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U.S. Supreme Court considers case at crossroads of religious freedom and LGBTQ rights

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The Supreme Court on Wednesday heard arguments in an important First Amendment case that could result in a changed interpretation of the clause that protects the free exercise of religion.

The case, *Fulton v. City of Philadelphia*, arose from a dispute over Philadelphia's decision to end a contract with a Catholic foster care agency because the agency would not place children with homes of same-sex couples.

The city claims it was merely adhering to its general anti-discrimination policies, but the agency asserted that the city's action violated the First Amendment's free exercise clause by discriminating against its religious beliefs.

During the nearly two-hour argument, conservative justices seemed to tilt toward the Catholic agency.

"If we are honest about what's really going on here, it's not about ensuring that same-sex couples in Philadelphia have the opportunity to be foster parents," said Justice Samuel Alito Jr. at one point. "It's the fact the city can't stand the message that Catholic Social Services and the archdiocese are sending by continuing to adhere to the old-fashioned view about marriage."

Neal Katyal, lawyer for Philadelphia, countered, "Absolutely not, Justice Alito." He said Philadelphia spends \$26 million annually for foster care.

Justice Brett Kavanaugh called the city's stance "absolute and extreme" and said that endorsing it would "would require us to go back on the promise of respect for religious believers."

Though the oral argument took place via teleconferencing because of the pandemic, it could be said that "all eyes" were on new Justice Amy Coney Barrett, whose views about LGBTQ rights and her deep religious background were topics of discussion during her recent confirmation hearing.

The first question Barrett asked of the lawyer for the Catholic agency was not about the Philadelphia case itself, but rather whether the Supreme Court's 1990 decision *Employment Division v. Smith* should be overturned.

That ruling, written by the late Justice Antonin Scalia, held that if a law does not directly discriminate against religion but is "neutral" and "generally applicable," the Free Exercise Clause does not have to make an exception for those who claim that the law inhibits their

religious beliefs. The precedent has been criticized as an unconstitutional weakening of the Free Exercise clause.

But if the court overturns the Smith decision, others say it would cause great disruption. At the oral argument Wednesday, Justice Stephen Breyer said, “It’s pretty hard to see how all kinds of government programs can exist with every religion making exceptions every which way for all kind of reasons.”

One brief filed by the National League of Cities and other municipal organizations posited what might happen in such a scenario. “A fireman who believes that gay people are committing sin and will suffer eternal damnation might refuse to put out a fire that breaks out at a gay bar,” the brief stated, adding other examples such as “a police officer refusing to guard an abortion clinic for religious reasons, or postal workers refusing to deliver mail they consider sacrilegious.”

Some justices sought to find a middle ground that would allow for free exercise of religion while also respecting LGBTQ rights. Ilya Shapiro of the Cato Institute said after the argument, “In the biggest case the Supreme Court has heard since Amy Coney Barrett joined the bench, it was heartening to see the justices struggle to do right by religious believers, members of the LGBTQ community and, perhaps most importantly here, the kids in desperate need of fostering and adoption.”

After the argument, one of the plaintiffs who wanted to participate in the Catholic agency’s program, said she was pleased with the justices’ line of questioning. “I’m grateful the justices took our arguments seriously and seemed to understand that foster parents like me just want to provide loving homes for children,” said Toni Simms-Busch. “It does not help anyone for the city to shut down the best foster-care ministry in Philadelphia, particularly when we have loving homes ready for children in need.”

American Civil Liberties Union lawyer Leslie Cooper, said, “Discrimination should have no place in our country, and no place in taxpayer-funded programs — and an overwhelming majority of our country agrees. But discrimination does still happen, which is why it is important that the Supreme Court should not undermine our nondiscrimination laws and our government’s ability to enforce nondiscrimination provisions in government contracts.”

Marcel Pratt, city solicitor of Philadelphia, said of the argument, “We appreciated the opportunity to present our case to the court today. The court asked hard questions of both sides, and we are grateful for them. We look forward to the court’s resolution of this important case.”

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