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Local Gov'ts Must Note Lessons In Religious Exception Ruling

By **Eric Fraser and Josh Bendor** (June 23, 2021, 1:35 PM EDT)

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On June 17, in Sharonell Fulton v. City of Philadelphia, Pennsylvania, the U.S. Supreme Court held that the city of Philadelphia violated the free exercise clause when it terminated its contract with Catholic Social Services because the foster care agency refused to certify same-sex couples as foster care families.

The decision marks a noteworthy change in the free exercise doctrine that has governed since the Supreme Court's 1990 ruling in Employment Division v. Smith, and may or may not signal the beginning of the end of Smith.

State and local governments, and the lawyers who advise them, should take careful note of Fulton and pay particular attention to laws that give the government discretion to grant exceptions and are susceptible to claims of burdening religion.

Philadelphia works with more than 20 private foster care agencies to place children in foster homes. These private agencies certify families for foster care placement based on home visits and statutory criteria.

After Catholic Social Services stated that it would not certify same-sex couples, Philadelphia terminated its contract.

The city cited section 3.21 of its standard foster care contract, which prohibits agencies from rejecting prospective foster parents based on their sexual orientation "unless an exception is granted by the Commissioner ... in his/her sole discretion."

Under Smith, laws that incidentally burden religion are not subject to strict scrutiny under the free exercise clause so long as they are neutral and generally applicable.

Smith has been controversial since the day it was decided, prompting Congress to enact the Religious Freedom Restoration Act and numerous states to adopt analogous statutes, or so-called little RFRAs, to impose strict scrutiny when the government burdens religion.

Catholic Social Services urged the Supreme Court to overrule Smith. Justices Samuel Alito, Neil Gorsuch and Clarence Thomas agreed, contending in a 77-page concurrence that Smith lacks support in the

constitutional text and is a danger to religious freedom.

Additionally, two other justices expressed skepticism of Smith.

But ultimately, the majority did not overturn Smith in this case because it was not necessary to reach the issue.

Instead, the court ruled for Catholic Social Services on a narrower ground.

Chief Justice John Roberts, writing for six justices, explained that the contractual provision prohibiting discrimination against same-sex couples was not "generally applicable" because the provision allowed Philadelphia to grant exceptions.

Once Philadelphia allowed for discretionary exceptions, the court concluded, Philadelphia could no longer contend that it was making generally applicable decisions. Instead, it was applying "a system of individual exemptions," which invited it to consider "the particular reasons for a person's conduct."

That individualized policymaking placed Philadelphia's decision to terminate Catholic Social Services' contract outside the protective confines of Smith and into the land of strict scrutiny, which, as usual, was fatal.

Fulton may signal the end of Smith. Three justices — Justices Alito, Gorsuch and Thomas — penned a full-throated attack on Smith's logic and consequences.

Justice Amy Coney Barrett, joined in relevant part by Justice Brett Kavanaugh, wrote a short concurrence expressing skepticism about Smith's validity "[a]s a matter of text and structure."

That means there may be five votes to overturn Smith, and state and local governments cannot assume that Smith will remain the law.

On the other hand, Smith remains the law for now and will be applied by the lower federal courts unless the Supreme Court abandons it.

Like other doctrines assumed to be on their deathbed, Smith may survive. As a result, governments should be aware that Smith could fall, but they should not focus on Fulton as a potential harbinger of Smith's demise.

Instead, they should focus on how Fulton will be applied and what it might inspire.

Fulton has three primary lessons for state and local governments and those who advise them.

First, governments should take a hard look at laws that contain discretionary exceptions and that may be susceptible to claims that they burden religion.

After Fulton, allowing a decision maker to exercise discretion in granting an exception from a law renders the law not generally applicable. The decision to refuse to grant a discretionary exception under a claim of religious hardship will be subject to strict scrutiny.

This holding may prompt increased litigation. Governments may wish to head off these challenges in

advance by reviewing their statutes, ordinances and contracts for discretionary exceptions or exceptions that allow for secular reasons but not religious reasons.

Many discretionary exceptions have never even been used, but merely creating the system for granting exceptions removes the law from the generally applicable framework.

In Fulton, for example, it is not clear why Philadelphia created the possibility of an exception to the anti-discrimination provision in the first place if it then denied an exception to a Catholic foster care agency.

If a provision for a discretionary exception has never been exercised and is unlikely to ever be needed, the safest course is to remove it.

Second, governments should continue to be cautious when considering requests for religious accommodations.

When these issues arise, administrators should consider working with their lawyers early in the process. Under Fulton, the government should be particularly wary of denying a request for accommodation when the law, ordinance or contract gives the government discretion.

Further, some religious requests may need to be accommodated, particularly if secular exceptions are possible. Denials of religious accommodations should be based on clear, specific harms to the government or third parties if the exception were granted.

After Fulton, governments should not deny requests merely because they are religious in nature or because the requester is allegedly inconsistent in his or her beliefs.

And when governments do deny requests for accommodation, they should make a clear record of their compelling reasons in case of possible litigation.

Third, Justice Alito's criticism of Smith may inspire analogous attacks on Smith-type approaches to state constitutional provisions and a more vigorous application of the little RFRAs that exist in more than 30 states.

Although the results of this dynamic are more difficult to predict, state and local governments should consider this risk factor, especially if the appellate courts in their states are likely to be receptive to Justice Alito's concurrence.

As Fulton shows, governments will sometimes face tension between their goals of promoting religious liberty and their goals of prohibiting discrimination.

Governments are still able to protect and enforce a broad range of anti-discrimination statutes, and the court gave weight to Philadelphia's anti-discrimination goal.

At the same time, there may be increasing demands on governments to accommodate the religious beliefs of their constituents.

Although the court has not fully explained how to resolve these tensions, the lesson for now is to carefully analyze existing provisions that allow for discretionary or secular exceptions to otherwise generally applicable laws and to take care when considering requests for religious accommodation.

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