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Linda C. McClain*

Part I. Introduction

Fulton v. City of Philadelphia presents a new iteration of a by-now familiar constitutional claim: recognizing civil marriage equality—the right of persons to marry regardless of gender—inevitably and sharply conflicts with the religious liberty of persons and religious institutions who sincerely believe that marriage is the union of one man and one woman. The context in *Fulton* was a government contract with a religious non-profit (CSS) to provide foster care services: when that contract – incorporating the Fair Practices Act, a local antidiscrimination law – prohibited CSS from discriminating on the basis of sexual orientation (among other grounds), did CSS's religious liberty require the City of Philadelphia to exempt it from that requirement instead of cancelling the contract once it learned that CSS would not certify same-sex couples as foster parents because of the Catholic Church's beliefs about marriage?[1]

While the Supreme Court may have "surprised every Court watcher with a unanimous decision in favor of" Sharonell Fulton (and other foster parents) and Catholic Social Services (CSS),[2] that unanimity on the judgment, not on Chief Justice Roberts's opinion, did not signal

* Robert Kent Professor of Law, Boston University School of Law. I presented an earlier version of this article at the symposium, *Fulton*, Faith, Families, and Foster Care, sponsored by the University of Virginia School of Law, Family Law Center and am grateful to participants for comments. Many thanks to my former research assistant Kaela Dunn and current assistants Amanda Baird and MacKenzie Freed for valuable research on this article. Disclosure: I joined the amicus brief submitted in *Fulton v. City of Philadelphia* by Legal Scholars in Support of Equality in Support of Respondents and authored by Professor Kyle Velte.

[1] *See* Fulton v. Philadelphia, 922 F.3d 140, 146-149 (3rd Cir. 2019), *rev'd*, 593 U.S. __ (2021) (slip. op.).

[2] Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, AMERICAN CONSTITUTION SOCIETY, SUPREME COURT REVIEW (5th ed., 2020-21), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3888375.

consensus on the Court over how best to resolve the evident conflicts raised by such public-private partnerships.[3] To the contrary. Roberts' narrow (and, arguably, "questionable"[4]) basis for holding that Philadelphia violated CSS's First Amendment right to free exercise of religion—that Philadelphia's foster care contract lacked "general applicability" because it permitted an administrator to grant exceptions "in his/her sole discretion"—avoided several larger questions about the respective scope of religious liberty and of antidiscrimination law when a religious entity partners with government to provide a social service.[5]

Perhaps the largest and most commented upon of those avoided questions was whether the Court should reconsider and overrule its controversial precedent, *Employment Division v. Smith*, as CSS and many of its amici urged the Court to do. *Smith,* they argued, insufficiently protects First Amendment rights like those alleged by CSS; instead, government should satisfy a compelling interest standard before it can burden the free exercise of religion. Justices Alito, Gorsuch, and Thomas emphatically answered that question yes, and castigated Roberts for not overruling *Smith;* however, neither Roberts and the two other conservatives justices nor the three remaining liberal justices were ready to do so, at least not yet.[6]

This article focuses on other unaddressed, significant questions in *Fulton,* including the precedential force and implications of the Court's earlier decisions in *Obergefell v. Hodges* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* on a post-Kennedy and post-Ginsburg Court with a 6-3 conservative majority. As elaborated below, those cases addressed

[3] Fulton v. City of Philadelphia, 593 U.S. __ (2021) (slip. op.). Five members of the Court—Justices Barrett, Breyer, Kagan, Kavanaugh, and Sotomayor—joined Chief Justice Roberts' opinion. Barrett wrote a brief concurrence (joined by Justices Kavanaugh and, in part, by Breyer). Three of the conservative justices, Justices Alito, Gorsuch, and Thomas, concurred only in the judgment; Alito wrote a lengthy concurrence (joined by Thomas and Gorsuch) and Gorsuch wrote a concurrence (joined by Alito and Thomas).
[4] Lupu & Tuttle, *supra* note 2, at 3.
[5] *Fulton*, 593 U.S. __, slip op. at 5-10.
[6] Roberts stated that "we need not revisit [Smith] here" because the instant case "falls outside *Smith.*" *Id.* at 5.

earlier iterations of the evident conflict between marriage equality—and LBGTQ equality more broadly—and First Amendment claims. I will argue that the Court's opinion in *Fulton* also did not engage with analogies that were powerful, pervasive, and contested in those earlier cases: the analogy between discrimination on the basis of race and discrimination on the basis of sexual orientation and the analogy between religious opposition to interracial marriage, on the one hand, and, on the other, to same-sex marriage. Even so, those analogies featured in the *Fulton* briefs and in the justices' questioning during the oral argument. Notably, a rejection of that analogy appeared in Justice Alito's *Fulton* concurrence, where he argued that "lumping those [like CSS] who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs," as well as contrary both to the majority's "commitment" in *Obergefell* and to *Masterpiece Cakeshop*.[7] Strikingly, Justice Alito's rhetoric of racial bigotry echoes his earlier dissents in those very cases he now enlists. This article illustrates the different ways in which the parties and their amici enlisted or rejected the race analogy.

Fulton also leaves unanswered questions about the parameters of public-private partnerships like those between the City of Philadelphia and CSS and of how different conceptions of pluralism and of the place of religion in the public square shape competing views of those parameters. Those conceptions, evident in briefs by the parties and their amici, shape arguments about whether a government contract properly insists upon adherence to public values like nondiscrimination in providing services or whether pluralism requires that private actors – even when contracting with government – be free to act on their beliefs and be exempt from such nondiscrimination norms. I will argue that it may be productive and illuminating to compare these present-day debates over pluralism and public-private partnerships with controversies

[7] *Id*. at 75 (Alito, J., concurring).

arising twenty years earlier over the faith-based initiative launched by President George W. Bush. That initiative also rested on premises about the place of religion in the public square. While the central controversies over this initiative were not over civil marriage equality, they still raise pertinent questions about government partnerships with civil society actors and about the best understanding of pluralism in a constitutional democracy.

Both in *Fulton* and in the debate over the faith-based initiative, concerns over "discrimination" take two forms: first, that religious entities who contract with government might be subject to *governmental* discrimination in not receiving funding and, second, that religious entities who contract with government might themselves engage in discrimination. With respect to the former, for example, foster parent and name plaintiff Sharonell wrote in an op-ed: "As a single mom and woman of color, I've known a thing or two about discrimination over the years. But I have never known vindictive religious discrimination like this, and I feel the fresh sting of bias watching my faith publicly derided by Philadelphia's politicians."[8]

II. Prior Iterations of the LBGTQ Equality v. Religious Liberty Clash: *Obergefell* and *Masterpiece*

The efforts by same-sex couples to gain equal access to marriage *licenses*, that is, the right to marry, triggered claims that recognizing such a right to marry would inevitably and sharply conflict with the religious liberty of beliefs of persons and religious institutions who sincerely believe that marriage is the union of one man and one woman. Even though such couples sought access to *civil* marriage, not *religious* marriage, objections premised on religious

[8] Sharonell Fulton, Opinion, *My Faith Led Me to Foster More than 40 Kids; Philly is Wrong to Cut Ties with Catholic Foster Agencies*, PHILA. INQUIRER (May 24, 2018, 2:25 PM), https://www.inquirer.com/philly/opinion/commentary/catholic-social-services-philadelphia-lawsuit-lgbtq-gay-foster-parents-adoption-sharonell-fulton-20180524.html.

liberty predicted that this change in civil law would put protected First Amendment freedoms at risk in various ways. In *Obergefell v. Hodges*, Justice Kennedy, writing for the majority, recognized the fundamental right of same-sex couples to marry while seeking to reassure those with traditional religious beliefs that they remained free to express and advocate for their sincere religious beliefs.[9] Kennedy wrote: "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[10] However, Kennedy explained, it would "disparage" the choices and "diminish" the personhood of same-sex couples if "sincere, personal opposition" to same-sex marriage "becomes enacted into law and public policy," because it would "put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[11] This denial to same-sex couples of "the same legal treatment as opposite sex couples" was unjustifiable, given that (as Kennedy concluded) the four principles and traditions that explain why marriage is a fundamental right applied equally to same-sex couples.[12]

This respectful language about sincere religious opposition did not prevent the four dissenters in *Obergefell* from claiming that Kennedy was, in effect, engaging in a "jurisprudence of denigration"[13] and portraying those who resisted (as Justice Roberts put it) the majority's evolved understanding of marriage as bigoted.[14] Justice Scalia's dissent charged the majority with contending that the age-old one man-one woman definition of marriage "cannot possibly be

[9] Obergefell v. Hodges, 576 U.S. 644, 672 (2015).
[10] *Id.*
[11] *Id.*
[12] *Id.* at 670-71.
[13] For this phrase, see generally Stephen D. Smith, *The Jurisprudence of Denigration*, 48 U. C. DAVIS. L. REV. 675 (2014) (applying it to United States v. Windsor, 570 U.S. 744 (2013)).
[14] *Obergefell*, 576 U.S. at 711-12 (Roberts, C.J., dissenting). *See* LINDA C. MCCLAIN, WHO'S THE BIGOT? 178-80 (2020).

supported by anything other than ignorance and bigotry."[15] Justice Alito's much-quoted dissent evocatively warned that, despite such "reassurances" by the majority, those who dissent from the new "orthodoxy" might be able to whisper their beliefs in their homes, but, if they uttered them in public, would "risk being labeled as bigots and treated as such by governments, employers, and schools."[16] Alito predicted that Justice Kennedy's analogies between excluding same-sex couples from marriage to now-repudiated forms of race and sex discrimination in marriage would invite people to "vilify" as bigots those who oppose same-sex marriage.[17]

Obergefell's holding that states must extend "civil marriage" to same-sex couples on the "same terms and conditions as [to] opposite sex-couples"[18] resolved—or should have resolved—the issue of access to marriage itself in those states still precluding such access under state "defense of marriage" laws. However, some public officials asserted that having to issue marriage licenses or performing marriage ceremonies for same-sex couples violated their religious liberty. Several states have enacted laws permitting conscience- or religion-based exemptions from such duties, provided that *some* public official can perform them.[19] In response to the highly-publicized refusal to issue marriage licenses by County Clerk Kim Davis (recently valorized by Justices Alito and Thomas as one of the first "victims of [the *Obergefell*] Court's cavalier treatment of religion"[20]), Kentucky changed its marriage license form so that clerks neither "issued" nor signed it.[21] Alabama abolished entirely the "requirement that a marriage

[15] *Obergefell*, 576 U.S. at 719 (Scalia, J., dissenting).
[16] *Id.* at 741 (Alito, J., dissenting).
[17] *Id.*
[18] *Id.* at 676 (majority opinion).
[19] For such recusal laws, see, e.g., N.C. Gen. Stat. § 51-5.5 (2021); Miss. Code Ann. § 11-62-5(8)(a) (2021).
[20] Davis v. Ermold, 141 S. Ct. 3, 3 (Mem) (2020), 19-926 Davis v. Ermold (10/05/2020) (supremecourt.gov).
[21] KY. REV. STAT. ANN. § 402.100 (West 2017).

license be issued by the judge of probate,"[22] evidently because of the continued objection by some judges to same-sex marriage and their refusal to issue licenses to anyone.[23]

This battle over the import of *Obergefell* featured in another iteration of the evident conflict between civil marriage equality and religious liberty: access by same-sex couples to wedding-related goods and services like wedding and reception sites, flowers, cakes, and wedding photography.[24] In states and cities with public accommodations laws that include sexual orientation as a protected category, owners of such businesses with religious objections to same-sex marriage claimed that their religious liberty required that they be exempt from public accommodations laws requiring them to serve same-sex couples. By contrast to the quest for marriage licenses, these cases involved the quest for goods and services in the marketplace, which might seem like a "private" space. However, most states deem businesses open to the public to be "public accommodations" subject to the state's antidiscrimination laws. Thus, claims for religious exemptions from such laws, as Professor Melissa Murray aptly argues, seek to "*shrink* the public sphere—and the domain of state-endorsed laws and norms—and *expand* the private sphere and the authority of private actors who operate outside of the State's reach."[25] These cases, thus, raised issues about who should be protected in civic spaces. A feature uniting them is that they arose in states with public accommodations law that had evolved to include "sexual orientation" as a protected category.

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[22] Act of May 31, 2019, No. 2019-340, 2019 Ala. Acts 340 (codified as amended at ALA. CODE §§ 22-9A-17, 30-1-5, 30-1-12, 30-1-16).

[23] *Alabama Legislature Passes Bill to End Judge-Issued Marriage Licenses*, WHNT NEWS (May 23, 2019, 3:48 PM), https://whnt.com/news/alabama-legislature-passes-bill-to-end-judge-issued-marriage-licenses/.

[24] Some of these conflicts predated *Obergefell. See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (holding that photographer who declined to photograph a same-sex couple's commitment ceremony violated New Mexico's public accommodations law).

[25] Melissa Murray, *The Geography of Bigotry*, 99 B.U.L.REV. 2611, 2627 (2019) (commenting on MCCLAIN, *supra* note 14). On exemptions to state public accommodations laws, see generally, *e.g.*, Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631 (2016).

Even prior to *Obergefell*, several state courts had ruled that refusal to provide goods and services to a same-sex couple was discrimination on the basis of sexual orientation, rejecting the argument that the refusal was not based on the would-be customers' *sexual orientation*, but instead on their *marriage*.[26] But *Obergefell*'s majority opinion and several dissents provided new constitutional touchpoints in this controversy. As I detailed in *Who's the Bigot?*, the nation's most famous wedding cake baker, Jack Phillips, owner of Masterpiece Cakeshop, along with his many amici, appealed *both* to Justice Kennedy's majority opinion to insist the Court honor *Obergefell*'s "promise" to protect his sincere, decent, and honorable beliefs *and* to the dissents to warn that ruling against him would lead to traditional believers like him being branded as bigots and driven from the public square.[27] They strenuously rejected analogies to refusals of goods and services based on race and deflected the significance of the fact that the public accommodations of the Civil Rights Act of 1964 (Title II) did not include religious exemptions. As Texas, Alabama, and some other states asserted: "Public-accommodations concerns of past eras are not present here."[28] They also insisted that the harms that Phillips would suffer to his conscience and/or his business if compelled to design and bake cakes for same-sex couples or stop offering wedding cakes entirely far outweighed the dignitary and other harms to the couple denied service, Craig and Mullins, who could readily find bakeries willing and eager to serve them.[29]

[26] For elaboration, see MCCLAIN, *supra* note 14, at 186-91 (2020) (discussing *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013)).
[27] *Id.* at 194-203 (analyzing briefs).
[28] *Id.* at 198 (quoting Brief for the States of Texas, Alabama et al. as Amici Curiae in Support of Petitioners at 3, Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018)).
[29] *Id.* at 196 (discussing Brief of Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. in Support of Petitioners at 30, Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018)).

Pertinent to *Fulton*, some religious amici supporting Phillips insisted that the case was not simply about wedding cakes and religiously-motivated business owners, but also about the broader question of the terms on which religious entities could participate in the public square – or the "public sphere."[30] Pluralism, civility, and tolerance, they argued, required robust protections of First Amendment freedoms so that people of conscience could live their faith everywhere. For example, the amicus brief for the United States Conference of Catholic Bishops (quoting Pope Francis) insisted that religion "should not be relegated to the inner sanctum of personal life," but instead had rightful concerns over "societal and national life" and "the soundness of civic institutions."[31] The brief specifically elaborated on how "religious exercise" took many forms, not only that of "religiously motivated" businesses (like Masterpiece Cakeshop) but also the numerous acts of charity performed by religiously motivated institutions, including those engaged in providing adoptive and foster care services.[32] At stake, then, was "the freedom to live according to one's religious beliefs in daily life and, in doing so, advance the common good."[33] The First Amendment protected the "freedom of religious institutions that serve the public and the most vulnerable members of society as a way of living faith through action in the public square."[34] The brief offered as a cautionary tale the experience of Catholic Charities in Illinois, Massachusetts, and the District of Columbia, "forced to shut down rather than comply with government mandates to place children with same-sex couples on the same basis as opposite-sex couples."[35] The brief appealed to pluralism in insisting that "the common good" would be advanced by allowing religiously-motivated people and institutions to act on the

[30] Brief for Conf. of Cath. Bishops, Colo. Cath. Conf. et al. as Amici Curiae in Support of Reversal at 4, *Masterpiece Cakeshop*.
[31] *Id.*
[32] *Id.* at 4, 19.
[33] *Id.* at 6.
[34] *Id.* at 19.
[35] *Id.* at 19.

truth as they discern it, including in "the public square," particularly on "contentious issues" on which debate should continue.[36]

Craig and Mullins, the Colorado Civil Rights Commission, and their amici countered each of these arguments. First, they explained that to uphold Colorado's public accommodations law, the Court need not deem Phillips a bigot, analogize him to a racist, or doubt his sincerity: Colorado's law reached conduct, not belief, and applied regardless of one's motive for refusing service. They insisted on the relevance of the race analogy, contending that allowing a religious exemption to Title II would have seriously blunted its impact, given (then) still-pervasive religious beliefs in racial segregation. In support, they reminded the Court of its earlier case, *Newman v. Piggie Park Enterprises,* in which a restaurant order brought an unsuccessful constitutional challenge to Title II on the ground that requiring him to serve Black customers along with white ones violated his religious beliefs about racial segregation.[37] They explained the problems of finding a limiting principle for religious exemptions to modern state public accommodations laws, which are much broader than Title II in covering many protected characteristics, including sex. Finally, they insisted that broad exemptions from Colorado's law could result in serious harm to LGBTQ persons, drawing on social science about minority stress, the persistence of "pervasive" discrimination against LGBTQ persons in Colorado and elsewhere in the U.S., and the intersectional harms face by LGBTQ persons of color. [38]

Respondents and amici also appealed to values of pluralism, civility, and tolerance, but to argue that such values require limits to *acting on* religious beliefs in businesses open to the public. In a religiously diverse nation like the U.S., amici cautioned, there could be no principled

[36] *Id.* at 31-32.
[37] 256 F. Supp. 941, 945 (D.S.C 1966), *aff'd,* 377 F.2d 433 (4th Cir. 1967, *aff'd,* 390 U.S. 400 (per curiam).
[38] *See* MCCLAIN, *supra* note 14, at 199-209 (analyzing briefs).

limit to a conscience exemption. Instead, as the church-state scholars amicus brief argued, there would be numerous clashes between "commands of conscience" and state laws "that protect fundamental rights, equal protection, health and safety, free markets, or other social goods."[39] As Justice Scalia famously observed in *Employment Division v. Smith*, permitting religious beliefs to justify not obeying the law would "permit every citizen to become a law unto himself,"[40] raising "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[41]

In his opinion for the Court, Justice Kennedy reversed the appellate court's upholding of Colorado's antidiscrimination ground on the relatively narrow ground that the Colorado Civil Rights Commission showed "hostility" toward Phillips' religious beliefs, contrary to the First Amendment requirement that government officials be "neutral" when considering claims that a law violates one's sincere religious belief. [42] As I have elaborated elsewhere, because of this flaw, the Court did not resolve the question about whether and when public accommodations laws must exempt business owners with sincere religious objections to same-sex marriage or, in the alternative, when the latter must comply with such laws despite those beliefs. Instead, Kennedy advised that such disputes, in "future cases," must "be resolved with tolerance, without undue respect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[43] But Kennedy's opinion, nonetheless, offered enough nuggets or intimations for both sides to claim partial victory. Defenders of laws like

[39] *Id.* at 199-200 (quoting Brief of Church-State Scholars as Amici Curiae in Support of Respondents at 4, 12, *Masterpiece Cakeshop*).
[40] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
[41] *Id.* at 888.
[42] Masterpiece Cakeshop v. Colorado Civil Rights Comm's, 138 S. Ct. 1719, 1731-32 (2018).
[43] MCCLAIN, *supra* note 14, at 208 (quoting *Masterpiece*, 138 S. Ct. at 1732).

Colorado's and of LBGTQ equality were relieved that Kennedy recognized that state law could "protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[44] And he implicitly embraced the relevance of the race analogy by citing to *Piggie Park* for the proposition that even though "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression," the general rule is that "such objections do not allows business owners and other actors in the economy and society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[45] Kennedy also noted the changed political and constitutional landscape due in part to precedents like Obergefell: "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts of inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances, must protect them in their civil rights."[46] Kennedy also appealed to "the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations" to explain how broad exemptions from antidiscrimination laws could lead to "community wide-stigma" toward "gay persons."[47]

On the other hand, Phillips' supporters could claim victory in Kennedy's ruling that the CCRC showed "hostility" and animosity toward Phillips' beliefs encouraging. Even though Kennedy did not use the language of bigotry, his conclusion could also fuel charges, in future cases, that public officials who denied religious exemptions exhibited antireligious bigotry.[48]

[44] *Masterpiece Cakeshop*, 138 S. Ct. at 1727-28.
[45] *Id.* at 1727.
[46] *Id.* at 1728.
[47] *Id.* at 1727.
[48] MCCLAIN, *supra* note 14, at 208.

Further, Kennedy criticized one Commissioner's statement that it was a "despicable piece of rhetoric" to use religion to harm others, given the appeal to religion to justify slavery and the Holocaust, as "disparaging" Phillips' religion by calling the appeal to religious beliefs "despicable" and also by implying the appeal to religion was "insubstantial and even insincere." This comment, which Kennedy read as comparing Phillips' beliefs to religious defenses of slavery and the Holocaust, was not "disavowed" by other officials and thus failed to show "fairness and impartiality."[49] One reading of Kennedy's sympathetic rendering of Phillips' dilemma of conscience and his sharp criticism of the CCRC for its "hostility" was that comparisons to religious racism of the past was inappropriate.

All these different readings of *Masterpiece* would be pertinent in *Fulton,* where the conflict shifted from a business owner offering goods and services in the marketplace to a religious non-profit contracting with government to offer foster care services. As a preface to my analysis of *Fulton,* I now step back in time to consider controversies over such public-private partnerships that arose in connection with the "faith-based initiative" first introduced by President George W. Bush. As my title suggests, one key issue about the initiative was whether to conceive of public-private partnerships as "unleashing" the power of faith as religious entities provided social services in accordance with their beliefs or as "harnessing" that power so that such entities provided those services in a way consistent with public values and constitutional limits. That quandary, I will argue, is also pertinent for assessing *Fulton.*

Part III. Looking Back to the Faith-Based Initiative

[49] *Masterpiece*, 138 S. Ct. at 1729-30.

In January 2001, during President George W. Bush's first month in office, he announced a "faith-based initiative," centered in the newly-created White House Office of Faith-Based and Community Initiatives ("OFBCI"), which would coordinate a federal effort "to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America's communities."[50] The "blueprint" for this initiative, evocatively titled *Rallying the Armies of Compassion*, described the creation of OFBCI as a centerpiece of the Bush Administration and of "compassionate conservatism."[51] The blueprint pronounced faith-based and community groups as "indispensable" to meeting "the needs of poor Americans and distressed neighborhoods," adding that "[g]overnment cannot be replaced by charities, but it can and should welcome them as partners."[52] To do so, the government initiative would (in the following alliterative phrase) "enlist, equip, enable, empower, and expand the heroic works of faith-based and community groups across America."[53] It sought to expand to more governmental agencies and social spending the "bipartisan," "Charitable Choice provision," first included in the 1996 welfare law, that allowed "private, religious, and charitable organizations" to compete "on an equal footing for Federal funding to provide services," and to "protect their religious character" if they accepted federal funds.[54]

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[50] Exec. Order No. 13,199, 3 C.F.R. 13199 (2002), https://www.govinfo.gov/content/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-eo13199.pdf.

[51] THE WHITE HOUSE, RALLYING THE ARMIES OF COMPASSION (2001), H.R. Doc. No. 107-36, https://babel.hathitrust.org/cgi/pt?id=umn.31951d01972003y&view=1up&seq=1. [Also available at: https://georgewbush-whitehouse.archives.gov/news/reports/faithbased.html, but without page numbers.] In describing this initiative, I incorporate part of the analysis I did of this "faith-based initiative" several years into its creation. *See generally* Linda C. McClain, *Unleashing or Harnessing "Armies of Compassion"?: Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361 (2008).

[52] President George W. Bush, *Foreword* to THE WHITE HOUSE, RALLYING THE ARMIES OF COMPASSION 4, 4 (2001), https://babel.hathitrust.org/cgi/pt?id=umn.31951d01972003y&view=1up&seq=1. [Also available at: https://georgewbush-whitehouse.archives.gov/news/reports/faithbased.html, but without page numbers.]

[53] *Id.*

[54] THE WHITE HOUSE, RALLYING THE ARMIES OF COMPASSION, *supra* note 51, at 14.

A key motivation for the initiative was the premise that, despite the long history of governmental partnerships with the nonprofit sector, laws and policies unduly constrained partnerships with religious organizations. Hence, the imagery of "unleashing" the power of "faith-based and community solutions"—the "armies of compassion"— so that overly strict ideas of separation of church and state and neutrality did not hinder them. Charitable groups, including religious ones, should compete "on a level playing field, so long as they achieve valid public purposes"; "bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality" should be the operative ones.[55] A subsequent report, under OFBCI Director John DiIulio, *Unlevel Playing Field*, concluded that there was "widespread bias against faith-and community based organizations in Federal social service programs," due to policies and practices going "well beyond sensible constitutional restrictions."[56] In seeking to eliminate that supposed "bias" and "unleash" those organizations, however, DiIulio found it difficult to distinguish between directly funding human services and funding religion. Some conservatives rejected this effort at line-drawing, believing that "'real' faith-based groups" should receive federal funding, even if they sought to "convert people to a particular faith."[57] On the other hand, proposed legislation implementing the initiative stalled in Congress precisely over concern with direct funding of religious activities and also whether religious entities permitted to discriminate in hiring under Title VII of the Civil Rights Act would receive this direct funding.[58]

[55] *Id.*
[56] THE WHITE HOUSE OFFICE ON FAITH-BASED AND COMMUNITY INITIATIVES, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (Aug. 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/08/unlevelfield.html.
[57] McClain, *supra* note 51, at 373 (quoting DAVID KUO, TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION 159-60 (2006)).
[58] *Id.* at 373.

The terrorist attacks of September 11, 2001 temporarily pushed this and much else in President Bush's domestic agenda aside, focusing his Administration on homeland security and what became the long "war on terror." But, in 2002, Bush renewed his efforts with a new Director of OFBCI, Jim Towey (who had worked with Mother Teresa); Towey spoke of the power of faith and praised Bush for his vision of "unleashing new armies of compassion that will change countless lives."[59] More legislative efforts ensued. Proponents of The Charity Aid, Recovery, and Empowerment Act (CARE) sought to appease conservative and liberal critics by including provisions that, on the one hand, protected religious groups against discrimination in receiving federal funding simply because of their religious nature and, on the other, provided that religious groups receiving federal funds should not be exempt from antidiscrimination laws concerning hiring.[60] Over the next several years, lawmakers, nonprofits, scholars, and others debated the initiative, including such questions as what role "faith" played in delivering social services (e.g., as the *motive* for delivering such services or as the *method* of doing so), whether faith-based providers performed better than their secular counterparts (and on what metric), and whether (as Charles Glenn explored, in *The Ambiguous Embrace*) faith-based providers could accept government funds and regulation without destroying their autonomy and distinctiveness that makes them effective.[61] While Congress never passed implementing legislation, the Bush Administration implemented the initiative through executive orders and agency regulations.[62] By the end of the Bush's term, a dozen federal departments and "Agency Centers for Faith-Based and Community Initiatives," charged with including faith-based and community groups;" over

[59] *Id.* at 374-75.
[60] *Id.* at 375 (discussing efforts by Senator Rick Santorum and Senator Joseph Lieberman to defend CARE).
[61] *Id.* at 387-404 (discussing perspectives on the question: "why does identity matter?").
[62] *See* Stanley Carlson-Thies, *The Biden Partnerships Plan Is Faith-Based Initiative 5.0*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Jun. 22, 2021).

two dozen states had passed legislation either aimed at increasing state partnerships with faith-based organizations or referring to them as potential partners in social service programs.[63]

A full narrative on the subsequent incarnations of the OFBCI is not relevant to this article. It bears mention, however, that President Obama retained (and renamed) the initiative as the Office of Faith-Based and Neighborhood Partnerships. Obama echoed Bush in urging greater involvement of civil society in solving social problems, although his advisory council on the initiative tweaked the Bush Administration's regulations after reviewing their constitutionality.[64] The new regulations retained one controversial provision -- the freedom of religious entities receiving government funds to consider religion in their hiring decision – but also extended to all government-funded social programs (not just Charitable Choice ones) a beneficiary's right to request an alternative to a "faith-based provider" and also to be informed of their religious protections.[65] President Trump campaigned on pledges to protect religious liberty and on being "the great friend of evangelical Christians" and took various executive actions to do so (e.g., conscience protections from the Affordable Care Act and rollbacks on protecting LGBTQ persons).[66] However, Trump did not announce a "White House Faith and Opportunity Initiative" until May 2018; instead of a separate office, the initiative was eventually overseen by a new "partnership advisor" in the Office of Public Liaison, but lacked leadership.[67] In February 2021, President Biden established (in effect, reestablished) the "White House Office of Faith-Based and Neighborhood Partnerships" and helmed it with Melissa Rogers, a prior director of the Obama-era office and a sharp critic of the Trump initiative for weakening protections of

[63] McClain, *supra* note 51, at 382.
[64] Carlson-Thies, *supra* note 62, at 3-4.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 4; Executive Order 13831 of May 3, 2018, 83 FED. REG. (No. 89) 20715 (May 8, 2018).

beneficiaries.[68] The Biden executive order echoed President Bush's alliterative aim of the federal government seeking to "enlist, equip, enable, empower, and expand the work of community-serving organizations, both faith-based and secular, to the extent permitted by law."[69] Notably, among the aims of this government-civil society collaboration are to "combat systemic racism" and "strengthen pluralism."[70] The order commits to strengthening such organizations' ability "to deliver services effectively in partnership with Federal, State, and local governments and with other private organizations, while preserving our fundamental constitutional commitments guaranteeing the equal protection of the laws and free exercise of religion and forbidding the establishment of religion."[71]

How to honor these "fundamental constitutional commitments" proved a challenge from the initiative's inception, but the initiative was aided by changes in the Supreme Court's Establishment Clause jurisprudence. While, during the 1970s, the Supreme Court "adopted a categorical prohibition on government aid for pervasively sectarian organizations," by the early 21st century, it was interpreting the Establishment Clause in a way that opened the door to much wider funding of religious non-profits.[72] As Ira Lupu and Robert Tuttle observe, this jurisprudence supported two funding tracks for the initiative's support of social service programs. First, government could not directly fund "specifically religious activities," so that, if a grant recipient had social services with religious content, they "must be privately financed and

[68] Executive Order 14015 of February 14, 2021, 86 FED. REG. (No. 31) 10007 (Feb. 18, 2021); on Rogers, see Carlson-Thies, *supra* note 62, at 1, 5.
[69]Executive Order 14015 of February 14, 2021, *supra* note 68, at 1.
[70] FACT SHEET: President Biden Reestablishes the White House Office of Faith-Based and Neighborhood Partnerships, Feb. 14, 2021.
[71] Executive Order 14015, *supra* note 69, at 1.
[72] Ira C. Lupu and Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity* at 27 *in* THE RISE OF CORPORATE LIBERTY (Zoe Robinson, Chad Flanders, and Micah Schwartman, eds., forthcoming 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535991.

separated by time or place from publicly financed services."[73] Second, government could indirectly support social welfare programs in which social services are "interwined" with religious content when a beneficiary makes an "uncoerced choice" of that program (e.g., through vouchers.[74] The "constitutional logic" is that this "free choice of beneficiaries," where the beneficiary picks a program with religious content while secular choices are available, means that government does not directly fund religion.[75]

Some defenders of religious liberty argue that the prohibition of direct aid in this two-track approach is governmental discrimination against "religious providers who are not willing or able to segregate secular and religious elements of their program."[76] Lupu and Tuttle defend this line-drawing as consistent with "constitutional values," concern for the "dignity of program beneficiaries," and the premise that "civil government should not use religion as a mean to the state's own ends, however laudable those goals might be."[77] While the *Fulton* case does not raise precisely the same issues, it does involve the question of on what terms a religious non-profit that provides social services may receive direct governmental funds. What happens, for example, when the state's "ends," such as delivering foster care services without discrimination based on protected categories, conflicts with a religious entities' line-drawing on who they will serve? Just as faith-based providers argued they could not divorce their faith from the services they offered, Chief Justice Roberts observes, in *Fulton,* that "the religious views of CSS inform its work in

[73] *Id.* at 28-29.
[74] *Id*.
[75] *Id.* at 29.
[76] *Id.* (giving examples of Stanley Carlson-Thies and proponents of "freedom of the church").
[77] *Id.* at 30.

this system," including its belief that "'marriage is a sacred bond between a man and a woman.'"[78]

These questions raise the issue of the meaning and value of pluralism in a constitutional democracy. Defenders of the faith-based initiative who supported direct funding argued that religious groups should be able to deliver religiously-infused services in which faith was a central element so long as persons could choose among religious and secular providers. Such appeal relates to the role played by ideas of subsidiarity; "compassionate conservatism," for example, was sometimes called "subsidiarity conservatism."[79] Some proponents of the initiative argued that devolving federal power both to state and local government and to associations would correct the federal government's undue expansion into and usurpation of work that should be done locally and by civil society. A mantra was that government funding (including indirect funding of faith-infused or faith-integrated methods) would preserve "value pluralism": as Stephen Monsma wrote, government should "supplement—not supplant—families, houses of worship, self-help organizations, block clubs, community development corporations, and other manifestations of civil society."[80]

The value of pluralism and of respecting the historical role of civil society also featured in arguments in *Fulton*. At oral argument, the attorney for CSS referred to CSS's work in foster care as something it had done "for two centuries" before the City of Philadelphia became involved. [81] With that baseline, of course, the restrictions imposed through the City's contract

[78] *Fulton*, 593 U.S. ___ (2021), slip op. at 2.
[79] McClain, *supra* note 51, at 404 (quoting Senator Rick Santorum, *A Compassionate Conservative Agenda: Addressing Poverty for the Next Millennium*, 26 J. LEGIS. 93, 93 (2000)).
[80] STEPHEN MONSMA, PUTTING FAITH IN PARTNERSHIPS 185 (2004) (cited in McClain, *supra* note 51, at 367).
[81] Transcript of Oral Argument at 5, Fulton v. City of Phila. (2020) (No. 19-123), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-123_o758.pdf.

with CSS due to the nondiscrimination provisions of the Fair Practices Ordinance seem like unfair and unconstitutional burdens – an incursion by the City on the valuable and honorable work done by CSS as a civil society actor. The Solicitor General (amici for CSS) appealed to pluralism to contend that "gay persons" could accept CSS receiving an exemption from serving them as prospective foster parents them without feeling their own "dignity and worth" diminished, stretching *Masterpiece Cakeshop's* observations that "gay persons" would not experience that diminution because *clergy* had a religious exemption from performing wedding ceremonies. The Solicitor General contended such couples would recognize that a "pluralistic nation that respects religious tolerance" could accommodate "longstanding, deep-seated, sincere religious beliefs that oppose same-sex marriage" as consistent with the Free Exercise Clause.[82] CSS's counsel and the Solicitor General argued that CSS had turned no same-sex couples away, and that there are plenty of other foster-care agencies that could serve such couples. Failing to respect pluralism, counsel contended, would drive CSS out of the important work it had done for centuries and with no "compelling" interest, since gay couples interested in becoming foster parents have many other social service agencies willing to help them. Counsel for the City, in turn, challenged this baseline, countering that CSS had not done "this" – contracting with the City to certify eligible foster parents under the City's foster care program – for centuries.[83] While Chief Justice Roberts does not mention explicitly mention pluralism, his opinion opens with the narrative of the Catholic Church serving "the needy children of Philadelphia for over two centuries," highlights how Philadelphia's foster care system "depends on cooperation between the City and private foster agencies like CSS," and closes by quoting Philadelphia's

[82] *Id.* at 40.
[83] *Id.* at 84-85.

acknowledgment that "CSS has 'long been a point of light in the City's foster-care system.'"[84] As discussed below, Roberts also interprets the First Amendment as requiring that CSS should have an accommodation so that it can "continue serving the children of Philadelphia in a manner consistent with its religious beliefs."[85]

Part IV. Fulton v. City of Philadelphia

My evaluation of *Fulton* will be as follows. First, I offer a brief analysis of certain themes in the party and amicus briefs: their rhetoric (if any) of bigotry and discussion of the race analogy; their deployment of *Obergefell* and *Masterpiece,* and their evaluation of the significance of the public-private partnership—the contract—between the City and CSS.[86] Second, I observe the presence – or absence – of these themes in the majority and concurring opinions in *Fulton.*

A. Thematic Analysis of the Party and Amicus Briefs

1. Petitioners

The Rhetoric of Bigotry and the Race Analogy. As in *Masterpiece Cakeshop,* the rhetoric of bigotry appeared more frequently in the briefs of the parties challenging the application of antidiscrimination law and their amici than in those defending such laws.[87] Not surprisingly, the several briefs for CSS that used such rhetoric also enlisted the *Obergefell* and *Masterpiece Cakeshop* dissents. Petitioners argued: "as the dissent warned in *Obergefell*, '[t]hese apparent

[84] *Fulton*, Slip op. at 1-2, 15. In an arguable precursor of the faith-based initiative, President George H.W. Bush, in his January 1989 inaugural address, called upon Americans to be "a thousand points of light" through service to each other; he later established a "Daily Point of Light" award, stressing how "a neighbor can help a neighbor." *Points of Light,* https://www.pointsoflight.org/history/.
[85] *Fulton,* slip op. at 15.
[86] This is a selective, not exhaustive evaluation.
[87] For a comparison in *Masterpiece,* see MCCLAIN, *supra* note 14, at 192-203.

assaults on the character of fairminded people will have an effect, in society and in court,' and it would be a mistake 'to portray everyone who does not share the majority's "better informed understanding" as bigoted.'"[88]

Several amici for CSS argued that City officials equated CSS's religious beliefs with bigotry.[89] They invoked the warnings in Justice Alito's *Obergefell* dissent,[90] arguing that the City was "unquestionably" treating CSS "as a bigot," which "could be construed as invidious discrimination."[91] As did the *Obergefell* dissenters, these amici viewed drawing analogies between race and sex discrimination, on the one hand, and sexual orientation discrimination – as well as between religious objections to interracial marriage and to same-sex marriage – as tantamount to a charge of bigotry.[92] For example, the Jewish Coalition for Religious Liberty distinguished between unlawfully turning away persons based on race from turning away same-sex couples based on religious views, which should not be "equat[ed] . . . with bigoted discrimination."[93] As in *Masterpiece,* some amici sought to draw a line between core protected categories like race and the "vast expansion of covered categories" (i.e., categories like sexual orientation), which "often occurs with little analysis of the difference between race and newly protected classes."[94] While landmark civil rights legislation properly sought to "eradicate America's long history of racial discrimination," the Institute for Faith and Family argued, "as

[88] Brief for Petitioners at 35, Fulton v. City of Phila., No. 19-123 (U.S. filed May 27, 2020) (quoting Obergefell v. Hodges, 576 U.S. 644, 712 (2015) (Roberts, C.J., dissenting)). Briefs for this case are available online at https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/.
[89] *See, e.g.*, Brief for Jewish Coal. for Religious Liberty as Amicus Curiae in Support of Petitioners at 27, *Fulton*; Brief for Inst. for Faith & Fam. & Int'l Conf. of Evangelical Chaplain Endorsers as Amici Curiae in Support of Petitioners at 13, *Fulton* [hereinafter, Brief for Inst. for Faith & Fam.]; Brief for Great Lakes Just. Ctr. as Amicus Curiae in Support of Petitioners at 15, *Fulton*.
[90] *See, e.g.*, Brief for Inst. for Faith & Fam., *supra* note 89, at 13; Brief for Archbishop Jerome E. Listecki & Roman Cath. Archdiocese of Milwaukee as Amici Curiae in Support of Petitioners at 4, *Fulton*.
[91] Brief for Inst. for Faith & Fam., *supra* note 89, at 13.
[92] Brief for Jewish Coal. for Religious Liberty, *supra* note 89, at 27.
[93] *Id.*
[94] Brief for Inst. for Faith & Fam., *supra* note 89, at 9-10.

protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants."[95]

A number of CSS's amici challenged the race/sexual orientation analogy without referring to bigotry. These briefs sounded a theme that CSS's attorney and the Solicitor General voiced in the oral argument: racism is special—"sui generis"—and "implicates unique historical, constitutional, and institutional concerns."[96] Thus, ending race discrimination is a *uniquely* compelling and fundamental governmental interest, warranting the highest judicial scrutiny. Some amici contended that whereas race is an immutable *characteristic*, CSS discriminates based on LGBTQ *conduct*.[97] They argue that listing a characteristic other than race in a statute does not create a compelling government interest in protecting groups other than racial minorities from discrimination. The Solicitor General offered a different race analogy: religious stereotypes are at play in the City's treatment of CSS and are comparable to impermissible racial stereotypes.[98]

Appeals to Obergefell *and* Masterpiece. Some amici expressly criticized *Obergefell*, arguing that Justice Kennedy's majority opinion failed to consider the impact of its ruling on religious liberty; some amici cited the prediction in Justice Thomas's *Obergefell* dissent of an inevitable conflict.[99] On the other hand, petitioners and their amici also affirmatively enlisted Kennedy's majority opinion, reminding the Court of *Obergefell*'s "promise" that its holding

[95] *Id.* at 11.
[96] Brief for Neb., Ariz. & Ohio as Amici Curiae in Support of Petitioners at 33, *Fulton* (quoting Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017)).
[97] *See* Brief for Concerned Women for Am. et al. as Amici Curiae in Support of Petitioners at 18, *Fulton*.
[98] *See* Brief for United States as Amicus Curiae in Support of Petitioners at 30, *Fulton*.
[99] *See, e.g.*, Brief for Inst. for Faith & Fam., *supra* note 89, at 14-17; Brief for Robertson Ctr. for Const. L. as Amicus Curiae in Support of Petitioners at 28-29, *Fulton*; Br. for Concerned Women for Am. et al., *supra* note 97, at 26; Brief for Life Legal Defense Found. et al. as Amici Curiae in Support of Petitioners at 4, *Fulton*.

would not disrupt First Amendment rights or interfere with sincerely held religious beliefs opposing same-sex marriage.[100] Further, they argued that the City had imposed a burden on CSS's *sincerely*-held beliefs about marriage, citing language from *Obergefell* in support,[101] and that such belief — which underlies its opposition to same-sex marriage — is *decent* and *honorable.*[102]

Amici also enlisted Justice Kennedy's opinion in *Masterpiece Cakeshop* to argue that the City Council's statement about "discrimination that occurs under the guise of religious freedom" had *disparaged* religion by characterizing it as insincere.[103] They invoked *Masterpiece*'s language about the need for "neutrality" in considering sincere religious beliefs and argued there were parallels between statements by the City Council and the Commissioner here and the statements at issue in *Masterpiece* that indicated "hostility."[104] Some amici cited *Masterpiece* as evidence of increasing governmental hostility toward religion.[105] Amici who urged the Court to overrule *Smith* appealed to Justice Gorsuch's dissent in *Masterpiece*, describing *Smith* as controversial.[106]

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[100] *See, e.g.*, Brief for Inst. for Faith & Fam., *supra* note 89, at 6, 17; Brief for Robertson Ctr. for Const. L., *supra* note 99, at 28-29; Brief for Dorothy Frame et al. as Amici Curiae in Support of Petitioners at 24, *Fulton*; Brief for Rutherford Inst. as Amicus Curiae in Support of Petitioners at 16-17, *Fulton*.

[101] *See, e.g.*, Brief for 76 U.S. Sens. & Members of House of Reps. as Amici Curiae in Support of Petitioners at 3, *Fulton*; Brief for Coal. for Jewish Values et al. as Amici Curiae in Support of Petitioners at 33, *Fulton*; Brief for Former Foster Child. & Foster/Adoptive Parents & Cath. Ass'n Found. as Amici Curiae in Support of Petitioners at 32, *Fulton* [hereinafter, Brief for Former Foster Child. & Foster/Adoptive Parents].

[102] *See, e.g.*, Brief for Neb., Ariz. & Ohio, *supra* note 96, at 31, 34; Brief for Current & Former State Legislators as Amici Curiae in Support of Petitioners at 23-24, *Fulton*.

[103] *See, e.g.*, Brief for Jewish Coal. for Religious Liberty, *supra* note 89, at 27; Brief for United States, *supra* note 98, at 32; Brief for State of Tex. et al. as Amici Curiae in Support of Petitioners at 32-33, *Fulton*; Brief for Galen Black as Amicus Curiae in Support of Petitioners at 13-14, *Fulton*.

[104] *See, e.g.*, Brief for Jewish Coal. for Religious Liberty, *supra* note 89, at 26-27; Brief for Life Legal Defense Found. et al., *supra* note 99, at 10-12; Brief for Church of Jesus Christ of Latter-day Saints et al. as Amici Curiae in Support of Petitioners at 13, *Fulton*; Brief for Christian Colls. & Univs. et al. as Amici Curiae in Support of Petitioners at 25-27, *Fulton*; Brief for Rutherford Inst., *supra* note 100, at 8.

[105] *See* Brief for State of Tex. et al., *supra* note 103, at 30-31; Brief for Former Foster Child. & Foster/Adoptive Parents, *supra* note 101, at 31 & n.12.

[106] *See, e.g.*, Brief for Bruderhof et al. as Amici Curiae in Support of Petitioners at 27-28, *Fulton*; Brief for Robertson Ctr. for Const. L., *supra* note 99, at 9; Brief for State of Tex. et al., *supra* note 103, at 20.

CSS's Status as a Government Contractor. How did the petitioners and their amici defend CSS's position, as a licensed foster care provider, that it would not work with same-sex couples despite the City's Fair Practices Ordinance?[107] Petitioners and amici disputed the treatment of foster care services as a "public accommodation," arguing that the contract did not turn a religious organization into a public accommodation; petitioners also argued that Philadelphia "is using its contracting and funding authority to exclude a disfavored religious actor."[108] They also argued that, under the contract, CSS "is an independent contractor... and shall not... be deemed an employee of the City."[109]

Both petitioners and amici stressed the long history of religious organizations' involvement in fostering care – before government's involvement and argued that because CSS "cannot perform its foster-care services in violation of its faith, Philadelphia's actions have the effect of banning the group's ministry."[110] Several amici emphasized that religion was a motivator for religious organizations to get involved in foster care work, citing directives in religious texts to care for widows and orphans.[111] In effect, this work was a form of religious exercise: the "exercise of [Christian] faith includes specific work in the world," [112] including "religiously-motivated care for unwanted, abused, or orphaned children."[113]

Some amici distinguished between *discrimination* (for example, based on race) and a refusal to act *contrary to religious conscience* (for example, based on CSS's belief about

[107] *See* Fulton v. City of Philadelphia, 922 F. 3d 130, 146 (3d Cir. 2019) ("[W]hen the agencies confirmed that, because of their religious views on marriage, they would not work with gay couples, Human Services ceased referring foster children to them.").
[108] Brief for Petitioner, *supra* note 88, at 13, 22; Brief for Inst. for Faith & Fam., *supra* note 89, at 32-33.
[109] Brief for Petitioner, *supra* note 88, at 8.
[110] Brief of Neb. Ariz. & Ohio, *supra* note 96, at 5, 26.
[111] *See, e.g.*, Brief for Petitioner, supra note 88, at 3-4; Brief for U.S. Conf. Cath. Bishops & Penn. Cath. Conf. as Amici Curiae in Support of Petitioners at 16, *Fulton*; Brief for Current & Former State Legislators as Amici Curiae in Support of Petitioners at 11-2, *Fulton*.
[112] Brief for Found. Moral L. as Amicus Curiae in Support of Petitioners at 34, *Fulton.*
[113] Brief for 76 U.S. Cong. Members as Amici Curiae in Support of Petitioners at 9 n.5, *Fulton*.

marriage).[114] Amici pointed out that CSS never actually turned away any same-sex couple and that if they were ever approached by such a couple, they would refer them to another agency who could serve them.[115] Further, because the City is free to use other agencies to place children with same-sex couples, CSS need not do so.[116] Another argument was that CSS is willing to work with single LGBTQ individuals, but unwilling to work with unmarried heterosexual couples, thus demonstrating that it is not discriminating based on sexual orientation.[117] Yet another characterization of CSS's actions was that it does not discriminate against any of the *children* it serves.[118]

The Party and Amicus Briefs: Respondents

The Rhetoric of Bigotry and the Race Analogy. Virtually no briefs filed on behalf of respondents used the rhetoric of bigotry. The one brief that did so extensively, the Brief for Legal Scholars in Support of Equality, urged the Court to reject the argument that the race analogy is irrelevant to the instant case because, while race discrimination was clearly rooted in bigotry, not sincere religious beliefs, CSS's refusal to provide services to same-sex couples is rooted in sincere religious beliefs.[119] The brief challenges this oversimplified historical contrast, explaining that those who defended segregation and opposed interracial marriage on religious

[114] *See, e.g.*, Brief for Inst. for Faith & Fam., *supra* note 89, at 13-14.
[115] *See, e.g.*, Brief for Neb., Ariz. & Ohio, *supra* note 96, at 37; Brief for Robertson Ctr. for Const. L., *supra* note 99, at 29; Brief for Concerned Women for Am. et al., *supra* note 97, at 9-10; Brief for Current & Former State Legislators, *supra* note 102, at 16; Brief for Church of Jesus Christ of Latter-day Saints et al., *supra* note 104, at 28; Brief for Dorothy Frame et al., *supra* note 100, at 3; Brief for Fifteen Penn. State Sens. as Amici Curiae in Support of Petitioners at 2, *Fulton*.
[116] Brief for Former Foster Child. & Foster/Adoptive Parents, *supra* note 101, at 23.
[117] *See, e.g.*, Brief for United States, *supra* note 98, at 3; Brief for Ams. for Prosperity Found. as Amicus Curiae in Support of Petitioners at 6-9, *Fulton*.
[118] *See, e.g.*, Brief for New Hope Fam. Svcs., Inc. & Cath. Charities W. Mich. as Amici Curiae in Support of Petitioners at 16, *Fulton*; Brief for 76 U.S. Sens. & Members of House of Reps., *supra* note 101, at 5.
[119] *See generally* Brief for Legal Scholars in Support of Equal. in Support of Respondents, *Fulton*. As noted earlier, I joined this brief. For some of its historical analysis, the brief draws on MCCLAIN, WHO'S THE BIGOT?, *supra* note 14.

grounds insisted on their sincerity, rejected the label of "bigot," and held views that were not out of the mainstream. The brief also argues that it is not the Court's proper role in a First Amendment challenge to determine whether or not sincere religious views reflect bigotry.[120] Further, the brief observed, *Masterpiece* implicitly accepted the race analogy by citing *Piggie Park*.[121]

Without explicitly using the rhetoric of bigotry, several amici also pointed to the religious origins of beliefs supporting racial discrimination to conclude that the religious source of the belief does not distinguish today's beliefs about same-sex marriage.[122] One amici argued that *Palmore v. Sidoti* could have involved religious-based racial discrimination; the state could not ratify those views, just as *Obergefell* spoke of limits to putting the state's "imprimatur" on sincere religious views denying others liberty.[123] The brief argued for the same result in the instant case: the state cannot ratify religious-based LGBTQ discrimination.[124] The brief argued that CSS's belief about marriage also reflects stereotypes about the proper roles of men and women in child-rearing and asserted that "*Palmore* teaches that 'the Constitution cannot control such prejudices but neither can it tolerate them.'"[125]

While petitioners and their amici advanced the *race is special* line of argument, respondents and their amici resisted such reasoning. They argued that the expansion of protected

[120] *See* Brief for Legal Scholars in Support of Equal., *supra* note 119, at 11-14.
[121] *See id.* at 19-20. On *Piggie Park*, see also Brief for President of House of Deputies of Episcopal Church et al. as Amici Curiae in Support of Respondents at 31, *Fulton*.
[122] *See, e.g.*, Brief for Legal Scholars in Support of Equal., *supra* note 119, at 8-14; Brief for Scholars of Const. Rts. & Ints. of Child. as Amici Curiae in Support of Respondents at 20-21, *Fulton*; Brief for Miguel H. Díaz, Ambassador to Holy See, Ret. et al. as Amici Curiae in Support of Respondents at 8-13, *Fulton*; Brief for Lawrence G. Sager as Amicus Curiae in Support of Respondents at 9-10 & n.4, *Fulton*; Brief for GLBTQ Legal Advocs. & Defs. & 27 Other LGBTQ Advoc. Grps. as Amici Curiae in Support of Respondents at 24-25, *Fulton* [hereinafter, Brief for GLAD]; Brief for Leadership Conf. on Civ. & Hum. Rts. et al. as Amici Curiae in Support of Respondents at 31-32, *Fulton*.
[123] Brief for Scholars of Const. Rts. & Ints. of Child. as Amici Curiae in Support of Respondents at 19-22, *Fulton*.
[124] *Id.*
[125] *Id.* at 25-26 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

groups in antidiscrimination laws does not change the compelling nature of the government's interest in preventing discrimination.[126] Some contended that the protected characteristics included in the City's Fair Practices Ordinance all involve status; further, all are irrelevant to parenting ability.[127]

Amici also resisted a sharp distinction between race discrimination and sexual orientation discrimination, saying a refusal of service would be equally impermissible on both grounds.[128] A number of amici stressed the problems of limiting principles, warning that to allow religious discrimination on the basis of sexual orientation in this case might well lead to permitting religious discrimination on the basis of race in the future.[129] Stressing the importance of intersectionality, some amici explained that race and sexual orientation are not mutually exclusive categories: LGBTQ people of color often suffer a particularly severe kind of discrimination, which would be exacerbated by a ruling for CSS.[130]

The Role of Obergefell *and* Masterpiece. Amici also enlisted *Obergefell* for the proposition that even sincere and decent beliefs cannot justify enacting government-sponsored

[126] *See, e.g.*, Brief for Alan Brownstein et al. as Amici Curiae in Support of Respondents at 12, *Fulton*;
[127] *See* Brief for Local Gov'ts, Mayors & U.S. Conf. of Mayors, *supra* note 139, at 6; Brief for Mass. et al., *supra* note 131, at 18; Brief for Legal Scholars in Support of Equal., *supra* note 119, at 28-30.
[128] *See, e.g.*, Brief for Church-State Scholars, *supra* note 132, at 14; Brief for Orgs. Serving LGBTQ Youth, *supra* note 131, at 15; Brief for President of House of Deputies of Episcopal Church et al., *supra* note 121, at 10-11; Brief for Legal Scholars in Support of Equal., *supra* note 119, at 28-30.
[129] *See, e.g.*, Brief for Svcs. & Advoc. for GLBT Elders ("SAGE") & 25 Other Orgs. Serving Older & Disabled Individuals as Amici Curiae in Support of Respondents at 31-32, *Fulton*; Brief for Local Gov'ts, Mayors & U.S. Conf. of Mayors, *supra* note 139, at 17-18; Brief for Lee C. Bollinger et al. as Amici Curiae in Support of Respondents, *Fulton*, at 20-21; Brief for Indian L. Professors as Amici Curiae in Support of Respondents at 15-17, *Fulton*; Brief for Former Svc. Sec'ys & Mod. Mil. Ass'n of Am. as Amici Curiae in Support of Respondents at 33-34 n.15, *Fulton*; Brief for Leadership Conf. on Civ. & Hum. Rts. et al., *supra* note 122, at 14-16; Brief for N.Y. State Bar Ass'n, *supra* note 136, at 8, 18; Br. of Lutheran Child & Fam. Svcs. of Ill., *supra* note 136, at 17-18; Brief for President of House of Deputies of Episcopal Church et al., *supra* note 121, at 33; Brief for FosterClub & Former Foster Youth, *supra* note 136, at 2; Brief for Nat'l Women's L. Ctr. & 35 Additional Orgs. as Amici Curiae in Support of Respondents at 32, *Fulton* [hereinafter, Brief for Nat'l Women's L. Ctr.]; Brief for Nat'l League of Cities et al. as Amici Curiae in Support of Respondents at 15, *Fulton*.
[130] *See, e.g.*, Brief for Ctr. for Study of Soc. Pol'y & Nat'l Ctr. for Lesbian Rts. as Amici Curiae in Support of Respondents at 19, *Fulton*; Brief for GLAD, *supra* note 122, at 11-12; Brief for Scholars Who Study LGB Population, *supra* note 142, at 7; Brief for Leadership Conf. on Civ. & Hum. Rts. et al., *supra* note 122, at 14-16.

discrimination.[131] Thus, neither the City of Philadelphia nor its amici questioned the sincerity of CSS's beliefs;[132] some amici quoted the Third Circuit's conclusion that the City treated CSS's beliefs as sincere and deeply held.[133] They argued, however, that the *sincerity* of CSS's belief is not sufficient to grant it a religious exemption.[134] Professor Eugene Volokh argued, in a brief supporting neither party, that even sincere religious beliefs cannot justify harms imposed on third parties.[135]

Many amici cited to *Obergefell*'s recognition that same-sex couples can provide loving families for their children[136]—a fact pertinent to *Obergefell's* third, child-protective principle about why marriage is fundamental. They also argued that a ruling for CSS could lead to infringing upon the "constellation of benefits" guaranteed by *Obergefell*. While the briefs do not directly mention foster parent eligibility as one of those "benefits," some amici reasoned that a ruling in favor of CSS by the Court could invite other organizations to deny benefits, such as family leave and death benefits, which *Obergefell* specifically mentioned. [137]

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[131] *See, e.g.*, Brief for Scholars of Const. Rts. & Ints. of Child., *supra* note 122, at 21-22; Brief for Lee C. Bollinger et al., *supra* note 129, at 19 n.11, *Fulton*; Brief for Church-State Scholars, *supra* note 132, at 20; Brief for Orgs. Serving LGBTQ Youth as Amici Curiae in Support of Respondents at 15, *Fulton*; Brief for Mass. et al. as Amici Curiae in Support of Respondents at 19, *Fulton*; Brief for Nat'l LGBT Bar Ass'n et al. as Amici Curiae in Support of Respondents at 15, *Fulton*; Brief for Legal Scholars in Support of Equal., *supra* note 119, at 9-11.

[132] *See, e.g.*, Brief for Republican Legislators, Elected Offs. & Leaders as Amici Curiae in Support of Respondents at 23, *Fulton*; Brief for Church-State Scholars as Amici Curiae in Support of Respondents at 28, *Fulton*. However, some amici supporting Philadelphia did point out that there is debate within Catholicism over whether or not to accept LGBTQ people. *See* Brief for 27 Lay Roman Caths. as Amici Curiae in Support of Respondents at 3, 29, *Fulton*.

[133] *See* Brief for Miguel H. Díaz, Ambassador to Holy See, Ret. et al., *supra* note 122, at 29. *See Fulton*, 922 F.3d at 157.

[134] *See, e.g.*, Brief for Baptist Joint Comm. for Religious Liberty et al. as Amici Curiae in Support of Respondents at 28, *Fulton*.

[135] Brief for Professor Eugene Volokh as Amicus Curiae in Support of Neither Party at 19-20, *Fulton*.

[136] *See, e.g.*, Brief for Scholars of Const. Rts. & Ints. of Child., *supra* note 122, at 10, 30 n.91; Brief for Miguel H. Díaz, Ambassador to Holy See, Ret. et al., *supra* note 122 at 17-19; Brief for Lawrence G. Sager, *supra* note 122, at 7; Brief for Church-State Scholars, *supra* note 132, at 22; Brief for Fam. Equal. & PFLAG Nat'l as Amici Curiae in Support of Respondents at 26, *Fulton*; Brief for N.Y. State Bar Ass'n as Amicus Curiae in Support of Respondents at 23-24, *Fulton*; Brief for Lutheran Child & Fam. Svcs. of Ill. as Amicus Curiae in Support of Respondents at 6, *Fulton*; Brief for Foster Club & Former Foster Youth as Amici Curiae in Support of Respondents at 5 & n.2, *Fulton*; Brief for Child.'s Rts. et al. as Amici Curiae in Support of Respondents at 26, *Fulton*; Brief for Nat'l LGBT Bar Ass'n et al., *supra* note 131 at 5.

[137] *See, e.g.*, Brief for GLAD, *supra* note 122, at 17; Brief for Child.'s Rts. et al., *supra* note 136, at 33.

Obergefell, amici also argued, recognized that same-sex couples experienced dignitary harm when denied government benefits or services.[138] The City had an interest in protecting LGBTQ people from such harm.[139] Finally, amici cited *Obergefell* as reflecting broad principles of equal citizenship for LGBTQ people.[140]

Amici similarly invoked *Masterpiece Cakeshop* as recognizing the dignitary and stigmatic harm from discrimination.[141] Several quoted Justice Kennedy's statement that "gay persons and gay couples cannot be treated as social outcasts or inferior in dignity and worth."[142] *Masterpiece Cakeshop*, amici contended, supported the idea that there are limits to religious liberty when it enacts discrimination.[143]

Amici also distinguished *Masterpiece Cakeshop* in contrasting the City's treatment of CSS from the Colorado Civil Rights Commission's supposed "hostility" toward Phillips. *Masterpiece*, amici contended, involved administrative deficiencies and hostility not present in

[138] *See, e.g.*, Brief for Lawrence G. Sager, *supra* note 122, at 17; Brief for Orgs. Serving LGBTQ Youth, *supra* note 131, at 15-16; Brief for Leadership Conf. on Civ. & Hum. Rts. et al., *supra* note 122, at 14-15.
[139] *See, e.g.*, Brief for Am. Bar Ass'n as Amicus Curiae in Support of Respondents at 11, *Fulton*; Brief for Annie E. Casey Found. et al. as Amici Curiae in Support of Respondents at 29, *Fulton*; Brief for Local Gov'ts, Mayors & U.S. Conf. of Mayors as Amici Curiae in Support of Respondents at 6-7, *Fulton*; Brief for Church-State Scholars, *supra* note 132, at 14, 17.
[140] *See, e.g.*, Brief for Lawrence G. Sager, *supra* note 122, at 17; Brief for GLAD, *supra* note 122, at 8; Brief for First Amendment Scholars as Amici Curiae in Support of Respondents at 27, *Fulton*; Brief for Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies as Amici Curiae in Support of Respondents at 27, *Fulton*; Brief for Off. of Cook Cnty. Public Guardian as Amicus Curiae in Support of Respondents at 27-28, *Fulton*.
[141] *See, e.g.*, Brief for Orgs. Serving LGBTQ Youth, *supra* note 131, at 15-16; Brief for Leadership Conf. on Civ. & Hum. Rts. et al., *supra* note 122, at 14-15; Br. of Child.'s Rts. et al., *supra* note 136, at 31.
[142] *See, e.g.*, Brief for Scholars Who Study LGB Population as Amici Curiae in Support of Respondents at 19, *Fulton*; Brief for Baptist Joint Comm. for Religious Liberty et al., *supra* note 134, at 15; Brief for President of House of Deputies of Episcopal Church et al., *supra* note 121, at 10, 29.
[143] *See, e.g.*, Brief for Miguel H. Díaz, Ambassador to Holy See, Ret. et al., *supra* note 122, at 6; Brief for GLAD, *supra* note 122, at 9; Brief for First Amendment Scholars, *supra* note 140, at 20-21; Brief for Church-State Scholars, *supra* note 132, at 20; Brief for ADL (Anti-Defamation League) & Other Orgs. as Amici Curiae in Support of Respondents at 13, *Fulton*.

the City's dealings with CSS.[144] Some argued that, under *Masterpiece*, statements are only one factor to be considered in assessing respectful treatment.[145]

CSS's Status as a Government Contractor. Respondents and their amici emphasized that CSS voluntarily contracted with the City and, akin to *Smith's* worry, that "[g]overnment 'could not function' if its contractors could insist upon carrying out their duties according to their personal beliefs."[146] Several amici characterized CSS as attempting to avoid obligations in a government contract it accepted.[147] One brief contended that CSS "seeks to assert a 'veto over public programs' that do not comport with its religious views."[148]

Numerous amici explained that because the government itself cannot discriminate, and CSS is providing government services; therefore, it presents a different case than a wholly private operation denying services.[149] While petitioners and their amici stressed how CSS should be able to bring its religious beliefs to bear on how it does its foster-care work, respondents and their amici stressed how there are public-regarding limits on private actors' conduct when they contract with government. Respondent, for example, argued that "[p]ermitting government workers to perform their jobs as their religious beliefs dictate often runs up against the government's own obligation to treat citizens equally with regard to religion."[150]

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[144] *See, e.g.*, Brief for 27 Lay Roman Caths., *supra* note 132, at 28; Brief for Alan Brownstein et al., *supra* note 126, at 18; Brief for Annie E. Casey Found. et al., *supra* note 139, at 35-36.
[145] *See* Brief for Am. Atheists as Amicus Curiae in Support of Respondents at 9, *Fulton*.
[146] Brief for Respondents, *Fulton*, at 2, 11 (citing *NASA v. Nelson*, 562 U.S. 134, 149 (2011)).
[147] *See, e.g.*, Brief for Alan Brownstein et al., *supra* note 144, at 6; Brief for Gov't Conts. Professor & Prac. Richard C. Loeb as Amicus Curiae in Support of Respondents at 4, *Fulton*; Brief for Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies, *supra* note 140, at 3; Brief for Nat'l Women's L. Ctr., *supra* note 129, at 3.
[148] *See* Br. of Baptist Joint Comm. for Religious Liberty et al., *supra* note 134, at 23 (quoting Lyng v. N.W. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988)).
[149] *See, e.g.*, Brief for Lawrence G. Sager, *supra* note 122, at 13-21; Brief for Republican Legislators, Elected Offs. & Leaders, *supra* note 132, at 13-15, Brief for Lee C. Bollinger et al., *supra* note 131at 10-12, Brief for Baptist Joint Comm. for Religious Liberty et al., *supra* note 134, at 19-21; Brief for Mass. et al., *supra* note 131at 4-14.
[150] Brief for Respondents, *supra* note 146, at 21.

Amici contended that, since the City contracts with private agencies like CSS to carry out part of its child welfare responsibilities, those agencies act on the City's behalf. If the City allowed them to exclude same-sex couples, "it would violate the Equal Protection Clause."[151] By contrast to petitioners' amici, several amici for respondents insisted that CSS's policies *did* constitute discrimination.[152]

Addressing CSS's First Amendment claims, amici explained that "the First Amendment does not require governments to use contractors who refuse to provide the contracted services on a nondiscriminatory basis."[153] Nor does the First Amendment allow private contractors "to dictate the terms under which they provide important government services."[154] At the same time, amici stressed that the City did not seek to compel CSS to "change its religious beliefs about same-sex marriage"[155] or dictate its speech; rather, "if an organization chooses to bid for a foster-care contract, it must offer services equally to all."[156]

Some religious amici asserted that contended that the non-discrimination policy protects religious freedom, since without it, "would-be foster parents could face governmental discrimination for their religious beliefs."[157] Such amici also warned that if city governments "are told that they may not contract out a social program without losing the ability to ensure the program adheres to public policy, many such governments may well decide to simply perform these services themselves through public employees."[158] While "[s]uch a decision would be

[151] Brief for Lawrence G. Sager, *supra* note 122, at 11.
[152] *See, e.g.*, Brief for 27 Lay Roman Caths., *supra* note 132, at 7; Brief for Miguel Díaz, Ambassador to Holy See, Ret. et al., *supra* note 122, at 5; Brief for Church-State Scholars, *supra* note 132, at 18; Brief for Scholars Who Study LGB Population, *supra* note 142, at 23; Brief for Fam. Equal. & PFLAG Nat'l, *supra* note 136, at 2.
[153] Brief for Mass. et al., *supra* note 131, at 4.
[154] *Id.* at 14.
[155] Brief of Lee C. Bollinger et al, at 17.
[156] Brief for Mass. et al., *supra* note 131, at 11.
[157] Brief of Baptist Joint Committee et al., *supra* note 134, at 17.
[158] *Id.* at 20.

perfectly constitutional," it would hinder rather than further religious liberty: there would be "fewer opportunities for participation in some kinds of religiously meaningful work," such as "helping the City recruit and support stable families to temporarily care for abused and neglected children in the City's custody."[159] This argument resonates with reasoning behind the faith-based initiative: enlist religious and community actors to address difficult social problems.

This sampling of the extensive argumentation over the significance of the contract between the City and CSS offers a basic picture of how private actors take on certain obligations and limitations when they enter the public space and carry out public purposes. As one religious amici put it: "There is no free exercise right to extract a subsidy for religious work in a government program that contravenes the City's own, democratically determined conception of the public interest."[160]

Part V. The Supreme Court (Partial) Resolution and Open Questions

The Supreme Court, in its 9-0 ruling, left many of the issues percolating in the *Fulton* case unresolved. For example, while several justices pressed CSS and the Solicitor General on the race analogy at oral argument, asking whether a ruling for CSS would also permit a refusal of service based on objection to interracial marriage,[161] the Chief Justice's narrow ruling put to the side questions about line-drawing between permissible and impermissible exemptions from antidiscrimination laws. As I have argued elsewhere, this evident unanimity does not indicate a "center" that will hold with respect to instances in which religious liberty is in evident conflict

[159] *Id.* at 20.
[160] Brief of Baptist Joint Committee et al., *supra* note 134, at 21.
[161] Linda McClain, *The* Fulton v. City of Philadelphia *Oral Argument: Interracial Marriage as a Constitutional Lodestar—or Third Rail—in Reasoning about Religiously-Motivated Discrimination*, BALKINIZATION (Nov. 17, 2020), https://balkin.blogspot.com/2020/11/the-fulton-v-city-of-philadelphia-oral.html.

with LGBTQ rights.[162] Perhaps Roberts wrote such a narrow opinion to appear nonpartisan or consensus-building. Perhaps he did so to gain the votes of the three liberals— Justice Kagan, Justice Breyer, and Justice Sotomayor. They, in turn, may have taken a pragmatic approach in joining Roberts's narrow opinion, rather than dissenting from a broader opinion less protective of LGBTQ rights, and of antidiscrimination law more generally. Certainly, all three, at oral argument, raised questions about the scope of a religious exemption for government contractors, for example, who believed that men and women should be seated separately in public transportation.[163] Given that, on the current Court, there are no longer four liberal justices to ally with a moderate or conservative to form a 5-4 majority in favor of LGBTQ rights, a ruling in favor of Philadelphia was very unlikely. Thus, Breyer, Kagan, and Sotomayor may have been seeking to limit the damage.

The apparent unanimity conceals considerable disagreement among the justices, not only about whether to overrule *Smith*, but also over the constitutional landscape formed by *Obergefell* and *Masterpiece Cakeshop*. For example, in his lengthy concurrence (joined by Justices Gorsuch and Thomas), Justice Alito argued that keeping *Smith* "leaves religious liberty in a confused and vulnerable state."[164] Notably, it is only in Justice Alito's *Fulton* concurrence that any rhetoric of bigotry occurs. Alito writes: "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

[162] My analysis here draws on Linda C. McClain, *Fulton: Is There a "Center" to Hold in the Supreme Court's Religious Liberty/LGBTQ Rights Jurisprudence?*, BERKLEY FORUM (Jul. 26, 2021), https://berkleycenter.georgetown.edu/responses/is-there-a-center-to-hold-in-supreme-court-jurisprudence-on-religious-liberty-and-lgbtq-rights.

[163] McClain, *The* Fulton v. City of Philadelphia *Oral Argument*, *supra* note 162 (reporting Breyer's question).
[164] *Fulton*, slip op. at 77.

about marriage together with racial bigots is insulting to those who retain such beliefs." Alito quotes both from *Obergefell*'s majority opinion and from *Masterpiece Cakeshop* to insist that "traditional beliefs about marriage" are "decent and honorable" and should not be equated with "racism, which is neither."[165] Alito's rhetoric of bigotry in *Fulton* suggests continuing opposition to *Obergefell* because of its impact on religious liberty, even as he enlists *Obergefell* to defend religious liberty.[166]

Roberts' *Fulton* opinion also left for future cases how best to understand how commitments to civility, tolerance, and pluralism, along with equality and nondiscrimination, should apply in conflicts like that at issue with CSS's contract with the City of Philadelphia. Thus, some immediate sharply contrasting reactions to *Fulton* were that the "Supreme Court sides with religious bigotry" *and* that it "upholds civic pluralism for our diverse society."[167] I have suggested that the *Fulton* conflict has reverberations with earlier debates over the faith-based initiative and the constitutional parameters of public-private partnerships. Perhaps the latest instantiation of that initiative, under the Biden/Harris Administration, will offer insights about how to "strengthen pluralism and respect constitutional guarantees" while pursuing government-civil society partnerships to pursue valuable ends like combating systemic racism, addressing the COVID-19 pandemic, and increasing "opportunity and mobility for historically disadvantaged communities."[168] At the same time, hyperpartisanship and polarization makes it difficult to offer nuanced approaches to such conflicts. Further, because of the issues that Chief

[165] *Id.* at 75.
[166] In a public speech to the Federalist Society, Alito reportedly commented: "You can't say that marriage is the union between one man and one woman. Until very recently, that's what the vast majority of Americans thought. Now it's considered bigotry."
[167] *Compare* Lacy Crawford, Jr., *Press Release: Supreme Court Sides with Religion Bigotry in Fulton v. City of Philadelphia*, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (Jun. 17, 2021) *with* Stanley Carlson-Thies, Fulton v. City of Philadelphia: *Supreme Court Upholds Civic Pluralism for Our Diverse Society*, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE (Jun. 29, 2021).
[168] Fact Sheet, *supra* note 70.

Justice Roberts left unresolved, resolutions are more likely to come in the executive and legislative arena than in the Court. Encouragingly, the climate for LBGTQ equality is far better under the current federal administration of Biden/Harris, than under Trump/Pence; there are also encouraging developments in Congress. At the state and municipal level, however, the U.S. is a checkerboard of red and blue and 2021. Some cities and states expressly prohibit discrimination against LGBTQ persons by agencies contracting with government to provide social services based on religious beliefs, while some permit it; some have no explicit protections of LGBTQ persons against discrimination at all.[169] Further, there has been an alarming number of proposed and enacted laws targeting transgender persons. The full implications of *Fulton* for this checkerboard remain to be seen. The struggle for liberty and equality will continue to be pursued state-by-state and locality-by-locality.

[169] For a map of current state laws, including foster care and adoption laws, see Snapshot: LGBTQ Equality By State, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps.