AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/ Religion/Free Exercise

**Fulton v. City of Philadelphia, Pennsylvania, \_\_\_ U.S. \_\_\_** (2021)

*Sharonell Fulton is a foster parent affiliated with Catholic Social Services (CSS) in Philadelphia. For many years CSS and other private organizations assisted Philadelphia in finding suitable homes in foster children. In 2018, the Philadelphia Department of Human Services declared that it would no longer use CSS to determine suitable homes because that agency refused to certify same-sex couples as appropriate foster parents. Fulton, other foster parents affiliated with CSS, and the CSS filed a lawsuit against Philadelphia, claiming the exclusion violated the free exercise clause of the First Amendment as incorporated by the due process clause of the Fourteenth Amendment. The local federal court refused the CSS’s request for a preliminary injunction and that decision was sustained by the Court of Appeals for the Third Circuit. CSS appealed to the Supreme Court.*

 *The Supreme Court unanimously reversed the Third Circuit. Chief Justice Roberts’s majority opinion claimed that the Philadelphia program was not generally applicable because the Department of Human Services was authorized by law to make exemptions even if no exemptions were made. Justice Amy Barrett agreed with Justice Roberts, noting that the complexities of changing free exercise doctrine should wait for another day. Justices Samuel Alito and Neil Gorsuch wrote concurring opinions urging the justices to replace the any discrimination rule of* Employment Div., Dept. of Human Resources of Ore. v. Smith (1990) *with the compelling interest standard of* Sherbert v. Verner(1963)*. Does Roberts provide convincing evidence that the Philadelphia policy was not generally applicable or do you think he stretched the facts to avoid having to consider whether to overrule Smith? Should Smith be overruled? If so, what should replace Smith? Justice Alito accuses Justice Scalia, who wrote the majority opinion of failing to follow Scalia’s usual interpretive methodologies. How likely is that? What explains why one generation of conservatives favored* Smith *and the next generation preferred a return to* Sherbert?

Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb) delivered the opinion of the Court.

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The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that “Congress shall make no law ... prohibiting the free exercise” of religion. As an initial matter, it is plain that the City's actions have burdened Catholic Services’ (CSS) religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”  Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

*Employment Div., Dept. of Human Resources of Ore.* v. *Smith* (1990) held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. CSS urges us to overrule *Smith*. . . But we need not revisit that decision here. This 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.

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. . . . .A law is not generally applicable if it “invite[s]” the government to consider the particular reasons for a person's conduct by providing “ ‘a mechanism for individualized exemptions.’”  For example, in *Sherbert* v. *Verner* (1963), a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. . . . *Smith* later explained that the 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. *Smith*went on to hold that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”  A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. . . .

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Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the “sole discretion” of the Commissioner. The City has made clear that the Commissioner “has no intention of granting an exception” to CSS. But the City “may not refuse to extend that [exemption] system to cases of ‘religious hardship’ without compelling reason.”

. . . . We have never suggested that the government may discriminate against religion when acting in its managerial role. . . . No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

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. . . . [T]he City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it “invite[s]” the government to decide which reasons for not complying with the policy are worthy of solicitude at the Commissioner's “sole discretion.”

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The City asks us to adhere to the District Court's contrary determination that CSS qualifies as a public accommodation under the ordinance. The concurrence adopts the City's argument, seeing no incongruity in deeming a private religious foster agency a public accommodation. We respectfully disagree with the view of the City and the concurrence. Although “we ordinarily defer to lower court constructions of state statutes, we do not invariably do so.”  Deference would be inappropriate here. The District Court did not take into account the uniquely selective nature of the certification process, which must inform the applicability of the ordinance. We agree with CSS's position, which it has maintained from the beginning of this dispute, that its “foster services do not constitute a ‘public accommodation’ under the City's Fair Practices Ordinance, and therefore it is not bound by that ordinance.” We therefore have no need to assess whether the ordinance is generally applicable.

A government policy can survive strict scrutiny only if it advances “interests of the highest order” and is narrowly tailored to achieve those interests.  Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. Rather than rely on “broadly formulated interests,” courts must “scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.”  The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, particularly because the authority to certify foster families is delegated to agencies by the State, not the City

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”  On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

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Justice [Barrett](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0505709001&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb), with whom Justice [Kavanaugh](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb) joins, and with whom Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb) joins as to all but the first paragraph, concurring.

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith* (1990), this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*’s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith*were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise? What forms of scrutiny should apply? . . .

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes. A longstanding tenet of our free exercise jurisprudence . . . is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny.

Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb), with whom Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb) and Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb) join, concurring in the judgment.

In *Employment Div., Dept. of Human Resources of Ore.*v.*Smith* (1990), the Court abruptly pushed aside nearly 40 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

There is no question that *Smith*’s interpretation can have startling consequences. Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States. . . . . We may hope that legislators and others with rulemaking authority will not go as far as *Smith* allows, but the present case shows that the dangers posed by *Smith* are not hypothetical. The city of Philadelphia (City) has issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children.

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This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started. The City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will reject that argument; and CSS will file a new petition in this Court challenging *Smith*. What is the point of going around in this circle?

Not only is the Court's decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions. . . .

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To fully appreciate what the Court did in *Smith*, it is necessary to recall the substantial body of precedent that it displaced. Our seminal decision on the question of religious exemptions from generally applicable laws was *Sherbert* v. *Verner* (1963), which had been in place for nearly four decades when *Smith* was decided. . . . The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for the next 37 years.

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This is where our case law stood when *Smith* reached the Court. . . . [W]ithout briefing or argument on whether *Sherbert* should be cast aside, the Court adopted what it seems to have thought was a clear-cut test that would be easy to apply: A “generally applicable and otherwise valid” rule does not violate the Free Exercise Clause “if prohibiting the exercise of religion ... is not [its] object ... but merely the incidental effect of ” its operation. . . . Paying little attention to the terms of the Free Exercise Clause, it was satisfied that its interpretation represented a “permissible” reading of the text, and it did not even stop to explain why that was so. The majority made no effort to ascertain the original understanding of the free-exercise right, and it limited past precedents on grounds never previously suggested. *Sherbert* [was] . . . placed in a special category because [the case] concerned the award of unemployment compensation and *Yoder v. Wisconsin* (1972) was distinguished on the ground that it involved both a free-exercise claim and a parental-rights claim. Not only did these distinctions lack support in prior case law, the issue in *Smith* itself could easily be viewed as falling into both of these special categories. After all, it involved claims for unemployment benefits, and members of the Native American Church who ingest peyote as part of a religious ceremony are surely engaging in expressive conduct that falls within the scope of the Free Speech Clause.

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. . . . [W]e should begin by considering the “normal and ordinary” meaning of the text of the Free Exercise Clause: “Congress shall make no law ... prohibiting the free exercise [of religion].” . . . Those words had essentially the same meaning in 1791 as they do today. “To prohibit” meant either “[t]o forbid” or “to hinder.” The term “exercise” had both a broad primary definition (“[p]ractice” or “outward performance”) and a narrower secondary one (an “[a]ct of divine worship whether publick or private”). And “free,” in the sense relevant here, meant “unrestrained.” 1 Johnson (1755).

If we put these definitions together, the ordinary meaning of “prohibiting the free exercise of religion” was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted.

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Not only is it difficult to square *Smith*’s interpretation with the terms of the Free Exercise Clause, the absence of any language referring to equal treatment is striking. If equal treatment was the objective, why didn't Congress say that? And since it would have been simple to cast the Free Exercise Clause in equal-treatment terms, why would the state legislators who voted for ratification have read the Clause that way?

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What was the free-exercise right understood to mean when the Bill of Rights was ratified? . . . By that date, the right to religious liberty already had a long, rich, and complex history in this country. . . . In all of those State Constitutions, freedom of religion enjoyed broad protection, and the right “was universally said to be an unalienable right.”

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By the founding, more than half of the State Constitutions contained free-exercise provisions subject to a “peace and safety” carveout or something similar. . . . The model favored by Congress and the state legislatures—providing broad protection for the free exercise of religion except where public “peace” or “safety” would be endangered—is antithetical to *Smith.*If, as *Smith* held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary. Legislatures enact generally applicable laws to protect public peace and safety. If those laws are thought to be sufficient to address a particular type of conduct when engaged in for a secular purpose, why wouldn't they also be sufficient to address the same type of conduct when carried out for a religious reason?

. . . . That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States. When there were important clashes between generally applicable laws and the religious practices of particular groups, colonial and state legislatures were willing to grant exemptions—even when the generally applicable laws served critical state interests.

. . . . Some early State Constitutions and declarations of rights formally provided oath exemptions for religious objectors. For instance, the Maryland Declaration of Rights of 1776 declared that Quakers, Mennonites, and members of some other religious groups “ought to be allowed to make their solemn affirmation” instead of an oath. . . . Military conscription provides an even more revealing example. In the Colonies and later in the States, able-bodied men of a certain age were required to serve in the militia, but Quakers, Mennonites, and members of some other religious groups objected to militia service on religious grounds. . . . The Continental Congress also granted exemptions to religious objectors because conscription would do “violence to their consciences.” This decision is especially revealing because during that time the Continental Army was periodically in desperate need of soldiers, the very survival of the new Nation often seemed in danger, and the Members of Congress faced bleak personal prospects if the war was lost. Yet despite these stakes, exemptions were granted.

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Another argument advanced by *Smith*’s defenders relies on the paucity of early cases “refusing to enforce a generally applicable statute because of its failure to make accommodation.”  If exemptions were thought to be constitutionally required, they contend, we would see many such cases. There might be something to this argument if there were a great many cases denying exemptions and few granting them, but the fact is that diligent research has found only a handful of cases going either way. Commentators have discussed the dearth of cases. . . . When the body of potentially relevant cases is examined, they provide little support for *Smith*’s interpretation of the free-exercise right. Not only are these decisions few in number, but they reached mixed results. In addition, some are unreasoned; some provide ambiguous explanations; and many of the cases denying exemptions were based on grounds that do not support *Smith.*

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That conclusion cannot end our analysis. “We will not overturn a past decision unless there are strong grounds for doing so,” but at the same time, *stare decisis*is “not an inexorable command.”  It “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.”  And it applies with “perhaps least force of all to decisions that wrongly denied First Amendment rights.” In assessing whether to overrule a past decision that appears to be incorrect, we have considered a variety of factors, and four of those weigh strongly against *Smith*: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down.

*Smith's reasoning*. . . . . *Smith* is a methodological outlier. It ignored the “normal and ordinary” meaning of the constitutional text, and it made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment's adoption. And the Court adopted its reading of the Free Exercise Clause with no briefing on the issue from the parties or *amici*.

Then there is *Smith*’s treatment of precedent. It looked for precedential support in strange places, and the many precedents that stood in its way received remarkably rough treatment.

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*Consistency with other precedents*.*Smith* is also discordant with other precedents. *Smith* did not overrule *Sherbert* or any of the other cases that built on *Sherbert*from 1963 to 1990. . . .

The same is true about more recent decisions. In *Hosanna-Tabor Evangelical Lutheran Church and School*v*. EEOC* (2012), the Court essentially held that the First Amendment entitled a religious school to a special exemption from the requirements of the Americans with Disabilities Act of 1990 (ADA). . . . There is also tension between *Smith* and our opinion in *Masterpiece Cakeshop, Ltd.*v*. Colorado Civil Rights Comm'n* (2018). In that case, we observed that “[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.”

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*Workability*. One of *Smith*’s supposed virtues was ease of application, but things have not turned out that way. Instead, at least four serious problems have arisen and continue to plague courts when called upon to apply *Smith*.

“Hybrid-rights” cases. The “hybrid rights” exception, which was essential to distinguish *Yoder*, has baffled the lower courts. They are divided into at least three camps.. Some courts have taken the extraordinary step of openly refusing to follow this part of *Smith*’s interpretation. . . . . A second camp holds that the hybrid-rights exception applies only when a free-exercise claim is joined with some other independently viable claim. . . .

Rules that “target” religion. Post-*Smith* cases have also struggled with the task of determining whether a purportedly neutral rule “targets” religious exercise or has the restriction of religious exercise as its “object.”  A threshold question is whether “targeting” calls for an objective or subjective inquiry. Must “targeting” be assessed based solely on the terms of the relevant rule or rules? Or can evidence of the rulemakers’ motivation be taken into account? If subjective motivations may be considered, does it matter whether the challenged state action is an adjudication, the promulgation of a rule, or the enactment of legislation? Should courts consider the motivations of only the officials who took the challenged action, or may they also take into account comments by superiors and others in a position of influence? And what degree of hostility to religion or a religious group is required to prove “targeting”?

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The nature and scope of exemptions. There is confusion about the meaning of *Smith*’s holding on exemptions from generally applicable laws. Some decisions apply this special rule if multiple secular exemptions are granted. And still others have applied the rule where the law, although allowing no exemptions on its face, was widely unenforced in cases involving secular conduct.

Identifying appropriate comparators. To determine whether a law provides equal treatment for secular and religious conduct, two steps are required. First, a court must identify the secular conduct with which the religious conduct is to be compared. Second, the court must determine whether the State's reasons for regulating the religious conduct apply with equal force to the secular conduct with which it is compared. In *Smith*, this inquiry undoubtedly seemed straightforward: The secular conduct and the religious conduct prohibited by the Oregon criminal statute were identical. But things are not always that simple.

Cases involving rules designed to slow the spread of COVID–19 have driven that point home. State and local rules adopted for this purpose have typically imposed different restrictions for different categories of activities. Sometimes religious services have been placed in a category with certain secular activities, and sometimes religious services have been given a separate category of their own. To determine whether COVID–19 rules provided neutral treatment for religious and secular conduct, it has been necessary to compare the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities that should be used for comparison has been hotly contested.

In *South Bay United Pentecostal Church*v*. Newsom* (2020), where the Court refused to enjoin restrictions on religious services, THE CHIEF JUSTICE’s concurrence likened religious services to lectures, concerts, movies, sports events, and theatrical performances.  The dissenters, on the other hand, focused on “supermarkets, restaurants, factories, and offices.

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*Subsequent developments*. . . .

None is apparent. Reliance is often the strongest factor favoring the retention of a challenged precedent, but no strong reliance interests are cited in any of the numerous briefs urging us to preserve *Smith*. Indeed, the term is rarely even mentioned.

All that the City has to say on the subject is that overruling *Smith* would cause “substantial regulatory ... disruption” by displacing RFRA, RLUIPA, and related state laws, Brief for City Respondents 51 (internal quotation marks omitted), but this is a baffling argument. How would overruling *Smith* disrupt the operation of laws that were enacted to abrogate *Smith*?

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If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.

Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case. As noted, CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future.

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We have covered this ground repeatedly in free speech cases. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. . . . .The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle. Many core religious beliefs are perceived as hateful by members of other religions or nonbelievers. Proclaiming that there is only one God is offensive to polytheists, and saying that there are many gods is anathema to Jews, Christians, and Muslims. Declaring that Jesus was the Son of God is offensive to Judaism and Islam, and stating that Jesus was not the Son of God is insulting to Christian belief. Expressing a belief in God is nonsense to atheists, but denying the existence of God or proclaiming that religion has been a plague is infuriating to those for whom religion is all-important.

Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game. While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs. . . .

One final argument must be addressed. Philadelphia and many of its *amici* contend that preservation of the City's policy is not dependent on *Smith.*They argue that the City is simply asserting the right to control its own internal operations, and they analogize CSS to either a City employee or a contractor hired to perform an exclusively governmental function.

This argument mischaracterizes the relationship between CSS and the City. The members of CSS's staff are not City employees; the power asserted by the City goes far beyond a refusal to enter into a contract; and the function that CSS and other private foster care agencies have been performing for decades has not historically been an exclusively governmental function.

. . . . The power that the City asserts is essentially the power to deny CSS a license to continue to perform work that it has carried out for decades and that religious groups have performed since time immemorial.

Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb), with whom Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb) and Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Ic3d65b56cf2b11eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ic3d65b56cf2b11eb850ac132f535d1eb) join, concurring in the judgment.

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Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith*’s fate that it is willing to say pretty much anything about municipal law and the parties’ briefs. One way or another, the majority seems determined to declare there is no “need” or “reason” to revisit *Smith* today

But tell that to CSS. Its litigation has already lasted years—and today's (ir)resolution promises more of the same. Had we followed the path JUSTICE ALITO outlines—holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable—this case would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers may rewrite the City's contract to close the . . . loophole.

Once any of that happens, CSS will find itself back where it started. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. To the City, it makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children. And throughout it all, the opacity of the majority's professed endorsement of CSS's arguments ensures the parties will be forced to devote resources to the unenviable task of debating what it *even means*.

Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties. . . . The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*’s test even thirty years after it was announced. . . .

It's not as if we don't know the right answer. *Smith*has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. The Court granted certiorari in this case to resolve its fate. The parties and *amici* responded with over 80 thoughtful briefs addressing every angle of the problem. JUSTICE ALITO has offered a comprehensive opinion explaining why *Smith*should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?

. . . .

What possible benefit does the majority see in its studious indecision about *Smith* when the costs are so many? The particular appeal before us arises at the intersection of public accommodations laws and the First Amendment; it involves same-sex couples and the Catholic Church. Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid “picking a side.” But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution *is*picking a side. *Smith* committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today.