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In NCLA Amicus Win, Unanimous Supreme Court Protects Free Exercise of Religion for Foster Parents

Sharonell Fulton, et al. v. City of Philadelphia, et al.

Washington, DC (June 17, 2021) – Today, a unanimous Supreme Court ruled in favor of Catholic Social Services (CSS) and three affiliated foster parents in their lawsuit against the City of Philadelphia after being excluded from a foster-care program based on their religious beliefs. The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an *amicus* brief in June 2020 in support of the plaintiffs, arguing that the administrative process by which Philadelphia instituted its foster care policy is inherently tilted against religious Americans and that the City's actions violated the Free Exercise clause of the First Amendment.

The City of Philadelphia enters into contracts with agencies to place children with foster families. As part of CSS's religious beliefs, it will not certify same-sex married couples as prospective foster families. For this reason, in 2018, the City abruptly terminated foster placement through CSS. CSS and the foster parents it certifies did not seek to impose their religious beliefs on anyone and had provided foster-care services through the City of Philadelphia for more than 50 years. The City's decision left foster parents like Sharonell Fulton, who has fostered more than 40 children, without CSS's support.

In Chief Justice Roberts's opinion for the Court, reversing the Third Circuit, he reasoned that Philadelphia's policies "burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." Under *Employment Division v. Smith*, laws or regulations that incidentally burden free exercise may be upheld if they are neutral and generally applicable. However, Chief Justice Roberts held that "[t]his case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable." Hence, a majority of the Court saw no reason to revisit *Smith* here.

NCLA's *amicus* brief had primarily focused on two related concerns: (1) that the First Amendment fundamentally secures religious equality for Americans and protects them from unequal constraints that discriminate against individuals or organizations on account of their religious beliefs and practices; and (2) that administrative policymaking is inherently unequal and even prejudiced against religious individuals and groups. Significantly then, the Court explained that any administrative regime that provides 'a mechanism for individualized exemptions' is not generally applicable, particularly where the exemptions are entirely discretionary. So, where the City offered such exemptions to its contractual non-discrimination requirement, the City needed to have a 'compelling reason' *not* to extend an exemption to CSS based on 'religious hardship.'

The Court is correct that the refusal of the City to contract with CSS for foster care services unless the organization agreed to act against its religious beliefs does not survive strict scrutiny and violates the First Amendment. Under strict scrutiny, a policy must be narrowly tailored to advance the City's compelling interest. The Court held that extending an exemption to CSS would not harm the City's interests in maximizing the number of foster families or avoiding liability. And although the Court said that equal treatment of prospective gay foster parents is a

weighty interest, the City's system of available exceptions (even though not given out) undermines its claim that its non-discrimination policies are absolute.

NCLA released the following statements:

"Although the Supreme Court in *Fulton* reached the correct outcome, it still needs to confront the underlying problem that administrative governance is slanted against many religious Americans. Unelected bureaucrats are much less responsive than elected lawmakers to the deep-seated religious concerns of many Americans. So even when administrative rules *are* facially neutral, they often end up burdening religious Americans in ways enacted laws would not. The danger, in short, is that the entire game is tilted. The New Civil Liberties Alliance will continue to press the Court to face up to this inherent bias in administrative rulemaking."
— **Philip Hamburger, Chairman and President, NCLA**

"The Court's holding that administrative regimes that provide discretionary mechanisms for individualized exemptions are not generally applicable laws is promising. Applied correctly, that holding provides a good first step toward assuaging NCLA's concern that administrative leeway too often empowers hostility to religion."
— **Mark Chenoweth, Executive Director and General Counsel, NCLA**

"NCLA is pleased that the Court unanimously decided that Philadelphia's policies and actions toward CSS violate the Free Exercise Clause. Unfortunately, the opinion stops short of recognizing that the First Amendment protects Americans from unequal constraints that discriminate against them on account of their religious beliefs and practices. This is especially true here, where the policy decision at issue was made in the administrative context."
— **Kara Rollins, Litigation Counsel, NCLA**

For more information visit the case page here**.**

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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