

# Why the Supreme Court Should Take This Major Religious Freedom Case

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## KEY TAKEAWAYS

The Supreme Court should hear *Fulton v. Philadelphia* to clarify the rights of faith-based adoption and foster care agencies nationwide.

Hearing this case will allow the Court to revisit a legal precedent that has significantly restricted the free exercise of religion for three decades.

The Court can clarify that the First Amendment guarantees religious tolerance for people of all faiths, especially those serving vulnerable children.

Catholic Social Services (CSS) is a faith-based foster care agency that has served the City of Philadelphia for over 100 years. In March 2018, city officials targeted the agency over its religious beliefs about marriage, forcing the agency to either agree to certify same-sex couples as foster parents or end its foster care services. Since CSS would not agree to violate its religious beliefs by certifying same-sex foster parents, the city ended its partnership with CSS. As a result, dozens of CSS's foster homes sit empty—even as the city faces an unprecedented foster care crisis. CSS filed a lawsuit alleging religious discrimination and, after losing at the federal district and appeals courts, recently asked the Supreme Court to hear the case. The Court will soon decide whether to grant or deny a hearing.

The Supreme Court should take the case for three reasons. First, the Supreme Court can use this case to

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clarify that the government may not discriminate against faith-based adoption and foster care agencies because of their religious beliefs. Second, the Court can revisit the universally criticized legal precedent of *Employment Division v. Smith* and hold that religious freedom is a fundamental right, meriting robust legal protection. Finally, the Court can reaffirm that the First Amendment requires the government to tolerate and accommodate the diverse religious beliefs of all Americans, especially those serving the most vulnerable among us.

## “Like a Mother to Me”

When Wayne Thomas was five years old, he was rushed to the hospital by ambulance.<sup>1</sup> At the time, Wayne was living with his aunt and uncle in a dilapidated house in Philadelphia while his mother struggled with drug addiction. In the midst of an explosive fight with Wayne’s aunt, Wayne’s uncle threw boiling water on Wayne. A neighbor heard Wayne’s screams and called the police. Wayne was admitted to the hospital with severe burns requiring weeks of intensive medical treatment.

After Wayne was discharged from the hospital, the city removed him from his aunt’s and uncle’s home and placed him in foster care. The city assigned Wayne’s case to Catholic Social Services, a faith-based foster care agency in Philadelphia. The agency carefully considered which of their available foster parents would be the best fit for Wayne and chose to place him with Sharonell Fulton,<sup>2</sup> a Catholic foster mom devoted to making her home a safe harbor for traumatized children with special needs.

Wayne stayed with Ms. Fulton, whom he called “Meme,” for the next 14 years. “Meme was like a mother to me,” Wayne says. Today, at the age of 31, Wayne says he is “thriving” as a successful HVAC technician. When he compares his life with the lives of his 11 siblings who did not receive Ms. Fulton’s care or CSS’s services, he says his life is much better than theirs “because of what [Meme and CSS] gave me.” To this day, he identifies Ms. Fulton’s house as “home” and expresses gratitude for CSS’s involvement in his life. “Everything I went through that involved [CSS] gave me so much hope,” he says.

Ms. Fulton praises CSS for supporting her as she sheltered and loved more than 40 children over 25 years. She says CSS has been a lifeline to her as she has cared for children like Wayne, many of whom had severe medical and emotional problems. She has been grateful to work with an agency that shares her faith and says CSS’s social workers are “like family,” providing her with around-the-clock support and showing “great love and care” to her and her foster children.

## “It Is Not 100 Years Ago”

CSS has served children like Wayne and foster parents like Ms. Fulton for over 100 years.<sup>3</sup> In 2017, the ministry found safe, loving foster homes for over 250 children.<sup>4</sup> Although CSS has a stellar record of serving the City of Philadelphia’s most vulnerable children, the city abruptly ended its contract with CSS almost two years ago, effectively shutting down CSS’s foster care program.

In March 2018, Philadelphia’s Department of Human Services (DHS) put out an “urgent” call for 300 more foster families. At the time there were more than 6,000 children in foster care.<sup>5</sup> That same month, after a *Philadelphia Inquirer* reporter asked CSS what they would do if a hypothetical same-sex couple sought to foster a child through their agency, the city targeted the agency. CSS responded that, because of the Catholic Church’s long-held belief that children do best when raised in a home with a married mother and father, they would refer the hypothetical couple to one of the dozens of other foster care providers in the city. When the city heard about CSS’s response, it immediately launched an investigation into CSS’s alleged “discrimination” occurring “under the guise of” religion—even though no same-sex couple had asked to foster a child through CSS or had been prevented from fostering.

Later, DHS sent a letter to CSS announcing a new policy requiring all foster care agencies to agree to certify same-sex couples as foster parents in order to retain their contracts with the city. The city said that if CSS did not agree to certify same-sex couples, it would begin a “transition plan” to shut down CSS’s foster care program. The city also said that CSS could not refer any couples to other agencies, even though the city frequently allowed other Philadelphia foster agencies to make referrals for reasons ranging from geographic location to language needs. CSS asked the city for a religious exemption to continue to make referrals in accordance with its religious beliefs, but was denied the request.

In a meeting with CSS, city officials told CSS it should follow “the teachings of Pope Francis” because “times have changed” and “it is not 100 years ago.”<sup>6</sup>

Minutes after the meeting, a city official called CSS and announced that the city would no longer refer any new foster children to the agency due to CSS’s inability to certify the homes of same-sex couples for child placement. With no new children coming in CSS’s doors, the ministry now has dozens of available foster homes sitting empty—even though more children in Philadelphia need foster care now than at any time in the past decade. In

2019, the city confessed it desperately needs to move 250 children out of the city’s overcrowded, government-run “congregate care” facilities and into foster homes, but that it does not have enough available foster homes to meet the demand.<sup>7</sup>

No same-sex couple in America is prohibited from adopting, and Philadelphia does not limit the number of foster agencies that can obtain foster contracts to work with the city. The city’s 30 agencies specialize in serving its diverse residents—with some agencies focusing on the Latino population and others on children with special needs. Four agencies have the Human Rights Campaign’s “Seal of Approval” in recognition of their work with the LGBT community.<sup>8</sup> There is no shortage of children who need foster parents. Respecting the freedom of all foster agencies to operate according to their beliefs will maximize the city’s ability to recruit qualified foster parents and minimize the waiting period for children.

## Taking It to the Supreme Court

In June 2018, CSS sued on behalf of its agency, but also on behalf of foster children like Wayne, who now have one fewer agency to help them find a home, and foster parents like Ms. Fulton, who can no longer foster children through the agency they love.

Although CSS lost its case at the federal district and appeals courts, it has now appealed its case to the Supreme Court.<sup>9</sup> CSS has asked the Court to take the case and rule that the agency is free to operate according to its beliefs under three key religious freedom precedents: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>10</sup>

*Masterpiece Cakeshop* held that the government may not act in a manner hostile to religious belief and that hostility may be proven through government officials’ disparaging remarks about a targeted party. CSS argues that the City of Philadelphia’s numerous disparaging statements about CSS’s religious beliefs—from telling the agency to change its beliefs because it’s “not 100 years ago” to the mayor’s history of anti-Catholic tweets—prove that the government acted with impermissible hostility toward CSS’s religious beliefs.

Second, *Trinity Lutheran* held that the government may not exclude a religious group from receiving a government benefit simply because the organization is religious. CSS contends that *Trinity Lutheran* prevents the city from excluding CSS from participating in the city’s foster care program simply because CSS is a religious organization operating according to religious principles.

Third, *Church of Lukumi* held that the government may not use neutral laws to target religious conduct. *Lukumi* also held that laws that include exemptions for secular purposes but do not allow exemptions for religious purposes are inherently suspect and must be subjected to strict scrutiny. CSS argues that the city is using its “no referrals” rule to target CSS—especially since the city has allowed secular agencies to make referrals for secular purposes but is denying CSS the right to make referrals for religious purposes.

Finally, CSS asked the Court to hold that the city’s attempts to force CSS to affirm same-sex marriage, contrary to CSS’s religious beliefs, are a violation of the Supreme Court’s free speech precedents. The city has said CSS must agree to certify same-sex households in order to retain its contract with the city. The certification process requires CSS to provide a written evaluation of the relationship of the individuals in a potential foster home. CSS contends that to make such an evaluation and certification of a home led by a married same-sex couple would require the ministry to provide a written endorsement of same-sex marriage in violation of its religious beliefs. CSS asks the Court to hold that the government cannot coerce CSS to make such a statement.

## Why the Court Should Hear *Fulton*

While CSS has strong arguments for why the Court should rule in its favor, much more is at stake than CSS’s right to continue operating. The outcome of *Fulton v. Philadelphia* has national implications for religious freedom. The Supreme Court should take the case to clarify the Free Exercise rights not only of faith-based agencies, but of all Americans.

**The Supreme Court Should Take *Fulton* to Clarify the Rights of Faith-Based Agencies.** The United States is in an adoption and foster care crisis, with over 430,000 children in foster care and over 125,000 children waiting to be adopted.<sup>11</sup> These numbers have risen dramatically over the past decade due to America’s ongoing opioid epidemic.<sup>12</sup> Unfortunately, states do not have enough foster homes to meet the demand.<sup>13</sup> Social workers who rescue children from dangerous home situations have been forced to take children to a 24-hour McDonald’s while they call agencies across the state, desperately trying to find an open bed for the children in their care.<sup>14</sup> Some states have resorted to squeezing five or more children into a single foster home,<sup>15</sup> while other states are placing increasing numbers of children in state-run “congregate care” facilities, where children are vulnerable to trauma and abuse.<sup>16</sup>

At the same time, state and local laws are shutting down faith-based adoption and foster care agencies because of the agencies' belief that children do best when placed in a home with a married mother and father.<sup>17</sup> These laws—typically laws prohibiting discrimination on the basis of sexual orientation—have resulted in multiple lawsuits involving faith-based agencies at the local, state, and national level.<sup>18</sup>

State discrimination against religious foster agencies has imposed high costs upon foster children. According to Executive Director of Catholic Charities in Illinois Steve Roach, 3,000 children were affected, and thousands of foster parents are no longer able to work with Catholic Charities as a result of the state's adoption of the Religious Freedom Protection and Civil Unions Act of 2011. The language in that law required that all agencies providing this service must be willing to place children with same-sex couples. According to Roach, after 50 years of providing foster care for tens of thousands of children across Illinois, the state said, “[w]ell, if you do not surrender that religious belief, you will be eradicated.”<sup>19</sup>

Boston CSS was faced with the same Hobson's choice and ended its foster care services in 2006. The foster crisis was particularly acute in that city, where from 2011 to 2015, fentanyl led to a 130 percent increase in opioid overdose deaths.<sup>20</sup> This contributed to the almost 30 percent increase in the number of children in care in the state over a five-year period. The state was so strapped for foster families that in just a 12-month period, it granted 50 percent more overcapacity waivers to families so they could take in more children.<sup>21</sup>

Legislatures in several states—including Texas, Virginia, South Dakota, North Dakota, Mississippi, Alabama, and, recently, Oklahoma, Kansas, and Tennessee—have passed laws to exempt faith-based agencies from requirements that would compel them to choose between serving vulnerable children and families and following their faith.<sup>22</sup> Michigan also passed a similar law. However, the current governor is no longer enforcing it and, in March 2019, the state attorney general signed a settlement agreement with the ACLU to stop the state from working with faith-based adoption agencies that place children only with a married mother and father.<sup>23</sup> Efforts to protect religious freedom ensure a diverse variety of agencies can serve diverse populations and help maximize the number of foster and adoptive families available.

At a time of such legal uncertainty, religious agencies need to know their rights. They cannot afford to invest finances and infrastructure in ministries that could be shut down at any time. The Court should use this opportunity to clarify that the First Amendment prohibits *all* levels of government from

acting with hostility toward religious agencies. The Court should also hold that the government may not exclude faith-based agencies from government programs because of their religious beliefs. Such a holding will ensure that faith-based agencies can keep their doors open, allowing America's foster kids to have access to more agencies, which will give them more paths to a safe, loving home.

**The Supreme Court Should Take *Fulton* to Reconsider the Controversial *Smith* Precedent.** In *Employment Division v. Smith*, the Supreme Court denied a religious exemption to Native American employees of the state of Oregon who had been fired from their jobs for violating a ban on the use of peyote, a hallucinogenic substance frequently used by Native Americans in their religious ceremonies. The holding of the Supreme Court—that the government may burden religious exercise if a law is neutral and generally applicable—sent shockwaves throughout the legal community.

In *Smith*, the Court adopted a lower standard of review than had previously been applied in Free Exercise cases. It adopted the lower “rational basis” standard of review, meaning that a law may pass Constitutional scrutiny if the government can merely demonstrate a rational connection between the law’s intended goals and the means used to achieve the goals. The decision ended decades of judicial review under the “strict scrutiny” standard, which required the government to justify burdening religious exercise by demonstrating it had a compelling interest and by showing the law was narrowly tailored to achieve the interest. In response, a diverse group of liberal, conservative, and religious groups, ranging from the American Civil Liberties Union to the National Association of Evangelicals, joined together to press Congress to pass the Religious Freedom Restoration Act that restored the “strict scrutiny” standard.<sup>24</sup>

Since *Smith* was announced in 1990, it has dictated outcomes that are highly restrictive of Americans’ rights to freely exercise their faith. For example, pharmacists have been forced to choose between prescribing abortion-inducing drugs or shutting down their pharmacies,<sup>25</sup> while a high school football coach was fired for taking a knee and offering a silent prayer after a football game.<sup>26</sup> Additionally, Amish community members have been forced to place markings on their buggies that violate their consciences<sup>27</sup> and a Jewish family was required to have an autopsy performed on their son—even though they objected to autopsies on religious grounds.<sup>28</sup> *Smith* has been especially problematic for religious minorities like Muslims, Sikhs, Buddhists, and Native American–faith practitioners.<sup>29</sup>

Not only has *Smith* been unpopular, but it has proven unworkable for lower courts. The federal circuit courts have split over how to apply *Smith*,

resulting in inconsistent protection for religious freedom from circuit to circuit.<sup>30</sup>

In light of *Smith*'s problematic outcomes and unworkability, CSS asked the Court to reconsider *Smith* and clarify that the government may not restrict religious freedom absent a compelling interest that is achieved through the least restrictive means possible. The Supreme Court may be ready to do just that. In early 2019, Justices Samuel Alito, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh expressed interest in reconsidering *Smith*,<sup>31</sup> while Chief Justice John Roberts has also joined opinions expressing concern over *Smith*'s restriction of religious liberty.<sup>32</sup> *Fulton* is an excellent vehicle for the Court to revisit *Smith* and hold that religious freedom is a fundamental right deserving of robust protection under the law.

**The Supreme Court Should Take *Fulton* to Reaffirm the First Amendment's Guarantee of Religious Tolerance.** In the 2014 case of *Obergefell v. Hodges*, the Supreme Court held that there is a constitutional right to same-sex marriage.<sup>33</sup> In Justice Anthony Kennedy's majority opinion, he assured people of faith that the government's recognition of same-sex marriage would not lead to infringement on religious freedom. He insisted that people of faith would remain free to advocate for their beliefs about marriage without reprisal.

However, Chief Justice Roberts was not convinced. In his *Obergefell* dissent, Chief Justice Roberts predicted that the new right to same-sex marriage would soon come into conflict with religious beliefs, such as when "a religious adoption agency declines to place children with same-sex married couples." Chief Justice Roberts said such situations would "soon be before this Court." In *Fulton v. Philadelphia*, Chief Justice Roberts's prophecy has come true.

Although *Fulton* centers on the rights of a faith-based foster care agency, it points to a bigger issue of state and local governments struggling to balance the right to same-sex marriage with the Constitution's guarantee of religious liberty to those who believe that marriage is a union of one man and one woman. However, as Justice Kennedy said, *Obergefell* does not dictate the silencing of people of faith. Instead, in a diverse, pluralistic society, people of all beliefs and values should be free to advocate for their beliefs and live according to their values without fear of government censorship or reprisal. The Supreme Court should take the *Fulton* case to clarify that the First Amendment—and *Obergefell*—require the government to respect all religious beliefs, including minority viewpoints.

## Conclusion

The Court should hear *Fulton v. Philadelphia*. The case came before the Court on a request for emergency relief in mid-2018. Justices Thomas, Alito, and Gorsuch voted to take the case, leaving the case just one vote shy of the four votes required for the Supreme Court to grant a hearing.<sup>34</sup> Now that Justice Kavanaugh is on the Court, he may provide the requisite fourth vote to take the case. Chief Justice Roberts is also likely to be sympathetic to the case since he predicted this type of problem arising for faith-based adoption agencies. His “no” vote in 2018 may have been due to the case coming before the Court at such an early stage in the litigation. Now that the case is more developed, the Chief Justice may be ready to grant a hearing. Providing clarity about the Constitution’s protections in the context of faith-based child welfare is urgent.

As Natalie Goodnow writes:

With a population of 325 million people—Hispanics, Christians, Asians, atheists, whites, Muslims, African Americans, Buddhists, Native Americans (and too many other religions, races, and ethnicities to list)—across 3,000 counties and two billion acres of intensely varied geography, the United States represents an incredibly diverse community. This is mirrored in a diverse set of providers that deliver human services to families across the nation, including foster and adoptive services. There are public, private, faith-based, and secular child-welfare agencies. They all abide by regulations and requirements set by their states, to ensure a certain standard of care for the children they serve. They all do important work. With the growing foster care and adoption needs of the country, there is plenty of room for all these agencies to roll up their sleeves and work together.

Forcing agencies out because of their faith leaves other agencies to absorb their caseloads—requiring more caseworkers, more foster families to recruit and train, and more resources to serve these additional children. That is especially tough when many agencies are already staggering under the influx of children into foster care over the last five years.<sup>35</sup>

By hearing *Fulton v. Philadelphia*, the Supreme Court can bring much-needed clarity to the scope of the First Amendment’s guarantee of religious freedom for all Americans. It can also ensure that faith-based agencies like CSS will remain free to serve vulnerable children and help them find safe homes with loving parents. The First Amendment demands as

much, and America's religious agencies, foster children, and foster parents deserve no less.

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## Endnotes

1. Wayne's story is shared in *Fulton et al. v. City of Philadelphia et al.*, "Brief of Amici Curiae: Former Foster Children and Foster Parents and the Catholic Association Foundation in Support of Appellants and Reversal," Case 18-2574 (3d Cir. 2018), September 4, 2018, <https://s3.amazonaws.com/becketnewsite/Brief-of-Amici-Curiae-Former-Foster-Children-and-Foster-Parents-and-the-Catholic-Association-Foundation-in-Support-of-Appellants-and-Reversal.pdf> (accessed January 14, 2020).
2. Ms. Fulton's story is shared in an OpEd she authored, "My Faith Led Me to Foster More Than 40 Kids; Philly Is Wrong to Cut Ties With Catholic Foster Agencies," *Philadelphia Inquirer*, May 24, 2018, <https://www.inquirer.com/philly/opinion/commentary/catholic-social-services-philadelphia-lawsuit-lgbtq-gay-foster-parents-adoption-sharonell-fulton-20180524.html> (accessed January 17, 2020), and *ibid.*
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