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Fulton v. City of Philadelphia

- FREE EXERCISE
- ESTABLISHMENT CLAUSE
- FREEDOM OF SPEECH
- DISCRIMINATION
- RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

Issues

Under the First Amendment, can a city prevent a private foster care agency from participating in the city's foster care system because that agency refuses to agree to a non-discrimination policy that requires it to consider potential same-sex or unmarried foster parents?

Oral argument:
November 4, 2020
Court below:
United States Court of Appeals for the Third Circuit
This case asks the Court to balance First Amendment rights with the government's interest in promoting equality. Petitioner Catholic Social Services ("CSS") contracted with Respondent City of Philadelphia ("the City") to provide foster care and choose foster parents for the City's youth; however, CSS objected to the inclusion of a non-discrimination clause in its contract that required it to consider LGBT+ individuals as foster parents. CSS argues that the City's non-discrimination clause specifically targets it as a Catholic organization, thereby infringing upon its religious beliefs under the Free Exercise Clause and compelling it to endorse LGBT+ relationships in contravention of the Free Speech Clause. The City counters that the non-discrimination clause is a policy that applies to all contractors who undertake governmental work, and that CSS cannot claim to use religious freedom to undermine the City's strong interest in preventing discrimination. The Supreme Court's decision in this case will implicate laws impacting religious freedom, LGBT+ issues, and equal protection.

Questions as Framed for the Court by the Parties

(1) Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held;

(2) whether *Employment Division v. Smith* should be revisited; and

(3) whether the government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs.

Facts

Catholic Social Services ("CSS") was established in 1797 in Philadelphia ("the City"), Pennsylvania as a religious non-profit foster care service. Although affiliated with the Archdiocese of Philadelphia, CSS is regulated both by the state of Pennsylvania and the City.

Once a child enters the City's foster care system, the City assigns the child to one of the foster care agencies with whom the City contracts. These contracts are on a renewable, year-long basis and include 30 different foster care agencies. CSS's contract with the City specified that CSS (1) would be paid on a *per diem* basis for each child that it placed with foster parents; (2) would assure that its foster parents were certified in accordance with state regulations; and (3) would not discriminate against anyone based on their race, color, religion, national origin, and sexual orientation "in public accommodations" as specified by the City's Fair Practices Ordinance.

CSS, however, only certifies married or single foster parents and does not extend certification to unmarried cohabiting individuals. Because CSS believes that same-sex married couples are unmarried, it categorizes all same-sex married couples as cohabiting individuals who cannot be certified nor placed. In March 2018, the Philadelphia Inquirer ("the Inquirer") reported that CSS and one other foster care agency would not work with same-sex married couples. The Inquirer also called the Department of Human Services ("DHS") to report the issue. DHS inquired with the two agencies and confirmed the report.

Two days after the Inquirer published its article, the City Council of Philadelphia ordered an investigation into DHS's contracts with discriminatory social service agencies. Although DHS and CSS initially met to discuss the discriminatory issue, they did not reach a resolution. DHS followed up after

the meeting to alert CSS that there would be an "intake freeze" during which the City would stop assigning incoming foster care children to CSS. However, DHS made exceptions whenever CSS was the best agency in a position to place a child.

During their discussions, CSS argued to DHS that its policy of certifying and screening foster parents should not be evaluated as a "public accommodation" and that the City breached its contract by instituting an "intake freeze" on CSS. Further, CSS contended that the "intake freeze" was motivated by religious hostility against the organization. The City responded that the contract with CSS was not "formally suspended" and, in the alternative, that the contract did not require the City to refer children to CSS; therefore, the "intake freeze" did not breach their contract. Furthermore, the City maintained that the foster care system is a category of "public accommodation" and therefore CSS had breached their contract by discriminating against same-sex married couples.

Following this impasse, CSS, along with foster parent Sharonell Fulton and other foster parents, filed this case and moved for a preliminary injunction to force the City to end the "intake freeze" against CSS. The district court denied the preliminary injunction. CSS appealed, but the United States Court of Appeals for the Third Circuit affirmed the district court's decision and upheld the City's non-discrimination policy. CSS then petitioned the Supreme Court for a writ of certiorari, which the Court granted on February 24, 2020.

Analysis

THE GOVERNMENT'S ABILITY TO REGULATE CONTRACTORS

Petitioner CSS argues that the First Amendment's Free Exercise Clause prevents the City from limiting religious organizations such as CSS from acting in accordance with their beliefs. CSS emphasizes that the Free Exercise clause prevents the City from imposing "disabilities," or exclusionary actions, on CSS due to its religious beliefs, including in the contexts of marriage and child-rearing. CSS contends that its role as an independent private contractor means that the City cannot compel CSS to follow a particular ideology regarding LGBT+ families. CSS further argues that its history of providing private foster care — "long before" regulation by the City — further underscores its status as a private actor not bound by governmental speech or religious restrictions.

The City responds that, while the Free Exercise Clause forbids the government from restricting private religion and speech, the City has significantly broader powers in its capacity as a manager of contractors than as a "sovereign." The City contends that in the managerial context, exempting religious objectors

from government policies and laws would severely impair the government's ability to function. Furthermore, the City asserts that when CSS chooses to contract as a foster care agency, it acts not as a private citizen, but as a government employee as an agent with "official capacities." Thus, the City argues that CSS is bound to act in accordance with government regulations on non-discrimination, including refraining from placing children in foster care "in a manner the City has deemed contrary to the interests of its residents and children."

GENERAL APPLICABILITY OF THE NON-DISCRIMINATION POLICY

CSS contends that the City's non-discrimination policy also violates the Free Exercise Clause because it is neither generally applicable nor neutral. First, CSS argues that the City's non-discrimination policy is "specifically directed" at CSS with the aim of thwarting CSS's religious beliefs and is therefore impermissible regardless of any compelling interest on the part of the City. In particular, CSS maintains that the non-discrimination policy is not neutral because the City has shifted between various policies that target CSS's choice to exclude LGBT+ individuals from foster care eligibility. Second, CSS asserts that the non-discrimination policy is not generally applicable because the policy includes waivers and exemptions that the City can offer at its discretion whenever a foster agency seeks to refuse potential parents for reasons including marital status, familial status and disability. CSS, however, argues that the City stated that CSS would not be granted exemptions, thus underscoring that the non-discrimination policy is not generally applicable but targets religiously-motivated conduct instead.

CSS contends that, given the "severe" lack of neutrality in the City's policy, the Supreme Court should apply strict scrutiny to the City's purported interest in preventing discrimination. CSS maintains that the City's stated interest is not compelling because it is riddled with exemptions and, further, "broad nondiscrimination statements" do not justify punishing a private agency for its religious convictions concerning marriage. Finally, CSS argues that the City could have more narrowly tailored its policy to its goals without obstructing CSS's First Amendment rights. For example, CSS claims that the City could have allowed CSS to refer potential LGBT+ parents to other foster agencies.

In response, the City asserts that the non-discrimination policy is both neutral and generally applicable. First, the City contends that the non-discrimination policy is neutral because it does not distinguish based on religion, nor does it target CSS "because of" the agency's religious beliefs. The City argues that CSS relies on out-of-context statements made by government officials to claim that the City targeted CSS; yet in actuality, the non-discrimination policy applies equally to every foster care agency. Second, the City explains that the non-discrimination policy is generally applicable because it "categorically

prohibits discrimination," whether religious or secular in nature, and is present in every contract with every agency. In particular, the City addresses the exemption issue by arguing that the Fair Practice Ordinance categorically bars exemptions on the basis of discrimination anyway. Similarly, the City acknowledges that some foster care providers have specializations but maintains that those specializations do not rise to the level of discrimination.

The City further contends that the non-discrimination policy satisfies strict scrutiny because the City has a compelling interest in prohibiting discrimination among its foster care providers. First, the City asserts that its policy ensures that the law will treat potential LGBT+ foster parents equally to heterosexual parents. Second, the City explains that the non-discrimination policy increases the pool of potential foster parents regardless of sexual orientation. Finally, the City points out that permitting CSS to engage in discrimination in the course of a government contract—discrimination that the City itself cannot engage in—implicates the City as a party to that discrimination.

REVISITING EMPLOYMENT DIVISION V. SMITH

CSS argues that the Supreme Court should overrule its decision in *Employment Division v. Smith*, which held that if a law is neutral and generally applicable, then religious free exercise is not burdened. CSS contends that the Court should instead install a legal standard that reflects the "text, history, and tradition" of the Free Exercise Clause. Specifically, CSS contends that an original reading of the Free Exercise Clause guarantees the ability to both possess religious beliefs and affirmatively practice those beliefs. Thus, CSS claims that this case compels revisiting *Smith* because the City is actively interfering with a Catholic agency and its doctrine, stopping it from affirmatively practicing its beliefs in violation of the Free Exercise Clause's original meaning.

Further, CSS contends that stare decisis does not require the Supreme Court to uphold *Smith* because that decision relied upon a number of legal predictions that have failed to come true. In particular, CSS maintains that an "anarchy" of religious exemptions has not arisen; rather, judicial history has shown that courts are capable of adjudicating the tension between the law and religious liberty. Additionally, CSS argues that laws such as the Religious Freedom Restoration Act provide an administrable standard for restricting religion, rendering the test from *Smith* unnecessary.

The City responds that, regardless of *Smith*, the Government has always possessed the authority to manage its "internal affairs." Further, the City contends that the Free Exercise Clause has never given private actors the right to "wield" government power according to their religious beliefs.

The City also counters that *state decisis* favors retaining *Smith* because the decision's reasoning remains sound. The City maintains that the Free Exercise Clause bars a government prohibition on religion but has never guaranteed an affirmative right to practice religion within the sphere of government. Further, the City contends that *Smith* is consistent with more than a century of previous Free Exercise jurisprudence and laid the foundation for other important First Amendment cases. Finally, the City points out that CSS offers no replacement for *Smith* beyond a blanket application of strict scrutiny to every case involving the Free Exercise Clause.

Discussion

CONSEQUENCES FOR FOSTER CHILDREN

A group of former foster children, foster parents, and the Catholic Association Foundation, in support of CSS, argue that CSS has always acted in the best interest of children because the organization is "child-centered" in its approach to placing children with foster parents. Moreover, Nebraska, Arizona, and Ohio, also in support of CSS, contend that the steady increase of children in the foster care system—with nearly half a million children currently needing care—requires religious organizations like CSS to continue placing children with foster parents, lest the foster care system become overwhelmed. Nebraska, Arizona, and Ohio argue that the ideological diversity of foster care agencies serves children more effectively because different agencies can use their "expertise [to] target different audiences for their recruiting efforts." Similarly, James and Gail Blais and the General Conference of Seventh-Day Adventists ("The Seventh-Day Adventists et al.") assert that Christian families are more likely to adopt children but would hesitate to do so if the only options available were government agencies who propagate policies different from their Christian beliefs. The Seventh-Day Adventists et al. conclude that the loss of faith-based agencies will ultimately deny children the possibility of finding a foster family.

Scholars of the Constitutional Rights and Interests of Children ("SCRIC"), in support of the City, argue that permitting CSS to discriminate against same-sex married couples would allow CSS to violate its obligation to place foster children in homes that offer "permanence, stability, and security." Specifically, SCRIC contends that when CSS excludes same-sex couples from the pool of potential foster parents, children lose access to quality homes. SRIC points out that the biggest impact of this exclusion will be experienced by children who have "special needs" or who are LGBT+. Additionally, SCRIC explains that same-sex couples help to alleviate the steady increase of children within the nation's foster care system, as such couples are "seven times more likely to foster children and to adopt children than their different-sex counterparts."

DISCRIMINATION AGAINST DIFFERENT GROUPS

The Institute for Faith and Family and the International Conference of Evangelical Chaplain Endorsers ("IFF and ICECE"), in support of CSS, argue that the City is fostering an environment of "intolerance, uniformity, exclusion, and inequality" by demanding that CSS change its position on placing children with same-sex couples. IFF and ICECE assert that forcing CSS to change its stance on same-sex foster placement weakens diversity by excluding religious organizations from the public sphere. Moreover, IFF and ICECE warn that silencing CSS's religious beliefs would weaken the diverse "freedom of thought" that plays a key role in maintaining a healthy American democracy.

The Voice for Adoption and other child welfare organizations, in support of the City, counter that allowing religious agencies to discriminate against same-sex couples creates an environment that leaves prospective foster families as outcasts, thereby reinforcing a misperception that LGBT+ couples are not allowed to foster at all. Alternatively, SCRIC contends that allowing CSS to continue using their policy would open the doors to discrimination on the basis of sex or sexual orientation, since "if one member of the same-sex couple were a different sex," CSS would certify them as foster parents. The American Bar Association ("the ABA") also warns that expanding religious-liberty exceptions to public accommodation laws could have a double-edged effect of hurting religious organizations because individuals could invoke a religious command to oppose other religions. For example, the ABA argues that organizations could invoke religious liberty to discriminate against Muslim, Jewish, or Christian couples just as they could against LGBT+ couples.

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Additional Resources

- James Esseks, *The Next Big Case on LGBTQ Rights is Already Before the Supreme Court,* Washington Post (Oct. 9, 2020).
- Mark J. Stern, *SCOTUS May Give Foster Care Agencies a Right to Refuse Same-Sex Couples*, Slate (Feb. 24, 2020).
- Rob Abruzzese, *Philadelphia Case Could Have Large Implications for Foster Children in New York, State Bar Association Says*, Brooklyn Daily Eagle (Aug. 21, 2020).