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Don’t Rain on Fulton’s Parade: Religious Freedom Is Winning at the Supreme Court

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Defenders of the free exercise of religion need to accept that we are playing a long game. Religious freedom is winning, even if the Court’s religious freedom jurisprudence develops over the span of more than one term.

The final weeks of a Supreme Court term are always full of suspense. This term was no different. Religious freedom advocates awaiting the Court’s decision in *Fulton v. Philadelphia* were happily surprised. On June 17, the Court was unanimous in its judgment that the city of Philadelphia violated the First Amendment when it refused to renew its contract with the Catholic Archdiocese of Philadelphia’s foster-care placement agency unless the agency agreed to certify same-sex couples as foster parents.

Fulton adds to a growing body of pro-religion decisions by the Court in recent years. It is an important victory against the strong-arm tactics of overzealous politicians, and it means that children from troubled backgrounds in Philadelphia will once again benefit from a tradition of Catholic foster care in the city that dates back more than two hundred years.

It is disappointing, then, that some conservative commentators didn’t celebrate. “One Cheer for the Supreme Court on Religious Liberty: A narrow ruling helps Catholic foster parents, but the faithful deserve more protection under the First Amendment,” read the headline of an editorial for the *Wall Street Journal*. “Unlike the liberals of 30 or even 10 years ago, today’s secular progressives are openly hostile to religious liberty, which needs a Supreme Court willing to defend it,” lamented the *Journal*’s editors. Josh Hammer, opinion editor at *Newsweek*, wrote that “Fulton could, and should, have been so much more.”

What *Fulton* Didn’t Do

Why rain on *Fulton*’s parade? It has something to do with how the Court treated—or didn’t treat—*Employment Division v. Smith*. The 1990 decision—deeply unpalatable to religious liberty advocates—says that the First Amendment is not violated by “neutral and generally applicable” laws with an incidental burden on religion. Chief Justice John Roberts, joined by a majority of the justices in *Fulton*, did not reach the question whether to revisit *Smith*. Instead, the majority

explained that the 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."

Justice Samuel Alito, joined by Justices Clarence Thomas and Neil Gorsuch, concurred in the court's judgment, but wanted the Court to overrule *Smith* once and for all. Alito's exacting concurrence asserted that "[*Smith*] can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption." Justice Amy Coney Barrett also wrote a concurring opinion, which was joined by Justice Brett Kavanaugh. Barrett wrote that she found "the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances." But "the textual and structural arguments against *Smith* are more compelling."

So, for the first time, a majority of the justices expressed their disagreement with *Smith*, even though not all of them saw *Fulton* as a case that required that question to be resolved. These five justices identify as originalists: adherents of a method of judicial interpretation that holds that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. That is remarkable, considering that *Smith* was authored by the late Justice Antonin Scalia, who is regarded as one of the founding fathers of originalism.

Justice Alito identified the problem:

When *Smith* was decided, scholars had not devoted much attention to the original meaning of the Free Exercise Clause, and the parties' briefs ignored this issue, as did the opinion of the Court. Since then, however, the historical record has been plumbed in detail, and we are now in a good position to examine how the free-exercise right was understood when the First Amendment was adopted.

Originalists like Alito pay close attention to such developments.

What is clear after *Fulton* is that *Smith* stands on shaky ground. It is only a matter of time before the Court overrules it. That the Court did not do so in *Fulton* is not cause for despair. Explicitly overruled or not, future litigants should no longer rely on *Smith*. In fact, Alito's analysis in *Fulton* is an originalist's trail map for reconsidering *Smith*. The Court taps into this sort of guidance often. You might recall, for example, that the Court adopted the reasoning of Justice Alito's 2012 *Hosanna-Tabor v. Equal Employment Opportunity Commission* concurrence last summer when applying the ministerial exception to teachers of religion at two Catholic parochial schools in *Our Lady of Guadalupe School v. Morrisey-Berru*.

What *Fulton* Did Do

Defenders of the free exercise of religion need to accept that we are playing a long game. Religious freedom is winning, even if the Court's religious freedom jurisprudence develops over the span of more than one term. This past spring, professors Lee Epstein of Washington University in St. Louis and Eric Posner of the University of Chicago Law School published a study finding that the Supreme Court under the conservative majority of the last 15 years is much more likely than before to decide cases in favor of religious rights. *Fulton* builds on the Court's pro-religion track record.

The days of *Smith* are limited. *Fulton* also adds much, much more to the Court's religious freedom jurisprudence.

First, it is clear that *all* the sitting justices will carefully review policies that burden religious exercise. *Fulton*'s unanimity is extremely significant, explained Roger Severino, former Director of the Office of Civil Rights at the Department of Health and Human Services and now a senior fellow at the Ethics and Public Policy Center. "By its actions the Court is saying people with sincere faith-informed understandings of social issues that cut against the grain of secularist thought aren't to be treated as bigots, and government needs to back off."

Second, the Court rejected the progressive argument that guarding against "dignitary harms" to same-sex couples or youth justifies denying religious accommodations. And, as Notre Dame Law Professor Richard W. Garnett pointed out in a commentary for *First Things*, "the Court's handling of the city's asserted 'compelling interest' in combatting discrimination will almost certainly be important in a wide variety of future cases."

Finally, the Court was unwilling to treat foster parent certification—a fact-specific and not generally available government service—as a "public accommodation." The Cato Institute's Walter Olson, in a blog post entitled "*Fulton v. City of Philadelphia*: Yes, It Was a Big Deal," observed that "keeping the definition of public accommodation helps keep law and litigation from engulfing sectors of society needlessly in cultural conflict."

This point of clarification is crucial, because government officials are increasingly using public accommodation laws to exclude individuals and organizations that hold traditional views on marriage from all sorts of activities. A prime example is Washington State's relentless persecution of florist Barronelle Stutzman, who declined to provide floral arrangements for the same-sex wedding of a long-time customer based on her Christian beliefs. It is disappointing that the Court recently declined to review Stutzman's case. Given the widespread confusion in the lower courts over whether the government violates the First Amendment when it forces someone to provide creative services against their beliefs, the Court will have to decide soon whether government must exempt religious objectors from the demands of expanded public accommodation laws.

Fulton **Is a Victory—and a Sign of More to Come**

In the meantime, *Fulton*'s influence on the Court's religious freedom jurisprudence can already be seen. On July 2, the Court issued a grant, vacate, and remand order (GVR) in a case brought by a religious community against its local government. The Swartzentruber Amish argue that Fillmore County, Minnesota violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) when the county demanded they install modern septic tanks for disposal of "gray water"—water used, for example, in dishwashing or laundry—or be subject to jail, fines, and even losing their farms. The GVR means that the initial ruling against the Amish has been vacated and the case has been sent back to the lower court to be reconsidered in the context of the new *Fulton* decision.

In a concurring opinion, Justice Gorsuch highlighted issues for lower courts to consider in light of *Fulton*. For starters, when a court considers whether government has a "compelling governmental interest" in imposing a contested regulation, it must include reference to "the specific application of [a regulation] to *this* community." The point here is significant: the government must have a compelling reason to deny the specific community or person their rights. Moreover, wrote Gorsuch, courts must give weight to exemptions that other groups enjoy both in *and* outside the jurisdiction. This is crucial. Before denying an accommodation, the government must do some homework. Quoting *Fulton*, Gorsuch reminded the lower courts that "If 'the government can achieve its interests in a manner that does not burden religion, *it must do so*.'" It's only been a few weeks since the Court decided Fulton, and already it is powerful precedent in favor of religious Americans.

One would expect that a significant victory for religious liberty in a case involving the imposition of a sexual orientation anti-discrimination policy would add to the demands of secular progressives to overhaul the Court. And so it did. What is surprising is that some conservatives wanting to overhaul our courts felt emboldened. "It is time for a reckoning. . . . The conservative legal movement needs to soberly confront and grapple with its shortcomings," wrote *Newsweek*'s Hammer.

Shortcomings? There is no need for any "reckoning," and one might wonder where such melodramatic language comes from. Back in February, Hammer presented for *Public Discourse* his idea of "common good originalism." Ed Whelan, Senior Fellow of the Ethics and Public Policy Center, convincingly explained in a rebuttal the theory's imprudence and idiosyncrasy. *Fulton* certainly is no reason to propose novel theories to replace originalism.

Religious freedom is faring far better under the Court's originalist majority than it did in the latter half of the twentieth century. *Fulton* adds to the Court's pro-religion track record. Let's not snatch defeat from the jaws of the *Fulton* victory.