

# Adoption in the Keystone State



By Paul Engel

- The Supreme Court sided with Catholic Social Services in its case against the City of Philadelphia.
- Touted as a victory for religious freedom, a look beyond the headlines shows that this opinion is really a Trojan horse.
- According to the court, religious freedom is not protected by the Constitution, but on the opinion of a few judges.

What is the role of government in enforcing societal norms? Does the state have the legal power to force compliance with its preferred worldview? A religious freedom case pitting the city of Philadelphia against Catholic Social Services has had its day at the Supreme Court. While the court correctly found for Catholic Social Services, the details prove that judges and lawyers at all levels have a serious comprehension problems when it comes to reading the Constitution of the United States.

For those of you not familiar with the details of *Fulton et al. v. City of Philadelphia*, let me quote from the syllabus of the court's opinion:

*Philadelphia's foster care system relies on cooperation between the City and private foster care agencies. The City enters standard annual contracts with the agencies to place children with foster families. One of the responsibilities of the agencies is certifying prospective foster families under*

*state statutory criteria. Petitioner Catholic Social Services has contracted with the City to provide foster care services for over 50 years, continuing the centuries-old mission of the Catholic Church to serve Philadelphia's needy children. CSS holds the religious belief that marriage is a sacred bond between a man and a woman. Because CSS believes that certification of prospective foster families is an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. But other private foster agencies in Philadelphia will certify same-sex couples, and no same-sex couple has sought certification from CSS.*

### **Fulton et al. v. City of Philadelphia Syllabus**

The City of Philadelphia contracts with several agencies to place children with foster families. One of these agencies is Catholic Social Services (referred to as CSS for the remainder of the opinion). What should be a surprise to no one is that CSS, being under the Roman Catholic Church, holds to a Roman Catholic view of marriage and families. For this reason, CSS will not place children with unmarried or same-sex married couples. The court notes that CSS is not the only foster care agency that the City of Philadelphia contracts with, some of who will place children with same-sex couples.

*Against this backdrop, a 2018 newspaper story recounted the Archdiocese of Philadelphia's position that CSS could not consider prospective foster parents in same-sex marriages. Calls for investigation followed, and the City ultimately informed CSS that unless it agreed to certify same-sex couples the City would no longer refer children to the agency or enter a full foster care contract with it in the future. The City explained that the refusal of CSS to certify same-sex married couples violated both a non-discrimination provision in the agency's contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.*

## [Fulton et al. v. City of Philadelphia Syllabus](#)

Everything was fine until an article pointed out the Archdiocese of Philadelphia refused to let CSS consider same-sex married couples as potential foster parents. Remember, according to the court no same-sex couple had even asked CSS to foster a child with them, so no one has been refused anything. However, the article, and subsequent calls for investigation (by whom isn't mentioned) was sufficient for the city to inform CSS that, unless they agreed to place children with same-sex couples, the city would no longer refer children to them. Why did the City of Philadelphia do this? They claimed it violated the non-discrimination provisions of both the contract the city had with CSS and the city's Fair Practices Ordinance.

Catholic Social Services and three affiliated foster parents sued to keep the city from enforcing its decision not to do business with them anymore, claiming it violated the Free Exercise Clause of the Constitution of the United States. The District Court denied CSS's case and the Third Circuit agreed, claiming both the contractual requirement and the city's ordinance were both neutral and general applicable. CSS and the foster parents appealed to the Supreme Court, which held:

*The refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment.*

## [Fulton et al. v. City of Philadelphia Syllabus](#)

### **First Amendment**

Let's start with the question of the First Amendment. This case cannot be a violation of the First Amendment to the Constitution of the United States . The First Amendment states:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;*

### **U.S. Constitution, Amendment I**

Congress did not create the Fair Practices Ordinance or the contractual requirements for foster care agencies, the City of Philadelphia did. Therefore, these actions are by the city, not Congress, and do not fall under the restrictions of the First Amendment. They do, however, fall under the Constitution of Pennsylvania:

*All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.*

### **The Constitution of Pennsylvania, Article I, §3**

Since the Constitution of Pennsylvania prohibits interference with the rights of conscience, the laws of the City of Philadelphia cannot compel CSS to violate theirs. What about those who do not wish to support a ministry of the Roman Catholic Church? Or what about the citizens of Philadelphia who do not wish to support ministries that discriminate against religious teachings? Both questions are moot, since no law can give preference to any religious establishment or mode of worship. Since faithful Roman Catholics believe that marriage is between one man and one woman, and that the best place for children to be raised is with a legally married couple, to deny them the opportunity to exercise their religion by the dictates of their own conscience would be to give preference to those religious establishments that do not hold to the same convictions.

What about the neutral and generally applicable test? This “test” comes from an opinion authored by Justice Scalia in the case [Employment Division v. Smith](#) (referred to in the opinion simply as Smith).

*Although a State would be “prohibiting the free exercise [of religion]” in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.*

### [Employment Division v. Smith](#)

In the Smith case, which involved the denial of unemployment benefits for the use of peyote during religious ceremonies, Justice Scalia admits that the State of Oregon was prohibiting the free exercise of the respondents religion, but the justice said that was OK, because the law was not specifically directed at their religious practices. Hence the neutral and generally applicable test is unconstitutional, because the Constitution says Congress “shall make no law”, not “shall only make neutral and generally applicable laws related to freedom of religion”. Based on the logic of Justice Scalia, both the state and federal governments can abridge the right to freely exercise your religion as long as they didn’t target only religious practices. A flagrant violation not only of the Constitution of the United States, but of Justice Scalia’s oath of office, this is an excellent example of bad behavior indeed. Since courts today inflate their own opinions above the Constitution they’ve sworn or affirmed to support, we see Justice Scalia’s mistake has expanded and grown to the point that some judges believe churches can be classified as “non-essential” and shut down in an emergency.

In the *Fulton v. Philadelphia* case, the court found that CSS's freedom of religion was abridged.

*The City's actions burdened CSS's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs.*

### [Fulton et al. v. City of Philadelphia Syllabus](#)

The rest of the syllabus goes on to support their opinion with egregious arguments. Not because the City of Philadelphia violated the Constitution of Pennsylvania's religious freedom clauses, nor because it denied Roman Catholics the equal protection of the law (a violation of the Fourteenth Amendment). No, the only reason Justice Roberts used in the syllabus, and to which all of the other justices agreed in part or in whole, was that the City of Philadelphia's contractual requirements were not "generally applicable". How do they find that?

*The non-discrimination requirement of the City's standard foster care contract is not generally applicable. Section 3.21 of the contract requires an agency to provide services defined in the contract to prospective foster parents without regard to their sexual orientation. But section 3.21 also permits exceptions to this requirement at the "sole discretion" of the Commissioner. This inclusion of a mechanism for entirely discretionary exceptions renders the non-discrimination provision not generally applicable.*

### [Fulton et al. v. City of Philadelphia Syllabus](#)

Since exceptions to the contract requirements are, according to the court, at the sole discretion of the Commissioner, they are not generally applicable. That means all the City of Philadelphia has to do is remove the exception from the language, and the Supreme Court says they can abridge the free exercise of the CSS's religious beliefs all they want. As for

the city's Fair Practices Ordinance, the court said it did not apply because CSS did not meet the definition of a "public accommodation" under that law.

## **Conclusion**

So it appears Catholic Social Services of Philadelphia lives to foster another day. However, this victory is not based on the law, but the fickle opinions of a handful of judges. What if another court does not think an exception clause violates general applicability? And what if the City of Philadelphia modifies the exception clause to make it more neutral? Not only has the court told the City of Philadelphia exactly what they need to do in order to compel CSS to consider same-sex couples for adoption or lose their contract, they have pulled the wool over the eyes of the American people. They have claimed that they are upholding the rule of law, while bringing in yet another Trojan Horse full of judges claiming the power to overturn the Constitution based solely on what they think. This may be a victory for Catholic Social Services, but it is a pyrrhic victory for the American people.

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[BI0: Paul Engel founded The Constitution Study in 2014 to help everyday Americans read and study the Constitution. Author and speaker, Paul has spent more than 20 years studying and teaching about both the Bible and the U.S. Constitution. Freely admitting that he "learned more about our Constitution from School House Rock than in 12 years of public school" he proves that anyone can be a constitutional scholar. You can find his books on Amazon and Apple Books. You can also find his books, classes and other products at the Constitution Study website (<https://constitutionstudy.com>). You can reach him at [paul@constitutionstudy.com](mailto:paul@constitutionstudy.com)