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People pray outside the U.S. Supreme Court in Washington Sept. 26, 2020. (CNS photo/Tyler Orsburn)



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The Supreme Court, with a full bench, will hear oral arguments by teleconference Nov. 4 about a Catholic social service agency that had been excluded from Philadelphia's foster care program for not accepting same-sex couples as foster parents.

The case, Fulton v. Philadelphia, pits religious liberty against discrimination laws protecting members of the LGBTQ community, and because it is similar to previous cases that have come before the court, some legal experts have said there is potential for a narrow ruling on it.

In 2018, for example, in the case of a Colorado baker who said he would not make a wedding cake for a same-sex couple because it would violate his religious beliefs, the court issued a narrow ruling for the baker, saying the state administrative agency that had ruled against him had been hostile to his religious beliefs.

At a webinar this fall sponsored by Georgetown University's law school, Paul Clement, a partner at the Washington law firm of Kirkland & Ellis, and solicitor general of the United States from 2005 to 2008, said the court has a lot of "off ramps" with this upcoming case that could allow it to just address parts of the issue.

He said the court may find a way for Philadelphia to give the faith-based agency an exemption to the anti-discrimination law.

A decision that looms over the court in this case is the 1990 Employment Division v. Smith decision, which involved two American Indians who were denied unemployment benefits in Oregon after they were fired for using peyote, a hallucinogenic drug, in a religious ceremony.

The court ruled in favor of Oregon, saying its right to legislate against drug use superseded a religious group's right to use a drug as part of a spiritual ritual. The ruling has been interpreted as giving state and local governments broad powers over religious practices.

In its petition in the Fulton case, Catholic Social Services urged the Supreme Court to overturn the Smith decision, saying that even though the agency's program should be allowed under that ruling, the decision "has confused rather than clarified the law and should be reconsidered."

Clement said he would be shocked if the Smith decision was overruled.

Richard Garnett, professor of law and political science at the University of Notre Dame and director of the university's program on church, state and society, said the court could rule for the agency on the narrow ground that the city's policies are not really neutral or generally applicable, similar to its 2018 decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission, where it favored the baker.

Writing this summer for scotusblog, a blog about the Supreme Court, he said the case would likely revisit its Smith decision, which promised more clarity on religious liberty claims but has instead brought up different interpretations from the lower courts.

Garnett wrote that the current high court's "interpretation and application of the religion clauses have continued an evolution that made First Amendment doctrine more coherent and also more consonant both with historical practice and the judicial role."

"Exactly how a 'revisiting' of Smith would fit in with this evolution remains to be seen," he added.

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The faith-based foster care program was supported in friend-of-the-court briefs by the U.S. Conference of Catholic Bishops, the Pennsylvania Catholic Conference and a few Catholic Charities agencies.

Other supporters included more than 30 other religious groups, states and a group of members of Congress arguing the Catholic social service agency should be able to continue its program under its First Amendment right to the free exercise of religion.

In 2018, the city of Philadelphia stopped using the foster program of Catholic Social Services of the Philadelphia Archdiocese because the agency has a policy of not placing children with same-sex couples or unmarried couples because these unions go against church teaching on traditional marriage. A year later, the U.S. Court of Appeals for the 3rd Circuit sided with the city, calling the agency's policies discriminatory.

Other Catholic Charities agencies similarly weighed in, including Illinois agencies, which stressed that when Illinois similarly canceled their participation in the state's foster care program after more than 40 years of involvement, it "harmed Illinois children contrary to its duty to act in their best interest."

"The lesson should be clear: The court should respect and accommodate the free religious exercise of faith-based agencies because to do so does not conflict with the interest of same-sex couples to become foster parents and, on the other hand, is necessary to prevent harm to children in need of high quality foster care," the agencies aid.

In 2011, the Catholic bishops in Illinois announced they were dropping their lawsuit against the state for requiring Catholic Charities agencies to provide their services to same-sex couples. The agencies also ended their adoption and foster care programs.

In other briefs filed in support of the Philadelphia Catholic Social Services, 13 states asked the court to protect the partnership of government and religious ministries, and a group of three states stressed the long-standing, historical dependence on religious foster care ministries by state and local governments.

A group of 76 members of Congress asked the Supreme Court to protect faith-based agencies and stop Philadelphia's attempt to "quash" child welfare providers that have different religious beliefs than those the government prefers.

A coalition of minority religious groups, including the United Sikhs, the Bruderhof Communities, and the Islam and Religious Freedom Action Team, also urged the court to protect religious exercise saying the outcome of this case will affect other actions based on religious beliefs.

The groups supporting Philadelphia in friend-of-the-court briefs included scholars who study the rights of children who said that granting an exemption for religious foster-care agencies that do not certify same-sex couples would limit the pool of possible foster parents and thus harm foster children.

A similar argument was filed by social workers and nonprofits that deal with child welfare, adoption and foster care, who urged the court to recognize that LGBTQ youth are disproportionately represented in the foster-care system and more at risk for negative experiences.

A group of local governments and mayors also filed a brief supporting the city that pointed out how local governments enter into contracts with private parties to provide a variety of services to their residents.

The brief said that nondiscrimination requirements such as the one for the foster program are in place not to "force conformity of belief," but instead to "ensure that all our residents receive publicly funded services with dignity and respect and without experiencing exclusion."

Becket, a religious liberty law firm, is representing two foster parents in defending the Catholic Social Services policy. The case takes its name from foster parent Sharonell Fulton, who joined in the lawsuit against the city along with another foster parent, Toni Simms-Busch.

Live audio of the oral arguments can be heard at 10 a.m. (EST) Nov. 4 at https://cs.pn/3oGxnbF.