# Fulton v. City of Philadelphia

## Facts

### Philadelphia barred Catholic Social Services (CSS) from placing children in foster care based on CSS policy of not licensing same-sex couples to be foster parents

## Procedural History

### District Court denied CSS a preliminary injunction

### Third Circuit Court affirmed

### S.C. grants certiorari

## Issue

### Should the Court revisit its decision in Employment Division v. Smith?

### Is Philadelphia’s refusal to contract with CSS due to CSS’s refusal to accept same-sex foster parents, violate CSS Free Exercise Clause and Free Speech?

## Holding

### The Court need not revisit Smith due to strict-scrutiny already being applied to this case under Lukumi.

### Philadelphia’s refusal to contract with Catholic Social Services for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violate the free exercise clause of the First Amendment. The Free Speech question is not answered by the Court.

## Judgment

### Reversed and Remanded

## Arguments

### Fulton:

#### The United States is founded on a pluralistic religiously tolerant society. The Church holds long held religious views rejecting same-sex couples. These views should be tolerated due to the history, the Free Exercise Clause, and laws opposing this view lacks neutrality, and the lgbt community have known these views

#### Same-sex couples are not being harmed by the Catholic Social Services because same-sex couples can go to 30 different adoption agencies in Philadelphia, no same-sex couple has ever applied at CSS, and if a same-sex couple does apply they will be referred to someone else

#### The CSS foster services does not constitute a “public accommodation” under the City’s Fair Practices Ordinance

#### Employment Division v. Smith should be overruled because it provides too narrow of a platform to judge Free-Exercise cases

### Philadelphia:

#### By CSS discriminating against same-sex couples it allows for a harmful stigma to be supported that perpetuates the cycle of oppression on the LGBT community and violated the Fair Practices Ordinance

#### Because the CSS is a state-supported program, and the state of Philadelphia has anti-discrimination laws protecting LBGT, specifically section 3.21,, CSS is acting in violation of those laws

#### If the religious exemption is granted to Philadelphia’s nondiscrimination laws the effect will radiate far beyond foster-care. Government workers and private contractors could claim religious exceptions to discriminate

#### Third person harm is forbidden when considering religious exceptions under the Establishment Clause.

## Legal Reasoning

### Majority, Roberts (joined by Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett)

#### The non-discrimination requirement of the City’s standard foster care contract is not generally applicable. Section 3.21 of the contract requires agencies to not discriminate against same-sex couples, however there is an exception written in the code that allows for discretion from the Commissioner. This inclusion of the mechanism for entirely discretionary exceptions renders the non-discrimination provision not generally applicable. Further, because state law makes clear that the City’s authority to grant exceptions from section 3.21 also governs section 15.1’s general prohibition on sexual orientation discrimination, the contract as a whole contains no generally applicable non-discrimination requirement.

#### Philadelphia Fair Practice Ordinance does not apply to CSS’s actions because FPO regulates actions of public accommodations opportunities, but a foster parent certification is not made available to the public in the usual sense of the word.

##### The contractual non-discrimination requirement burdens CSS’s religious exercise and is not generally applicable, so it is subject to “the most rigorous of scrutiny.” A government policy can only survive strict scrutiny it is advances compelling interests and is narrowly tailored to achieve those interests. The city does not have the compelling interest that outweighs CSS burden of being denied a license. This violates the Free Exercise Clause of the 1st amendment, but it will not be considered whether the City’s actions also violate Free Speech Clause.

#### “CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its 3. religious beliefs; it does not seek to impose those beliefs on anyone else.”

#### Philadelphia’s law is not neutral

#### “We have no occasion to reconsider Smith because under Lukumi the highest level of strict scrutiny is applied here anyways”

#### CSS has long been a point of light in the City’s foster care system, CSS seeks only an accommodation that will allow them to keep serving children and do not wish to impose their religious beliefs on anyone else. The refusal of Philadelphia to contract with CSS unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny.

### Concurring, Barrett (joined by Kavanaugh and Breyer)

#### The historical record is more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. The textual and structural arguments against Smith are more compelling, it is difficult to see why the Free Exercise Clause along with the other First Amendment freedoms offers nothing more than protection from discrimination.

##### If Smith is replaced, the following questions need answering: Should entities like Catholic Social Services be treated differently than individuals? Should there be a distinction between indirect and direct burdens on religious exercise? What forms of scrutiny should apply? And if the answer is strict scrutiny, would pre-Smith cases rejecting free exercise challenges to garden variety laws come out the same way?

#### We need not wrestle with these questions in this case, though, because the same standard applies regardless whether Smith stays or goes. A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives Smith—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions.

### Concurring, Alito (joined by Thomas and Gorsuch)

#### The Court granted certiorari to decide whether to overrule Smith and the Court sidesteps the question

### Concurring, Alito

#### “There is no question that Smith’s interpretation can have startling consequences. Here are a few examples. Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The act would have been consistent with Smith and prevent the celebration of a Catholic mass anywhere in the United States.”

#### Catholic Churches have been exemplary leaders in foster care and orphanages forever

#### “The City apparently prefers to risk leaving children without foster parents than to allow CSS to follow its religiously dictated policy, which threatens no tangible harm”

#### “The City has been adamant about pressuring CSS to give in, and if the City wants to get around today’s decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today’s decision will vanish—and the parties will be back where they started.”

#### Calls for Smith to be reconsidered. It is a badly decided case that invalidated valuable precedent and has harmed religious organizations since with bad interpretation of the Free Exercise clause.

##### Sherbert v. Verner, 1963

###### Established the ‘compelling state interest’ test in order to impose on the Free Exercise of Religion Clause

##### Wisconsin v. Yoder, 1972

##### Thomas v. Review Bd. Of Individual Employment Security Division, 1981

##### Hobbie v. Unemployment Appeals Comm’n Fla., 1987

#### “After receiving more than 2,500 pages of briefing and af- ter more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.”

#### Smith should be replaced with the Compelling Government Interest test, “The answer that comes most readily to mind is the standard that Smith replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.”

### Concurring, Gorsuch (joined by Thomas and Alito)

#### The majority did a dizzying set of maneuvers in order to avoid Smith. When the Court chose not to pick a side in this case, they actually did by refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution.

#### Smith should be re-examined and overturned

#### “We hardly need to “wrestle” today with every conceivable question that might follow from recognizing Smith was wrong. See ante, at 2 (BARRETT, J., concurring). To be sure, any time this Court turns from misguided precedent back toward the Constitution’s original public meaning, challenging questions may arise across a large field of cases and controversies. But that’s no excuse for refusing to apply the original public meaning in the dispute actually before us.”

## Precedent

### Employment Division v. Smith

### Masterpiece Cakeshop v. Colorado Civil Rights Commission

### West Virginia State Board of Education v. Barnette

### Church of Lukumi Babalu Aye, Inc v. Hialeah

## Source of Law

### Free Exercise of Religion

### Free Speech

### 14th Amendment

## Values

### Freedom of Religion v. Federal/State imposed action

### Textual v. Progressive

### Constitution v. Precedent

### History v. Freedom from discrimination

## Impact

### Leaves the religious questions still needing to be answered.