News

Activists and supporters block the street outside the U.S. Supreme Court in Washington Oct. 8

Activists and supporters block the street outside the U.S. Supreme Court in Washington Oct. 8, 2019. The court will hear oral arguments on Nov. 4, 2020, in a case pitting religious liberty against the a non-discrimination law protecting LGBTQ people. (CNS/Reuters/Jonathan Ernst)



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If the Supreme Court's conservative majority favors religious liberty arguments in the upcoming *Fulton* v. *City of Philadelphia* case, the outcome could undermine local anti-discrimination laws for LGBTQ people, said law professor Leslie Griffin in a webinar hosted by New Ways Ministry Nov. 1.

Fulton — which will be argued on Nov. 4, the day after the presidential election — will be one of the first cases conservative Justice Amy Coney Barrett, one of six Catholics on the Supreme Court, will hear after being appointed and confirmed to replace her liberal predecessor, Ruth Bader Ginsburg.

The case started when the city of Philadelphia found out Catholic Social Services (CSS) was preventing same-sex couples from fostering children on the basis of their sexual orientation, in violation of the city's anti-discrimination law protecting LGBTQ people.

The city stopped allowing the agency to place foster children, at which point CSS sued, arguing that the city had violated its First Amendment rights to free exercise of religion and free speech. Lower courts ruled against the agency.

Catholic Social Services is essentially arguing it has a right under the First Amendment free exercise of religion clause to participate in Philadelphia's foster care program while disobeying its anti-discrimination ordinance, said Griffin.

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Griffin, who has a doctorate in religious studies and teaches at the University of Nevada, Las Vegas, School of Law, filed an amicus curiae ("friend of the court") brief in favor of the city of Philadelphia, along with DignityUSA, New Ways Ministry and several other organizations.

"It's possible there would be five justices who would find such a free exercise right," Griffin said. "That would be a very hard thing for the anti-discrimination laws — to create a free exercise right to discriminate. My hope is the court goes another way."

Catholic Social Services' representatives have also asked the court to reconsider a landmark decision it made in 1990 in the case *Employment Division, Department of Human Resources of Oregon v. Smith*.

Prior to *Smith*, the government had to prove that any burden on religious liberty was justified by a "compelling state interest" and that the state interest couldn't be achieved with less restrictive means.

In his opinion for the majority in *Smith*, late conservative justice Antonin Scalia wrote that individuals' religious beliefs don't excuse them from obeying "laws of general applicability," or neutral, valid laws everyone else has to follow. This meant that these laws — which apply across the board and don't target specific religious practices — aren't subject to the same level of scrutiny as other laws that do directly impact religious practices.

"*Smith* said everybody has to follow the law," Griffin said. "But … there are many Americans who say, 'I want more protection for religion, because I don't want religions to have to obey the … anti-discrimination laws.' "



Two women with their children participate in a marriage equality march in Seattle in 2013. Catholic Social Services sued the city of Philadelphia over its LGBTQ anti-discrimination law, which CSS said violates its constitutional right to free exercise of religion in excluding LGBTQ couples as foster parents. (Flickr/Richard Wood)

If the court sides with Catholic Social Services, it could make protecting LGBTQ people more difficult for governments because anti-discrimination laws could be construed as limiting religious freedom, Griffin said.

Supporters of the agency argue that because freedom of religion is part of the Bill of Rights in the Constitution, it should trump more recent laws and court decisions that

prohibit discrimination against LGBTQ people, she said.

"A bad court decision within *Fulton* would … [change] free exercise so that whenever the government burdens religion, it has to come forward with a compelling government interest to do so," Griffin said. "And then [it] will say that Catholic Social Services has won that standard here, because religious freedom trumps the anti-discrimination law."

If so, the city might be forced to contract with the agency despite its discriminatory practices, Griffin said.

"[CSS's supporters have] a vision of the First Amendment that says, 'The First Amendment gives us a religious right to disobey the law,' which is what the *Fulton* plaintiffs are asking for," Griffin said.

Some supporters of Catholic Social Services argue that if the agency is barred from placing children in foster care because of its discriminatory practices, it will harm children who need families, she said.

Research suggests, however that LGBTQ couples are up to six times as likely as heterosexual couples to foster children. In Massachusetts, which has an anti-discrimination law, 15% to 28% of adoptions of foster children have involved LGBTQ couples.

The State of Massachusetts, which co-wrote an amicus brief in support of Philadelphia said allowing LGBTQ couples to foster children expands the number of loving homes available for foster children, especially for LGBTQ children, who are overrepresented in the foster care system.

Griffin said if Philadelphia prevails, it will be important for LGBTQ groups to form alternative organizations that could step in to fill the gap where religious providers that discriminate are excluded.

The *Fulton* case is just the latest installment in a decades-old fight pitting religious liberty against rights for marginalized groups, Griffin said. In previous decades, religious organizations argued that racial discrimination was justified by their faith, she said. And in more recent years, the court has seen several high-profile cases where religious groups argue for a right to discriminate based on sexual orientation. With Barrett replacing Ginsburg, the conservative majority could favor religious

liberty arguments even more strongly than before, she said.

"There's a real tension between how much you want religious freedom to be protected, and how much you can do that and still protect LGBTQ rights," Griffin said. "It's a very hard question."

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