's and Koski's free exercise rights).