

Supreme Court Holds That The First Amendment Prohibits Philadelphia From Requiring Catholic Foster-Placement Agency To Certify Same-Sex Couples As Foster Parents

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Decided June 17, 2021

Fulton v. City of Philadelphia, No. 19-123

Today, the Supreme Court held 9-0 that Philadelphia violated the First Amendment by refusing to contract with a Catholic agency for declining to certify same-sex couples as foster parents.

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Background:

Philadelphia contracts with private agencies to place children with foster parents. The city's contracts incorporate a city ordinance prohibiting sexual-orientation discrimination in public accommodations. Catholic Social Services ("CSS") contracted with the city to provide foster-care placement services. After learning that CSS would not certify same-sex couples as foster parents based on its religious beliefs regarding marriage, the city refused to renew its contract with CSS. CSS sued, alleging that the city had violated CSS's First Amendment rights.

The Third Circuit, applying *Employment Division v. Smith*, 494 U.S. 872 (1990), held that the city's nondiscrimination policy is a neutral, generally applicable law, and that CSS failed to show that the city either treated CSS differently than secular organizations or had ill will against religion.

Issue:

Whether the First Amendment prohibits the government from forcing a religious agency to comply with a non-discrimination requirement in order to participate in the foster-care system, where compliance requires the agency to take actions and make statements contrary to its religious beliefs.

Court's Holding:

Yes, at least where, as here, the non-discrimination requirement is not generally applicable and the government fails to offer a compelling reason to deny the religious agency an exemption.

"The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment."

GIBSON DUNN

Chief Justice Roberts, writing for the Court

What It Means:

- Today's decision reiterates that the government must have a compelling reason to enforce a nondiscrimination policy that burdens religious exercise if the policy otherwise permits exemptions.
- Because the Court determined that strict scrutiny applied regardless of *Employment Division v. Smith*, it "ha[d] no occasion to reconsider that decision." The decision thus leaves the door open to further litigation involving the intersection of faith-based organizations and government nondiscrimination policies. If a nondiscrimination policy is subject to exemptions, the government's failure to grant religious exemptions likely will be subject to strict scrutiny.
- The Court's narrow, fact-specific ruling leaves unanswered whether the First Amendment mandates religious exemptions to nondiscrimination policies in other contexts. Any such religious objections will have to be evaluated on their own merits under the appropriate level of scrutiny.
- Although the majority declined to address the continued viability of *Employment Division v. Smith*, three justices (Justices Thomas, Alito, and Gorsuch) would have overruled Smith and two more (Justices Barrett and Kavanaugh) suggested that the "textual and structural arguments against *Smith*" were "compelling."

The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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