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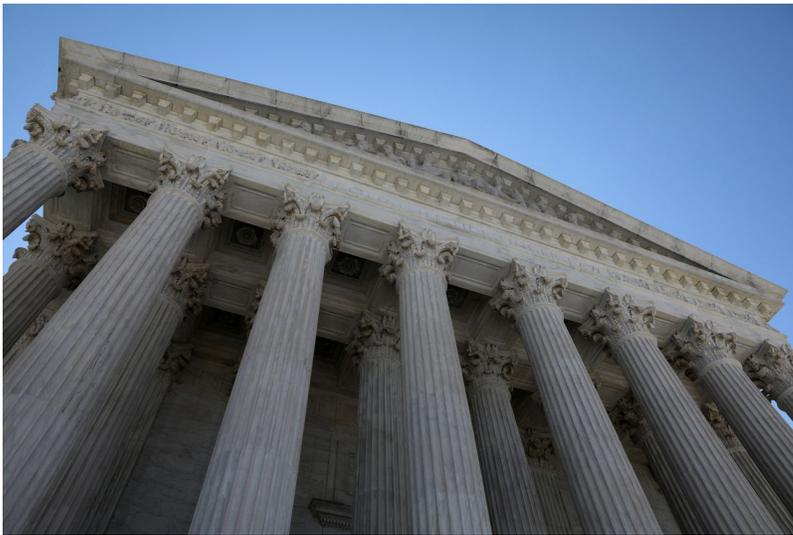
OPINION | REVIEW & OUTLOOK

Philly, Catholics and Foster Kids

The Supreme Court’s next religious-liberty case could be big.

By [The Editorial Board](#)

Nov. 3, 2020 6:22 pm ET



The U.S. Supreme Court building in Washington.

PHOTO: JONATHAN ERNST/REUTERS

Religious liberty is America’s first freedom, enshrined in the opening 16 words of the Bill of Rights. But the rise of progressive secularism is putting increased tension on American pluralism. Case in point is *Fulton v. Philadelphia*, an appeal from a Catholic foster agency that the Supreme Court will take up Wednesday.

To the left, the case is simple: Catholic Social Services (CSS) won't certify gay couples for foster placements. Philadelphia says this violates the city's nondiscrimination rules, meaning that CSS can no longer be contracted as a foster agency unless it changes its policy. CSS sued. To hear progressives, what it's asking for is a religious license to discriminate against Philly's LGBT citizens.

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The details are more complicated. Religious work in this sphere goes back centuries, and CSS says the first Catholic orphanage in Philadelphia dates to 1798. Today about two dozen agencies facilitate foster care. For decades, that included CSS. It serves all children, regardless of sexuality. If a gay couple were to ask for a home study, CSS would refer them elsewhere. "But the record shows," it says, "that no same-sex couple had ever approached CSS in this way."

The genesis of the case was a Philadelphia Inquirer article in 2018 that highlighted the CSS policy. Soon thereafter, CSS says a city official pushed it to change its approach, saying that it's "not 100 years ago" and urging it to follow "the teachings of Pope Francis." The official, according to the city, is also Catholic and was merely trying to find common ground.

When CSS refused to budge, the city froze its foster referrals and its contract was allowed to expire. An appeals court sided with the city, saying that CSS is owed no exemption, since the nondiscrimination policy is "a neutral, generally applicable law." The precedent

here is the 1990 ruling in *Employment Division v. Smith*, in which a Native American was denied state benefits after using peyote in a ritual.

CSS argues that the appeals court was wrong, that its beliefs were treated with hostility. It adds that foster care isn't a "public accommodation" like a restaurant. Agencies weigh prospective parents based on subjective judgments about their family lives. The city may consider race when placing specific children.

Maybe that's enough to win, but CSS also asks the Court to throw out *Smith* as "unsupported by the text, history, and tradition of the Free Exercise Clause." An amicus brief by a Jewish group adds that minority faiths have the most at stake: Imagine a hypothetical law that "required practices incompatible with kosher animal slaughter." The brief cites the case of a family denied damages after a child was given an autopsy "against the commands of their Hmong faith."

Philadelphia counters that CSS does not have a constitutional right to work "on the City's behalf, with City funds, pursuant to a City contract, in a manner that the City has determined would be harmful to its residents." An obvious solution is for Philadelphia to give CSS an exemption, while explaining to the public that foster care exists to help children and that gay couples are welcomed by other agencies.

But the progressive winners of the culture war seem unwilling to give quarter to the losers. In 2008 Barack Obama said he believed "that marriage is the union between a man and a woman." A decade later, CSS was told that its policy, based on the same view, disqualified it from longstanding good work with Philadelphia's children. Meantime, Joe Biden wants to renew the effort to foist contraceptives onto the health plans offered by the Little Sisters of the Poor.

In a big, diverse country of 330 million people, questions of religion are best approached with an inclination toward pluralism and an attitude of live and let live. But if that's too much to hope as militant secularism advances, then at least the faithful have the First Amendment.

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