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Potential Implications of Supreme Court Decision on Employment Law

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On June 17, 2021, the US Supreme Court released its decision in the case *Fulton v. City of Philadelphia*. The case was brought by Catholic Social Services, which claimed that the City government violated its First Amendment right to free exercise of religion by refusing to work with the foster care agency unless it agreed to certify same-sex couples as foster parents, as required by the contract between the agency and the City. The Supreme Court held on narrow grounds that the City did violate the agency's free exercise rights by refusing to grant a religious exception that was hypothetically allowed by the agency's contract. While the decision was relatively narrow and did not overturn any existing law, it could have larger impacts on non-discrimination provisions in the employment context, especially for government contractors.

Fulton v. Philadelphia **Background**

The City of Philadelphia has contracts with over twenty foster care agencies, which find temporary homes for children the City removes from their parents. Those contracts all include an agreement that the foster care agency will not discriminate against potential foster parents or children based on their sexual orientation or several other protected characteristics. The contracts also include a statement that the Commissioner of Human Services can grant an exception to the nondiscrimination provision, but no exception has ever been granted. The City also has a Fair Practices Ordinance, which prohibits providers of public accommodations from discriminating on the basis of sexual orientation. When the City learned that one of its foster care agencies, Catholic Social Services ("CSS"), refused to certify same-sex couples as foster parents, it announced that it would not use CSS to place children with foster parents until the organization agreed to comply with the nondiscrimination requirements in the contract and ordinance. CSS and some of its certified foster parents sued the City, claiming violations of their free speech and free exercise of religion rights.

The lawsuit, *Fulton v. City of Philadelphia*, made its way to the U.S. Supreme Court, where arguments were largely focused on the free exercise questions. The Supreme Court had ruled in a 1990 case, *Employment Division v. Smith*, that laws which are neutral toward religion and generally applicable to everyone, but incidentally burden religious practice, are not subject to strict scrutiny under the Free Exercise clause of the First Amendment. Rather, those laws are valid as long as they are rationally related to a legitimate government interest. Philadelphia argued that both its foster care agency contracts and Fair Practices Ordinance were written with the religiously-neutral, and legitimate, intent of stopping discrimination within the City, and that the provisions applied generally to all foster care

agencies in the City, therefore meeting the requirements of *Smith*. CSS argued both that the provisions were not neutral or generally applicable, and that the Court should overturn *Smith*.

The Supreme Court's Decision

The Supreme Court unanimously agreed with CSS's argument that the nondiscrimination provision in the contract was not generally applicable, and therefore not subject to *Smith*. This is because the contract gave the city government the power to make individual exceptions to the nondiscrimination provision. The fact that the City had never in fact granted an exception did not matter—the possibility that some foster care agency could one day be exempted made the contractual provision not "generally applicable" to religious and non-religious entities alike in the eyes of the Supreme Court. Because *Smith*'s rational basis test did not apply, the City's contract provision must pass muster under the strict scrutiny standard applicable to Free Exercise claims. Specifically, the City would be required to prove not that its nondiscrimination rule served a compelling government interest, but that the denial of any exemption requested for religious reasons was necessary to meet a compelling governmental interest, and that no less restrictive means was available.

The City of Philadelphia and an amicus had also pointed to several prior Supreme Court decisions which said that governments have greater leeway in setting the terms of their contracts than in writing laws. They argued that everyone is required to follow laws, but no entity is required to serve as a government contractor. Nor is doing so a right guaranteed by law. Therefore, contractual infringements on one's rights are not subject to as thorough scrutiny as infringements written into laws. The Supreme Court in *Fulton* acknowledged these prior decisions, but quickly dismissed the City's argument that it made a difference in this case, stating, "We have never suggested that the government may discriminate against religion when acting in its managerial role." The Court did not state what level of scrutiny should apply to provisions in government contracts that are generally applicable but infringe on the exercise of religion, focusing only on the Philadelphia-CSS contract's lack of general applicability.

The Court accepted CSS's contention that having to certify same-sex couples as foster parents would be "tantamount to endorsement" of the same-sex relationship contrary to the organization's religious beliefs, and would therefore be a government-imposed burden on their free exercise of religion. Although the City of Philadelphia had argued that certifying foster parents only indicated that the couple met the legal criteria set by the government, the Supreme Court accepted CSS's statement that it burdened their religious practice at face value, as the Court attempts to avoid making value judgements about the validity of anyone's religious beliefs.

Applying strict scrutiny, the Court considered the City of Philadelphia's reasons for denying CSS an exemption to the nondiscrimination provision: increasing the number of potential foster parents by forbidding discrimination against same sex couples, avoiding a potential lawsuit if it permitted one of its contractors to discriminate, and ensuring the equal treatment of potential foster parents and children regardless of sexual orientation. It said that rejecting CSS's exemption request could actually narrow the pool of potential foster parents by having one less agency certifying parents, and that the City had not given any concrete evidence that it would be sued if it granted the exemption. And while it acknowledged that the interest

in equal treatment of foster parents and children regardless of sexual orientation is a "weighty" one—putting off for another day the question of whether it is a "compelling" interest—the fact that the contract gave the City the option to make some exemptions to the nondiscrimination law indicated to the Court that denying all exceptions was not necessary to serve that interest. Therefore, the exemption denial did not pass strict scrutiny.

The Court also held that the public accommodations provision of Philadelphia's Fair Practices Ordinance did not apply to CSS as a foster care agency, because it did not provide a readily accessible service, but required potential parents to go through a months-long process involving background checks, medical exams, and home studies. The law therefore did not apply in this case.

Since the contract fell outside of *Smith* and the Fair Practices Ordinance did not apply at all, a majority of the Justices decided not to address the question of whether to overrule *Smith*. Justices Barrett and Kavanaugh indicated in a concurrence that they think the rule from *Smith* is incorrect, but that they were not sure what standard should replace it, and did not think *Fulton* was the proper case to make that decision. Justice Breyer agreed with the portion of the concurrence that said it was unclear what standard would replace *Smith* and that it was unnecessary to make that decision in this case. Justice Alito, joined by Justices Thomas and Gorsuch, wrote that he would replace *Smith* with a rule that requires strict scrutiny of any law that "imposes a substantial burden on religious exercise." He also made it clear that he believed requiring CSS to certify same-sex couples as foster parents or stop running a foster care agency would impose a substantial burden on religious practice, and that "Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case."

There are therefore five Justices—a majority of the Court—who would vote to overrule *Smith* given the proper legal challenge—for example, if Philadelphia removed the hypothetical exemption from its foster care contracts and continued refusing to work with CSS. At least three of them would replace it with a rule giving a broad, though not absolute, license to discriminate if there were religious grounds to do so.

Potential Implications for Employment Law

For now, the rule from *Smith* remains valid, meaning the analysis of generally applicable laws like Title VII, which does not allow for individually-determined exceptions on non-religious grounds, remains the same. (Perhaps ironically, there are two exceptions to Title VII which allow religious organizations to discriminate against employees in certain circumstances—one which allows religious organizations to give preference in hiring to members of their own religion, and the ministerial exception, which exempts religious entities from non-discrimination laws as applied to employees who help teach or spread the faith.)

But this ruling will have an impact on government contracts that do include the possibility of exemptions for non-religious entities or on non-religious grounds. I suggested in November that this decision could have a huge impact, given that the federal government alone spent just under $600 billion on nearly 6 million contracts for services from private entities. Any contract with the federal government that costs at least $10,000 is subject to Executive Order 11246, which prohibits contractors from discriminating against employees based on

race, color, religion, sex, sexual orientation, gender identity, or national origin. But the executive order also allows the Secretary of Labor to exempt contracts "when the Secretary deems that special circumstances in the national interest so require." While this is a narrower provision only permitting exceptions in the national interest, not in the contractor's interest, it is possible that a court following the logic of *Fulton* could say that the possibility of exemptions for non-religious reasons means that denying a "religious burden" exemption is subject to strict scrutiny. The different provisions in contracts signed by thousands of state and local governments will be closely scrutinized and challenged as well. And because the *Fulton* opinion seemingly narrowed a government's ability to set standards in its own contracts if those standards interfere with a contractor's religious beliefs, but did not provide any guidance as to the limits of that authority, there may be a wide variety of approaches taken by lower court judges interpreting these contracts until the Supreme Court makes that decision in the future.