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Legal Sidebar

# Supreme Court Considers Overruling Free Exercise Precedent in *Fulton v. Philadelphia*

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On November 4, 2020, the Supreme Court heard oral argument in *Fulton v. City of Philadelphia*, an appeal asking the Court to revisit foundational precedent interpreting the First Amendment's Free Exercise Clause. The November session of oral arguments was the first for newly confirmed Justice Amy Coney Barrett, who could play a key role in resolving this appeal. In *Fulton*, a Catholic foster-care agency raised religious objections to complying with Philadelphia's policies prohibiting contractors from discriminating on the basis of sexual orientation. The City had stopped referring foster children to the agency after discovering it would not work with same-sex couples as foster parents. The lower courts rejected the agency's constitutional claims, citing *Employment Division v. Smith*, a 1990 case in which the Supreme Court held that the Free Exercise Clause generally will not "excuse" individuals from complying with valid, neutral, and generally applicable laws. The Court agreed to consider whether to revisit *Smith* when it granted the petition for certiorari in *Fulton*. If the Court overrules *Smith*, it would likely make it easier for religious entities to seek religious exemptions from generally applicable laws. The case could have significant implications not only for other foster care and adoption agencies seeking to avoid complying with local nondiscrimination policies, but also for other businesses with religious objections to serving certain customers or events.

This Legal Sidebar provides an overview of the constitutional jurisprudence at issue in this case, as well as a discussion of the specific facts and arguments raised in *Fulton*, including the Justices' questioning at oral argument. It concludes by discussing the potential implications of the case for Congress.

## Legal Background

The First Amendment's Free Exercise Clause provides that the government "shall make no law . . . prohibiting the free exercise" of religion. The Supreme Court has said the government generally may not "target[] religious beliefs as such." If a law restricts religious "practices because of their religious motivation" or discriminates based on religious status, it will be subject to strict scrutiny, meaning the law is invalid unless the government can show it "is justified by a compelling interest and is narrowly tailored to advance that interest." In 2018, for example, the Supreme Court held in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* that a state violated the Free Exercise Clause when it applied its

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nondiscrimination laws to compel a baker to make a cake for a same-sex wedding because the state's administrative proceedings demonstrated hostility towards the baker's religious beliefs.

Under *Employment Division v. Smith*, however, a law does not violate the First Amendment if the burden on religious exercise is "merely the incidental effect of a generally applicable and otherwise valid provision." In *Smith*, the Supreme Court rejected a free-exercise claim brought by two members of a Native American church. They challenged a state's decision to deny them unemployment benefits after they were fired for using peyote in violation of state criminal drug laws. The church members argued that this denial of benefits impermissibly burdened their religious practice, given that the peyote was used for sacramental purposes. The Supreme Court rejected this claim, stating that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"

Justice Antonin Scalia, writing for the five-Justice majority in *Smith*, acknowledged that some prior Supreme Court decisions had applied a heightened standard to analyze free-exercise claims, but said those rulings requiring the government to demonstrate a compelling interest had "nothing to do with an across-the-board criminal prohibition on a particular form of conduct." The *Smith* Court concluded that these earlier cases concerned laws that were not truly "generally applicable." Instead, those cases involved systems like unemployment-benefit programs in which the government decided case by case whether to apply laws through "individualized . . . assessment[s]." Because these cases entailed a greater risk of religious discrimination in individual exemption decisions, they required a heightened standard of review. By contrast, the criminal laws in *Smith* generally prohibited the use of certain drugs and were "not specifically directed at [the church members'] religious practice."

The Court's ruling in *Smith* proved "controversial" in both its immediate aftermath and in the years that followed. Concurring in the judgment in that case, Justice Sandra Day O'Connor claimed that the Court's opinion "dramatically depart[ed] from well-settled First Amendment jurisprudence" and argued that the majority should have applied "the compelling interest test." Congress expressed its disagreement with the *Smith* decision by passing the Religious Freedom Restoration Act (RFRA), which presently imposes a heightened standard of scrutiny for federal government actions that "substantially burden a person's exercise of religion *even if* the burden results from a rule of general applicability." (RFRA does not apply to state government actions, although many states, including Pennsylvania, have adopted similar statutes limiting state actions.) Regardless, after *Smith*, the critical question for evaluating a constitutional free-exercise claim is often whether the law is neutral or generally applicable, or if instead the government has impermissibly discriminated against religion, as was the case in *Masterpiece Cakeshop*.

## *Fulton v. City of Philadelphia*: Procedural History and Arguments

In *Fulton*, Catholic Social Services (CSS) sued the City of Philadelphia after the City stopped referring foster children to the agency. The City had discovered that CSS would not comply with local policies prohibiting sexual orientation discrimination. The specific issue on appeal is whether the City may insist on including a nondiscrimination provision in its contract with CSS to provide foster-care services. Before the Third Circuit, CSS primarily argued that the City violated the Free Exercise Clause by applying its nondiscrimination policy in a way that "was neither neutral nor generally applicable" but instead targeted CSS's religious exercise. The Third Circuit, however, rejected CSS's evidence that purportedly showed the City "acted out of religious hostility," concluding that CSS had not been "treated differently because of its religious beliefs." Accordingly, the Third Circuit ruled that the case was governed by *Smith*, and CSS's "religiously motivated conduct enjoy[ed] no special protections or exemption from [the] general, neutrally applied legal requirements" contained in the nondiscrimination policy. (CSS also unsuccessfully raised constitutional free speech claims before the Third Circuit, and has revived those claims in its briefing before the Supreme Court. Oral arguments, however, focused on the free-exercise claims, and so this Legal Sidebar does, as well—notwithstanding the fact that a different

federal appeals court ruled in July that a New York adoption agency raising similar constitutional claims had stated plausible free speech claims.)

Before the Supreme Court, CSS continues to argue that *Smith* does not apply because the City "imposed special disabilities on CSS because of its religious beliefs," demonstrating impermissible "hostility toward CSS's religious beliefs" and triggering heightened scrutiny. The United States filed an amicus brief in support of CSS that agrees with these claims. CSS also suggests, however, that while the Court could rule for the agency by holding that *Smith* does not govern, "the more straightforward way to clarify the law" in this case would be "to replace *Smith* with" a new standard for evaluating free-exercise claims. CSS argues that *Smith*'s rule allowing more lenient review in the context of generally applicable laws is inconsistent with "the text, history, and tradition" of the Free Exercise Clause. CSS contends that the Court should instead adopt a strict-scrutiny standard for all laws that infringe religious exercise, allowing religious protection to be limited only in the case of "particularly important government interests." And the City fails to meet that burden, says CSS, because a "broad nondiscrimination interest" is insufficient to justify infringing the agency's "religious exercises concerning marriage."

During oral argument, some of the Justices explored how the strict-scrutiny standard advanced by CSS might play out in future cases. Justices Stephen Breyer, Sonia Sotomayor, and Amy Coney Barrett asked how courts should evaluate claims by entities with religious objections to interracial marriage. If the Court were to hold that the Free Exercise Clause prevents governments from applying nondiscrimination laws to those who object to same-sex marriage, these Justices questioned whether governments would have to extend the same treatment to those raising religious objections to interracial marriage. In response, the attorney arguing on behalf of the United States suggested courts would not have to allow racial discrimination, pointing to Supreme Court precedent that, in his view, established that eradicating racial discrimination "presents a particularly unique and compelling interest." Justice Samuel Alito followed up this answer by asserting that *Obergefell v. Hodges*, the 2015 case that struck down state laws discriminating against same-sex marriage, supported the idea that racial discrimination would present a different case. Justice Alito and the attorney for the United States both noted that Justice Anthony Kennedy's opinions in *Obergefell* and *Masterpiece Cakeshop* contained language recognizing religious beliefs opposing same-sex marriage as worthy of respect and suggesting that the government should accommodate those beliefs.

Justice Elena Kagan later pressed the attorney for the United States to answer whether the United States believed that governments have a compelling interest in preventing discrimination on the basis of sexual orientation, and the attorney conceded that "in the abstract," the interest might "perhaps" be compelling. In response to later questioning by Justice Brett Kavanaugh, though, the attorney for the United States argued that Philadelphia's potential interest in enforcing its nondiscrimination policy against CSS, specifically, was undermined by the fact that other foster agencies were willing to work with gay couples. He suggested that consequently, the government's interest in ensuring gay couples have the opportunity to serve as foster parents was served even if CSS would not work with them. Counsel for intervening civil rights groups later contended, however, that if the City was "required to grant exemptions," other agencies might also seek to turn away couples based on their sexual orientation or other characteristics.

The City's arguments emphasize that this case involves the terms of a government contract, saying that "[w]hatever CSS's rights when *regulated* by the government, it is not entitled to *perform services* for the government however it sees fit." Drawing from precedent establishing that the government has more leeway to regulate public employment and its own internal affairs than private entities, the City argues that ordinary constitutional principles do not apply to this dispute involving a government contractor. Instead, the City contends that a more deferential approach is appropriate, suggesting that contracting rules should receive more forgiving review than *Smith*'s neutral-and-generally-applicable standard. But even if normal standards apply, the City says its nondiscrimination requirement, which is included in every contract and applies to "secular and religious agencies alike," satisfies *Smith*'s neutral-and-

generally applicable standard. In response to CSS's claims that the City targeted CSS because of its religious beliefs and did not act neutrally, the City maintains that the extrinsic statements of government officials highlighted by CSS are insufficient to demonstrate religious hostility.

The first question during oral argument, from Chief Justice John Roberts, asked CSS's attorney to respond to the City's argument that the government should have more leeway under the Free Exercise Clause to set conditions for contractors in a public program, as opposed to when it is issuing regulations that apply "across the board." Most of the other Justices also seemed interested in this issue. For example, Justice Sotomayor asked why CSS's situation is different from other cases where courts have allowed the government to "set the criteria it wants" for its contractors. In one exchange, Justice Kagan asked what the outcome would be if a prison contractor objected to a contractual provision prohibiting employees from using drugs by seeking a religious exemption for peyote use. CSS's attorney said the government's interests would "be a lot stronger" in that hypothetical situation. In contrast, Justice Neil Gorsuch later asked whether it mattered that this contract provision was based on a city ordinance. CSS's attorney asserted that this separate, legally binding ordinance took the city "out of the contracting context" and into "the general regulating context."

Finally, the City argues this case "is an exceptionally poor vehicle to consider the validity of *Smith*," both because the case arises in the context of a contractor dispute and because the City says it can satisfy strict scrutiny. The City claims its nondiscrimination requirement serves "state interests of the highest order," including ensuring equal treatment for prospective foster parents and maximizing the number of available foster parents, and is "narrowly tailored to serve those interests." The City also contends the Court should adhere to *stare decisis* principles and not overrule *Smith* because Justice Scalia's opinion remains a reasonable interpretation of the text and historical understanding of the First Amendment.

## Implications for Congress

The Supreme Court's ruling in *Fulton* could have significant implications for free-exercise claims, particularly if the Court overturns *Smith*, which effectively renders many free-exercise challenges to neutral and generally applicable laws unsuccessful. In some sense, if the Court overturned *Smith* and instituted a strict-scrutiny standard as advocated by CSS, the practical implications of such a ruling might be limited by RFRA, which already requires applying a strict-scrutiny analysis if the federal government substantially burdens a person's free exercise of religion. But while Congress retains the power to amend RFRA, the legislature cannot change judicial interpretations of the First Amendment, as Justice Breyer pointed out at oral argument. Thus, a Supreme Court decision instituting a strict-scrutiny standard under the Free Exercise Clause would mean that such heightened review of government action would continue even if Congress repealed RFRA or legislated that RFRA does not apply to certain government actions.

Alternatively, the Supreme Court could decide *Fulton* without reconsidering *Smith*. For example, the Court could agree with the City that, regardless of what standard governs free-exercise challenges to ordinary regulations, courts should apply a more deferential standard in the contracting context. Such a decision would likely give federal and state governments more leeway to impose conditions on contractors, even those with religious objections. Conversely, the Court could rule for CSS on narrower grounds, similar to its 2018 *Masterpiece Cakeshop* decision in which the Court focused on whether the state proceedings at issue demonstrated hostility towards a baker's religious beliefs. Justice Barrett raised this possibility at oral argument, asking why the Court should "even entertain the question whether to overrule *Smith*" if the Court could instead rule for CSS by holding that *Smith* does not apply. Along these lines, others, including Justices Alito and Kagan, asked whether the City's nondiscrimination policy was non-neutral under *Smith* because it seemed to contemplate the possibility of granting exemptions allowing noncompliance. A ruling that leaves *Smith* in place could still have important consequences by clarifying Supreme Court precedent on when a specific law is not neutrally applied or generally applicable within the meaning of *Smith*.

Regardless of how the Supreme Court resolves *Fulton*, further litigation is likely. At least two other petitions currently pending before the Court ask the Court to overrule *Smith*, potentially presenting the Justices with another opportunity to revisit *Smith* if they decide not to reach the issue in this case. Apart from *Masterpiece Cakeshop*, the Court has been presented with a number of other appeals from religious businesses that have sought to decline service to same-sex weddings without being punished for violating nondiscrimination laws. But religious entities may seek religious exemptions from generally applicable laws in a variety of contexts, as demonstrated by the facts of *Smith* itself. For example, one of the other pending petitions that asks the Court to revisit *Smith* involves a would-be government contractor who raises religious objections to providing the government with his Social Security number.

On the other hand, overruling *Smith* to institute a heightened standard of review for all Free Exercise Clause challenges could prompt more adoption or foster-care agencies—and many other entities—to seek religious exemptions from generally applicable federal and state policies, including provisions prohibiting discrimination on the basis of sexual orientation. As suggested during oral argument, one open question that could arise in these challenges is whether governments can satisfy strict scrutiny to justify applying such nondiscrimination laws to religious agencies. In *Bob Jones University v. United States*, the Supreme Court concluded that the IRS could deny tax-exempt status to private schools that discriminated on the basis of race, even though the schools claimed that the racial discrimination was required by their religious beliefs and protected by the Free Exercise Clause. The Court said that "certain governmental interests" are "so compelling" that they will "allow even regulations prohibiting religiously based conduct." In particular, the Court held that the government's interest "in eradicating racial discrimination in education" was so compelling that it outweighed any burden imposed on the schools' religious exercise by the denial of the tax benefit, and further held that application of the nondiscrimination policy was the least restrictive means to achieve this interest. The Supreme Court has not considered whether governments' interests in generally eradicating discrimination on the basis of non-racial classifications could satisfy strict scrutiny, but may be faced with this question in the near future.

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