

IMPACTS AND CONSEQUENCES OF FULTON V. CITY OF PHILADELPHIA



Presented By The Philadelphia LGBTQ Bar Association

Featuring: Diana Cortes, Philadelphia City Solicitor

Mary Catherine Roper, ACLU of Pennsylvania Deputy Legal Director

Martricia McLaughlin, Pennsylvania Bar Association LGBTQ Rights Committee Co-chair

INTRODUCTORY REMARKS

- ❖ Don't forget to fill out your attendance and evaluation form, if you are seeking CLE credit. Link available here: <https://forms.gle/QR7EAXBV7acTPaaEA>.



DIANA CORTES, ESQ.

- ❖ Diana Cortes (she/her/ella) is the City Solicitor, the City of Philadelphia's chief legal officer. She was appointed by the Mayor on December 11, 2020. She serves as general counsel to the Mayor and his Administration, City Council, and all City departments, agencies, boards, and commissions. She manages the City's Law Department, which employs over 215 lawyers and over 100 professional staff. The Law Department's diverse legal practice covers federal, state, and local agency litigation, commercial and real estate transactions, tax, regulatory law, social services, and legislation.



❖ MARTRICIA MCLAUGHLIN, ESQ.

- ❖ Martricia O'Donnell McLaughlin is a magna cum laude graduate of LaSalle College in Philadelphia and of the Rutgers-Camden School of Law in 1979. She served Northampton County as a criminal prosecutor for almost 12 years and a county solicitor for 8 years. Her private practice concentrates in criminal law, mediation, especially of family law and issues related to older adults, and guardianship and probate matters. Martricia McLaughlin also has expertise in bullying issues in the community, workplace, and law enforcement context and provides coaching and legal services on this issue. She is the Co-Chair of the LGBTQ Rights Committee of the Pa Bar Assn and was the Vice Chair of the GLBTQ Right Committee (same Committee, earlier name) for the previous three years.



MARY CATHERINE ROPER, ESQ.

- ❖ Mary Catherine Roper (she/her/hers) is the deputy legal director at the ACLU of Pennsylvania, where she coordinates litigation on a broad range of civil liberties issues, including freedom of speech, religious liberty, racial and ethnic justice, equality for lesbians and gay men, student rights, privacy, prisoners' rights, and police misconduct. Mary Catherine was counsel for intervening defendants, Philadelphia Family Pride and the Support Center for Child Advocates, during the *Fulton v. City of Philadelphia* litigation.



FULTON v. CITY OF PHILADELPHIA: BACKGROUND

- ❖ City of Philadelphia contracts with non-profit organizations to administer foster care and adoption programs. Each of these contracts, like all city contracts, requires compliance with the Philadelphia Fair Practices Ordinance (Phila. Code § 9-1101 et seq.), which prohibited contractors from discriminating in the provision of public accommodations because of “sex, sexual orientation, [or] gender identity...”
- ❖ After an investigation, Philadelphia Inquirer (Julia Terruso) reports that “**Two foster agencies in Philly won't place kids with LGBTQ people**” on March 13, 2018.
- ❖ Philadelphia’s Bethany Christian Services & Catholic Social Services (CSS) stated they would refuse to certify same-sex couples as qualified foster parents since, in their view, certification “is tantamount to endorsement.”
- ❖ Philadelphia declines to renew the foster care contracts, and CSS and four of its foster parents, represented by counsel from the Becket Fund for Religious Liberty, sued the City of Philadelphia asking the court to order the city to renew the agency’s contract



FULTON v. CITY OF PHILADELPHIA: BACKGROUND (E.D. PA.)

- ❖ CSS and foster parents file a complaint against the City of Philadelphia and move for a preliminary injunction, arguing that the City's failure to renew the contract violated Pennsylvania's Religious Freedom Protection Act (71 P.S. § 2404), the Free Exercise Clause of the First Amendment, the Free Speech Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Pennsylvania's state constitutional corollaries, among other things.
- ❖ Support Center For Child Advocates and Philadelphia Family Pride, representing advocates for children in foster care and LGBTQ+ foster parents and prospective foster parents, intervened at the District Court phase.
- ❖ District Court rules in favor of the City of Philadelphia, 320 F. Supp. 3d 661 (E.D. Pa. 2018), finding that “the balance of harms and the public interest militate in favor of denying” CSS's motion for injunction.



FULTON v. CITY OF PHILADELPHIA: BACKGROUND (3RD CIRCUIT)

- ❖ CSS appeals to the U.S. Court of Appeals for the Third Circuit.
- ❖ Third Circuit finds that the nondiscrimination policy “is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exception from that policy” under *Employment Division v. Smith*, 494 U.S. 872 (1990).
- ❖ Appellate court affirms the district court’s decision, noting that the City of Philadelphia “stands on firm ground in requiring its contractors to abide by its non-discrimination policies when administering public services.” 922 F.3d 140 (3d Cir. 2019).

FULTON V. CITY OF PHILADELPHIA: U.S. SUPREME COURT

- ❖ CSS files a petition for writ of certiorari July 22, 2019, cert. granted February 24, 2020. Over the course of briefing, 82 amicus curiae briefs are filed, including one on behalf of the Philadelphia LGBTQ Bar Association (Brief of National LGBT Bar Association, et al.)
- ❖ Briefing focuses generally on Employment Division question, querying whether the City's Fair Practices Ordinance is a neutral and generally applicable law, entitling it to protection against First Amendment claims.

Since the 1980s, the **Philadelphia LGBTQ Bar Association** has supported Philadelphia's LGBTQ+ legal community and paved the legal path for queer rights in Philadelphia and the United States. The Philadelphia LGBTQ Bar Association aims to advance the welfare and full equality of the LGBTQ+ community. The Philadelphia LGBTQ Bar Association has a particular interest in ensuring that same-sex couples are treated equally in the foster care system for the protection and benefit of both same sex-couples and foster children, some of whom identify as LGBTQ and would be harmed by placement in households hostile to their identities.



QUESTIONS PRESENTED TO THE SUPREME COURT

- ❖ The City of Philadelphia chose to exclude a religious agency from the City's foster care system unless the agency agreed to act and speak in a manner inconsistent with its sincere religious beliefs about marriage. The Third Circuit upheld that action under *Employment Division v. Smith*. The questions presented are:
 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?
 3. Whether a 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?

PRIMER ON EMPLOYMENT DIVISION V. SMITH

- ❖ Two employees ingested peyote, an illegal hallucinogen under Oregon law, as part of their religious ceremonies as members of the Native American Church and were terminated for illegal drug use by their employer.
- ❖ State's unemployment system denied claims for compensation, finding that the employees were dismissed due to work-related misconduct.
- ❖ Employees filed suit, and Oregon State Supreme Court held that the state law prohibition on illegal drug consumption violated the Free Exercise Clause of the First Amendment.
- ❖ U.S. Supreme Court holds that “valid or neutral law[s] of general applicability” will survive a First Amendment challenge and avoid strict scrutiny.
- ❖ *Employment Division v. Smith* almost immediately came under fire, and Congress passed the Religious Freedom Restoration Act. (RFRA) in 1993. 42 U.S.C. § 2000bb.

FULTON V. CITY OF PHILADELPHIA: SUPREME COURT DECISION

- ❖ On June 17, 2021, the Supreme Court of the United States unanimously agreed that “[t]he refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment.”
- ❖ Chief Justice Roberts delivered the opinion for the court, joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, Barrett. Justices Barrett, Alito, and Gorsuch filed separate concurring opinions.
- ❖ The Supreme Court issued a narrow ruling, holding that the City’s nondiscrimination policy in the foster contract was not generally applicable because the Philadelphia Human Services Commissioner could issue exceptions from the policy.
- ❖ Additionally, the Court held that the Fair Practices Ordinance was inapplicable to the foster care context because foster care certification was not a public accommodation.
- ❖ Justice Roberts believed the contract allowed the Philadelphia Human Services Commissioner to issue exceptions from the nondiscrimination policy, and therefore held the contract failed the general applicability standard and was thus subject to strict scrutiny.

IMPLICATIONS OF FULTON V. CITY OF PHILADELPHIA

- ❖ Potential expansion of religious exemptions from other “generally applicable” laws, including antidiscrimination laws, building safety codes, and housing requirements at the state and federal levels.
- ❖ Status of *Employment Division v. Smith*? Justices Alito, Thomas & Gorsuch would have specifically overturned *Employment Division v. Smith*, and Justices Barrett & Kavanaugh suggest they would overturn *Smith* as well.
- ❖ Non-Profit Provision of Government Services. Will local governments begin to provide direct services out of hesitancy that a non-profit will claim exemptions from governmental nondiscrimination requirements?
- ❖ In other places, religious social service agencies claim a right not to work with foster families of a different faith, which can exclude non-believers and those of minority faiths from serving as foster parents.

QUESTIONS?



PROGRAMMING NOTE

- ❖ Partnership with Mazzoni Center for Philadelphia Trans Wellness Conference (July 22-24). Legal Professional CLE track provides up to 8 CLE credits.
- ❖ Late Summer/Early Fall CLE on state-level anti-trans bills, including for gender confirmation treatment, sport participation for trans youth.
- ❖ Fall CLE with Lawyers Concerned for Lawyers & Judges Concerned for Judges



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