



Fulton v. Philadelphia: Religious Exemptions from Generally Applicable Laws

June 22, 2021

The Supreme Court issued its [highly anticipated decision](#) in *Fulton v. City of Philadelphia* on June 17, 2021. In *Fulton*, a Catholic foster care agency raised religious objections to complying with Philadelphia’s policies prohibiting contractors from discriminating on the basis of sexual orientation. The U.S. Court of Appeals for the Third Circuit [rejected](#) the agency’s claims, citing a 1990 case called *Employment Division v. Smith*. Under *Smith*, a foundational case interpreting the First Amendment’s Free Exercise Clause, religious entities are usually not entitled to constitutional exemptions from neutral, generally applicable laws. On appeal, the agency [asked](#) the Supreme Court to overrule *Smith*. In a [unanimous judgment](#), the Supreme Court ruled for the agency, but a majority of the Court declined to overrule *Smith*. This Legal Sidebar discusses the Court’s decision in this case, including the majority and concurring opinions, and discusses the implications of the decision for Congress.

Legal Background: *Employment Division v. Smith*

The [First Amendment](#)’s Free Exercise Clause provides that the government “shall make no law . . . prohibiting the free exercise” of religion. The Supreme Court has [said](#) that the government generally may not “target[] religious beliefs as such.” If a law [restricts](#) religious “practices because of their religious motivation” or [discriminates](#) based on religious status, it will be subject to [strict scrutiny](#), meaning the law is invalid unless the government can show that it “is justified by a compelling interest and is narrowly tailored to advance that interest.”

In *Employment Division v. Smith*, however, the Supreme Court held that a law does not violate the First Amendment if the burden on religious exercise does not result from hostility to religion, but is “merely the incidental effect of a generally applicable and otherwise valid provision.” Justice Scalia, writing for the five-Justice majority in *Smith*, [rejected](#) a free exercise claim brought by two members of a Native American church. The state had denied them unemployment benefits after they were fired for using peyote in violation of state criminal drug laws. The church members [argued](#) that this denial of benefits impermissibly burdened their religious practice, given that the peyote was used for sacramental purposes. The Supreme Court rejected this claim, [stating](#) that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”

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Justice Scalia acknowledged that some prior Supreme Court decisions had applied a heightened standard to analyze free-exercise claims, but [wrote](#) that those earlier cases concerned laws that were not truly “generally applicable.” Instead, those cases [involved](#) systems like unemployment-benefit programs in which the government decided case by case whether to apply laws through “individualized . . . assessment[s].” Because these cases entailed a greater risk of religious discrimination in individual exemption decisions, they [required](#) a heightened standard of review: “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” The Court [held](#) that these prior cases had “nothing to do with an across-the-board criminal prohibition on a particular form of conduct.”

Supreme Court cases after *Smith* confirmed that its reasoning applies only to laws that are truly neutral and generally applicable. For example, in *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court held that a local ordinance prohibiting certain types of animal sacrifice violated the Free Exercise Clause. The Court [held](#) that the law’s purpose was “the suppression of religion,” and therefore, the ordinance was not “neutral” under *Smith*. Further, the Court [said](#) that the city had been granting exemptions for secular activities on “a *per se* basis” but disallowing “killings for religious reasons.” The Court [concluded](#) the city was singling out “religious practice” for “discriminatory treatment,” “devalu[ing] religious reasons for killing by judging them to be of lesser import than nonreligious reasons.” In the Court’s [view](#), the city’s system for granting exemptions required “an evaluation of the particular justification for the killing,” representing “a system of ‘individualized governmental assessment of the reasons for the relevant conduct’” that triggered heightened scrutiny under *Smith*.

Lower courts have issued various decisions assessing laws that entail individual exemptions under *Smith* and *Church of Lukumi Babalu Aye*. A [number](#) of [courts](#) have [held](#) that the mere existence of a discretionary exemption for secular activities does not trigger strict scrutiny. Instead, these courts have inquired into the purpose and past applications of the exemption, [asking](#) whether the exemption reflects discriminatory animus against religious practice. To identify discrimination, [some](#) courts have inquired into whether the secular exemptions are “[comparable](#)” to the religious exemption sought by the challenger, or whether instead the state had a valid, nondiscriminatory reason to treat the religious activity differently. More narrowly, one opinion [ruled](#) that “*Smith*’s ‘individualized exemption’ exception is limited . . . to systems that are designed to make case-by-case determinations” and does not apply to statutes simply because they “contain express exceptions for objectively defined categories of persons.” Other courts, however, have held that strict scrutiny can be triggered even if the exemptions are not applied on an “individualized” basis, with one opinion (written by then-Judge Alito) [saying](#) that the government ordinarily may not create “a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.” Accordingly, it appears that there has been some inconsistency in lower courts’ interpretation of this aspect of *Smith*.

Earlier this year, the Supreme Court issued a decision considering the treatment of secular and religious activities under generally applicable laws. The Court [ruled](#) in *Tandon v. Newsom* that a law cannot be considered neutral and generally applicable if it treats “*any* comparable secular activity more favorably than religious exercise.” To determine whether an exempted secular activity is “comparable” to a covered religious activity, the two activities “must be judged against the asserted government interest that justifies the regulation at issue.” Applying this standard, the Supreme Court [granted](#) a preliminary injunction temporarily staying enforcement of state regulations that limited religious gatherings in response to the COVID-19 pandemic. The Court [applied](#) heightened scrutiny because the state treated secular activities such as haircuts and retail shopping more favorably than at-home religious gatherings, without showing that the secular activities posed a lower risk of transmission of COVID-19. [Some](#) commentators [saw](#) this holding as further limiting *Smith* and later, [some](#) said it [foreshadowed](#) the Court’s ruling in *Fulton*.

Fulton v. City of Philadelphia

Factual Background

In *Fulton*, Catholic Social Services (CSS), a religious foster care agency, [sued](#) the City of Philadelphia after the City stopped referring foster children to the agency. The City had [discovered](#) that CSS would not comply with local policies prohibiting sexual orientation discrimination—policies that were included both in its contract with the city and in a local ordinance. While the City [offered](#) to continue working with CSS by offering new contracts to renew services, the agency [objected](#) to the continued inclusion of contract language forbidding sexual orientation discrimination. In a provision titled “Rejection of Referral,” the contract [specified](#) that providers could not reject a child or family “for Services” on the basis of their sexual orientation, unless the Commissioner of Philadelphia’s Department of Human Services granted an exception, in the Commissioner’s “sole discretion.” The City had never granted an exception under this provision in its other contractual relationships, and took the [position](#) that this provision only allowed it to grant exceptions for referrals from the City, not from more general nondiscrimination provisions governing other types of services.

CSS [argued](#) that by insisting on contract provisions prohibiting discrimination, the City violated the Free Exercise Clause, saying the City applied its nondiscrimination policy in a way that “was neither neutral nor generally applicable” but instead targeted CSS’s religious exercise. The Third Circuit [rejected](#) CSS’s evidence that purportedly showed the City “acted out of religious hostility,” [concluding](#) that CSS had not been “treated differently because of its religious beliefs.” Accordingly, the Third Circuit [ruled](#) that the City’s nondiscrimination policies were “general, neutrally applied legal requirements,” and that the case was therefore governed by *Smith*, so that CSS’s “religiously motivated conduct enjoy[ed] no special protections or exemption.”

Majority Opinion

The Supreme Court [voted](#) unanimously to reverse the decision of the Third Circuit. The majority opinion, written by Chief Justice Roberts and joined by five other Justices, [concluded](#) that the nondiscrimination policy contained in the contract was not generally applicable because it contained an exemption, as described above. Describing *Church of Lukumi Babalu Aye*, the majority [said](#) that a law “lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” The Court [rejected](#) the City’s (and [trial court’s](#)) reading of this contractual exception as applying only to referrals from the City, concluding instead that the text broadly encompassed all “services.” Although the City had never actually granted an exception under this provision, the majority [concluded](#) that it was “the creation of a formal mechanism for granting exceptions” that made the policy “not generally applicable,” because this discretionary mechanism invited “the government to decide which reasons for not complying with the policy are worthy of solicitude.” Ultimately, the Court [held](#) that the contract “incorporate[d] a system of individual exemptions,” and accordingly, the City could not “refuse to extend that [exemption] system to cases of ‘religious hardship’ without compelling reason.”

The City also [argued](#) that CSS had violated a local ordinance prohibiting discrimination in public accommodations. CSS [responded](#) in part by claiming again that the City had allowed exceptions for secular reasons, so that the ordinance was not generally applicable. However, the majority decided that it did not need to reach any constitutional questions related to this ordinance after [concluding](#), contrary to the holding of the [trial court](#), that the ordinance did not extend to “certification as a foster parent,” because that certification “is not readily accessible to the public.”

Because the city policy contained in the new contract was not generally applicable under *Smith*, the majority opinion [applied](#) strict scrutiny to analyze whether the City could validly apply its

nondiscrimination requirement to CSS. The City [argued](#) that its nondiscrimination policy served “three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children.” The Court [ruled](#) that while these interests might be compelling when considering the nondiscrimination policies generally, they were insufficient to justify specifically “denying an exception to CSS.” The majority [said](#) that the City had not shown how exempting CSS from the nondiscrimination policy would undermine these interests. For example, there was insufficient evidence to prove that an exemption allowing CSS to participate would reduce the number of available foster parents or create a greater risk of the City being sued. Further, while granting CSS an exception might lead to unequal treatment of prospective foster parents and foster children, the Court said that where the City’s contract would allow some exceptions, it had not [shown](#) a “compelling reason why it has a particular interest in denying an exception to CSS.”

Accordingly, the majority [declined](#) to overrule *Smith*, although CSS had asked the Court to do so. Because the City’s policy was not generally applicable under *Smith*, the Court had analyzed it “under the strictest scrutiny regardless of *Smith*,” and had “no occasion to reconsider that decision” in *Fulton*.

Concurring Opinions

While the judgment of the Supreme Court was unanimous, Justices Thomas, Alito, and Gorsuch [did not join](#) Chief Justice Roberts’s majority opinion, instead concurring only in the judgment.

Justice Alito wrote a lengthy [concurring opinion](#) joined by Justices Thomas and Gorsuch. He would have [overruled](#) *Smith*, [describing](#) the decision’s interpretation of the Free Exercise Clause as “hard to defend.” In its place, he [would have](#) instituted a strict scrutiny standard: “A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.” In this case, he would have ruled that the City failed to meet this standard. Justice Alito [stated](#) that CSS’s actions had never actually “hindered any same-sex couples from becoming foster parents” [because](#) “the record reflect[ed]” that no same-sex couples had sought to work with the agency, and CSS was willing to refer couples to other agencies. As a result, Justice Alito [wrote](#), CSS’s policy of not working with same-sex couples had “only one effect:” expressing “the idea that same-sex couples should not be foster parents because only a man and a woman should marry.” In [his view](#), the City could not suppress CSS’s “religious practice . . . simply because it expresses an idea that some find hurtful.”

Justice Gorsuch also wrote a separate [conurrence](#), joined by Justices Thomas and Alito, criticizing the majority’s approach to resolving the case. Among other issues, he [argued](#) that the majority opinion erred in its interpretation of the contract and in “trailblazing through the Philadelphia city code,” pointing out that the lower courts had resolved these issues differently—or not at all.

Further, although Justice Barrett joined the majority opinion, she also wrote a short [conurrence](#) saying that while she believed there were “compelling” arguments “against *Smith*,” the Court would likely also face difficulties in determining what standard should replace *Smith*. Her opinion was joined by Justices Kavanaugh and Breyer, though Justice Breyer did not join the paragraph casting doubt on *Smith*.

Implications for Congress

The Supreme Court’s decision in *Fulton* will likely make it easier for religious entities to obtain religious exemptions from government regulation. As discussed above, a number of lower courts had interpreted the “system of individual exemptions” exception from *Smith* relatively narrowly, only applying a heightened standard to a claim seeking a religious exemption if there is some proof of religious hostility or discrimination, or if a law’s application involves case-by-case, individualized decisions. The majority opinion in *Fulton*, however, suggested that if an exemption *could* allow religious activities to be treated differently than secular activities, the availability of the exemption triggers heightened scrutiny regardless

of whether or how that exemption has been applied. For example, *Fulton* indicated that strict scrutiny may apply to a denial of a religious exemption even without analyzing whether the government has granted comparable exemptions for secular activities, contrary to some lower court opinions applying *Smith*. Nonetheless, *Tandon* could suggest that comparability matters in some cases, possibly if a law entails favorable treatment for specified secular activities, as opposed to discretionary individual exemptions.

Thus, *Fulton* could have significant consequences for any federal laws that currently allow regulated entities to seek individual exemptions from complying with those laws. Entities seeking religiously motivated exemptions could cite *Fulton* to trigger strict scrutiny on the grounds that the law is not generally applicable and that *Smith* therefore does not apply. The strict scrutiny standard makes it harder for the government to justify applying the law against the religious entity, making it more likely that religious plaintiffs will succeed in asserting a constitutional objection. Further, the majority opinion in *Fulton* clarifies that even if the government generally has a compelling interest in prohibiting discrimination, that general interest may not justify applying nondiscrimination laws to particular religious entities. Instead, *Fulton* suggests that the government has to provide evidence showing how granting an exemption to that particular plaintiff would undermine the government's interests. Accordingly, going forward, Congress may consider looking closely at the exemptions it allows from its laws, and particularly, at whether religious exemptions are required, or whether it has a compelling interest in applying laws to religious entities.

In some senses, Congress's ability to respond to *Fulton* may be somewhat limited. While Congress can, in some circumstances, provide [more protection](#) for religious exercise or create [exemptions](#) for religious activities, it cannot provide *less* protection for religious exercise than the Constitution requires or otherwise alter constitutional standards. Thus, for example, the federal [Religious Freedom Restoration Act \(RFRA\)](#) has already instituted a strict scrutiny standard for federal actions that substantially burden religion. However, if Congress agreed with Justice Alito that *Smith* should be overruled, the Supreme Court has [cast doubt](#) on Congress's ability to do the same for state actions that burden religion. By contrast, if Congress disagreed with the outcome in *Fulton*, Justice Alito's concurring opinion [suggested](#) that a government might be able to avoid triggering strict scrutiny under the majority opinion in *Fulton* if it eliminates existing exemptions, so that the law becomes generally applicable under *Smith*.

At least [two](#) other [petitions](#) currently pending before the Supreme Court ask the Court to overrule *Smith*, potentially presenting the Justices with another opportunity to revisit *Smith* in the near future. Three Justices clearly expressed in *Fulton* that they would overrule *Smith*, and Justices Barrett and Kavanaugh suggested they could be amenable to overruling *Smith* in an appropriate case, if they found a proper alternative standard. The Court is set to consider [both cases](#) at its June 24 conference.

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