

In the
Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,

Respondents.

**On Writ of Certiorari to the United States Court
of Appeals for the Third Circuit**

RESPONDENTS' JOINT MOTION FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28.4 of this Court, Respondents City of Philadelphia et al. (“the City”), and Support Center for Child Advocates and Philadelphia Family Pride (“the Intervenor-Respondents”), jointly file this motion for divided oral argument. Respondents request that argument time be divided as follows: 20 minutes for the City and 10 minutes for the Intervenor-Respondents. This division of argument time would ensure that both sets of respondents have their interests fully represented and their arguments fully conveyed by counsel.

1. This case arises out of the City’s foster care program. The City requires that all private agencies who enter into contracts with it to carry out that program refrain from discriminating on the basis of certain protected

characteristics. Petitioner Catholic Social Services (CSS), however, wishes to carry out one aspect of the program—screening and certifying potential foster parents—while refusing to accept same-sex couples. CSS (joined by certain individual petitioners) maintains that the First Amendment’s Free Exercise and Free Speech Clauses give it the right to carry out this governmental function while discriminating against same-sex couples.

Petitioners sued the City in federal court, seeking a preliminary and permanent injunction requiring the City to enter into a contract to allow it to perform foster parent certification services while refusing to accept same-sex couples. Respondents Support Center for Child Advocates (which advocates on behalf of children in foster care) and Philadelphia Family Pride (a membership organization that includes LGBTQ+ foster parents and prospective foster parents) intervened as defendants. Dist. Ct. Doc. 69.

2. Respondents have been represented by separate counsel throughout this case. They filed separate briefs in the district court and the court of appeals. Each set of respondents also presented oral argument in the court of appeals.

Respondents have filed separate briefs in this Court as well, reflecting their distinct perspectives. The City seeks to advance its sovereign interest in enforcing conditions on the performance of delegated governmental functions, pursuant to government contracts. The City also defends the ability of regulators, under *Employment Division v. Smith*, 494 U.S. 872 (1990), to establish and enforce

neutral and generally applicable rules, regardless of whether such rules have the incidental effect of burdening some individuals' exercise of religion.

Intervenor-Respondents seek to advance the interests of individuals protected by antidiscrimination rules. They stress the importance of those protections and the harm that would befall would-be foster parents and children in foster care if agencies that administer foster care programs were free to discriminate against same-sex couples. More generally, Intervenor-Respondents explain how requiring governments to allow religious organizations that perform government services to override program requirements based on religious objections would threaten the effective functioning of numerous social services programs.

The arguments by the City and Intervenor-Respondents are mutually reinforcing; each shares the other's goals. But they also have distinct perspectives on the questions stemming from their roles as government entity and private organization, respectively.

3. When—in cases involving free exercise claims and otherwise—governmental parties and private parties are on the same side of an appeal, this Court regularly hears oral argument from both. *See, e.g., Little Sisters of the Poor, Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (government seeking to grant religious exemption and private party seeking to benefit from it); *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (state and local governments challenging rescission of DACA program and private groups and individuals who would be affected); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct.

2067 (2019) (governmental agency defending against First Amendment claim and private organization); *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (state challenging method of conducting the census and private organizations representing affected communities); *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (state agency seeking to enforce antidiscrimination law and individuals seeking to avoid being discriminated against); *Janus v. Am. Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018) (state defending statute against First Amendment challenge and private union); *Harris v. Arizona Independent Redistricting Comm'n*, 136 S. Ct. 1301 (2016); *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016) (state agency and private individuals claiming that electoral district was racially gerrymandered); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015) (political party and Black officeholders in case challenging districting plan as discriminatory); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (individual employee and governmental agency seeking to enforce antidiscrimination law); *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009) (government defending federal voting-rights statute and private organizations representing individuals whose interest the law protected).

Granting divided argument under these circumstances recognizes the distinct sovereign interest of the government in representing itself, and the individual interest of the private parties who are directly affected by the policies at issue. In fact, in *Masterpiece Cakeshop* and *Hosanna-Tabor*, the Court granted divided

argument between the governmental and private parties in cases—just like this one—involving First Amendment challenges to applications of antidiscrimination laws. And in *American Legion*, the Court granted divided argument between a governmental entity and a private organization that, as here, had intervened as a defendant below to join in defending against a First Amendment challenge to governmental action.

4. So, too here, respondents believe that the Court would benefit from oral argument by both governmental and private parties. Both sets of respondents have important interests at stake, and both continue to be represented by separate counsel. Divided argument is especially appropriate in light of the great public importance of the case and the broad claims petitioners are making—most notably, arguing for a sweeping reconceptualization of how the Free Exercise Clause operates.

5. Finally, respondents note that the United States, as *amicus curiae*, has moved (with petitioners’ consent) for divided argument on petitioners’ side of this case.

6. For the foregoing reasons, both the City and the Intervenor-Respondents believe that their participation in oral argument would be of material assistance to the Court. We therefore request that the Court divide oral argument as described above between counsel for the City and counsel for the Intervenor-Respondents.

Respectfully submitted,

Neal Kumar Katyal
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Marcel C. Pratt
City Solicitor
CITY OF PHILADELPHIA
LAW DEPARTMENT
1515 Arch Street
Philadelphia, PA 19102

Counsel for Respondents
City of Philadelphia, Department of
Human Services for the City of
Philadelphia, and Philadelphia
Commission on Human Relations

Leslie Cooper
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
lcooper@aclu.org

Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Counsel for Respondents
Support Center for Child Advocates
and Philadelphia Family Pride