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After *Fulton*: (How) Are Trump's Judges Trumping LGBTQ+ Civil Rights Protections?

CLE Workshop Materials (as of May 2, 2021)

The Supreme Court's decision in *Fulton v. City of Philadelphia* will tell us more about how, and at what speed, Trump's appointments to that court are reshaping First Amendment doctrine and whether our half-century old civil rights framework remains effective even as the Equality Act proposes to update and expand its coverage. This panel will discuss the implications of the Court's *Fulton* decision(s) for government contracting with faith-based social service agencies and other enforcement of nondiscrimination rules as against free exercise objections. It also will address recent lower federal court decisions in First Amendment cases, and their implications for both federal and state legislative efforts to expand religious exemptions from civil rights and other public welfare laws.

U.S. Supreme Court Case Docket:
https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-123.html

Oral argument transcript:
https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-123_o758.pdf

Oral argument recording:
https://www.supremecourt.gov/oral_arguments/audio/2020/19-123

SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Case preview: Court will tackle dispute involving religious foster-care agency, LGBTQ rights

By **Amy Howe**
on Oct 28, 2020 at 4:00 pm

This article is the first entry in a **symposium** *previewing* **Fulton v. City of Philadelphia**.

In the past five years, the Supreme Court has ruled that the Constitution guarantees **a right to same-sex marriage** and that federal employment discrimination laws **protect LGBTQ employees**. On Nov. 4, the justices will hear oral argument in a clash between religious freedom and laws and policies that protect LGBTQ rights. The court's decision in ***Fulton v. City of Philadelphia*** could have a significant impact for state and local governments that use private companies to provide services to their residents – if the justices decide to reach the broader issues presented by the case.

The question of how to balance sincere religious beliefs against the government's interest in protecting LGBTQ rights is one with which the justices have struggled. In 2018, the justices confronted this question in the case of a Colorado baker who refused to create a custom cake for a same-sex couple because he believed that doing so would violate his religious beliefs. The justices ultimately issued a **narrow ruling** for the baker, holding that the state administrative agency that had ruled against him had treated him unfairly by being too hostile to his religious beliefs. The justices did not decide, however, whether requiring the baker to bake a cake for a same-sex couple would violate his right to freedom of speech under the First Amendment.

In *Fulton*, a similar First Amendment question returns to the Supreme Court in a lawsuit brought by Catholic Social Services, a foster-care agency associated with the

Archdiocese of Philadelphia. During the 50 years that it has worked with the city to place foster children, CSS has worked with thousands of foster parents, including the named plaintiff in this case: Sharonell Fulton, who has served as a foster mother to 40 children over 25 years. For CSS, the home studies that are part of the process of certifying prospective foster parents are effectively endorsements of the family. The agency's Catholic beliefs, it explains, preclude it from certifying both foster parents who are not married and same-sex married couples – although it is not clear whether any same-sex couple has ever asked CSS for certification.

Sharonell Fulton, named petitioner in the case (Becket Fund)

The dispute now before the Supreme Court began after city officials read a March 13, 2018, article in a Philadelphia newspaper about a complaint against a different foster-care agency. The article also indicated that the Archdiocese of Philadelphia and CSS follow the Catholic Church's teachings on marriage, which prohibits them from providing certifications for same-sex couples. Two days later, the city council passed a resolution that instructed the Department of Human Services, which is tasked with finding a home for foster children, to change its contracting practices. The resolution condemned "discrimination that occurs under the guise of religious freedom." DHS also initiated an investigation into whether religious foster-care agencies had discriminated against same-sex couples. By March 16, DHS had blocked all referrals to CSS.

CSS, Fulton and another foster parent, Toni Lynn Simms-Busch, filed a lawsuit in May 2018, asking a federal court to require DHS to resume referrals to CSS. They argued that the city's actions violated several different provisions of the First Amendment: the free exercise clause, which protects religious belief and expression; the establishment clause, which (among other things) bars the government from favoring non-religion over religion; and the free speech clause. The district court denied CSS's request, concluding that the city's policy passed muster under the court's 1990 decision in **Employment Division v. Smith**, which held that government actions do not violate

the Constitution's free exercise clause as long as they are neutral and apply to everyone. The U.S. Court of Appeals for the 3rd Circuit **affirmed**. It found no sign that DHS had discriminated against CSS because of its religious beliefs. CSS then went to the Supreme Court, and the justices agreed to weigh in.

Arguments of the challengers

In its brief on the merits, CSS offered a variety of reasons why the court should reverse the 3rd Circuit's ruling in favor of the city. As an initial matter, CSS argued that the city's actions in cutting off referrals to the agency did not flow from a neutral, generally applicable law at all. Instead, CSS suggested, when the city and DHS learned through the March 2018 newspaper article that CSS would not certify same-sex couples for religious reasons, they wanted to penalize CSS and "reverse-engineered policies to justify" that outcome after the fact.

CSS next argued that the city's refusal to make referrals to the agency because of CSS's religious beliefs is precisely the kind of situation to which the free exercise clause applies. And in any event, CSS continued, the court's decision in *Smith* does not shield laws or policies that are "directed at" a particular religion and therefore not neutral, nor does it apply to laws that use individual exemptions and therefore are not generally applicable. Both of those exceptions, CSS asserted, apply to this situation. Philadelphia's policy is aimed squarely at prohibiting CSS's exercise of its religious beliefs, rather than having only an "incidental effect" on it. The city was also openly hostile toward CSS's religious beliefs, accusing the agency of discrimination and telling the agency that it was "not 100 years ago."

The policy is also not generally applicable, CSS added, because the city has two different systems to provide exemptions – a committee that can grant exemptions or waivers from city policies, as well as the possibility that DHS can grant exemptions in an individual case. Moreover, CSS noted, the city actually requires foster agencies to take marital status, disability and family status into account, and it allows agencies to make referrals to other agencies for secular reasons – for example, for Native American children and parents – but not for religious reasons.

What the city's actions boil down to, CSS wrote, is an effort to "compel a private organization's speech" by requiring CSS to do a home study that certifies same-sex couples as foster parents. That conduct is particularly troubling, CSS suggested, because the Supreme Court's 2015 ruling in ***Obergefell v. Hodges***, recognizing a right to same-sex marriage, indicated that religious groups could still "advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."

Because the city's actions are not protected by *Smith*, CSS told the justices, they are subject to "strict scrutiny" – the most stringent constitutional test. The city fails that test, CSS argued. It does not have a compelling interest in preventing discrimination, CSS contended, as demonstrated by the fact that the city gives exemptions from the nondiscrimination policy to others. Even if it did have a strong interest in enforcing its nondiscrimination policy against CSS, the agency continued, the city's actions are not narrowly tailored to achieve that interest because the effects of that enforcement go beyond CSS, barring children from being placed with foster parents even when CSS had already certified those homes. And the city has also not shown that it could not work around the problem by allowing CSS to refer same-sex couples to one of the 29 other agencies in the city's foster-care system, CSS observed.

CSS urged the court to scrap its ruling in *Smith* and replace it "with a free exercise standard that reflects the text, history, and tradition of the clause." *Smith*, CSS contended, rested on a series of predictions that have been proven to be wrong. For example, CSS suggested, granting exemptions from laws will not lead to "anarchy": Experience with the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act, federal laws enacted in response to *Smith*, has shown that courts can determine when laws should supersede religious rights. *Smith* was also wrong in its interpretation of the free exercise clause, CSS continued, which protects "an affirmative right for believers to practice their religion, not just hold particular religious beliefs." It's noteworthy, CSS added, that the First Amendment does not contain any limitations on the free exercise of religion – unlike, say, the Fourth Amendment, which prohibits searches that are "unreasonable."

The federal government filed a "friend of the court" brief supporting CSS. It told the justices that they don't need to decide whether to overrule *Smith* because the city's policy was neither neutral nor generally applicable. What's more, the government added, the city's conduct demonstrated "unconstitutional hostility toward Catholic Social Services' religious beliefs" — just as in the case of the Colorado baker.

Arguments of the city

In its brief on the merits, the city acknowledged that CSS is a "point of light in the City's foster-care system" that has worked "with distinction," and it noted that the city still contracts with CSS to provide other services to foster children. But it framed the question before the court very differently. It told the justices that because the lawsuit had originally focused on the constitutionality of the city's decision to freeze referrals under the 2018 contract, which has now expired, the only real question left in the case is whether the nondiscrimination requirement is unconstitutional. And the answer is no. CSS does not have a constitutional right to have the city "offer it a contract that omits

the same non-discrimination requirement every other" foster-care agency "must follow when performing services for the City."

Two Philadelphia-area nonprofit groups entered the case to defend the city's policy: the Support Center for Child Advocates, which provides legal assistance and advocacy for abused and neglected children in the Philadelphia area, and Philadelphia Family Pride, a group for LGBTQ-led families in the area. They told the justices that CSS has a choice. If it doesn't like the terms of the contract that the city is offering, it can decline to enter into the contract at all.

The city underscored that, by certifying foster-care parents, CSS is not endorsing same-sex relationships. It added that it has more latitude in regulating CSS, as one of its contractors, than it does in regulating private citizens – including when it comes to the free exercise clause. To be sure, the city noted, a government cannot single out contractors because of their religious beliefs or establish rules because of a hostility to religion. But in this case, the city emphasized, the nondiscrimination requirement is "generally applicable and neutral." First, it explained, every contract with a foster-care agency contains the same nondiscrimination provision, which applies to everyone the same way. The city stressed that it does not allow any agencies – either religious or nonreligious – to discriminate by denying service and referring would-be foster parents to other agencies, although agencies can provide information about their services that may lead prospective foster parents to go elsewhere.

The nondiscrimination requirement is also neutral, the city continued, because nothing in it suggests that it makes distinctions based on religion. As the lower courts found, the city told the justices, there was no evidence that CSS was targeted "because of" its religious beliefs. CSS cannot rely on statements by the mayor or the city council to make its case, the city pointed out, because DHS's actions are the ones at issue. Indeed, the city noted, further evidence that it does not distinguish based on religion can be seen in the fact that DHS has offered CSS "the same" contract that it offers to other agencies, because it would like to keep CSS as one of its contractors and has paid CSS "millions of dollars" for other services that the agency provides.

This is in any event not the case to overrule *Smith*, the city concluded. Even before the Supreme Court's ruling in *Smith*, the city emphasized, there was no individual right to challenge the government's management of its own affairs. The doctrine of stare decisis – the principle that courts will not normally overturn their own cases – also counsels against overruling *Smith*, the city argued. Stare decisis requires a "special justification" to reverse a past decision, and no such justification exists here. By contrast, the city contended, overruling Smith "would create a doctrinal mess," and CSS has provided "little guidance on how courts would clean it up."

Arguments of third parties

“Friend of the court” briefs on both sides painted vivid pictures of the potential consequences of the court’s decision. Two briefs supporting CSS focused on the significance of the case for religious minority groups. The Jewish Coalition for Religious Liberty told the justices that the dispute “represents an opportunity for the Court to restore robust Free Exercise protection to religious minorities,” who are disproportionately affected by generally applicable laws. For example, the group suggested, a law that prohibited circumcision for everyone might pass muster under *Smith* even though it would “severely burden” one of “Judaism’s most sacred practices.” A second brief — from a diverse array of groups including a Muslim organization, a Sikh organization, a Christian community from the Anabaptist tradition, and a society representing a faith within Hinduism — explained that although the federal Religious Freedom Restoration Act and comparable state laws have been helpful to protect religious minorities, these minorities “find themselves in a difficult situation” elsewhere. “Avoiding certain consequences of democratic government is the very point of having a First Amendment,” they emphasized.

Another brief supporting CSS, filed by Nebraska, Arizona and Ohio, stressed that states rely heavily on faith-based foster-care agencies to help them recruit foster parents and place children. In Nebraska and Alabama, for example, the states wrote, roughly 30% of the foster-care agencies are religious.

A group of scholars who study the rights of children filed a brief supporting the city. They contended that providing an exemption for religious foster-care agencies that refuse to certify same-sex couples would be harmful for foster children by limiting the pool of potential foster parents. A similar argument came from a brief filed by social workers and nonprofits that deal with child welfare, adoption and foster care, who told the justices that LGBTQ youth are both disproportionately represented in the foster-care system and more at risk for negative experiences in that system. Studies have suggested, the groups said, that the best way to prevent these negative experiences is by placing LGBTQ youth with welcoming foster families, which can be hard to find. “Eliminating prospective foster parents on the basis of their sexual orientation may remove the very parents who could most benefit LGBTQ children in foster care,” the groups concluded.

A group of local governments and mayors also filed a brief supporting the city. They described how local governments enter into contracts with private parties to provide a variety of services to their residents – everything from public transportation to after-school programs. Nondiscrimination requirements like the one in this case exist not to “force conformity of belief,” the governments explained, but “to ensure that all our residents receive publicly funded services with dignity and respect and without

experiencing exclusion." Allowing contractors like CSS to claim an exemption from nondiscrimination requirements would, they suggested, make it harder to deliver services, often to groups like LGBTQ people and the formerly incarcerated who most need it. Even more broadly, they continued, contractors could raise religious objections in other contexts – for example, to argue that male and female passengers on a bus should have to sit separately.

After the Oct. 26 confirmation of Justice Amy Coney Barrett to fill the vacancy created by the death of Justice Ruth Bader Ginsburg, this case will be one of the first cases argued with a new, solidly conservative majority on the court. Two justices have recently reiterated their criticism of the court's 2015 ruling in *Obergefell*. In a **statement regarding the denial of review** in the case of Kim Davis, the Kentucky clerk who refused to issue marriage licenses after the decision in *Obergefell*, Justices Clarence Thomas and Samuel Alito wrote that the ruling "will continue to have 'ruinous consequences for religious liberty.'" However, if there are not five votes for the kind of sweeping ruling that CSS seeks, the justices could once again sidestep the question, as it did in the case of the Colorado baker, by issuing a narrower ruling – for example, by holding that *Smith* does not apply because the city's nondiscrimination policy is not neutral or generally applicable.

This post was originally published at **Howe on the Court***.*

Posted in **Symposium before oral argument in Fulton v. City of Philadelphia**

Cases: **Fulton v. City of Philadelphia, Pennsylvania**

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The Supreme Court Could Allow the Use of a Religious Litmus Test for Foster Parents

The Supreme Court should reject a license to discriminate in our child welfare system and put the needs of children first. The 440,000 children in our nation's foster care system are counting on it.

By Leslie Cooper, Deputy Director, LGBT & HIV Project

October 15, 2019

UPDATE: On February 24, 2020, the Supreme Court agreed to take this case.

There are currently 440,000 children in foster care across the country. And the Supreme Court has been asked to hear *Fulton v. City of Philadelphia*, a case that could profoundly impact all of them.

In a petition filed with the court, a taxpayer-funded foster care agency is claiming a constitutional right to exclude prospective foster families that don't meet its religious criteria when providing public child welfare services. The ACLU and the ACLU of Pennsylvania, representing the Support Center for Child Advocates and Philadelphia Family Pride, intervened in this lawsuit.

If the court were to accept the claim of Catholic Social Services (CSS), which lower courts have rejected, as we reminded the Court last week, it would shrink the already insufficient pool of families for children in need of a loving home, undermine religious liberty, and hurt governments' ability to provide services of all kinds.

But CSS is arguing the exact opposite—and they're using some of the following myths to support its claims.

MYTH: Faith-based foster care agencies will shut down if they are forced to accept families that do not meet their religious requirements. This will reduce services available for children.

FACT: Many faith-based foster care agencies put the interests of children first and accept all families that are able to care for them.

While some foster care agencies refuse to work with families because they are headed by a same-sex couple, of a different faith than the agency, don't attend church, or

otherwise fail to meet the agency's religious criteria, most faith-based foster care agencies follow professional child welfare standards and accept all qualified families.

In the many states and cities across the country that require government-contracted agencies to accept all qualified families, faith-based agencies of diverse religious traditions play an important role in providing these services.

FACT: There is a shortage of *families*, not agencies.

When agencies have chosen to stop providing taxpayer-funded child welfare services because they were unwilling to comply with the requirement to accept all qualified families, other agencies, including faith-based agencies, have stepped in to provide those services.

There is no shortage of foster care agencies; there is a shortage of families, and allowing agencies to turn away qualified families based on religious criteria only makes it worse.

This is why the major child welfare organizations weighed in at the Court of Appeals in support of the City. Not a single child welfare organization supported CSS's position.

MYTH: There's no harm in allowing some agencies to discriminate because families that are turned away can just go to another agency.

FACT: The *children* cannot "just go to another agency."

Children in an agency's care don't have a choice about which agency cares for them. A five-year old can't raise their hand and say, "please transfer me to an agency that will find a family for me based on my needs, not their religious beliefs."

In Michigan, an agency would not place a child with his two siblings because their foster parents were a same-sex couple. When agencies take tax dollars to provide government services for children, the needs of the children must come first.

FACT: Discrimination deters families from fostering or adopting.

Even if other agencies nearby don't discriminate — which isn't always the case — when families are rejected for reasons having nothing to do with their ability to care for a child, they may not keep knocking on doors and risk further humiliation. Navigating a system that permits discrimination can be a barrier that prevents families from ever coming forward.

MYTH: Allowing agencies to screen families based on their religious beliefs advances religious freedom.

FACT: Allowing the use of religious tests for participation in a government program undermines religious freedom.

Until last year, CSS excluded families that were unable to provide a pastor's letter confirming their religious observance. We know other agencies exclude families because they are Catholic, Jewish or otherwise do not share the agency's faith.

Allowing taxpayer-funded agencies to restrict eligibility based on religious beliefs would expose members of minority faith communities to the risk of exclusion from government programs and deny them full participation in American life.

For this reason, numerous faith leaders and organizations dedicated to religious liberty, including the Anti-Defamation League (ADL), the Hindu American Foundation, and Muslim Advocates, oppose CSS's position as presenting a threat to religious liberty. There was virtually no faith support for CSS's position at the appeals court.

MYTH: Faith-based agencies have a right to government contract on their own terms.

FACT: Taxpayer-funded government contractors do not have a right to dictate how government services are provided.

Philadelphia, like many cities and states, prohibits government-contracted foster care agencies from discriminating against qualified families. If organizations providing government services under public contracts have a right to opt out of contract requirements that conflict with their religious beliefs, it would seriously affect how government services are provided.

Seventeen states and D.C. weighed in earlier in this case to explain that what CSS is asking for would seriously affect how government services are delivered.

"The implication of the ruling that [CSS] seek[s] is that the private organizations that provide [child welfare] services should be able to tailor contractual requirements based on religious belief to serve only those they choose in the particular manner that they choose. Such a framework would at a minimum hinder, and potentially preclude altogether, government agencies' reliance on contractors to deliver services mandated by state law and policy to be provided to all who qualify for them."

The Supreme Court should reject a license to discriminate in our child welfare system and put the needs of children first. The 440,000 children in our nation's foster care system are counting on it.

https://www.aclu.org/news/lgbtq-rights/will-the-supreme-court-sanction-the-use-of-a-religious-litmus-test-for-foster-parents

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Fulton v. City of Philadelphia: The Supreme Court Considers the Religious License to Discriminate, Again

By Currey Cook, Senior Counsel and Youth in Out-of-Home Care Project Director

November 5, 2020

On Wednesday's fraught post-election morning, the Supreme Court, with newly installed Justice Amy Coney Barrett on the bench, heard argument in *Fulton v. City of Philadelphia*, a case with major implications for children in foster care, for LGBTQ people, and for anyone seeking government services. Right from jump, the Justices focused on the central issue: May an agency with a contract to perform a government service with taxpayer dollars dictate its own contract terms, giving itself special privileges to discriminate based on its religious views?

First, a little background: Catholic Social Services ("CSS") had a contract with Philadelphia to recruit and license foster families on behalf of the City. In 2018, the City learned that another contractor, Bethany Christian Services, refused to license a same-sex couple seeking to foster. The City reminded all contract agencies of the terms of their city contracts, which include following City law prohibiting sexual orientation discrimination. While Bethany agreed to comply, CSS refused and told the City it would not license same-sex couples. Philadelphia ended CSS's foster parent licensing contract, but continues to pay CSS $26 million dollars annually to provide other foster care services, such as running group homes. CSS, represented by anti-LGBT law firm The Becket Fund, sued. After losing repeatedly in the lower courts, it appealed to the Supreme Court.

CSS's arguments were alarming. First, its position that it be allowed to dictate the terms of its contract drew pointed questions from Justices across the political spectrum and for good reason. Government contractors provide a host of services from food assistance to support services for seniors to shelters for youth experiencing homelessness and victims of domestic violence. If each contractor could decide to serve only those who agree with its views, the most vulnerable in our society will face harm. In addition, counsel supporting the City rightly pointed out the practical nightmare for governments if contractors generally can write their own exemptions, creating "a Balkanization of services."

Justices Sotomayor and Kagan quickly jumped on another specious CSS argument, that the City lacks a sufficient interest in prohibiting anti-gay discrimination and so must accommodate CSS's views. In a pointed, high stakes exchange, Justice Sotomayor questioned CSS on whether the accommodation CSS seeks would allow race discrimination against foster parents in the name of religion. CSS told the court no, because race is different and the government's interest in ending race discrimination is much greater. But hold on! The law has not ranked the government's interest in civic equality this way before. Past Supreme Court cases have said the government has a "compelling" interest in eradicating discrimination, period.

When pressed on this point, the federal government, supporting CSS in this case, would not provide a yes or no answer to the "compelling interest" question, acknowledging the government's interest in prohibiting sexual orientation discrimination only as an "abstract" concept. But, obviously, the harm to children and families is all too real.

Lambda Legal is confronting that harm directly in multiple cases in which the Trump administration has explicitly endorsed discrimination by government contractors against families headed by married, same-sex couples seeking to foster children and turned away by religious contractors. One contractor is Catholic, as in *Fulton*. The other is Evangelical and turns away Jewish and Catholic would-be parents as well as same-sex couples.

Both CSS and the federal government claimed there is no harm to rejected same-sex couples because they can simply "go somewhere else" – officially endorsing taxpayer-funded agencies telling LGBTQ people "we don't serve your kind." That's classic second-class citizenship, and Justice Sotomayor called out the blatant stigmatic harm.

And that doesn't even acknowledge the stigmatic harm to LGBTQ youth, who represent 20-30% of kids in foster care, from the message that they are "less than." That is where we focused in our amicus brief representing organizations serving LGBTQ youth across the country. These youth, and all kids in care, are harmed because this discrimination deters wonderful families from stepping up when children can't safely be with their parents.

Unsurprisingly, Justice Alito was back at it again, renewing his and Justice Thomas's attempt to undermine *Obergefell*'s application of constitutional protections to LGBTQ people. Justice Kavanaugh, purporting to be reasonable, echoed his past reference to the decision's recognition that religious objections to marriage equality may come from "decent and honorable" places. But these references to *Obergefell* were selective at best. They ignored the decision's ultimate conclusion – that when sincere objections to others' equality are enacted into law, it puts the State's imprimatur "on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." It remains to be seen whether this Court recognizes that allowing CSS to exclude same-sex couples from the government service they have contracted to provide does the same thing.

https://www.lambdalegal.org/blog/20201105_fulton-supreme-court-license-to-discriminate

SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Symposium: Philadelphia's exclusion of faith-based foster agency departs from history and undermines interests of children

By **James Campbell**
on Oct 29, 2020 at 11:16 am

This article is part of a **symposium** *previewing* **Fulton v. City of Philadelphia**.

James A. Campbell is solicitor general of the state of Nebraska. He filed an **amicus brief** *on behalf of Nebraska, Arizona and Ohio in support of the petitioners.*

In *Fulton v. City of Philadelphia*, the Supreme Court will decide whether Philadelphia may end Catholic Social Services' 100-year-old foster-care ministry simply because it operates according to its religious beliefs about marriage. As in most First Amendment cases, the key threshold question in resolving the religious group's free-exercise claim is determining whether strict scrutiny applies.

The court could take many paths to applying strict scrutiny. For one, the justices could jettison the flawed framework established in ***Employment Division v. Smith*** — which held that "neutral laws of general applicability" generally do not violate the free exercise clause — and bring much-needed revitalization to free-exercise jurisprudence. For another, Philadelphia's lack of religious neutrality toward Catholic Social Services — by, among other things, openly challenging the organization's interpretation of Catholic doctrine — warrants strict scrutiny. Or, as **Nebraska, Arizona and Ohio have explained** in our amicus brief, free-exercise analysis rooted in our nation's history and traditions concerning foster care also points the way to strict scrutiny. Choosing that final option, more so than a ruling that turns on the specific facts involving Catholic Social Services, would provide critical guidance to the many states and political subdivisions that continue to work with faith-based foster-care agencies.

Our nation has a long and well-documented history of allowing faith-based organizations to care for foster children without compromising their beliefs. Dating back to colonial times and extending well into the 1800s, religious and other private organizations shouldered the primary burden in caring for orphans and other disadvantaged children — and they did so with little to no government oversight. Religious groups ran orphanages and established successful programs to place children with individual families — an early form of what we now call foster care.

In the latter part of the 1800s, states began to get more involved, but they continued to work through — and rely heavily on — private faith-based groups. Indeed, many of the states' initial efforts involved funding the existing services of religious organizations. Later still, the states took on a more active role in placing and removing foster children, but even then, they continued contracting with faith-based groups to carry out much of that work.

Fast forward to today, and we see that state and local governments now assert total power over foster-care placements. And as this case illustrates, some are pushing to exclude faith-based agencies that have spent centuries caring for neglected kids. Worse yet, they are doing so because some government officials dislike that those groups operate according to their religious beliefs about marriage — namely, the belief that marriage is the union of one man and one woman, a view that the court has called **"decent and honorable."** This dramatic role reversal — and substantial departure from our nation's traditions — raises the specter of unconstitutionality and demands strict scrutiny.

Locke* v. *Davey demonstrates the flip-side of this. The court in that case rejected a free-exercise challenge to Washington state's withholding of public scholarship funds from students pursuing degrees in devotional theology. The court said that our nation has long opposed public funding for church leaders, and thus the state's exclusion was not "constitutionally suspect." But the opposite is true here. Philadelphia acted against the backdrop of faith-based groups doing foster-care work for centuries. Excluding Catholic Social Services departed from that history, so Philadelphia's actions, unlike the law in *Locke*, are highly irregular and constitutionally suspicious.

That strict scrutiny applies in this case does not mean government officials can never stop working with a faith-based foster-care agency. They can. But they must first demonstrate that they have a compelling interest in shutting down the religious group and that they have acted in a narrowly tailored manner.

Philadelphia has not satisfied those requirements. On the contrary, the city has undermined its interest in caring for foster children. It has done so by eliminating agencies that operate consistently with traditional Catholic (and similar religious) beliefs

about marriage, thereby reducing foster-care resources in the midst of an existing shortage.

As states like Nebraska have found, foster-care systems thrive when the government provides a diverse selection of child-placing organizations. Different organizations develop different expertise and target different audiences for their recruiting efforts. The more groups there are, and the more varied they are, the more effective their collective recruiting will be. Because fostering children is difficult work, people often require a deep level of comfort and support before they commit. Allowing prospective foster parents to choose from a broad array of child-placing agencies increases the likelihood that they will find the right organization to serve as their support system. And when states generate a large pool of diverse foster parents, that benefits kids by putting more of them into homes and by facilitating a better fit between the needs of individual children and the strengths of specific foster families.

Faith-based organizations, in particular, excel at recruiting and retaining high-quality foster parents willing to serve the most disadvantaged children, such as those who have suffered abuse or have special needs. For example, a religious group in Arkansas known as The CALL is “the source of all foster homes” in the state. This success of so many religious organizations makes sense considering that many foster parents are compelled to open their homes to children precisely because of their faith, those foster parents often want to partner with a group that shares their beliefs, and support networks built on a common faith help keep foster parents committed for the long haul.

But eliminating faith-based organizations like Catholic Social Services will jeopardize the interests of foster children. Consider that 36% of foster parents recruited through The CALL said that they would not have become foster parents without that group’s work. Driving those people of faith from the foster system by removing their chosen agency would harm the children they served. The city has no compelling interest in doing this.

Philadelphia nevertheless claims an interest in eliminating discrimination against same-sex couples. But the city has more than two dozen other foster-care agencies willing and able to place children with same-sex couples. With all these options, it’s hard to believe that same-sex couples would select a religious group that doesn’t recognize their union as a marriage. Tellingly, no same-sex couple has ever applied to foster through Catholic Social Services. Philadelphia’s actions are thus a supposed solution in search of a problem.

The court in ***Masterpiece Cakeshop v. Colorado Civil Rights Commission*** recognized that the government’s interests in preventing discrimination must give way when a decision not to recognize a same-sex marriage is “well understood in our

constitutional order as an exercise of religion." That's the case here. Catholic Social Services is a nonprofit religious organization that has been providing foster-care services as a ministry for over 100 years. It declines to recognize same-sex marriages *only* when partnering with foster parents, while otherwise providing its charitable services to LGBT individuals. The First Amendment protects religious organizations' right to serve their communities without sacrificing their convictions.

Forcing religious groups to shut down their centuries-old foster-care programs because they operate consistently with their faith is alien to our history and repugnant to our constitutional traditions. The court should put an end to it, and a ruling that focuses on our nation's history and tradition of foster care is a promising pathway to do exactly that.

Posted in **Symposium before oral argument in Fulton v. City of Philadelphia**

Cases: **Fulton v. City of Philadelphia, Pennsylvania**

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SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Symposium: The First Amendment does not require governments to contract with parties who do not comply with neutral, generally applicable rules

By **Clare Kindall**
on Oct 29, 2020 at 12:50 pm

*This article is part of a **symposium** previewing* **Fulton v. City of Philadelphia**.

*Clare Kindall is the solicitor general for the state of Connecticut, which joined a multi-state **amicus brief** filed in support of Philadelphia. While in accord with the states' filed brief, the views expressed here are entirely her own.*

On Nov. 4, the Supreme Court will hear oral argument in *Fulton v. City of Philadelphia*, a challenge to Philadelphia's requirement that any private vendor providing foster care services must agree not to discriminate on the basis of protected status. Philadelphia has never waived its nondiscrimination requirement for its vendors. Catholic Social Services wishes to be hired by the city but wants to discriminate, based on its religious beliefs, against LGBTQ+ families in the screening for placement of foster children. Both the federal district court and the U.S. Court of Appeals for the 3rd Circuit held that Philadelphia's nondiscrimination requirement for its contracts with private vendors does not violate the First Amendment.

The Supreme Court granted the petition for certiorari on three questions, one of which is whether a government program for foster care violates the First Amendment rights of religious organizations by conditioning participation on "taking actions and making statements that directly contradict the agency's religious beliefs." Yet, the facts of the case make it a particularly poor vehicle for a religious liberty argument. The state is not regulating; it is participating in the market for a particular service. The First Amendment does not require governments to use private contractors who refuse to provide the

contracted services on a nondiscriminatory basis. And when governments contract with private vendors for governmental services, the same contract conditions need to apply to all vendors. To do otherwise would throw government contracting into chaos.

Although CSS frames the issues in terms of religious freedom and the First Amendment, there simply is no constitutional right to be awarded a government contract and be paid from the public fisc. There is no constitutional right to serve as a foster-parent facilitator. There is nothing in the Constitution that requires governments to pay a private vendor so the private vendor can discriminate against anyone based upon any protected status, whether it is race, religion, national origin, gender, gender identity or sexual orientation.

Foster care is a governmental function, not a liturgical function. As the court stated in ***Schall v. Martin*** in 1984, the state has a grave responsibility to play its part as *parens patriae* and provide for the well-being of a child when "parental control falters." These children are the most vulnerable of the vulnerable. They reflect every race, gender and gender identity, religious background and sexual orientation. Discrimination against foster families that reflect that diversity is discrimination against these children. LGBTQ+ families have fostered children for decades and in many states are a significant portion of those who volunteer to be become foster or adoptive parents. Inclusion of LGBTQ+ families in the foster care system maximizes the number of safe and loving homes available for foster children.

But the issue here is not whether LGBTQ+ families should be foster parents. Nor has the court been asked whether it would be unconstitutional for a state to contract with a religious entity. Instead, the narrow question is whether it is unconstitutional for a government agency to *decline* to enter into such a contract. Government contractors cannot rewrite the terms of their contracts to suit their beliefs, however sincerely held. For example, garbage collectors hired by local governments could not decide to collect trash from married households and not unmarried households based on their religious beliefs or otherwise pick and choose who they serve while providing governmental services paid from the public fisc. To permit such a system would undermine the core foundation of government contracts as well as the separation of church and state.

Requiring governments to accommodate the "sincerely held religious beliefs" of contractors would inevitably lead to unconscionable results. It was not so very long ago that the idea that "Almighty God" had decreed that the races should be separate was the foundation for anti-miscegenation laws such as the one that the Supreme Court unanimously struck down in ***Loving v. Virginia***. Would a government be required to eliminate any of its contractual requirements that vendors must provide services to all, including multiracial couples, because one vendor holds the religious belief that "the races should be separate"? Does the First Amendment require the government to

provide this vendor with an exception to the “serve all” requirements, because of the vendor’s religious beliefs?

The answer is clearly no. The typical intersection between the First Amendment and government action arises when the government seeks to compel behavior that is contrary to a resident’s religious beliefs, such as conscripting **Quakers** to **fight** in the military, or when the government tries to **deny** **benefits** because of religious beliefs or status.

Here, the case is solidly grounded in the requirements of government contracting. A government must be able to spend its funds and pursue its own legitimate policies to serve its residents’ needs. A contract to provide services is not a government benefit. The foundation of government contracting is that the same requirements apply to all vendors, so there is a level playing field. Put another way, governments cannot play favorites with the public fisc.

To require, as a matter of constitutional law, that religious organizations be exempted from contractual terms of their choosing would quickly undermine all government contracting, as the exemptions would quickly overtake the rule. Any vendor who did not seek such exemptions would be at a significant competitive disadvantage, and the range of religious beliefs would undoubtedly expand to adjust to the economic circumstances.

This is precisely what the First Amendment’s separation of church and state is designed to avoid. The ability of our governments to govern is at stake. Governments, whether local, state or federal, are responsive to their citizens and held accountable to their electorates. Governments must be able to pursue their own legitimate policies. Governments must be able to contract with private vendors to pursue those legitimate policies. Governments cannot be forced to abandon those policies because a private organization, with genuine religious beliefs, wants the government to either change or waive those policies.

The free exercise clause of the First Amendment permits all religions to freely exercise their religious beliefs in their own sphere — it does not permit private contractors to require governments to adopt those beliefs or waive generally applicable requirements because of religious beliefs. Because this case concerns a religious organization trying to impose its religious beliefs upon government action at government cost, the review of the government’s requirements should be rational basis, rather than strict scrutiny, and the lower courts’ decisions should be affirmed.

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SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Symposium: *Fulton*, free exercise and three key questions about church-state relations

By **Helen Alvaré**
on Oct 30, 2020 at 10:28 am

This article is part of a **symposium** *previewing* **Fulton v. City of Philadelphia**.

Helen M. Alvaré is a professor of law at George Mason University's Antonin Scalia Law School.

Fulton v. City of Philadelphia is a legally complex case involving everything from free exercise and free speech claims, to nondiscrimination and foster care laws. Even the range of free exercise claims alone is broad. Catholic Social Services and longtime foster parents Sharonell Fulton and Toni Lynn Simms-Busch ask the court to do everything from declaring that Philadelphia demonstrated religious animus toward CSS, to overruling **Employment Division v. Smith**, the basis of contemporary free exercise law.

Given my background in both family law and the First Amendment, I will focus on those aspects of *Fulton* bearing upon the future of church-state cooperation regarding human services. The court's resolution of several questions in the case could affect cooperation concerning *any* religiously provided social services, education or health care.

The cloud currently hanging over the future of church-state cooperation was predicted by **Obergefell v. Hodges**, which ruled that the 14th Amendment guarantees the right to same-sex marriage. Many Christians hold that marriage must reflect a Creator's making men and women sexually complementary and the sole source of new life. They hold that they are powerless to change marriage, and that this understanding of the family uniquely reveals features of God's love and the ways in which human beings are

commanded to love all others. If *Fulton* is resolved such that these beliefs regularly foreclose the participation of many Christian nonprofits in the public square, communities will look very different in the future; Christians are inspired by the faith to offer countless charitable services.

Such a resolution would be particularly troubling in the foster care field. It would communicate that adults' interests and demands take priority over children's needs. This characterizes the "bad old days" of foster care, when some opportunists misused the system to **provide adults with children to work as subsidized labor**. Foster care reforms flipped this paradigm, orienting the system to find parents for children in need, versus providing children to adults in want. But Philadelphia's argument that the foster care system is a "**public accommodation**" – like movies, restaurants and hotels – that must be available to certain adults, is a return to an "adults first" paradigm. Philadelphia even refused to place children with foster families ready and certified by CSS, while publicly declaring a full-blown foster care "**emergency**," with 300 children in need of homes.

There are at least three constitutional questions raised in *Fulton* that bear upon religious agencies' cooperation with the state to serve the common good. The first — really a series of questions — relates to the *Smith* test for free exercise violations. How should the court scrutinize the city's policy? Is it a "neutral and generally applicable" policy that can survive constitutional scrutiny under a mere rational basis test? And what makes a policy neutral and generally applicable? Furthermore, if the policy does not meet this standard, can it satisfy *Smith*'s strict scrutiny requirement?

Each of these questions is complex and difficult. I can only sketch out responses here, and not even begin to address whether *Smith* should stand at all. First, even if *Smith* remains the standard, Philadelphia's policy is not neutral. The city's animus against the local Catholic community and CSS in particular is clear, as described below. Additionally, the city acknowledges its plenary authority to waive the policy at its discretion, *and* that it has made an advance decision never to waive it for CSS. This is the very portrait of a government action that is not generally applicable under *Smith* and **Church of the Lukumi Babalu Aye v. City of Hialeah**.

As such, the policy is subject to – and fails – the two elements of strict scrutiny analysis. The city should not be able to claim that it has a "compelling interest" (the first element) in ensuring that no hearer's dignity is offended by learning of the continued operations of a religious foster care agency adhering to its theology of marriage. As the court stated in **Masterpiece Cakeshop v. Colorado Civil Rights Commission**: A religion's objection to solemnizing a same sex marriage "would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." The

same is true regarding the religious exercise of a foster care agency. Furthermore, CSS is willing to help same-sex couples find other agencies. Thus the city's policy fails the "least restrictive means" element of strict scrutiny; the city can achieve its goals by requiring CSS to help same-sex couples find other agencies just as, today, Philadelphia's foster-care agencies help foster parents find agencies having more relevant expertise.

A second question concerns whether it is an unconstitutional condition for Philadelphia to require CSS to do and say certain things in order to continue supporting foster families. Philadelphia has control over the fate of foster children. They are in the city's custody; no agency may provide foster care services without city permission. But Philadelphia partners with agencies to support their ongoing care of individual foster children, *not* their home studies and certification. Yet the city demands that CSS conduct such studies and write certifications violating their religious beliefs, and simply add a "disclaimer." They argue that contractors are essentially government agents.

But requiring private contractors to contradict their beliefs in these ways is clearly unconstitutional under ***West Virginia State Board of Education v. Barnette***. And if the city goes unchecked here, this has ominous implications for other arenas in which the state wields significant power while religious participation also abounds. Governments might claim that their regulation or funding of aspects of religious schools, homeless shelters and hospitals renders these institutions agents of the government, required to pledge allegiance to the state's views on marriage and other disputed matters.

Third and finally, there is the question previously addressed in *Masterpiece Cakeshop*, about what constitutes impermissible state hostility toward a religion in violation of the free exercise clause. In *Masterpiece Cakeshop,* a state commission compared the baker's religious freedom argument for avoiding cooperation with a same-sex wedding to a religious justification for slavery or the Holocaust. Philadelphia's hostility is similar. City officials accused CSS of "**discrimination that occurs under the guise of religious freedom**," without the Holocaust and slavery references. But what other words or behavior might qualify as impermissibly hostile? **A history of prior denunciations of the Catholic Church** in Philadelphia? The mayor invited Pope Francis to "**kick some ass**" in the Archdiocese of Philadelphia when Francis visited there. Hostility specifically to the church's marriage teaching, the underlying controversy in this case? The city ridiculed CSS's beliefs as **retrograde**, and claimed that it knew Catholic theology – specifically, **the mind of Pope Francis** – better than CSS. What about the series of post-hoc rationales Philadelphia successively launched and abandoned, to justify cutting CSS out of foster care? These are too lengthy to rehearse in one essay, but the city claimed, and then abandoned, at least five different rationales before inserting a new nondiscrimination requirement into its post-hoc foster agency contracts. Even on the sixth try, however, the city retained the power to waive this

requirement, while simultaneously admitting that it had “no intention” of granting CSS a religious exemption. The Supreme Court’s decisions in *Masterpiece Cakeshop* and *Lukumi* confirm that every one of these statements and actions constitutes impermissible state hostility to CSS’ religion.

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INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Symposium: In *Fulton*, the court has the chance to jettison *Employment Division v. Smith* – and the pandemic shows why it should take it

By **Lindsay See**
on Oct 30, 2020 at 5:16 pm

This article is part of a **symposium** *previewing* **Fulton v. City of Philadelphia**.

Lindsay See is solicitor general of the state of West Virginia, which joined an **amicus brief** *on behalf of 13 states in support of the petitioners.*

The Supreme Court has options for how to approach this term's clash between Philadelphia's foster-placement policies and the religious beliefs of one of its long-standing partners. In *Fulton v. City of Philadelphia*, Catholic Social Services and two foster parents ask the court to revisit **Employment Division v. Smith**, but they also lob a multi-front challenge that does not require reversing precedent to prevail. So the court does not have to decide *Smith*'s fate this term. But it should. The religious liberty cases the COVID-19 pandemic is bringing to the courts underscore why free-exercise claims deserve a more nuanced approach than *Smith* — and that regardless of whether *Smith* remains good law in *Fulton*'s wake, the court is already well on its way.

This year, states face unenviably difficult decisions of where and how we can gather safely in public. But of all the hard questions that go into drafting resulting public-health directives, crafting them to avoid *Smith*'s pitfalls should not be one of them. *Smith* reads the First Amendment to allow burdens on religious exercise as long as restrictions apply to secular and religious entities alike, and are not a front for religious animus. With

careful drafting that avoids singling out religious meetings or treating them differently than similar secular gatherings, *Smith* (on its face) may pose a substantial obstacle for claims that COVID-19 orders impermissibly burden free exercise.

Yet despite this hornbook framework, *Smith* got little airtime in two COVID-19 free-exercise disputes this summer. In **South Bay United Pentecostal Church v. Newsom**, the court denied injunctive relief in a challenge to a California order limiting attendance at places of worship. Several weeks later, it denied a similar request involving Nevada's directive capping religious gatherings at 50 people in **Calvary Chapel Dayton Valley v. Sisolak**. In *Newsom*, neither Chief Justice John Roberts' concurrence nor Justice Brett Kavanaugh's dissent mentions *Smith*. Two of the three dissents in *Sisolak* are similarly mum, and Kavanaugh's invokes *Smith* only to emphasize the difficulty of justifying exceptions for secular reasons but not religious ones — not its holding about the relatively low threshold for enforcing generally applicable laws.

We should not make too much of these omissions; because the cases sought emergency injunctive relief (as opposed to a merits decision), four of the five opinions were penned by justices in dissent. The majority may well have considered these open-and-shut cases under *Smith*. But Roberts took time to write a concurrence in *Newsom*, and although his discussion of how California treated comparable secular gatherings gestures toward *Smith*, he stops short of invoking it by name. It is also telling that none of the dissenting justices felt the need to rebut this landmark decision directly. At a minimum, the COVID-19 docket suggests many justices are analyzing free-exercise challenges through a different lens than *Smith*'s alone.

It is not hard to blame them. Regardless of where a judge lands on these issues — undoubtedly somewhere between viewing COVID-19 as sufficiently compelling to apply all public-health orders to religious groups and requiring blanket exceptions for all religious conduct — ending the analysis with *Smith* leaves something to be desired. The pandemic is a stark reminder that religious bodies may sometimes be asked to make sacrifices for a time, and so many nationwide have done just that this year, remaking the ways they worship and serve their communities. But it is also the case that the First Amendment compels us to view restrictions burdening prayer meetings differently from those limiting summer concert attendance or the ability to enjoy a meal out with friends (no matter how much this year has taught us not to take simple pleasures like these for granted).

We see this instinct played out in the repeated emphasis in COVID-19 cases on the strong interests a worldwide health crisis provides; restricting something as important as religious practice requires an especially pressing justification. The problem with *Smith*, however, is it makes those justifications all but irrelevant. Broad application and absence of religious hostility are dispositive, not the severity of the free-exercise burden

nor the importance of the state's interest. From that standpoint, it is hardly surprising that the justices who wrote in *Newsom* and *Sisolak* asked for more exacting demonstrations than *Smith* alone requires. *Smith* is not up to the task of ensuring the First Amendment does not become a casualty of a world upended by pandemic.

And indeed, COVID-19 litigation is not the only time the court has sidestepped *Smith* in recent years. Consider the ministerial exception: **Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission** and last term's **Our Lady of Guadalupe School v. Morrissey-Berru** upheld exemptions to the Americans with Disabilities Act and Age Discrimination in Employment Act for religious employees tasked with promoting church doctrine. By any measure the ADA and ADEA are neutral, generally applicable laws, yet *Smith* received only cursory attention in these cases, too. This growing pattern shows that jettisoning *Smith* would not be as transformative a change as the flurry of briefing on both sides of *Fulton* might make it seem.

The court's informal distancing from *Smith* also means making the break official would not leave lower courts adrift for the cases to come. *Smith* has been controversial from its beginning, and decisions by Congress and many states to enact laws like the Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act mean courts already know how to resolve free-exercise cases outside *Smith*'s framework. Similarly, the various opinions in the COVID-19 cases reflect increasing emphasis on what it means to treat religious and nonreligious groups the same, and when consequences for religious entities become more than merely incidental.

The ministerial exemption doctrine is relevant here too: another example of a different path forward. *Our Lady of Guadalupe* and *Hosanna-Tabor* do not stop with whether laws are neutral and generally applicable — a test religious entities are prone to lose. But nor do they invite *Smith*'s concern that religious groups become a "law unto themselves" by casting doubt on *every* broadly applicable law applied to a synagogue, church or mosque. Instead, these cases advance a robust, history-based conversation on why religious liberty matters to our constitutional order and what it means for a law to infringe upon it — or not — in the first place.

That is the type of conversation we need to have in order to be equipped to address once-in-a-lifetime threats to public health without erasing religious liberty — as well as to discern the line *Fulton* seeks between enforcing policy fairly and exacting unfair penalties on groups with different beliefs. The interests in *Fulton*, COVID-19 litigation and the ministerial exception cases are nuanced and central to our most basic freedoms. We need a doctrine recognizing that because the free exercise clause protects religious outsiders, the rest of us may not be attuned to the point where

applying an otherwise fair and neutral policy becomes tantamount to asking religious persons and groups to sacrifice part of what makes them who they are. The First Amendment protects all of us, and we all deserve a doctrine that can account fairly for the serious interests on both sides of the scale. And while recent decisions show that the court need not formally discard *Smith* to keep up momentum in this area, *Fulton* is an important opportunity to make clear that *Smith* is no longer leading the way.

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INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Symposium: Religious privilege in *Fulton* and beyond

By **Micah Schwartzman, Richard Schragger and Nelson Tebbe**
on Nov 2, 2020 at 9:29 am

This article is part of a **symposium** *previewing* **Fulton v. City of Philadelphia**.

Micah Schwartzman is the Harry Cross Dillard professor of law at the University of Virginia School of Law. Richard Schragger is the Perre Bowen professor of law at the University of Virginia School of Law. Nelson Tebbe is the Jane M.G. Foster professor of law at Cornell Law School. All three joined an **amicus brief** *in support of Philadelphia*.

The world has changed since a couple months ago when we were invited to write this comment on *Fulton v. City of Philadelphia*. Justice Ruth Bader Ginsburg has died, and Amy Coney Barrett is now on the court. The significance of that change might not be obvious to the casual court watcher, who has seen several recent religious freedom cases decided 7-2. Yet the shift in the court's composition may well have profound implications for *Fulton* and for religious freedom more generally. For the past several terms, Chief Justice John Roberts has been the median or swing voter on critical issues in this area, but he is unlikely to remain in that position. In cases like *Fulton*, he will probably be replaced as the median justice by one of the justices to his right, all of whom are markedly more conservative in their free exercise jurisprudence.

The replacement of Ginsburg with Barrett may thus have far-reaching consequences for how the court will approach religious exemptions. Since the court decided ***Employment Division v. Smith*** 30 years ago, the rule has been that the free exercise clause does not require religious exemptions from laws that are, in the court's words, "neutral and generally applicable." In *Fulton*, the court has been asked to adopt an aggressive interpretation of what laws satisfy that standard. Some proponents of religious accommodation, including Justices Samuel Alito and Brett Kavanaugh, have argued that if a law has any secular exceptions that are in tension with the government's stated policy interests, then the government must also grant accommodations for religious

actors. This "**single secular exception**" or "most-favored nation" approach to what makes a law neutral and generally applicable, made prominent by Alito in ***Fraternal Order of Police v. City of Newark***, has mostly functioned as a less-than-subtle attempt to undermine the court's holding in *Smith*. It is hard to see how that approach could be used in *Fulton*, since Philadelphia has not granted any secular exemptions from its antidiscrimination policy, but that is the petitioners' leading argument.

And that litigation choice made sense before the death of Ginsburg. The question of what it means for a law to be generally applicable was a pressing one as long as Roberts was in control. He never signaled that he was willing to overrule *Smith*, unlike four other conservative justices **who have called for revisiting the court's interpretation of the free exercise clause**. Moreover, his votes in the COVID-related cases from this past summer, ***South Bay United Pentecostal Church v. Newsom*** and ***Calvary Chapel v. Sisolak***, put a damper on expectations that he might join the justices to his right. In those cases, the chief turned away religious challenges to orders restricting mass gatherings, even though those orders had been characterized by churches as exempting certain secular actors but not religious ones.

With the addition of Barrett, however, the court's conservatives may no longer need the chief's vote to overrule *Smith*. If so, questions about neutrality and general applicability could fall by the wayside. Perhaps there is some irony that it may take a former clerk of Justice Antonin Scalia, who wrote the court's opinion in *Smith*, to bury what is his most important and influential opinion under the First Amendment. But that outcome is far more likely now than it was two months ago.

If the court uses *Fulton* to reverse *Smith*, we should expect three further developments with respect to religious freedom.

First, although the court might purport to restore the pre-*Smith* compelling interest test, as Congress did when it reinstated the 1963 rule of ***Sherbert v. Verner*** in **the Religious Freedom Restoration Act**, we should not expect that it will interpret that test according to precedents from the *Sherbert* era. During the Warren and Burger courts, the free exercise clause was balanced against establishment clause constraints in cases involving religious exemptions, which were only rarely granted. But the Roberts court has shown no interest in such limitations, and, in ***Burwell v. Hobby Lobby***, the court **disparaged pre-*Smith* caselaw** that conflicted with its expansive approach to religious free exercise. *Hobby Lobby* was a RFRA case, but there is every reason to expect that the court will sideline its earlier free exercise jurisprudence if it applies heightened scrutiny in determining whether to grant exemptions.

A second development, building on the first, is that the conservative majority will distinguish, marginalize or overrule cases limiting exemptions that impose harms on third parties. The court recently has shown little concern for women who have lost health insurance coverage for contraception because of its decisions in *Hobby Lobby* and ***Little Sisters of the Poor v. Pennsylvania***. As Alito made clear in his concurring opinion in *Little Sisters*, in his view, there can be no establishment clause objection even when the government has given categorical and "**unyielding weight**" to religious interests and even when, as a result, it has imposed substantial and material

harms by depriving tens of thousands of people of statutory entitlements that they would otherwise have received. Ginsburg, by contrast, strongly opposed religious exemptions that impose serious harm on women in her very **last opinion**.

Before *Little Sisters*, the court had never approved an exemption that shifted serious burdens onto third parties, with the single exception of a **case** involving a church's control over its membership. Now that exception will be taken as the rule. In *Fulton*, a conservative majority will almost certainly ignore or reject arguments that granting a religious exemption from the city's antidiscrimination policy will lead to both material and dignitary harms to children and LGBT parents. The court has come close to taking this step in previous LGBT cases such as ***Masterpiece Cakeshop v. Colorado Civil Rights Commission.*** But in *Fulton,* and for the first time, the court may interpret the free exercise clause itself as authorizing exemptions that harm others and without any balance or constraint under the establishment clause.

Third, if a conservative majority reverses *Smith*, we should expect it to favor religious over nonreligious viewpoints, following the court's dicta in ***Cutter v. Wilkinson*** that "[r]eligious accommodations … need not come packaged with benefits to secular entities." A recent example is ***Illinois Republican Party v. Pritzker***, a decision by the U.S. Court of Appeals for the 7th Circuit that Barrett joined a few weeks before her nomination. The case involved a COVID-related public health order by Illinois Gov. J.B. Pritzker (D) that limited most social gatherings to 50 people but exempted religious organizations and houses of worship. The state Republican Party challenged the order, which also barred them from hosting large political gatherings, on the ground that the exemption unconstitutionally favored religious viewpoints in violation of the free speech clause. The 7th Circuit rejected that claim and affirmed Pritzker's order, holding that "speech that accompanies religious exercise has a privileged position under the First Amendment." Under this reasoning, the government can favor religious speech even when it suppresses core political speech.

For decades, conservatives have argued that religious views must be treated equally when compared to other social and political perspectives. That is the lesson of the court's **equal access cases** and its recent decisions involving school funding in ***Trinity Lutheran v. Comer*** and ***Espinoza v. Montana Department of Revenue***. But with Barrett's elevation, and with the chief's likely displacement, we have little confidence that the court will respect its own precedents concerning viewpoint neutrality and **equal treatment of religious and nonreligious views**.

With the chief at the center of the court, it was easier to imagine the court deciding *Fulton* on narrower grounds, focusing perhaps on problems of neutrality or general applicability, as the court did in *Masterpiece Cakeshop* to **avoid broader questions** about how to resolve conflicts between religious freedom and LGBT rights. But now, with an even more conservative majority, the court seems poised to transform the free exercise clause into a constitutional source of religious privilege — with little, if any, concern for substantial harms to others, whether dignitary or material, and, despite years of conservative argument to the contrary, with no real constitutional commitment to rejecting discrimination on the basis of religious status.

Perhaps *Fulton* will be decided in ways that avoid some of these concerns. Maybe at the outset of a newly configured court, the chief will prevail on his conservative colleagues to support a more cautious, incremental approach; or perhaps a majority, **possibly including some of the liberal justices**, will settle for a narrower decision, one focused on neutrality and general applicability, either in the manner of *Masterpiece Cakeshop* or on a "most favored nation" approach. But the court's conservative majority will almost certainly demand that the government fund religious organizations despite their refusal to abide by neutral and generally applicable conditions — and even when those conditions are justified by what have, up until now, been recognized as legitimate and indeed compelling governmental interests. In mandating exemptions in this context, the court is set to abandon core principles of religious freedom, including protecting against harm to others and requiring religious neutrality. Either way, *Fulton* is only the beginning.

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SCOTUSblog
INDEPENDENT NEWS & ANALYSIS ON THE U.S. SUPREME COURT

Symposium: Defending *Smith* by ignoring soundbites and considering the mundane

By **Lisa Soronen**
on Nov 2, 2020 at 4:19 pm

This article is the final entry in a **symposium** *previewing* **Fulton v. City of Philadelphia**.

Lisa Soronen is executive director of the State and Local Legal Center, which filed an **amicus brief** *in support of Philadelphia.*

When the Supreme Court agreed to hear *Fulton v. City of Philadelphia*, local governments across the country let out a collective groan when they read the second question presented. How could the Supreme Court decide whether to "revisit" (read: overturn) the 1990 decision **Employment Division v. Smith** in such a controversial case?

Your average American will hear a nontechnical description of the issue in this case (may the city of Philadelphia require Catholic Social Services to follow the city's nondiscrimination ordinance and place foster kids with same-sex couples) and make up their minds before even learning what *Smith* is about. More to the point, how will the justices not be so distracted by the facts of this case to give *Smith* thoughtful, thorough consideration?

Local governments want the court to ignore the soundbites and focus on the mundane in this case. If the court overturns *Smith,* local governments will face significant litigation over religious accommodations in many, if not most, areas of everyday operations.

In *Smith*, two drug rehabilitation counselors argued the First Amendment protected their use of peyote during a religious ceremony at their Native American church. The Supreme Court disagreed, concluding that individuals must comply with "valid and neutral law[s] of general applicability" regardless of their religious beliefs.

In *Fulton,* the U.S. Court of Appeals for the 3rd Circuit, citing *Smith*, noted "the City's nondiscrimination policy is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exception from that policy." Therefore, if CSS wanted to continue to place foster children, it had to agree to work with gay couples.

As a legal matter, what happens if the Supreme Court overturns *Smith*? The challengers in *Fulton* ask that the rational basis test in *Smith* be replaced with strict scrutiny. Under such a regime, a law that burdens religion would be unconstitutional unless a local government could prove the law is "narrowly tailored" to meet a "compelling interest." Strict scrutiny's nickname is "fatal scrutiny."

The practical advantage of *Smith* for local governments is that it is simple. *Smith* is a bright line rule; no one is entitled to an exception from a valid, neutral, generally applicable law.

One need look no further than the *Smith* opinion to appreciate the workability of its rule. In *Smith*, concurring and dissenting justices applied strict scrutiny to the Oregon statute criminalizing the use of peyote and couldn't agree if it passed or failed. The concurring justices concluded Oregon had a compelling interest in regulating the drug but called the question "close." The dissent "conclude[d] that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion."

So what would a world without *Smith* look like for local governments? Generally speaking, consider two simple truths: Local government's most basic function it to protect its citizenry by making rules regarding anything and everything, and religious practice in this country is remarkably diverse. More specifically, if *Smith* is overturned, free exercise claims are likely to be brought against local governments in three categories.

First, employment. Imagine a firefighter who refuses to put out a fire at a gay bar, a police officer who won't guard an abortion clinic, or a postal worker who won't deliver mail he or she finds sacrilegious. While these examples aren't as mundane as likely challenges to drug testing, work schedules or holidays, they aren't unrealistic either.

Second, contracting. According to one **estimate**, $1 trillion of the $6 trillion spent annually by federal, state and local governments goes to private companies. This case, of course, involves a private contractor. If *Smith* is overruled, all these private

companies will be entitled to application of strict scrutiny if they raise religious objections to neutral, generally applicable laws relevant to government services they agreed to provide. As the 3rd Circuit pointed out, there is something "highly unusual" about a private contractor seeking to unilaterally impose contractual terms in its agreement with a local government. But that is precisely what CSS is seeking to do in this case.

Finally, there is everything else — the truly mundane operations of local governments. In *Smith*, the court noted that "religious exemptions from civil obligations of almost every conceivable kind" have been sought, including "compulsory military service," "payment of taxes," "health and safety regulation such as manslaughter and child neglect laws," "compulsory vaccination laws," "traffic laws," "social welfare legislation such as minimum wage laws," "child labor laws," "animal cruelty laws," "environmental protection laws," and "laws providing for equality and opportunity for the races." Without *Smith*, any of these requirements could be challenged for religious reasons, and local governments would have to overcome strict scrutiny to apply them to everyone.

While local governments may still win cases like ***Mayle v. Chicago Park District***, involving a free exercise claim to bring a guinea hog to a park to practice Satanism, the wind will no longer be at their backs. If *Smith* is overturned, local governments will spend a lot of time and money, which they can ill afford, defending claims like the one in *Mayle*.

Some may argue that local governments can simply accede to demands for religious exemptions. But once a local government allows one religion to opt out of a law applicable to all, it opens itself to lawsuits brought by other religions that it has violated the establishment clause, the free exercise clause or the equal protection clause. For example, a recently filed **complaint** claims that the largest foster care placement agency in South Carolina has favored evangelical Protestants as foster parents over Catholics and Orthodox Christians.

Beyond the practical problems that overturning *Smith* would cause local governments, *Smith* promotes a value that is both intangible and vitally important to good governance at the local level: the notion that government officials enforce the law neutrally and do not play favorites.

For justices less interested in policy arguments, the words of the Framers may be more persuasive. As Justice Sandra Day O'Connor wrote in her concurring opinion in **McCreary County v. American Civil Liberties Union of Kentucky** (2005), the Framers knew "that line-drawing between religions is an enterprise that, once begun, has no logical stopping point."

While the State and Local Legal Center's ***amicus* brief** spends most of its time on the practical problems for local governments in mostly mundane instances if *Smith* were

overruled, the brief ends by explaining how the above adage from our Framers would come to fruition:

Overruling *Smith*, and thereby ending its protection of generally applicable neutral laws, would threaten local government's ability to act and be viewed as a fair arbiter. There would be "no logical stopping point" to strict scrutiny review of denials of religious exemptions from generally applicable neutral laws, requiring continual line-drawing by local governments, decisions in favor if some religions, and apparent bias towards others. Of all the problems that the Pandora's box of overruling *Smith* would create, this last one may be the worst of all.

Posted in **Symposium before oral argument in Fulton v. City of Philadelphia**

Cases: **Fulton v. City of Philadelphia, Pennsylvania**

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