A NEW MINORITY IN THE COURTS: HOW THE RHETORIC OF CHRISTIAN VICTIMHOOD AND THE SUPREME COURT ARE TRANSFORMING THE FREE EXERCISE CLAUSE

Hannah Bailey[†]

TABLE OF CONTENTS

ABSTRACT

Conservative Christians often bemoan the ways in which religious freedom in the United States is under attack in the modern age. In the wake of the Supreme Court's decisions on culture war issues like *Roe v. Wade* (1973) and *Obergefell v. Hodges* (2015), many

[†] Hannah Bailey graduated from Colgate University in 2020 where she majored in Religion and Mathematics. She continued to earn her Juris Doctor at Syracuse University College of Law in 2023. She would like to thank her advisor, Professor Jennifer Breen, and her former mentor, Professor Jenna Reinbold, for their expertise and support in exploring this topic and creating this Note. She would also like to extend special thanks to her biggest supporters, her parents and Sylvia Bailey.

religious conservatives feel a sense of dislocation, no longer seeing their views reflected in the dominant culture. This sense of cultural dislocation is demonstrated in the political and legal responses conservatives have taken in efforts to revive religious liberty. In the process of reclaiming religious liberty, religious conservatives have cultivated a potent narrative—Christian victimhood—which depicts conservative Christians as the ultimate victims of the modern age.

Concurrent with the cultural, political, and legal implications of the Christian victimhood narrative is an emerging shift in the Supreme Court's free exercise jurisprudence. Though the Court's 1990 decision, *Employment Division v. Smith*, drastically lowered the government's burden to escape constitutional liability in many free exercise cases, we can see an emerging trend, especially from the conservative justices of the Court, appealing to precedent containing an exception to *Smith*, *Church of Lukumi Babalu Aye v. City of Hialeah (*1993), which prohibits governmental discrimination toward religion. At a time where an influx of Christian legal organizations are litigating religious freedom cases, reflecting the narrative of Christian victimhood, the dominance of the *Lukumi* rationale in free exercise decisions is likely no coincidence. By inserting the narrative of Christian victimhood into legal arguments, Christian legal organizations are able to emphasize the presence of discrimination in free exercise claims, and the Court, in turn, applies the *Lukumi* exception to more and more cases, especially those involving Christian claimants. The symbiotic relationship between Christian victimhood and the Constitution's prohibition on discrimination against religion amounts to a powerful tool for Christians to receive protection from federal courts while drastically expanding free exercise protection to tremendous breadth.

INTRODUCTION

In a recent keynote address, Justice Samuel Alito warned, "religious liberty is fast becoming a disfavored right" in the United States.[1] Religious freedom as a second-class right is a potent narrative in the U.S. at both cultural and legal levels. In the wake of landmark Supreme Court cases, establishing constitutional precedent for culture

1. Samuel Alito, Assoc. J., Keynote Address at the Federalist Society National Lawyers Convention (Nov. 12, 2020) (transcript available at https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society).

war issues like abortion[2] and same-sex marriage, many Christians, particularly conservatives, are acutely aware of the supposed attack on religious liberty, seeing themselves as primary victims of the modern age.[3] This sense of embattlement in modern society, which this Note refers to as Christian victimhood, has become a potent narrative and attitude amongst conservative Christians.[4] As a result, more Christians are fighting to reclaim their religious freedom by bringing forth claims under the Free Exercise Clause of the U.S. Constitution.

The turn to the Free Exercise Clause by conservative Christians is a fairly remarkable shift in America's constitutional jurisprudence. In the mid-twentieth century, it was natural to think of free exercise issues solely as those affecting vulnerable religious minorities who were non-Christian or in minority Christian faiths, such as Mormons or Jehovah's Witnesses.[5] Conversely, conservative Christians sat in comfort, seeing their views reflected in the dominant culture and laws of the country.[6] Now, however, we see significant numbers of conservative Christians turn to the courts, bringing forth free exercise litigation.[7] Accompanying this uptick in litigation is an emerging narrative of Christian victimhood, casting conservative Christians as an embattled minority that is being marginalized by secular, liberal society.[8]

We can see a parallel trend in the Supreme Court. Since the Court issued its 1990 landmark decision for religious liberty, *Employment Division v. Smith*,[9] many religious freedom scholars argue that the protections offered by the Free Exercise Clause were essentially

2. While the Supreme Court recently overturned *Roe v. Wade*, 410 U.S. 113, 113 (1973), in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022), this does not undermine the significant impact *Roe* had on conservative Christians for the forty-nine years *Roe* remained good law.

3. *See* R. MARIE GRIFFITH, MORAL COMBAT: HOW SEX DIVIDED AMERICAN CHRISTIANS AND FRACTURED AMERICAN POLITICS 203, 311 (2017).

4. *See infra* Section I.

5. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 156 (2005).

6. *Id.* at 182.

7. *See infra* Section II.

8. *See infra* Section I.

9. Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

gutted.[10] One important exception to the precedent set forth in *Smith*, however, provides plaintiffs with a mechanism to bypass *Smith* to receive heightened constitutional protection. This exception arose in *Church of Lukumi Babalu Aye v. City of Hialeah* (1993).[11] Under *Lukumi*, if a religious claimant is able to frame the government policy at issue as targeting or discriminating against the claimant's religion, then the government policy is evaluated under strict scrutiny, which often signifies the policy will be struck down as unconstitutional.[12]

While the exception set forth in *Lukumi*—i.e., the principle that the government cannot discriminate against and target certain religious practices it disfavors—appears quite limited, recent Court decisions suggest it is expanding *Lukumi* to encompass more government action and policies.[13] The fact that the *Lukumi* anti-discrimination precedent is expanding at a time where Christians are filing free exercise claims in federal courts and urging claims of Christian victimhood hardly seems accidental.

This Note will unpack the narrative of Christian victimhood and track parallels that exist between this narrative and the legal reasoning employed by members of the Court in free exercise decisions post-*Smith*. Part I will examine the cultural, political, and legal dimensions of the Christian victimhood narrative, explaining how the narrative was formed and how it presents itself generally. Part II will analyze the Court's free exercise jurisprudence post-*Smith*. In the process, this section demonstrates the ways in which the *Lukumi* exception is employed through the reasoning of conservative justices on the bench, consequently expanding *Lukumi* to encompass instances of alleged discrimination and hostility toward Christians in particular. Finally, Part III connects Parts I and II, exposing the ways in which conservative Christian legal organizations have taken hold of the Christian victimhood narrative and injected it into litigation practices. This section also argues that the Court, in turn, reflects the narrative of Christian victimhood in decisions, concurrences, and dissents, by finding discrimination in more cases than the *Lukumi* precedent perhaps foresaw. By unpacking the manner in which Christian legal organizations have litigated free exercise cases with a sense of

10. *See, e.g.*, Kenneth Marin, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1432–33 (1991) (discussing consensus among legal scholars over the dramatic change in free exercise jurisprudence brought on by *Smith*).

11. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

12. *Id.*

13. *See infra* Section II.

Christian victimhood, this Note hopes to illume the drastic shift in the Court's free exercise jurisprudence toward creating precedent that is increasingly amenable to claims made by religious plaintiffs, and in particular, Christian plaintiffs.

I. THE RISE OF CHRISTIAN VICTIMHOOD

Justice Alito's dismay at the status of religion as a "disfavored right" in the United States is hardly unique. Rather, the sentiment that religious freedom is fast becoming a second-class right has taken root nationwide at social, political, and legal levels, especially among conservative Christians. Before we examine the ways in which conservative Christians embody the narrative of Christian victimhood at these three levels, it is important to provide clarity to the term conservative Christian. This Note looks to Didi Herman's definition.[14] Conservative Christian largely refers to "a coalition of organizations . . . based, for the most part, on a conservative evangelical Protestantism."[15] There are two important defining characteristics of conservative Christians: (1) resistance to changing values and evolving interpretations of the Bible; and (2) a belief in Christ's return, which is often associated with concerns about the "cultural degeneration" of humankind.[16] Moreover, conservative Christians are often both religiously and politically conservative, tending to favor right-leaning policies.[17]

14. *See* DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 12–13 (1998). While Herman employs the term "Christian Right" throughout her work, the difference in terminology is not substantial.

15. *Id.* at 12.

16. *Id.* at 12–13, 21. The belief of conservative Christians that Christ will one day return is significant because it leads Christians to be concerned about the morality of others in addition to themselves. Christians often associate being Christian with being a good American citizen, *see* ROBERT P. JONES, THE END OF WHITE CHRISTIAN AMERICA 227–28 (2016), so to see others deviate from the Christian standard of morality may create anxiety regarding the moral health of the nation upon Christ's return. Accordingly, many Christians believe their morals should be implemented through American politics. *See* CHRISTIAN SMITH, CHRISTIAN AMERICA?: WHAT EVANGELICALS REALLY WANT 104 (2000).

17. HERMAN, *supra* note 14, at 13–14. Herman lists potential policy preferences, including, anti-LGBTQ+ rights, procapitalist, promilitary, antifeminist, and anti-welfare policies. *Id.* Of course, however, not all Christians, let alone conservative Christians subscribe to each one of these policies. They are only provided as guidance to clarify the group to which this Note refers.

A. Social, Political, and Legal Aspects of Christian Victimhood

During the twentieth century, major social changes swept up the United States, yet as these changes began to unfold, conservative Christians remained confident in their dominance in American society. From the 1970s through the 1990s, scholar Kyle Velte characterizes the reaction of conservative Christians to LGBTQ+ civil rights as "outwardly bigoted."[18] With respect to gay rights, conservative Christians often vilified and dehumanized LGBTQ+ individuals to prevent them from gaining rights and acceptance in American culture, labeling LGBTQ+ individuals as diseased pedophiles and child molesters to condemn them and their lifestyle.[19] In opposing social change like LGBTQ+ civil rights, conservative Christians aligned in what Andrew R. Lewis terms "moral communities," asserting the policies of conservative Christians as morally correct, and therefore, correct for the nation's laws.[20] For some time, Christians were able to effectuate policies reflecting those morals by banning the employment of LGBTQ+ teachers in public schools and repealing nondiscrimination measures.[21] However, a dramatic shift occurred in the late twentieth century. As tolerance of LGBTQ+ individuals and other evolving sexual mores grew, conservative Christians found less success in "outward bigot[ry]."[22] Tony Marco—a critical figure who was "instrumental in orchestrating the campaign to pass a statewide, antigay initiative in Colorado"—summarizes this shift vividly:

> What gives gay militants their enormous power are money and the *operative presumption that gays represent some kind of "oppressed minority*." It is the fear that we may be "denying

18. Kyle C. Velte, *Fueling the Terrorist Fires with the First Amendment: Religious Freedom, the Anti-LGBT Right, and Interest Convergence Theory*, 82 BROOK. L. REV. 1109, 1134 (2017).

19. *Id.* at 1129–30; *see, e.g.*, ALAN SEARS & CRAIG OSTEN , THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY 41 (2003) (discussing the immorality of and negative effects recognizing same-sex marriage will have on Americans).

20. ANDREW R. LEWIS, THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS: HOW ABORTION TRANSFORMED THE CULTURE WARS 2 (2017).

21. Velte, *supra* note 18, at 1134. Arguably, this is still the approach of some conservative Christians, or at least, conservative politicians, as recent years have seen large numbers of anti-transgender legislation. *See* Pryia Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (last updated Apr. 15, 2021), https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html.

22. Velte, *supra* note 18, at 1133.

> an 'oppressed' group rights" that has induced widespread enough guilt in the American people to allow for the progress of "gay rights" we have seen to date. If this is true, I conclude that . . . demolishing the presumption that gays are an "oppressed minority" are the *only* means by which gay militants' political power can be destroyed *at its roots*. All other approaches to opposing "gay rights" are doomed to failure. . . . If this is so, as I believe it is, we need to immediately drop the "disgust" and "public health threat" arguments we have been depending on for 25 years. Besides being irrelevant to the issues gay militants are really raising, these arguments are no longer credible, appeal only to the "choir" and actually allow our opponents to once again tar us with the role of aggressor and clumsy, lying ones at that.[23]

Here, Marco highlights an important rhetorical strategy: by rejecting the characterization of LGBTQ+ individuals as marginalized people, conservative Christians could bolster themselves as the actual victims left in the wake of a cultural tide.[24]

In many ways, conservative Christians were indeed left in the wake of a cultural tide. Sweeping changes in gender roles and sexual mores throughout the twentieth century sparked a sense of "cultural dislocation" in conservative Christians.[25] Conservative Christians wished to maintain what they saw as the moral health of the nation, which, with respect to gender and the rise of feminism, involved "reclaim[ing] the nineteenth-century ideal of femininity both for themselves and for a culture that has abandoned that ideal."[26] Relatedly, two major culture war issues helped conservative Christians understand themselves as victims: abortion and same-sex marriage.[27] Landmark cases like *Roe v. Wade* and *Obergefell v. Hodges* cultivated feelings of anxiety for many conservative Christians who were morally opposed to both decisions.[28]

In line with Marco's advice, recent decades have seen the rise of Christian victimhood as a political narrative. For example, Senator Orrin Hatch bemoaned the state of religious freedom in his Keynote Address to Brigham Young University:

23. HERMAN, *supra* note 14, at 114 (emphasis in original).

24. *See id.* at 120.

25. Randall Balmer, *American Fundamentalism: The Ideal of Femininity*, *in* FUNDAMENTALISM AND GENDER 54 (John Stratton Hawley ed., 1994).

26. *Id.* at 59.

27. *See* GRIFFITH, *supra* note 3, at xviii.

28. *Id.* at 203, 276–77.

> This is an unsettled and unsettling time for religious liberty. Both at home and abroad, religious liberty is under attack. What was once a broad consensus here in the United States that religious freedom deserves special protection has crumbled. Indeed, President Obama and his administration have taken positions that, at best, treat religious liberty as simply an ordinary consideration and, at worst, are openly hostile to religious liberty.[29]

Notably, in support of his claim that religious liberty is under attack both home and abroad, the senator mostly cited examples where the rights of Christians were threatened.[30] Former Senate Majority Leader Mitch McConnell similarly remarked, "[p]owerful interests on the left want to shrink freedom of religion until it means *freedom to go to church for an hour on Sundays as long as it doesn't impact the rest of your life.*"[31] In response to a district court judge in New York holding invalid a conscience protection rule for healthcare workers, McConnell claimed "radical Democrats . . . want to force Christians and other people of faith who work in healthcare to either assist in procedures like abortion or lose their jobs," lamenting, "[s]o much for freedom of conscience."[32] While individuals like Hatch and McConnell claim to be concerned with freedom of religion as a general principle, their rhetoric largely focuses on the plight of Christians.

Following the 2016 election, concerns about the treatment of religion became a prominent concern of the Trump administration, and President Trump took several measures to defend religious freedom. In the summer of 2018, the Department of Justice (DOJ) announced its Religious Liberty Task Force—a task force with the goal of

29. Senator Orrin G. Hatch, Keynote Address at Brigham Young University 21st International Law and Religion Symposium (Oct. 5, 2014), *in* 2015 BYU L. REV. 585, 585 (2015).

30. *Id.* at 585–86 (discussing President Obama's administration and its intolerance for a Christian church's decision to hire or fire ministers; the Obama administration's policies that "force[d]" health employees to violate their religious beliefs, presumably in relation to abortion and reproductive health; and Boko Haram's assault on Christians abroad).

31. Senator Mitch McConnell, Remarks: McConnell Defends Religious Liberty in America (Dec. 5, 2019) (transcript available at https://www.republicanleader.senate.gov/newsroom/remarks/mcconnell-defends-religious-liberty-in-america) (emphasis in original).

32. *Id.*

prioritizing religious freedom cases[33] to counteract "[a] dangerous movement, undetected by many" that is "challenging and eroding our great tradition of religious freedom."[34] Additionally, the Trump administration rolled back policies put forth in the Obama administration that protected LGBTQ+ workers,[35] allowing federal contractors to violate anti-discrimination law so long as it was done on the account of "an implicitly defined set of religious or deeply held moral beliefs."[36] President Trump also expanded the number and type of Health and Human Services (HHS) exemptions available to medical practitioners with religious oppositions to certain procedures regarding women's reproductive health.[37]

While the Trump administration expressed concern for the health of religious freedom as a whole, critics doubt that the policies truly aimed to protect the religious freedom for all. Based on former Attorney General Jeff Sessions' comments, Steven Chintaman labels DOJ's Religious Liberty Task Force as a "Trojan Horse" for promoting Christian values.[38] For instance, in Sessions' announcement of the task force, he only expressed concern about the alleged erosion of Christian religious freedom, regretting that nuns have been "ordered to buy contraceptives," commending the bravery of a Christian baker who refused to serve a same-sex couple for their

33. Steven Chintaman, *Religious Liberty or Religious Privilege?: Reconciling the Religious Liberty Task Force with the First Amendment*, 20 RUTGERS J. L. & RELIGION 98, 98 (2018).

34. Jeff Sessions, Attorney General Sessions Delivers Remarks at the Department of Justice's Religious Liberty Summit (July 30, 2018) (transcript available at https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit).

35. Tom Gjelten, *Religious Freedom Arguments Give Rise to Executive Order Battle*, NPR (Nov. 16, 2020, 5:07 AM), https://www.npr.org/2020/11/16/934505425/religious-freedom-arguments-give-rise-to-executive-order-battle; *see also* U.S. DEP'T OF LAB. OFF. OF FED. CONT. COMPLIANCE PROGRAMS, DIRECTIVE (DIR) 2018-03 (Aug. 10, 2018), https://www.dol.gov/agencies/ofccp/directives/2018-03.

36. Katherine Stewart, *Whose Religious Liberty is it Anyway?*, N.Y. TIMES, (Sept. 8, 2018), https://www.nytimes.com/2018/09/08/opinion/kavanaugh-supreme-court-religious-liberty.html.

37. Sharita Gruberg, et al., *Religious Liberty for a Select Few: The Justice Department is Promoting Discrimination Across the Federal Government*, CTR. FOR AM. PROGRESS (Apr. 3, 2018), https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/04/03/448773/religious-liberty-select/. For further discussion of these policies, *see* Maggie Fox, *Trump HHS Reverses Obama Protections for Medical Providers*, NBC NEWS (Jan. 20, 2018, 3:49 PM), https://www.nbcnews.com/health/health-news/trump-hhs-reverses-obama-protections-medical-providers-n839296.

38. Chintaman, *supra* note 33, at 98–99.

wedding, and finding hope in President Trump's declaration that Americans will once again be able to say "Merry Christmas."[39] Other scholars note the Trump administration actually harmed other religious communities, particularly minorities.[40] For example, the administration implemented the infamous "Muslim ban" and cultivated a political climate that encouraged white nationalism, leading to an uptick in anti-Semitic and Islamophobic hate crimes.[41] Thus, some scholars assert that, in reality, the Trump administration mainly sought to protect "one brand of religion"—that of conservative Christians.[42]

The narrative of Christian victimhood has also seeped into the legal system in recent years. As Noah Feldman explains, during the mid-twentieth century—the era in which the Court began to hear religious freedom cases—religious freedom was seen as an issue of fostering religious diversity.[43] In other words, religions like Protestant Christianity dominated the American populace; as a result, the religion clauses were often invoked to protect the rights of "vulnerable minorities."[44] In order to accommodate diverse religions, Feldman argues courts took on a secularist approach: as long as the government was expunged of religion, it could accommodate Christians, Jewish people, and other religious people.[45] The secular attitudes the Court took on to create this version of religious tolerance have contributed to the sense of cultural isolation many conservative Christians now feel. For example, *Obergefell*—a decision which, on its face, is devoid of religion—was seen by many as an attack on Christians who opposed same-sex marriage.[46] During the mid-twentieth century,

39. Sessions, *supra* note 34; *see also* Memorandum from the Attn'y Gen. to Heads of Dep't of Corrs. on Religious Liberty Task Force (July 30, 2018), https://www.justice.gov/opa/speech/file/1083876/download.

40. *See* Gruberg, et al., *supra* note 37.

41. *Id.*

42. Chintaman, *supra* note 33, at 99. *See also* Gruberg, et al. *supra* note 37 ("It is apparent that DOJ will privilege certain religious views—especially those in opposition to LGBTQ and reproductive rights—in the application of [Jeff Sessions'] guidance" on religious liberty); *see also* Stewart, *supra* note 36 (arguing that "the real aim and effect of the religious liberty movement" in the Trump administration "is to advance [Christians nationalists'] idea of religion at the expense of everyone else").

43. FELDMAN, *supra* note 5, at 182.

44. *Id.* at 183.

45. *Id.* at 182.

46. *See* Jenna Reinbold, *"Honorable Religious Premises" and Other Affronts: Disputing Free Exercise in the Era of Trump*, 79 STUDS. L. POL'Y & SOC'Y 31, 41 (2019) (arguing that the dissenters in *Obergefell* essentially laid out and intensified

secularism "did not seem like a meaningful threat to religion" from a Christian point of view.[47] Because Christians sat comfortably in the dominant culture of the U.S., they did not "feel the threat" nor "organize against the new, legal secularism in any serious way."[48] This former sense of comfort helps explain, in part, why Christians rarely, if ever, appealed to religion clauses as a form of protection. In short, they never felt it necessary.

Over time, however, the threat of secularism became more apparent to religious conservatives.[49] Prominent evangelical leader, Pat Robertson, deplored, "[i]n one of the great tragedies of history, the Supreme Court of the supposedly Christian United States guaranteed the moral collapse of this nation" by finding overt Christian activity in public schools unconstitutional.[50] From a conservative Christian perspective, Robertson is not incorrect: the Supreme Court played no small role in shaping the narrative of Christian victimhood, especially with respect to cultural trends.[51] Lewis argues conservative Christians became a political minority after *Roe*,[52] and the politics surrounding gay rights and the *Obergefell* decision served as a "final blow to majoritarian Christian America."[53] Since conservative Christians no longer saw their values reflected in the United States' legal landscape, which now allowed for abortions and same-sex marriage, they increasingly felt the effects of largescale cultural dislocation.[54] Conservative Christians began to see cultural transformations in the United States as a serious threat, undermining the former comfort Christians once had as America's cultural majority.[55] Against this

the ways in which religious conservatives should be concerned about the issue of gay rights).

47. FELDMAN, *supra* note 5, at 182.

48. *Id.*

49. *See id.* at 187. For example, the school prayer cases that largely removed overt Christian practices and tautology in public schools were a serious wake up call for religious conservatives. *Id.*

50. *See* Catherine A. Lugg, *The Christian Right: A Cultivated Collection of Interest Groups*, 15 EDUC. POL'Y 41, 41 (2001). The topic of Christianity in public schools is a major point of contention with Christian conservatives that has furnished serious political and legal opposition. For a discussion of how the debate of religion in schools has translated into legal campaigns by Christian interest groups, *see id.*

51. *See id.* at 44, 48.

52. LEWIS, *supra* note 20, at 5.

53. *Id.* at 149.

54. JONES, *supra* note 16, at 230.

55. *See id.*, at 228 (discussing how white Christians feel less secure in their beliefs because they are no longer among the majority in America). According to a 2016 source, "[a] majority of Christians today believe that persecution against them has increased in the United States." George Yancey, *Has Society Grown More*

background, the rise of Christian victimhood was, in many ways, the by-product of social, political, and legal victories of secular, liberal policies.

B. The Potential Reality of Christian Victimhood

At this point in the discussion of the emergence Christian victimhood, it is worth considering that there is some truth to the marginalization of conservative Christians in modern America. In his work, THE END OF WHITE CHRISTIAN AMERICA, Robert P. Jones tracks the decline in popularity of white Christian views, claiming white Christians no longer "set[] the tone for the country's culture as a whole."[56] White Christian institutions have a decreased church presence and diminished influence, lending to the notion that white Christians are actually experiencing marginalization in the United States.[57] According to a 2021 Pew Research Center survey, "secularizing shifts" continue to sweep across the nation, contributing to a fifteen percent decrease in Christian affiliation—from seventy-eight percent of Americans to sixty-three percent—between 2007 and 2021.[58] Furthermore, only four in ten adults consider religion "'very important' in their lives."[59] Those that describe themselves as religious "nones"—agnostic, atheist, or "nothing in particular"—continue to grow in number, increasing by thirteen percent since 2011 from sixteen to twenty-nine percent of the American adult population.[60] Thus, from statistical perspective, it may be fair to consider conservative Christians as an emerging minority in the U.S. population. Viewed in this light, it is conceivable that the notion of Christian victimhood could lean closer to fact than merely a rhetorical strategy.[61] Regardless, the impact of this alleged marginalization of

Hostile Towards Conservative Christians? Evidence from ANES Surveys, 60 REV. RELIGIOUS RSCH. 71, 71–72 (2017).

56. JONES, *supra* note 16, at 39.

57. *Id.* at 49.

58. Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), https://www.pewforum.org/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/.

59. *Id.*

60. *Id.*

61. For a deeper discussion of this idea, *see* Yancey, *supra* note 55, at 88 (suggesting there might be merit to the idea that Christians are victims of hostility because "[w]ith the increase of their economic power, individuals who dislike conservative Christians are able to harm them in ways they were not able to accomplish in 1988.").

conservative Christians in America is contributing to profound shifts in the Court's approach to the Free Exercise Clause.

II. THE EXPANSION OF *LUKUMI*: EXAMINING THE SUPREME COURT'S FREE EXERCISE DECISIONS POST-*SMITH*

Thus far, this Note has unpacked the development of the narrative of Christian victimhood by conservative Christians. Now, we can turn to the Supreme Court itself, and take a close look at the ways in which the Court interprets cases from conservative Christians and generates new free exercise precedent.

A. Establishing Basic Precedent

In 1990, *Employment Division v. Smith* drastically changed the Supreme Court's free exercise jurisprudence.[62] According to many First Amendment scholars, by issuing *Smith*, the Court "'abandoned' its longstanding commitment to protecting the free exercise of religion and 'created a legal framework for persecution' of religion dissenters."[63] This dismal characterization of *Smith*'s effect on free exercise jurisprudence stems from the understanding that *Smith* rejected the former free exercise doctrine put forth in *Sherbert v. Verner* (1963).[64] Under the "*Sherbert* test," if a government action substantially burdened one's sincerely held religious beliefs, then the government must justify the action with a narrowly tailored and compelling government interest.[65] In effect, the *Sherbert* test required strict scrutiny where government action substantially burdened the free exercise of religion. While *Smith* did not overrule *Sherbert*, it held the *Sherbert* test inapposite where religious practices are burdened by "[a] neutral law of general applicability"[66]—no matter how substantial the burden or how central the religious practice is to one's faith.[67] Instead, under *Smith*, neutral laws of general applicability do not typically raise First Amendment concerns,[68] and the Court need not

62. *See* Marin, *supra* note 10, at 1431.

63. Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 850 (2001).

64. *Id.* at 860.

65. *See* Sherbert v Verner, 374 U.S. 398, 403 (1963).

66. Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

67. *Id.* at 887–88.

68. *Id.* at 878.

conduct "individualized governmental assessment[s]" of the burdens governmental actions place on religious individuals.[69]

Church of Lukumi Babalu Aye v. City of Hialeah (1993)[70] provides the most notable exception to the weak free exercise protections *Smith* offers. *Lukumi* was brought by practitioners of the Santeria religion, which is a fusion between Roman Catholicism and traditional African religion.[71] One of the "principal forms of devotion" in the Santeria religion is animal sacrifice.[72] When a Santeria church established its house of worship in the city of Hialeah with intentions of practicing animal sacrifice publicly, the city passed a series of ordinances and resolutions, effectively criminalizing animal sacrifice.[73] Hialeah's regulations did not target the Santeria religion explicitly, however, the Court closely examined the circumstances that led to the regulations, finding "it cannot be maintained[] that city officials had in mind a religion other than Santeria" when imposing the restrictions.[74] For instance, the city exempted the killing of animals for almost all other purposes other than the ritual killings of the Santeria practitioners.[75] Thus, the Court found the regulations were so targeted toward Santeria adherents that they amounted to "religious gerrymander[ing]."[76]

Significantly, regulations like those promulgated by Hialeah escape the lenient *Smith* analysis. If a regulation targets religious beliefs, and the "object of [the] law is to infringe upon or restrict practices because of their religious motivation," then the law is not neutral and does not implicate *Smith.*[77] Rather, regulations under the Hialeah framework demand a different kind of scrutiny than that in *Smith*: strict scrutiny.[78] In fact, as the Court emphasized in *Lukumi*, "[a] law that targets religious conduct for distinctive treatment or advances legitimate government interests only against conduct with a

69. Duncan, *supra* note 63, at 860–61.

70. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993).

71. *Id.* at 524.

72. *Id.*

73. *Id.* at 527.

74. *Id.* at 535.

75. *Lukumi*, 508 U.S. at 535–38. For example, the city exempted kosher slaughters as well as slaughters made by any licensed food establishment. *Id.* at 536. Furthermore, the city deemed hunting and fishing—both technically unnecessary killings under the ordinance—outside the prohibition. *Id.* at 537.

76. *Id.* at 535 (citations and internal quotes omitted).

77. *Id.* at 533.

78. *Lukumi*, 508 U.S. at 546.

religious motivation will survive strict scrutiny only in rare cases."[79] Given the level of scrutiny the Court applies to cases where a particular religion is impermissibly targeted, it is highly advantageous if a religious claimant is able to characterize their claim within the *Lukumi* framework.[80]

B. Unpacking Recent Supreme Court Free Exercise Decisions

This Note will consider constitutional free exercise claims[81] in three different procedural postures: (1) decisions ruling on the constitutionality of laws or policies; (2) decisions granting or denying injunctive relief; and (3) cases where a writ of certiorari is denied, but a concurrence or dissent addresses the free exercise issue.[82] Evaluating these three types of cases allows us to unearth common rhetoric amongst the Court, especially its conservative justices, regarding contemporary free exercise jurisprudence: a rhetoric of deep concern for and sensitivity to discrimination toward religion under the *Lukumi* precedent. In particular, this concern mostly arises in the context of claims where Christians are burdened by governmental action. Strikingly, the legal positions from the Court and its conservative justices strongly parallel the positions of conservative Christians at large—both see Christians and religious freedom as under attack in modern America.

79. *Id.*

80. Post-*Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA), which essentially restored the standard of review to that of free exercises cases prior to the *Smith* decision. *See* CONG. RSCH. SERV., THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020), https://crsreports.congress.gov/product/pdf/IF/IF11490. As a result, some religious groups now bring what seem like traditional free exercise cases under RFRA. For example, *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014); *see also* Little Sisters of the Poor Saints Peter & Paul Home v. Pa., 140 S. Ct. 2367, 2376 (2020). This Note will not address cases brought under RFRA or other congressional acts, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA). Rather, this Note examines the ways in which the Court's decisions since *Smith* are applying existing constitutional doctrine and shaping free exercise jurisprudence.

81. For the purpose of this Note, I do not discuss cases where free exercise issues are mentioned briefly or tangentially. For example, many cases that are dominantly about the Establishment Clause or the Free Speech Clause briefly discuss possible free exercise issues, but do not issue a ruling on free exercise grounds. Those cases are excluded from this discussion.

82. While some may argue that it is not worth caring about the rhetoric dissents and concurrences, this Note unpacks non-majority arguments in an effort to capture the Court's voices on free exercise issues and suggest the direction in which free exercise jurisprudence might go in the future. *See infra* Conclusion for more discussion.

1. Decisions Ruling on the Constitutionality of Laws or Policies

Since 1990, the Court has issued twelve decisions on free exercise grounds.[83] Two of those decisions are *Smith* and *Lukumi*. The remaining ten involved Christian or predominantly Christian claims.[84] Of those ten claims, eight were decided in favor of the Christian claimants.[85] The two resolved against the Christian claimants fell under the *Smith* doctrine.[86] In six of the eight claims where the religious claimants prevailed, the Court distinguished *Smith* and applied the rationale from *Lukumi*.[87] The reasoning employed by the

83. For statistics on the discussed cases, see *infra* Section II.B.

84. While not every free exercise claim heard by the Court in recent years solely pertain to Christians, this Note argues that these cases nevertheless involve predominantly Christian claims because, in effect, they benefit Christians over other religions. For example, *Espinoza v. Montana Department of Revenue* involved the use of state scholarship funds for religious schools. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020). While the case technically could apply to any religious school in Montana, regardless of denomination, it was brought by mothers who wanted their children to attend Christian schools. *Id.* at 2252. Additionally, it is suggested that Christian schools are the main schools at issue throughout the case. *See id.* at 2252–53, 2271–72. This is consistent with statistics on private school enrollment—49% of private school students are enrolled in either Catholic or conservative Christian schools, with only 10% enrolled in affiliated religious schools that are not Catholic or conservative Christian. *School Choice in the United States: 2019*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/schoolchoice/ind_03.asp#:~:text=Thirty%2Dsix%20percent%20of%20private,were%20enrolled%20in%20nonsectarian%20schools (last visited Aug. 26, 2022). Thus, while cases like *Espinoza* technically speak to religion at large, these decisions predominantly focus on and stand to benefit Christianity.

85. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017); *Espinoza*, 140 S. Ct at 2263; Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1724 (2018); Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022).

86. *See* Locke v. Davey, 540 U.S. 712, 715 (2004); Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. 661, 669 (2010).

87. Two cases did not apply *Lukumi*. First, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, was resolved by recognizing the power of churches and religious institutions to make ecclesiastical decisions about employment without government interference. Hosana-Tabor Evangelical Lutheran Church & Sch., 565 U.S. 171, 188–89 (2012). Like the other cases this Note discusses, however, the majority distinguished *Smith* in its reasoning by claiming, "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. . . . The contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit." *Id.* at 190. Additionally, *Our Lady of Guadalupe School v. Morrissey-Berru* is essentially an application of *Hosanna-Tabor* and did

Court in these cases reveal a common theme: the Court is increasingly concerned with discrimination against religion, especially as it applies to Christians.[88] By unpacking this theme, we will also unpack the ways in which the rhetoric of Christian victimhood has taken root in the Court itself and is now shaping free exercise jurisprudence.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) and *Espinoza v. Montana Department of Revenue* (2020), the Court applied the *Lukumi* precedent where the government refused to issue certain state funds to religious organizations.[89] Chief Justice Roberts, writing for the Court in both decisions, explained, "[p]lacing such a condition on benefits or privileges 'inevitably deters or discourages the exercise of First Amendment rights.'"[90] Accordingly, because the states in these cases refused to issue funding to religious institutions solely because they were religious, the states unconstitutionally discriminated against religion, violating the Free Exercise Clause.[91]

The *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) Court arguably addressed concerns about hostility toward Christians most directly.[92] There, the Court considered whether the Colorado Civil Rights Commission's treatment of a Christian baker's belief that it is sinful to provide a custom cake for a same-sex wedding violated the Free Exercise Clause.[93] Answering in the affirmative, Justice Kennedy resolved the case almost solely by appealing to *Lukumi*'s hostility toward religion rationale. In particular, the Court took issue with the following statement made by a commissioner:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[94]

not apply *Lukumi*. Our Lady of Guadalupe Sch. V. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020).

88. *See* cases cited *supra* notes 85–86.

89. *See Trinity Lutheran*, 137 S. Ct. at 2021–22; *Espinoza*, 140 S. Ct. at 2256.

90. *Espinoza*, 140 S. Ct. at 2256 (citing *Trinity Lutheran*, 137 S. Ct. at 2022).

91. *Trinity Lutheran*, 137 S. Ct. at 2025; *Espinoza*, 140 S. Ct. at 2262.

92. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1729 (2018).

93. *Id.* at 1723.

94. *Id.* at 1729.

Kennedy, in response, found the commissioner's statement to be inappropriately hostile to the Christian baker's beliefs about same-sex marriage, chastising the Commission for abandoning their role to be fair and neutral:

> To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' [the Christian baker's] invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.[95]

Coming to the Christian baker's defense, the Court invalidated the Commission's order that would require the baker to serve same-sex weddings because the baker was deprived of "a neutral decisionmaker who would give full and fair consideration to his religious objection."[96] In fact, Kennedy characterized the Court's role in protecting the Christian baker's beliefs from hostile treatment as an important duty, asserting, "it must be the proudest boast of our free exercise jurisprudence that we protect the religious beliefs that we find offensive."[97]

In 2021, the Court applied *Lukumi*'s rationale in *Fulton v. City of Philadelphia* (2021), finding Philadelphia's refusal to contract with Catholic Social Services (CSS) due to the organization's unwillingness to work with same-sex foster parents unconstitutional.[98] Philadelphia justified its decision to not contract with CSS on the basis that CSS's practice of turning away same-sex couples violated the city's non-discrimination policy.[99] Chief Justice Roberts, however, honed in on the fact that the city had the discretion to make an exception to this policy for CSS.[100] Since Philadelphia "offer[ed] no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others," the city's

95. *Id.*
96. *Id.* at 1726, 1732.
97. *Masterpiece Cakeshop*, 138 S. Ct. at 1737.
98. Fulton v. City of Phila, 141 S. Ct. 1808, 1874, 1882 (2021).
99. *Id.* at 1878.
100. *Id.* at 1877.

actions amounted to discriminatory treatment toward CSS due to its religious beliefs, which is prohibited by the First Amendment under *Lukumi*.[101]

In its most recent term, the Court issued two rulings dealing with religious freedom, both of which have a strong focus on the Free Exercise Clause and discrimination. *Kennedy v. Bremerton School District* (2022) involved a public high school football coach who was terminated from his position after he refused to end his practice of praying on the football field after games.[102] While the defendant school in *Kennedy* was concerned about the Establishment Clause implications of allowing a coach to pray with or in front of students in a public school setting, the Court found the coach's actions innocuous and the school's reaction severe.[103] According to Justice Gorsuch, the coach merely offered a "quiet prayer of thanks," and by "singl[ing] out private religious speech for special disfavor," the school district's actions were not neutral nor generally applicable, triggering strict scrutiny.[104] In fact, the school district's concerns about violating the Establishment Clause by allowing the coach to pray in front of impressionable students were, according to Gorsuch, completely unfounded, and the school district could not even show that the Free Exercise and Establishment Clauses are "at odds."[105] The Court reasoned individuals like the football coach should be able to practice religious expression publicly because "learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to a 'tolerant citizenry.'"[106] Accordingly, the Free Exercise Clause demanded the "quiet prayer[s]" of the football coach be protected to prevent unjust discrimination against religion.[107]

The Court also ruled in favor of religious claimants in *Carson v. Makin* (2022), a case involving Maine's tuition assistance program for parents who live in areas that do not have public secondary schools.[108]

101. *Id.* at 1882.

102. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415 (2022).

103. *See id.* at 2426.

104. *Id.* at 2415–16, 2420.

105. *Id.* at 2432. As the dissent suggests, Justice Gorsuch's comment is somewhat academically dishonest, as the tension between the clauses has long been recognized. *See id.* at 2447 (Sotomayor, J., dissenting).

106. *Kennedy*, 142 S. Ct. at 2430 (quoting Lee v. Weisman, 505 U.S. 577, 591 (1992)).

107. *Id.* at 2415, 2432–33.

108. Carson v. Makin, 142 S. Ct. 1987, 1993 (2022).

While parents could choose to send their child to either public or private schools with Maine's state-issued tuition, they were limited to "nonsectarian" schools.[109] Thus, families like the Carsons could not send their children to a Baptist school that aligned with the parent's Christian worldview.[110] After finding Maine's law disqualified some private schools from funding "solely because they are religious" and citing *Lukumi*, the Court applied strict scrutiny to invalidate the regulation and require that Maine offer equal assistance to those parents sending their children to religious institutions just as it does for secular institution.[111] Similar to *Kennedy*, Maine expressed concerns with the implications of funding the religious education of students under the Establishment Clause.[112] However, again, the Court refuted the State's worries because its refusal to pay tuition for students at religious schools was nonetheless discriminatory and offensive to the Free Exercise Clause.[113]

2. Decisions Granting or Denying Injunctive Relief

Post-*Smith* the Court considered nine applications for injunctive relief dealing with free exercise issues.[114] Eight of those nine applications involved Christian petitioners in some capacity.[115]

109. *Id.*

110. *Id.* at 1994–95. *Carson* also involved the Nelson family who wished to send their daughter to Temple Academy—a school that advertises the following mission statement: "Temple Academy exists to know the Lord Jesus Christ and to make Him known through accredited academic excellence and programs presented through our thoroughly Christian Biblical view." *About Us: Core Values*, TEMPLE ACAD., https://templeacademy.org/page/3168 (last visited Nov. 14, 2022).

111. *Carson*, 142 S. Ct. at 1997.

112. *See id.* at 1997–98.

113. *See id.* at 1998 ("A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.").

114. *See* Austin v. U.S. Navy Seals, 142 S. Ct. 1301, 1302 (2022); Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021);
Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021); Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527, 527 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020); Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 65 (2020); Murphy v. Collier, 139 S. Ct. 1111, 1111 (2019).

115. The outlier is *Murphy*, which involved a Buddhist prisoner who requested a Buddhist spiritual advisor to accompany him while he was executed. *Murphy*, 139 S. Ct. at 1112. The Court granted the prisoner's stay of execution until the state found a Buddhist spiritual advisor to accompany him at the execution. *Id.* at 1111. Justice Alito dissented. *Id.* at 1112. It should be noted that some of the other cases

Additionally, seven of the Christian applications concerned COVID-19 restrictions on churches.[116] The eighth application involved exemptions from COVID-19 vaccine requirements,[117] and of those seven, four applications were denied;[118] three were granted.[119] Regardless of the outcome of these applications, we can see strong rhetoric implicating the *Lukumi* rationale from the conservative justices in these cases. We will examine a few.

In *Dr. A. v. Hochul* (2021),[120] the Court denied injunctive relief with respect to a New York policy that eliminated religious exemptions for health care workers from a COVID-19 vaccine mandate.[121] Dissenting, Justice Thomas highlighted the constitutional concerns of the Court's decision by discussing two sympathetic characters: two devout Catholic doctors who object to vaccinations but nevertheless treat their patients with the utmost care and professionalism.[122] To Thomas, New York's policy clearly interferes with religious free exercise, "and does so seemingly based on nothing more than fear and anger at those who harbor unpopular religious beliefs," thus failing to pass constitutional muster under *Lukumi*.[123]

The Court considered two separate applications for relief in the case *United Pentecostal Church v. Newsom* in 2020 and 2021.[124] In a

also involved non-Christian claimants, as well. *See Roman Cath. Diocese*, 141 S. Ct. at 65 (considering an additional application from Agudath Israel of America).

116. *Dr. A*, 142 S. Ct. at 552; *Tandon*, 141 S. Ct. at 1296–97; *Danville Christian Acad.*, 141 S. Ct. at 527–28; *United Pentecostal*, 140 S. Ct. at 1613; *United Pentecostal*, 141 S. Ct. at 717; *Cavalry Chapel*, 140 S. Ct. at 2604; *Roman Cath. Diocese*, 141 S. Ct. at 65–66. Notably, these decisions involve Christian claimants, but are framed as applying to religion in general. One could thus argue that these decisions do not necessarily stand for the idea that Christians in particular are victims of the state, but religion as a whole is. The Note addresses this argument *infra* notes 217–20 and accompanying text.

117. *Austin*, 142 S. Ct. at 1302. It is unclear from the Court's decision whether the case involves Christian claimants. However, the lower court's opinion makes clear the plaintiffs involved "represent various Christian denominations." U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 342 (5th Cir. 2022).

118. These cases include *Dr. A*, 142 S. Ct. at 552; *Danville Christian Acad.*, 141 S. Ct. at 527; *United Pentecostal*, 140 S. Ct. at 1613; and *Cavalry Chapel*, 140 S. Ct. at 2603.

119. These cases include *United Pentecostal*, 141 S. Ct. at 716; *Tandon*, 141 S. Ct. at 1296; and *Roman Cath. Diocese*, 141 S. Ct. at 65.

120. The Court subsequently denied writ of certiorari in Dr. A v. Hochul, 142 S. Ct. 2569, 2569 (2022).

121. *Dr. A*, 142 S. Ct. at 552.

122. *Id.* at 552–53 (Thomas, J., dissenting).

123. *Id.* at 559 (Thomas, J., dissenting).

124. While the applications could in theory also benefit religions other than Christianity since the COVID-19 restrictions applied to all congregated worship,

dissent for the denial of the 2020 application, Justice Kavanaugh claimed a twenty-five percent occupancy cap on religious worship "indisputably discrimin[atory] against religion" because secular businesses and individuals were treated less restrictively.[125] Subsequently, the Court granted a separate injunction in part in 2021, upon which Justice Gorsuch put forth a statement, emphasizing the unique discrimination against religious institutions present in California's restrictions:

> Often, courts addressing First Amendment free exercise challenges face difficult questions about whether a law reflects "'subtle departures from neutrality,'" "'religious gerrymander[ing],'" or "impermissible targeting" of religion. But not here. Since the arrival of COVID-19, California has openly imposed more stringent regulations on religious institutions than on many businesses. . . . When a State so obviously targets religion for differential treatment, our job becomes that much clearer.[126]

Both Kavanaugh and Gorsuch ultimately assert, using *Lukumi* as guiding precedent, that the discrimination toward religion in *United Pentecostal* was so obvious that it unquestionably warranted constitutional protection.[127] Thus, even in the context of COVID-19 cases, which commonly involve emergency government action for public health and safety, we still see some justices reaching for the *Lukumi* rationale to suggest that religion is uniquely embattled during the pandemic.

Most recently, the Court granted a partial stay on a district court's order, which precluded the Navy from considering its Seals' vaccination status in making operational decisions.[128] Justice Kavanaugh concurred, emphasizing the need to respect the

there is reason to discuss this case in the context of discrimination against Christians in the context of this Note. First, and most obvious, the case was brought by a Christian church. Moreover, the case was brought in part by the Thomas More Society, an organization that boasts, "[w]e fight for your Judeo-Christian family values" on its website. *About Us*, THOMAS MORE SOC'Y, https://thomasmoresociety.org/about/ (last visited Nov. 14, 2022).

125. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J., dissenting).

126. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (statement of Gorsuch, J.) (quoting Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 534–35 (1993)).

127. *See id.* at 718, 719; *see also United Pentecostal*, 140 S. Ct. at 1614–15 (Kavanaugh, J., dissenting).

128. Austin v. U.S. Navy Seals, 142 S. Ct. 1301, 1302 (2022).

Executive's discretion in military and national security affairs.[129] Justices Alito and Gorsuch, however, dissented, dismayed that the Court would tolerate overt discrimination against Navy personnel on the basis of religion without requiring the Navy to show some compelling need to do so.[130] Additionally, Alito took issue with the fact that the Navy allowed for medical exemptions but not religious exemptions in its regulations.[131] Because Alito understood the Navy's policy to treat "conduct engaged in for religious reasons less favorably than conduct engaged in for secular reasons," he would find it likely unconstitutional under the Free Exercise Clause.[132]

3. Cases Where Writ of Certiorari is Denied with a Dissent or Concurrence

Lastly, since *Smith*, the Court has denied writs of certiorari to six free exercise cases,[133] five of which involved Christian claims and inspired dissents or concurrences.[134] Although certiorari was denied in all cases, the rhetoric from the dissents and concurrences highlights the recurring theme of discrimination toward Christianity through the lens of *Lukumi*.

One emblematic example is Justice Alito's dissent in *Stormans v. Weisman*—a case involving Washington state regulations that mandated pharmacists sell certain contraceptives, such as Plan B.[135] Calling the case "an ominous sign," Alito argued that, by not providing for religious accommodations, the regulations impermissibly discriminated against the beliefs of the plaintiff Christian family who ran a pharmacy and was morally opposed to selling drugs like Plan B.[136] To Alito, the issue could be framed as

129. *Id.* (Kavanaugh, J., concurring).

130. *Id.* at 1305 (Alito, J., dissenting).

131. *Id.* at 1307 (Alito, J., dissenting).

132. *Id.* at 1306–07 (Alito, J., dissenting).

133. *See* Stormans, Inc. v. Weisman, 579 U.S. 942, 942 (2016); Ben-Levi v. Brown, 577 U.S. 1169, 1169 (2016); Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909, 909 (2019); Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 634 (2019); Davis v. Ermold, 141 S. Ct. 3, 3 (2020); Dr. A v. Hochul, 142 S. Ct. 2569, 2569 (2022).

134. The outlier case is *Ben-Levi*, in which the Court denied writ of certiorari to Jewish inmates who were prevented by prison policy from praying and studying the Torah together. *Ben-Levi*, 577 U.S. at 1169–70 (Alito, J., dissenting). Alito dissented, arguing the prisoners' free exercise rights were violated. *Id.* at 1169.

135. *Stormans*, 579 U.S. at 944 (Alito, J., dissenting).

136. *Id.* at 942–43 (Alito, J., dissenting).

clear hostility toward the family's Christian views: "Violate your sincerely held religious beliefs or get out of the pharmacy business."[137]

Similarly, in a case regarding New Jersey's exclusion of religious buildings from historic preservation funds, Justice Kavanaugh appealed to the logic in *Lukumi*, stressing, "[b]arring religious organizations because they are religious from a general historic preservation grants program is pure discrimination against religion."[138] Thus, even in cases where certiorari was ultimately denied, we can see justices bringing out the same *Lukumi* rationale found in the other cases in their advocacy for why the case should be addressed by the Court.

Type of Decision	**Ruling on Constitutionality of Laws or Policies**	**Granting or Denying Injunctive Relief**	**Writ Denied with Concurrence/Dissent**
Total cases	12	9	6
Cases involving Christian claimants	10	8	5
Cases resolved in favor of Christian claimants	8	3	N/A
Cases resolved against Christian claimants	2	5	N/A

137. *Id.* at 944 (Alito, J., dissenting).

138. *Morris Cnty. Bd. of Chosen Freeholders*, 139 S. Ct. at 911 (Kavanaugh, J., concurring).

Cases not involving Christian claimants, invoking *Lukumi* rationale	N/A (the two cases are *Lukumi* and *Smith*)	1	1
Cases with Christian claimants, invoking *Lukumi* rationale	6	8	5
Cases litigated by Christian legal organizations	8	6	3

C. Is Lukumi Appropriate Precedent?

At this point in our discussion, it is helpful to question whether *Lukumi* is even appropriate precedent to apply in the cases discussed above. *Lukumi* itself is challenging precedent "because the Court viewed *Lukumi* as an extreme case and deliberately left unclear the appropriate methodology for deciding closer cases."[139] Douglas Laycock and Steven Collis consider *Lukumi* to be a "narrow exception" to the *Smith* rule.[140] In *Lukumi*, the government's regulations were struck down because they "gerrymandered to such an extreme degree that they applied to 'Santeria adherents but almost no others.'"[141] For those like Laycock and Collis, such targeted hostility toward a particular religious practice rightfully triggered strict scrutiny, but *Lukumi* should not extend much further. Similarly, Matteo Winkler takes a narrow view of *Lukumi*, arguing that it is inapplicable precedent in *Masterpiece Cakeshop*, because in *Lukumi*, the ordinances at issue "were polluted by a discriminatory intent,

139. James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 298 (2013).

140. Douglas Laycock & Steven T. Collis, *The 2016 Roscoe Pound Lecture: Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5 (2016).

141. *Id.*

which made them void for violation of the First Amendment," while *Masterpiece Cakeshop* involved neutral and generally applicable antidiscrimination law. [142] If one takes on a narrow view of "how targeted or selective a law must be before it will be deemed to fail the dual requirements of neutrality and general applicability,"[143] then the above cases may stretch *Lukumi* beyond its limits.

Moreover, many of the above cases were decided on the grounds that, if the government treats religious groups or individuals differently from their secular counterparts, such treatment is straightforward discrimination.[144] The Santeria religion in *Lukumi* was clearly singled out because its practices of animal sacrifice were considered distasteful to other members of the community.[145] Accordingly, the regulations at issue in *Lukumi* were discriminatory in the sense that particular religious beliefs and practices were targeted and deemed criminal.[146] *Lukumi* put forth the principle that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."[147] In contrast, the above cases often reason that differential treatment between religion and secular forces in a general sense is sufficient discrimination to trigger strict scrutiny.[148] In other words, the Court applies *Lukumi* even where there are no specific religious practices being burdened; rather, the government simply treats religious institutions or individuals differently from secular institutions or individuals.[149] This shift in *Lukumi*'s application raises questions as to whether the notion of discrimination is being stretched too far. It is unclear, for example, whether the denial of funds for a church to build a playground constitutes selectively burdening conduct motivated by religious belief under *Lukumi*.[150] However, this

142. Matteo M. Winkler, *What's in a Cake? A Note on* Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 37 DPCE ONLINE 1235, 1238 (2018).

143. Oleske, Jr., *supra* note 139, at 298.

144. *See supra* Section II.B.

145. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 535 (1993).

146. *See id.* ("It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered.").

147. *Id.* at 543.

148. *See e,g.*, Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909, 910 (2019) (Kavanaugh, J., concurring).

149. *See id.*

150. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017).

expansive understanding of discrimination commands the clear direction of free exercise jurisprudence.

Conversely, if one takes a broad understanding of the laws *Lukumi* intended to invalidate, then perhaps the Court and the justices discussed have it right—laws that merely treat religion differently from secular counterparts, such as government funding programs that do not extend to religious groups[151]—are discriminatory laws *Lukumi* should stamp out. The above cases make apparent the Court is embracing a broad understanding of *Lukumi*, consistently applying its anti-discrimination principle and thus, strict scrutiny. Yet it is less than clear at this point whether such application is warranted, or if these cases actually fall under the lenient standard from *Smith*.

III. MAPPING THE COURT'S CONCERNS WITH DISCRIMINATION ONTO CURRENT SENTIMENTS OF CONSERVATIVE CHRISTIANS

Why are *Lukumi* and questions of discrimination against religion fast becoming the litmus test for whether a free exercise claim is likely to succeed at the Supreme Court level? One reason may be because no case is clear cut. In the wake of *Smith* and *Lukumi*, it is unclear whether the above cases fall under either precedent. For instance, while there is merit to the argument that the government treated religious organizations differently from secular groups during the COVID-19 pandemic, does this treatment rise to the level of targeted discrimination prohibited by *Lukumi*?[152] If it does not, then perhaps the Court has expanded *Lukumi* beyond its original bounds, boiling down free exercise jurisprudence to questions of discrimination. Now, refusing government funding to religious institutions is considered *Lukumi* discrimination.[153] Now, a city's decision not to contract with a foster care agency that discriminates against LGBTQ+ individuals is considered *Lukumi* discrimination.[154] Now, a state's choice not to fund religious schools is a question of discrimination against religious

151. *See id.* at 2021–22; *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2256 (2020).

152. *See Lukumi*, 508 U.S. at 543 ("In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.").

153. *See Trinity Lutheran*, 137 S. Ct. at 2021–22; *see also Espinoza*, 140 S. Ct. at 2256.

154. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

parents.[155] The Court's generous application of *Lukumi* simply dominates the free exercise cases it hears.[156]

Further, the Court's 2021 to 2022 term raises questions of just how far the Court is willing to expand the *Lukumi* rationale to protect more and more religious claimants from alleged discrimination. Notably, the Court's zealous protection of free exercise rights has come at the cost of another facet of religious freedom: the Establishment Clause.[157] As Andrew Lewis observes, "[o]ver the past decade . . . the [C]ourt has come around to . . . minimizing *Lemon* and emphasizing free exercise concerns over and above establishment ones."[158] Years ago, *Carson* would likely appear as a clear establishment question.[159] Today, the religious claimants briefed the issues on appeal for the Court, first dedicating twenty-nine pages to their free exercise claim, and only adding eight pages at the end, arguing a claim under the Establishment Clause.[160] As David Cortman of Alliance Defending Freedom notes, *Carson* "marks a sea change where free exercise and establishment of religion meet."[161] And in the wake of decisions like *Carson* and *Kennedy*, it appears that the Establishment Clause is being gutted by the Court. Justice Gorsuch confirmed the suspicions of constitutional law scholars in *Kennedy*, officially declaring the death of the "*Lemon* Test," which formerly guided Establishment Clause cases.[162] Now, the Court will employ a "historical" test, which focuses on the clause's "original meaning and history."[163] As some scholars note, however, the bounds and application of this test remain unclear at this point, making the strength

155. *See* Carson v. Makin, 142 S. Ct. 1987, 1999 (2022).

156. *See generally id.*; *Fulton* 141 S. Ct. at 1882; *Trinity Lutheran*, 137 S. Ct. at 2021–22; *Espinoza*, 140 S. Ct. at 2256 (applying *Lukumi* in a variety of instances where the Court finds discrimination).

157. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

158. Andrew R. Lewis, *The New Supreme Court Doctrine Against Religious Discrimination*, WASH. POST (July 7, 2022), https://www.washingtonpost.com/politics/2022/07/07/scotus-carson-makin-maine-schools-bremerton-football-coach/.

159. David Cortman, *Among Supreme Court Decisions in June, One with Seismic Impact on Education*, NAT'L REV. (July 1, 2022, 3:07 PM), https://www.nationalreview.com/bench-memos/among-supreme-court-decisions-in-june-one-with-seismic-impact-on-education/.

160. Brief for Petitioner at 16–51, Carson v. Makin, 142 S. Ct. 1987, 1987 (2022) (No. 20-1088).

161. Cortman, *supra* note 159.

162. *See Kennedy*, 142 S. Ct. at 2428; *see also* Lewis, *supra* note 158.

163. *Kennedy*, 142 S. Ct. at 2428.

of the Establishment Clause ambiguous in the wake of the *Lemon* Test's demise.[164]

While the Court's increased focus on the Free Exercise Clause, *Lukumi,* and discrimination against religion may appear to be a phenomenon of a conservative Court,[165] there is more to consider. As outlined above, an impressive majority of the Court's free exercise cases since *Smith* involve Christian claimants in some capacity.[166] Yet the Court's acceptance of more cases involving Christians has also welcomed the rhetoric of Christian victimhood into Court opinions and precedent, even if in subtle ways. In *Trinity Lutheran*, the Court stressed the upstanding qualifications the Trinity Lutheran Church possessed[167] before highlighting the unfairness in the state's "express discrimination against religious exercise . . . solely because it is a church" asking for state money.[168] *Espinoza* found Montana discriminated against religious schools and the families whose children attend them.[169] *Masterpiece Cakeshop* was decided almost solely on the grounds that the Colorado Commission was intolerant to the Christian baker's beliefs.[170] *Fulton* drew upon the role of CSS as a "point of light in the City's foster-care system," and emphasized the discrimination Philadelphia imposed upon CSS's religious beliefs

164. Noah Feldman, *Supreme Court Is Eroding the Wall Between Church and State*, WASH. POST (June 30, 2022, 10:15 AM), https://www.washingtonpost.com/business/supreme-court-is-eroding-the-wall-between-church-and-state/2022/06/27/197c7cd6-f63c-11ec-81db-ac07a394a86b_story.html.

165. Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative (discussing how, in the Court's "hard turn to the right[, t]here were more 6-to-3 decisions this term than at any time in the [C]ourt's modern history, fewer unanimous decisions, and every single one of the more liberal justices was in dissent more times this year than in any year of their careers" (internal quotation marks omitted)).

166. *See supra* Section II.

167. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017–18 (2017).

168. *Id.* at 2022.

169. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262 (2020). While, at a glance, the Court's decision is not directly in favor of Christians, this ignores the reality of private schooling in the United States. For instance, in Montana, 63% of its private schools are religiously affiliated. *Best Montana Religiously Affiliated Private Schools (2022)*, PRIV. SCH. REV., https://www.privateschoolreview.com/montana/religiously-affiliated-schools (last visited Nov. 14, 2022). Of those schools, 27% are Christian, 26% Catholic, and 16% Seventh Day Adventist. *Id.*

170. *See supra* notes 92–97 and accompanying text.

over CSS's discrimination against LGBTQ+ individuals.[171] *Kennedy* underscored the quiet and non-disruptive behavior of the plaintiff football coach praying midfield and cast the school's reaction as outrageously discriminatory.[172] And lastly, *Carson* expressed notable sympathy toward the religious families who were denied the funds to send their children to schools consistent with their religious ideals and again, portraying the state as needlessly discriminatory.[173]

Some question the accuracy of the Court's characterization of the religious claimants put forth in the Court's decisions. For example, Laycock referred to Justice Gorsuch's portrayal of the football coach in *Kennedy* as "fundamentally dishonest."[174] According to Laycock, the prayers offered by the coach were not quiet nor isolated—"[t]hey were leading the students in prayer."[175] Thus, the coach's behavior was perhaps more insidious to the Establishment Clause than the Court lets on, undermining the Court's precedent involving school prayers.[176]

Regardless of the accuracy of the Court's portrayal of Christians as sympathetic and embattled figures, the drastic expansion of *Lukumi* and motifs of Christian victimhood cropping up in opinions begs the question: How are the expansion of *Lukumi* and the rhetoric of Christian victimhood related, and what is driving their prominence in recent free exercise cases? It is at this point that we can see two worlds converge. Evaluating the language employed by the Court in cases involving Christian claimants, it becomes clear that the narrative of Christian victimhood has developed legal potency. The means by which this convergence occurred become clearer upon examination of the strategic efforts of Christian legal organizations.[177]

171. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (internal quotation marks omitted).

172. *See supra* notes 102–07 and accompanying text.

173. *See* Carson v. Makin, 142 S. Ct. 1987, 1994–95 (2022).

174. Nina Totenberg, *Supreme Court Backs a High School Football Coach's Right to Pray on the 50-Yard Line*, NPR (June 27, 2022, 4:09 PM), https://www.npr.org/2022/06/27/1107961566/supreme-court-backs-a-high-school-football-coachs-right-to-pray-on-the-50-yard-l.

175. *Id.*

176. *Id.*

177. Throughout this Note, I use the term Christian legal organization to describe the groups litigating the religious freedom issues discussed. To be clear, not all of these organizations advertise themselves to be Christian explicitly. However, some speculate that the organizations I discuss have intimate ties to conservative Christian causes, suggesting more alignment with Christian causes than meets the eye. *See infra* 187–203 and accompanying text. For ease of discussion and for the purposes of highlighting broad trends in religious liberty litigation, I use the term

As discussed above, Christians once kept their values in American culture through assertions of morality.[178] However, Andrew Lewis argues conservative Christians now have turned to a new strategy—rather than a discourse of morality, Christians now employ a discourse of rights.[179] For example, rather than emphasize the immorality of abortion, conservatives have argued for the "right to life."[180] Importantly, Lewis argues that, in this turn to rights, conservative Christians have particularly embraced the right to religious liberty as a defense tactic in American culture wars.[181] As conservative Christians' shift to asserting rights in the courts rather than mere morality,[182] the American legal system has seen emerging Christian legal groups dominate the courts, bringing forth religious liberty claims.[183] While groups like the American Civil Liberties Union and the NAACP Legal Defense Fund once stood alone as tactical legal organizations with the goal of implementing progressive policy goals through strategic legal advocacy, Christian legal organizations "have undeniably proliferated over the past three decades."[184] According to Steven P. Brown, the growth of Christian legal organizations "can be viewed, in part, as a belated response to the conspicuous absence of religious conservatives from the courtrooms of the past."[185] Brown argues conservative Christians' dissatisfaction with "the political process as a means of implementing the conservative social vision necessary for reclaiming America" has morphed into an increased emphasis on the role of the judiciary in implementing conservative Christian policy.[186] The existence of the above cases support Brown's analysis.

Christian legal organizations. However, it is important to note that some of the organizations this Note discusses would eschew that label.

178. *See supra* Section I.A.

179. LEWIS, *supra* note 20, at 2.

180. *Id.* at 5.

181. *Id.* at 14.

182. *See supra* notes 43–55 and accompanying text. For a more in-depth discussion of the ways in which Christian legal organizations have utilized rights-oriented language to establish themselves in federal courts. *See also* LEWIS, *supra* note 20.

183. Daniel Bennett, *The Rise of Christian Conservative Legal Organizations*, RELIGION & POL. (June 10, 2015), https://religionandpolitics.org/2015/06/10/the-rise-of-christian-conservative-legal-organizations/.

184. *Id.*

185. STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS 6 (2002).

186. *Id.* at 4, 5.

Similar to conservative Christians generally, Christian legal organizations also embody the narrative of Christian victimhood in their mission statements and advocacy goals. For instance, Alliance Defending Freedom (ADF), a legal organization formed by Christians, laments on their website, "[a]s secular forces chip away at our nation's Judeo-Christian roots, religious freedom is increasingly threatened."[187] Similarly, the American Center for Law and Justice has a section on its website dedicated to the "Persecuted Church," linking articles to all the ways in which Christians are being persecuted in America and across the globe.[188]

In the cases where the Court heard and issued decisions on free exercise issues, Christian legal organizations were working behind the scenes. For example, *Trinity Lutheran* and *Masterpiece Cakeshop* were both litigated by ADF,[189] and *Fulton* and *Hosanna-Tabor* were both litigated by the Becket Firm.[190] Although the Becket Firm purports to be a litigation firm protecting "religious liberty for all,"[191] critics accuse the Becket Firm of "turn[ing] its focus toward representing Christians and the religious right" in recent years, suggesting greater alignment with conservative Christian ideals than the firm lets on. [192] *Carson* and *Kennedy* were both litigated in part by First Liberty.[193] First Liberty Institute asserts it believes "every American of any faith—or no faith at all—has a *fundamental* right to

187. *Religion: Our First Freedom*, ALL. DEFENDING FREEDOM, https://adflegal.org/issues/religious-freedom/overview (last visited Nov. 14, 2022).

188. *Persecuted Church*, AM. CTR. FOR L. & JUST., https://aclj.org/persecuted-church (last visited Nov. 14, 2022).

189. *See* Petition for Writ of Certiorari, Trinity Lutheran Church of Columbia, Inc. v. Pauley, 137 S. Ct. 2012, 2012 (2017) (No. 15-577); *See also* Petition for Writ of Certiorari, Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1719 (2018) (No. 16-111).

190. *See* Petition for Writ of Certiorari, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1868 (2021) (No. 19-123); Petition for Writ of Certiorari, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 171 (2012) (No. 10-553).

191. *Cases*, BECKET, https://www.becketlaw.org (last visited Nov. 14, 2022).

192. *See* Rebecca Bratek, *Becket Fund Law Firm Gaining a Reputation as Powerhouse After* Hobby Lobby *Win*, WASH. POST (July 20, 2014), https://www.washingtonpost.com/politics/becket-fund-law-firm-gaining-a-reputation-as-powerhouse-after-hobby-lobby-win/2014/07/20/c28931a4-104c-11e4-8936-26932bcfd6ed_story.html.

193. Petition for Writ of Certiorari, Carson v. Makin, 142 S. Ct. 1987, 1987 (2022) (No. 20-1088); Petition for Writ of Certiorari, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2407 (2022) (No. 21-418).

follow their conscience and live according to their beliefs.[194] To the extent that First Liberty Institute is not Christian-affiliated by design, it espouses the rhetoric of Christian victimhood just the same as organizations like the ADF. For example, Kelly Shackleford, the president of First Liberty Institute, called *Obergefell* and law protecting LGBTQ+ individuals as "another route for suing Christians" and a "direct attack" on religious freedom.[195] In essence, even if these organizations do not advertise themselves as Christian legal organizations, they believe in and convey the message of Christian victimhood into constitutional litigation. The Court, in return, incorporates that message into free exercise precedent through *Lukumi* and concerns of discrimination.

Similarly, although the injunctive relief cases discussed involved concerns about discrimination against religion in general—rather than specifically Christianity—Christian legal organizations serve as a link, connecting COVID-19 litigation with Christian victimhood. For example, *Dr. A.* was litigated by the Becket Firm,[196] *Danville Christian Academy* was litigated by First Liberty Institute, *Pentecostal Church* was litigated in part by Thomas Moore Society,[197] and *Calvary Chapel* was litigated by ADF,[198] all of which are conservative, Christian-sympathizing (if not outright Christian-associated) legal organizations. While non-Christians also challenged COVID-19 regulations on congregating for worship,[199] it is undeniable that a large number of these suits were or are being brought by Christian churches that are backed by Christian legal

194. *About*, FIRST LIBERTY, https://firstliberty.org/about-us/ (last visited Nov. 14, 2022) (emphasis in original).

195. Sarah Posner, *Anti-Trans Bathroom Debate: How a Local Religious-Right Faction Launched a National Movement*, ROLLING STONE (Jan. 22, 2018), https://www.rollingstone.com/politics/politics-news/anti-trans-bathroom-debate-how-a-local-religious-right-faction-launched-a-national-movement-203248/.

196. Petition for Writ of Certiorari, Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021) (No. 21-2566).

197. The Thomas More Society advertises itself as "fight[ing] for your Judeo-Christian family values" against a "growing hostility in our secular culture," especially in the realm of reproductive rights. *About Us*, THOMAS MORE SOC'Y, https://thomasmoresociety.org/about (last visited Nov. 14, 2022); *see also* S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128, 1130 (2021).

198. Appellant's Reply Brief, Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1228 (9th Cir. 2020) (No. 20-16169). The other Christian-related cases involving injunctions—*Tandon*, and *Roman Catholic Diocese*—had no apparent ties to Christian legal organizations.

199. *See* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 66 (2020) (involving Jewish claimants, as well).

organizations.[200] Some argue that pandemic litigation was brought by conservative Christian organizations because "[s]tate governors who ordered the closure of religious places of worship for normal meetings were vilified as aggressive secularists who acted in order not to protect public health, but to undermine religious freedom."[201] If conservative Christians took pandemic litigation as an opportunity to defend their idea of religious freedom, Paul Baumgardner claims the "Pandemic Court" took COVID-19 as an opportunity to expand religious freedom.[202] Thus, the efforts of conservative justices to end discrimination toward religion caused by state COVID-19 regulations, in many ways, maps onto the concerns conservative Christians themselves have during the pandemic—that churches and ministries are being treated "unfairly" because "some officials abused their powers."[203] Looking at the forces bringing forth this litigation, it appears likely that the rhetoric of Christian victimhood propelled COVID-19 litigation, as well.

Regarding the cases where certiorari was denied, conservative Christian legal organizations also furnish a link between the narrative of Christian victimhood and the concurrences and dissents written by some of the conservative justices. The Becket Firm served as counsel in *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation.*,[204] and both the Becket Firm and ADF served as counsel in *Stormans*.[205] *Davis* was brought by Liberty Counsel,[206] an organization that claims itself to be "a Christian ministry that

200. *See* David Crary, *More U.S. Churches Sue to Challenge COVID-19 Restrictions*, AP NEWS (Aug. 13. 2020), https://apnews.com/article/virus-outbreak-mn-state-wire-religion-ca-state-wire-lawsuits-7d2933ca919f33aa8c4c845e1d3febdc.

201. Jeffrey Haynes, *Donald Trump, the Christian Right and COVID-19: The Politics of Religious Freedom*, MDPI (Jan. 30, 2021), https://www.mdpi.com/2075-471X/10/1/6/htm.

202. Paul Baumgardner, *Immunizing the Flock: How the Pandemic Court Rewrote Religious Freedom*, MDPI (Feb. 17, 2021), https://www.mdpi.com/2075-471X/10/1/12.

203. ALL. DEFENDING FREEDOM, CHURCHES, COVID, AND CONSTITUTIONAL RIGHTS: DEFENDING CHURCHES DURING A PANDEMIC (2020), https://uploads-ssl.webflow.com/5a4d1738e77d7900016a366c/5efabf9029ce7d002d84aaae_ADFD_CMA_COVID%20Response%20Spring%202020_FINAL_Updates_20200622.pdf.

204. Petition for Writ of Certiorari, Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909, 909 (2019) (No. 18-364).

205. Petition for Writ of Certiorari, Stormans, Inc. v. Weisman, 579 U.S. 942, 942 (2016) (No. 15-862).

206. Petition for Writ of Certiorari, Davis v. Ermold, 141 S. Ct. 3, 3 (2020) (No. 19-926).

proclaims, advocates, supports, advances, and defends the good news that God in the person of Jesus Christ paid the penalty for our sins."[207] Accordingly, "[e]very ministry and project of Liberty Counsel centers around and is based upon this good news. . . . also referred to as the gospel."[208] Most recently, First Liberty Institute helped oppose the application for stay in *Austin v. Navy Seals*.[209] Thus, Christian legal organizations crop up in nearly every free exercise case discussed thus far.

While the fact that Christian legal organizations are litigating matters that relate to Christians might seem intuitive, there is something more significant unfolding when we consider the increased presence of Christian legal organizations in the Court in light of the cultural experiences of Christians in recent decades. Christian legal organizations in many ways embody Christian victimhood,[210] and they have molded this sense of victimhood into effective legal arguments. The proof of the effectiveness of Christian legal organizations is the above opinions, concurrences, and dissents, bemoaning the rampant discrimination against religious groups—often Christian—at the hands of the government.[211] While not all of the litigation efforts emerging from these organizations ultimately elicited new free exercise precedent, the presence of the *Lukumi* rhetoric in a variety of dissents or concurrences is still arguably significant. The presence of such rhetoric suggests that Christian legal organizations are beginning to shape free exercise jurisprudence and may soon permeate majority opinions. Just as groups in the past have shaped constitutional law through strategic litigation, such as the NAACP, in desegregating public education,[212] it appears we are seeing similar efforts by conservative Christian legal organizations with respect to free exercise rights.

207. *About Liberty Counsel*, LIBERTY COUNS., https://lc.org/about (last visited Nov. 14, 2022).

208. *Id.*

209. Respondents' Response in Opposition to Application for Partial Stay of the Injunction, Austin v. U.S. Navy Seals, 142 S. Ct. 1301, 1301 (2022) (No. 21A477).

210. *See supra* Section I.A; *see also supra* notes 187–88 and accompanying text.

211. *See supra* Section I.

212. *See* Robert L. Carter, *The NAACP's Legal Strategy Against Segregated Education*, 86 MICH. L. REV. 1083, 1085 (1988); *see also* Risa L. Goluboff, *Book Excerpt: The Lost Promise of Civil Rights* 93 VA. L. REV. 85, 101 (2007) (arguing that advances in labor rights, in part, resulted from "critical doctrinal and strategic decisions" by lawyers following *Brown v. Board of Education*, as well as the Supreme Court's reception to certain arguments).

Significantly, some of these groups are largely successful. For example, ADF has won fourteen cases at the Supreme Court since 2013, and the Becket Firm boasts of having an "undefeated Supreme Court record, prevailing in seven Supreme Court cases within the past ten years", including notable cases like *Burwell v. Hobby Lobby* (2014) and *Little Sisters of the Poor v. Commonwealth of Pennsylvania* (2020)[213] and they do so while perpetuating the notion of Christian victimhood. [214]

The Court's 2021 through 2022 term indicates these Christian legal organizations are becoming largely successful in shaping free exercise jurisprudence as a whole, as well. As Justice Sotomayor states in *Kennedy*, the Court's ruling "weakens the backstop" of the Establishment Clause and "elevates one individual's interest in personal religious exercise . . . . over society's interest in separation of church and state, eroding the protections for religious liberty for all."[215] Similarly, in *Carson*, Justice Breyer wrote the Court's decision "leads us to a place where separation of church and state becomes a constitutional violation."[216] Thus, to some, these free exercise victories for conservative Christians have fundamentally altered the Court's free exercise jurisprudence, putting the fate of the establishment jurisprudence in doubt.

To be clear, this Note does not argue that conservative Christians are the sole beneficiaries of the apparent trend in Supreme Court rhetoric, broadening the *Lukumi* precedent to cover more and more factual scenarios that might not properly implicate *Lukumi*. In fact, other religious groups appear to be benefiting from this shift in free exercise jurisprudence, as well. For instance, in *Murphy v. Collier* (2019), Justice Kavanaugh concurred in an application for a stay of execution for a Buddhist inmate who requested a Buddhist religious advisor be present during their execution.[217] Kavanaugh stressed that, by not providing the inmate with their requested spiritual provider, the

213. *History of Alliance Defending Freedom*, ALL. DEFENDING FREEDOM, https://adflegal.org/about-us/who-we-are/history (last visited Nov. 14, 2022); *Becket at the Supreme Court*, BECKET, https://www.becketlaw.org/ (last visited Nov. 14, 2022); *Top Becket Victories*, BECKET, https://www.becketlaw.org/about-us/top-victories/ (Last visited Nov. 14, 2022).

214. *See Our Mission*, BECKET, https://www.becketlaw.org/about-us/mission/ (last visited Nov. 14, 2022).

215. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2453 (2022) (Sotomayor, J., dissenting).

216. Carson v. Makin, 142 S. Ct. 1987, 2014 (2022) (Breyer, J., dissenting).

217. Murphy v. Collier, 139 S. Ct. 1111, 1111 (2019) (Kavanaugh, J., concurring).

government would commit "denominational discrimination" since religions like Christianity and Islam were accommodated, but Buddhism was not.[218] The Court's concern about discrimination against other types of religion beyond Christianity is consistent with the fact that some legal organizations previously discussed advertise themselves as defenders of religious liberty for all—not any specific type of religion.[219] This Note offers that we might cast doubt on such nonsectarian promises due to these organizations' alignments with conservative Christian causes, as well as statements made by the groups' leaders,[220] suggesting that the influence of Christian victimhood is still at work, even in litigation involving non-Christians. Thus, although the Court appears willing to apply the *Lukumi* rationale more broadly than cases involving Christians, Christian legal organizations may ultimately be forging the path that allows for this expansion.

This Note does assert, however, that the expansion of *Lukumi* is, in part, attributable to a burgeoning rhetoric of Christian victimhood, which is translated into legal arguments through Christian legal organizations. Given the statistics this Note explored,[221] it appears Christians, more often than not, benefit from this legal strategy. Beyond speculation, however, there is nothing concrete to suggest that Christians are particularly favored amongst the Court apart from the Court taking on a majority of cases involving Christian claimants.[222]

The narrative of Christian victimhood, through the efforts of Christian legal organizations, has not only forged powerful litigation

218. *Id.* at 1112. However, not all of the justices share this view. Justices Alito, Thomas, and Gorsuch dissented. Justice Alito argued the stay of execution should not have been granted because it was untimely, stating:

Even if Murphy is not held responsible for failing to act in 2013 or shortly thereafter, he and his attorneys certainly should have been spurred to action when, in November of last year, his execution date was set. Instead, his lawyers waited three months before writing to the Texas Department of Criminal Justice. How can that be justified?

Id. (Alito, J., dissenting). While the justices appear to decide on procedural grounds, their dissent raises questions of whether their concerns for discrimination against religion extend beyond Christian claimants.

219. *See supra* notes 191–95 and accompanying text.

220. *See supra* 191–95 and accompanying text.

221. *See supra* Section II.

222. This rings true even in the Supreme Court's 2021 term, where it appears all four cases concerning religious freedom involved Christians. *See* Megan Scully, *Supreme Court Docket Gets Busier with More Culture-War Showdowns*, BL (Feb. 22, 2022, 3:28 PM) https://news.bloomberglaw.com/us-law-week/supreme-court-docket-gets-busier-with-more-culture-war-showdowns.

techniques, but it has arguably taken root in Supreme Court precedent itself through the vehicle of the *Lukumi* precedent.[223] As Christian legal organizations enter the courtroom with the narrative that, "[a]cross the United States, Christians are being punished for living by their convictions,"[224] the social plight of conservative Christians is translated into new constitutional precedent. In effect, Christian legal organizations have utilized the narrative of Christian victimhood in litigation to unlock the mechanism by which the Court may give relief to those who consider themselves to be targeted and uniquely embattled by the society—the anti-discrimination exception to *Smith*. *Lukumi*'s safeguards against religious discrimination is significantly amenable to cases in which litigants assert rhetoric of Christian victimhood, as it is inherent in these litigants' worldview that they truly are discriminated against in contemporary America due to their Christian beliefs. At its core, the symbiotic relationship between Christian victimhood as a legal strategy and *Lukumi*'s anti-discrimination principle unearths why we see the expansion of *Lukumi*'s non-discrimination policy to cases that are perhaps beyond *Lukumi*'s original scope and why discrimination is becoming the dominant test in free exercise jurisprudence.

CONCLUSION

The influence of Christian victimhood on free exercise precedent becomes clear by analyzing the rhetoric of the conservative justices who routinely appeal to *Lukumi* and its prohibition of religious discrimination. While the Free Exercise Clause was once a clause appealed to mostly by minority religions, it is fast becoming a mechanism by which conservative Christians—a former majority religious group—can reassert their views into the American constitutional system after experiencing increased cultural dislocation in the wake of prominent culture war issues.

The long-term impacts of this new legal strategy by Christian legal organizations are unclear. Steven Brown claims that, since 1980, Christian legal organizations "have arguably had a greater impact on the nexus of law and religion than any other movement active in the federal courts," suggesting that the momentum gained by Christian legal organizations will not dissipate soon.[225] Additionally, given the

223. *See supra* Section II.

224. *Who We Are*, ALL. DEFENDING FREEDOM, https://adflegal.org/about-us (last visited Nov. 14, 2022).

225. BROWN, *supra* note 185, at 9.

composition of the Court,[226] as well as the ways in which Christian victimhood has cropped up in almost every free exercise case through the *Lukumi* rationale since *Lukumi* was issued,[227] this Note speculates the Court's free exercise jurisprudence will soon embrace an expanded sense of discrimination toward religion in a way that furnishes more protection to religious claimants, especially Christians.

Some consider these emerging legal efforts of conservative Christians in response to issues like same-sex marriage and abortion retrogressive and offensive.[228] In particular, critics argue that conservative Christians' legal approach to defending religious freedom pits the rights of Christians against the rights of other marginalized groups, such as LGBTQ+ individuals.[229] For instance, Stewart argues, "[t]oday's Christian nationalists will insist they are the only victims here. . . . That is precisely how 'religious liberty' works today. You maximize the moral anguish of those whose religion and values you favor and minimize the rights and suffering of those you disfavor."[230] However, some scholars have a more optimistic view of Christians' turn to the courts. For example, Maimon Schwarzschild suggests that, since litigation efforts of Christians lead to religious exemptions rather than to broad policies like legislation, free exercise accommodations may be preferable for those against conservative Christian policies.[231] Placing "[e]mphasis on accommodations and exemptions . . . is apt to divert the political energy of religious Americans from persuading their fellow citizens not to enact laws from which religious exemptions are needed or wanted."[232] The legal emphasis on exemptions through free exercise litigation thus signals a "withdrawal" of conservative Christians from majoritarian politics in

226. *See, e.g.*, Charles Cameron & Jonathan P. Kastellec, *Conservatives May Control the Supreme Court Until the 2050s*, WASH. POST (Dec. 14, 2021, 6:00 AM), https://www.washingtonpost.com/politics/2021/12/14/supreme-court-roe-conservatives/.

227. *See supra* Section II.B.

228. *See, e.g.*, Rob Boston, *The End of Roe: Supreme Court Overturns Landmark 1973 Abortion Rights Ruling*, AMS. UNITED (Jul. 15, 2022), https://www.au.org/the-latest/church-and-state/articles/the-end-of-roe-supreme-court-overturns-landmark-1973-abortion-right-ruling/#; Kenji Yoshino, *Is the Right to Same Sex Marriage Next?*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/opinion/same-sex-marriage-supreme-court.html?searchResultPosition=84.

229. *See* Velte, *supra* note 18, at 1136.

230. Stewart, *supra* note 36.

231. *See* Maimon Schwarzschild, *Do Religious Exemptions Save?*, 53 SAN DIEGO L. REV. 185, 198 (2016).

232. *Id.*

some sense, leading to narrower exceptions rather than policies that burden non-religious individuals.[233] Given the ways in which *Kennedy* and *Carson* appear to expand protection under the Free Exercise Clause, thereby encroaching upon protections under the Establishment Clause, some comment that the Court's approach to free exercise will ultimately curtail the rights of those who are not religious or whose religious practices take different forms than Christians.[234]

While it is uncertain what effect conservative Christian free exercise litigation will have in the long-term, such litigation is bound to endure. As discussed, polls show Christians are "increasingly become less of a numerical and cultural majority," and with this change in demographics, conservatives' tactics of turning to the courts and asserting their rights through the narrative of Christian victimhood is likely to persist.[235] With respect to the fate of *Lukumi*, it appears likely that *Lukumi*'s protections will expand, encompassing more forms of supposed religious discrimination, especially in regards to cases being litigated by Christian legal organizations. Such expansion may ultimately displace *Smith* as the dominant test for free exercise cases, making *Lukumi* and its anti-discrimination principle the central inquiry.

Of particular significance to this Note, the Court agreed to take up *303 Creative v. Elenis*—a case regarding a web designer with religious objections to same-sex marriage who refused to create webpages for same-sex couples—in its 2022 to 2023 term.[236] In *303 Creative*, the web designer wishes to post a statement on her page, explaining why she will not create websites for same-sex couples; however, such a statement is prohibited by Colorado's public

233. *Id.* at 199. Schwarzschild, however, recognizes the disadvantages of this approach from the perspective of religious people, noting, "[s]eeking frequent exemptions and accommodations puts religious people in the invidious position of demanding special privileges. This is never an appealing, or perhaps even a viable, demand: least of all in an egalitarian society, where a core idea is rejection of special privilege." *Id.*

234. Pamela Paul, *In the Face of Fact, the Supreme Court Chose Faith*, N.Y. TIMES (July 17, 2022), https://www.nytimes.com/2022/07/17/opinion/kennedy-bremerton-supreme-court.html?searchResultPosition=5.

235. LEWIS, *supra* note 20, at 3.

236. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1170 (10th Cir. 2021), *cert. granted*, 142 S. Ct. 1106 (Feb. 22, 2022) (No. 21-476); Ariane de Vogue & Tierney Sneed, *Supreme Court Takes Up Case of Web Designer Who Won't Work with Same-Sex Couples*, CNN (Feb. 22, 2022, 11:09 AM), https://www.cnn.com/2022/02/22/politics/supreme-court-same-sex-marriage-religious-liberty/index.html.

accommodations law.[237] The case comes in the wake of *Masterpiece Cakeshop*, and would allow the Court to expand upon that decision, clarifying how "the tension between state anti-LGBT discrimination laws and claims of religious liberty" should be confronted.[238] Consistent with the trends discussed, *303 Creative* is being litigated by prominent Christian legal organization, ADF.[239] In their summary of the case, ADF highlights the discriminatory nature of Colorado's law toward religion, asserting that "no one should be banished from the marketplace simply for living and working consistently with their religious beliefs."[240] Accordingly, the rhetoric of discrimination under *Lukumi* and the narrative of Christian victimhood may crop up in the Court's forthcoming decision as it relates to choosing between one's business and one's religious beliefs. Unfortunately, at this point, the case has been presented to the Court solely as a question of free speech, making it unlikely that the Court will provide the much needed clarity as to how far free exercise rights extend when such rights come into direct conflict with civil rights legislation.[241]

Based on the direction of free exercise cases post-*Smith*, the narrative of Christian victimhood and the corresponding legal rhetoric of justices of the Court in the form of the *Lukumi* rationale are likely to endure within the free exercise landscape into the foreseeable future. While the expansion of free exercise rights, especially to conservative Christians, could be characterized as pockets of exemptions necessary to sustain a tolerant society,[242] time will tell whether the rhetoric of Christian victimhood and the zealous protection of the rights of Christians in the Court truly equate to an effort at tolerance or if such efforts will lead to broader favoritism of Christianity in American courts.

237. de Vogue & Sneed, *supra* note 236.

238. *Id.*

239. 303 Creative v. Elenis*: Summary*, ALL. DEFENDING FREEDOM (Feb. 22, 2022) https://adflegal.org/case/303-creative-v-elenis.

240. *Id.*

241. Robert Barnes, *Wedding Websites Are the Latest Gay Rights Battleground in Colorado*, WASH. POST (Dec. 4, 2022), https://www.washingtonpost.com/politics/2022/12/04/colorado-supreme-court-web-design-lgbtq/.

242. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2430 (2022) (citing Lee v. Weisman, 505 U.S. 577, 590 (1992)); Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring) ("[I]t must be the proudest boast of our free exercise jurisprudence that we protect the religious beliefs that we find offensive.").