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Supreme Court Considers Religious Exemptions to Nondiscrimination Laws

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On November 4, the Supreme Court heard oral arguments in *Fulton v. City of Philadelphia*, the most recent case to address how the First Amendment's Religious Free Exercise Clause interacts with antidiscrimination laws as applied to religious entities. The case centers on foster care and certification of couples to be foster parents, but the case could have wide-ranging impacts on public accommodation and employment law, especially in the field of government contracts.

When the City of Philadelphia's Department of Human Services removes children from their parents' homes, it seeks to place those children temporarily with foster parents. But the city does not find those foster parents itself. Rather, it contracts with private agencies like Catholic Social Services to find suitable foster parents. The private organizations are responsible for doing home visits and the other steps necessary to approve individuals and couples as foster parents, and the city pays them for these services. In 2018, Catholic Social Services admitted to the City that it would not consider any same-sex couples as potential foster parents, which the City concluded was a violation of both its Fair Practices Ordinance and the terms of the contract between the City and Catholic Social Services. Thus, the City stated that it would only renew Catholic Social Services' contract for certifying foster parents if the organization agreed to consider same-sex couples on the same grounds as opposite-sex couples. Catholic Social Services refused and sued the City, claiming that the City infringed on its right to free exercise of religion under the First Amendment.

The City won in both the federal district and appeals courts, and the Supreme Court agreed to hear the case to answer three questions relating to what a free exercise plaintiff must prove to win a discrimination case, whether the Supreme Court should overturn its prior case *Employment Division v. Smith*, and what conditions a government agency can place on its contracts with private agencies.

Employment Division v. Smith **and the Current State of Free Exercise Law**

Employment Division v. Smith, decided in 1990, dealt with two men who were fired from their jobs at a drug rehabilitation center because they had used peyote,

which was against state law, and were then denied unemployment benefits since they had been fired for misconduct. But the men had used peyote as part of a religious ceremony, and claimed that the state violated the First Amendment when it denied them unemployment benefits based on their religious use of peyote. In an opinion written by Justice Scalia, the Supreme Court held that the Free Exercise Clause of the First Amendment prohibited governments from singling out religious conduct for regulation, but did not require governments to create religious exemptions from all of its laws. As long as the law was generally applicable to all religious and non-religious individuals alike, and neutral toward religion, meaning not intended to interfere with religious practice, the law met the requirements of the Free Exercise Clause. In other words, as long as Oregon's peyote ban applied to all citizens, not just members of a certain religious group, and as long as that law was written for a neutral reason like promoting health and safety as opposed to a legislative desire to stop a religious practice, the law was constitutional and could be applied to both religious and non-religious individuals. The fact that the law incidentally infringed on religious practice did not make it invalid.

Congress responded to *Employment Division v. Smith* by passing the Religious Freedom Restoration Act of 1993, or RFRA. This bill stated that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." It introduced a requirement that a person with a religious objection to a law must be exempted from that law unless the government had a compelling interest in passing the law, and the law was the least restrictive means of achieving that goal. This test is known as strict scrutiny, and is very difficult to meet, although religious employers do not always win when they invoke RFRA. For example in *Bostock v. Clayton County Georgia*, where the Supreme Court held that Title VII prohibits employers from discriminating on the basis of sexual orientation or gender identity, one of the employers had made a RFRA claim which failed in the lower court because Title VII did not substantially burden the employer's religious exercise and met strict scrutiny regardless. Additionally, many federal circuits only apply RFRA to cases in which the federal government is a party, such as when the Equal Employment Opportunity Commission brings the action to enforce Title VII, but not when a private employee files the lawsuit.

While RFRA originally applied to both state and federal laws, the Supreme Court later said that it could only apply to federal laws. This meant that while federal laws would have to either meet RFRA's strict scrutiny test or create religious exemptions, state laws only had to meet *Employment Division v. Smith*'s test that they be neutral toward religion and generally applicable to everyone—or whatever higher standard the state sets for its own laws.

Revisiting *Employment Division v. Smith*

In *Fulton v. City of Philadelphia*, both sides argue that they can win under *Employment Division v. Smith*. The City of Philadelphia argues that its requirements that foster care agencies not discriminate against potential parents based on sexual orientation, as contained in its Fair Practices Ordinance and the service contracts, are generally applicable to all foster care agencies, and have the neutral goal of stopping discrimination as opposed to infringing on religious practice. Catholic Social Services claims that the nondiscrimination provisions are intended to infringe on religious practices, and that they are not generally applied by the city, which allows foster care agencies to consider other protected categories like race and disability in narrow circumstances, but do not provide an exception to the sexual orientation nondiscrimination policy for religious objectors.

But in the event that argument fails, Catholic Social Services also asked the Supreme Court to revisit its decision in *Employment Division v. Smith*, and to replace that precedent with the strict scrutiny standard established by RFRA. A decision by the Supreme Court that the First Amendment requires religious exemptions from neutral laws of general applicability unless the law is the least restrictive means of serving a compelling governmental interest would not only extend the strict scrutiny test to state and local laws like the Philadelphia Fair Practices Ordinance, it would elevate it from a legislative mandate that any future Congress can overturn to a constitutional holding that only the Supreme Court or a constitutional amendment could undo. It would also go against legislative and judicial history tracing back to our country's founding, which traditionally indicates that the Free Exercise Clause does not require religious exemptions from neutral and generally applicable laws, as First Amendment scholars argued in an amicus brief, and as Justice Scalia noted in *Employment Division v. Smith* itself.

Control over Government Contracts

Another dimension of the *Fulton v. City of Philadelphia* case is that the City is acting not only as a regulator enforcing its Fair Practices Ordinance, but also as a market participant paying—or not paying—Catholic Social Services to perform a vital function on behalf of the city government. And the Supreme Court has stated in various cases that a government has the power to decide how it wants its work to be carried out by private contractors, even if there is some conflict with religious exercise. So, if that principle is followed, even if the Fair Practices Ordinance were required to include an exemption for those who religiously oppose same-sex marriage, the City could still grant contracts for its foster care program only to those organizations that agree not to discriminate against same-sex couples. Catholic Social Services argues that this too would violate the First Amendment, and that governments must grant exceptions to contractors based on honestly

held religious beliefs.

Possible Impacts of *Fulton v. City of Philadelphia* on Employment Law

With a six to three conservative majority on the high Court, it is likely that Catholic Social Services will win this case, although it is far from clear on what ground the Court will base its decision. At oral argument the Justices spent little time asking about whether they should overrule *Employment Division v. Smith*, which indicates that they may take a more moderate approach such as narrowing the situations in which *Smith* applies or introducing some sort of balancing test for courts to apply when religious beliefs conflict with nondiscrimination laws. But whatever ground it rules on, the decision is likely to chip away at employment protections for workers in at least some contexts, as the decision will apply not only to organizations discriminating against clients, but also against employers discriminating against employees, based on their religious beliefs.

A full overruling of *Smith* would mean that all state, local, and federal employment nondiscrimination laws must include exemptions for religious employers based on their firmly held religious beliefs. A ruling that governments must provide such exceptions in their contracts with private entities would allow greater discrimination in a huge portion of the economy. In fiscal year 2019 the federal government entered into nearly six million contracts for services from private entities, spending almost $600 billion on those contracts. The federal, state, and local governments contract with private entities for a huge range of things, from production of military supplies and energy to provision of day care through Head Start and running private prisons. As a group of businesses ranging from tech giants Apple and Google to retailers Macy's and Levi Strauss argued in an amicus brief, a ruling for Catholic Social Services could create unfair competition for government contracts where employers with religious objections—ranging from entities like Catholic Social Services, which is run by the Archdiocese of Philadelphia, to corporations like Hobby Lobby that are owned by a small number of religious adherents—are not required to comply with all neutral laws, and could make it difficult to recruit employees to locations where those employees might be denied public services by the only government contractor in town. And as 160 members of Congress argued, an expansion of religious exemptions would greatly infringe on Congress's ability to eradicate discrimination, especially in the contracts it funds through taxpayer money.

And as the City of Philadelphia stressed at oral argument, these exemptions for religious employers and service providers would not only pertain to sexual orientation discrimination. Rather, religious entities would be allowed to discriminate against employees and clients based on any sincerely held religious belief, including beliefs about the superiority of certain religions, genders, or races.

And while everyone was in agreement that the government has a compelling interest in eradicating racial discrimination, meaning that a ban on race discrimination would pass strict scrutiny against religious objections, the attorneys representing Catholic Social Services would not state whether the government had a compelling interest in eradicating other forms of discrimination, a question that is less clear from prior Supreme Court cases. The Supreme Court's decisions on the "Ministerial Exception" already allow religious employers to discriminate on any grounds against those employees they consider ministers, such as teachers in a Catholic school who play a role in spreading the faith, but this decision could expand the license to discriminate beyond those who qualify as "ministers." The Supreme Court explicitly declined to address the employer's religious objections to Title VII in *Bostock v. Clayton County, Georgia*, but a ruling in *Fulton* could fill in that gap now that the question of religious objections to neutral laws is properly before the Court.

Decisions from the Supreme Court involving LGBTQ rights typically come out at the end of the term in June, but the Court's decision could be published any time between now and then.