AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

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The American Wall of Separation Between Religion and State Undermined by Trump Appointees

DOGS believe that State Aid to private religious schools contravenes Section 116 of the Australian Constitution . Unfortunately, in 1981 the High Court of Australia did not think so - with the exception of Lionel Murphy . We now have entanglement of religion with the State in Australia.

Section 116 which separates religion from the State was based upon the First Amendment of the American Constitution and until recently the wall of separation has been upheld by the American Supreme Court.

But in two recent cases, and with Trump appointees the wall is under threat.

1. Fulton v City of Philadelphia

A recent finding in the *Fulton v City of Philadelphia* case is a sign of things to come,

The ruling ensures that adherents to minority faiths can come into court and argue that government bureaucrats undervalued their religious objections. the narrow decision, which turned on the specific facts of the case, means that religious extremists did not get the sweeping free pass they were seeking to discriminate wherever and however they want.

In its decision last week in Fulton v. City of Philadelphia, the U.S. Supreme Court held that the Philadelphia violated a Catholic foster care agency's First Amendment rights by trying to force the agency, in violation of its religious beliefs, to certify same-sex couples to be foster parents.

Many religious liberty advocates had hoped the court in Fulton would overturn a 1990 case that has posed significant hurdles for religious Americans, especially religious minorities, seeking accommodations. While the Fulton decision did not overturn that case, it did offer two promising developments for the protection of minority rights.

In Fulton, Philadelphia demanded that Catholic Social Services certify and endorse same-sex couples as foster parents if it wished to continue to participate in the foster care system, as it has for more than a century.

CSS refused, saying that certifying same-sex couples would violate the agency's sincerely held religious beliefs that marriage is a bond between one man and one woman. In response, Philadelphia stopped sending foster care placement requests to CSS, prompting the lawsuit.

In its lawsuit, CSS argued that Philadelphia's actions violated the religious freedom protections under the First Amendment. Specifically, CSS asked the court to revisit the standard created in the 1990 case, Employment Division v. Smith, and either overrule it or strictly limit it.

In *Smith*, the court ruled against two members of the Native American Church, Alfred Smith and Galen Black, who ingested peyote during their religious rituals. Peyote was an illegal substance under Oregon law.

Smith and Black were fired from their positions as counselors at a drug rehabilitation center and were barred from receiving unemployment benefits because of their workplace "misconduct."

Previous ruling raised civil liberty concerns

The court said that the First Amendment's religious freedom protections did not immunize Smith and Black from the consequences of criminal law. So long as a law applied to everyone (or is, in the court's words, "neutral" and "generally applicable"), it is permitted.

The Smith decision prompted outcry from civil liberties groups and religious advocates because the broad discretion it gave the government meant that few religious claimants would win, especially minority religious groups that have little political or social capital.

Many religious liberty advocates had hoped the court in Fulton would overturn Smith, particularly because the court had indicated its potential willingness to do so

Americans United for Separation of Church and State had this to say about the Fulton case:

Still Standing, But For How Long? Justice Barrett Takes Aim At The Wall of Separation

Jul 01, 2021 by Ethan Magistro
Jun 17, 2021

Americans United for Separation of Church and State President and CEO Rachel Laser issued the following statement in response to the U.S. Supreme Court's decision in *Fulton v. City of Philadelphia*:

"Today, the Supreme Court decided that Philadelphia had to allow Catholic Social Services to exclude LGBTQ families from its publicly funded foster care program. But "Nine justices could agree on this decision because it was so narrow. The court concluded that because Philadelphia allowed individualized exemptions from its non-discrimination requirements in its foster care program, it had to exempt Catholic Social Services. Significantly, the court

declined to rewrite the First Amendment to grant a broad license to discriminate in the name of religion. The court also acknowledged the importance of non-discrimination laws and specifically respected the dignity of LGBTQ people.

"We at Americans United will continue to work for real religious freedom, equality and the right to live and believe as we choose. The vast majority of Americans believe our laws should not allow anyone to use their religious beliefs to harm others – and certainly vulnerable children in foster care. Now more than ever, Congress needs to pass the Do No Harm Act to help prevent religious freedom from being misused to harm others."

Background: In Fulton v. Philadelphia, Americans United filed an amicus brief with the Supreme Court on behalf of four prospective foster families who were turned away because they couldn't pass the religious tests of taxpayer-funded foster care agencies contracted by the government. Those families include Americans United client Aimee Maddonna, a Catholic mother of three from South Carolina, and Fatma Marouf and Bryn Esplin, a married same-sex couple from Texas who are represented by Americans United and Lambda Legal.

With the Supreme Court's October 2020 term ending, the wall separating church and state still stands despite dogged attempts by the Religious Right to tear it down. Justice Amy Coney Barrett, who many feared would quickly transform the court into an ultraconservative stronghold, has so far moved more slowly to change Supreme Court religious-freedom precedent. But it is unclear whether this tentativeness will last.

Barrett, along with fellow conservative Justice Brett Kavanaugh, demurred on what religious extremists viewed as a prime opportunity to decisively alter church-state precedent. Both justices held back in *Fulton v. City of Philadelphia*, joining a majority opinion by moderately conservative Chief Justice John G. Roberts that, on narrow grounds specific to the fact pattern of the case, invalidated Philadelphia's decision to stop funding a religious foster-placement agency that refused to serve same-sex couples.

In *Fulton*, the majority refused to decide whether to overrule a critical precedent, *Employment Division v. Smith*, which makes it more challenging for religious organizations to use the First Amendment's Free Exercise Clause to impose their beliefs on others. Although Barrett, joined by Kavanaugh, wrote an opinion expressing disapproval of the *Smith* decision, they left the three-decade-old precedent intact for now, mainly because they were unsure what legal test should replace the rule adopted in *Smith* -- that laws that are neutral with respect to religion and generally applicable do not trigger heightened scrutiny under the Free Exercise Clause.

Barrett, Kavanaugh and Roberts have also joined the court's three more liberal justices in the majority more often than hardline conservative Justices Neil M. Gorsuch, Samuel A. Alito, and Clarence M.Thomas have. The court seems to have less of a 6-3 split than, as an article in *The Economist* put it, a 3-3-3 split, divided between the more liberal justices, the more cautious conservative justices and the three hardline justices "itching to hasten a conservative revolution."

Despite the semblance of a 3-3-3 split, the high court retains a decidedly conservative majority. Religious extremists and their lawmaker allies have capitalized on this conservative majority and likely will continue to do so, especially if the more cautious conservatives change their tune. Barrett has only been on the bench for eight months, which is hardly enough time to illuminate how she will act going forward.

It was also the addition of Barrett to the court that inspired religious groups to more aggressively challenge public-health orders designed to mitigate the COVID-19 pandemic. Barrett cast the deciding vote in *Roman Catholic Diocese of Brooklyn v. Cuomo*, which invalidated a New York order that limited the size of religious and other gatherings, marking a diametric reversal from two decisions issued while the late Justice Ruth Bader Ginsburg was still on the Court that had upheld such orders.

Barrett did exercise mild restraint in two subsequent COVID-19 health-order cases, declining to join calls by highly conservative justices to block a Kentucky order that temporarily closed in-person private schools and to eliminate nearly all restrictions that California had imposed on religious gatherings. But that restraint evaporated this past April in *Tandon v. Newsom*, when Barrett joined a 5-4 opinion that invalidated California's restrictions on prayer meetings in homes. The *Tandon* decision made several broad legal pronouncements that are in tension with prior Supreme Court precedents and are viewed by some observers as eviscerating the *Smith* precedent. Religious extremists are already attempting to use *Tandon* to argue for religious exemptions, using their religious beliefs in a manner that would harm numerous Americans who do not share their extremist dogmas.

Barrett's past, as a report created by Americans United before her confirmation hearing details, also shows why it makes more sense to be worried about her presence on the Court rather than be cautiously optimistic. In previous law-review articles, Barrett has shown a lack of respect for precedent, especially the landmark *Roe v. Wade* decision that established women's right to choose whether to end a pregnancy. Those writings and a record of supporting restrictions on reproductive rights should cause trepidation about the outcome of *Dobbs v. Jackson Women's Health Organization*, a pivotal abortion case that the court will hear next term.

Barrett has yet to be the devastating ultraconservative force on the Supreme Court bench that some have feared. She has knocked consequential bricks out of the wall of separation but has not bulldozed it -- at least, not yet. As cases on abortion, gun rights and other hot-button issues are slated for the Supreme Court's next term, skepticism of Barrett's relatively cautious conservative is well warranted. By this time next year, it will be much clearer whether Barrett intends on demolishing the wall of separation during her Supreme Court tenure.

2. Carson v Makin

The U.S. Supreme Court's has announced on July 2 that it will hear *Carson v. Makin* next term – a case that could significantly impact religious freedom and church-state separation:

Carson v. Makin (Docket 20–1088) is a pending United States Supreme Court case related to the First Amendment to the United States Constitution. Many

towns in Maine do not have public school districts. The state provides a tuition assistance program for residents of those localities to send their children to private schools, but sectarian schools are excluded. The Institute for Justice represents two families challenging the exclusion of sectarian schools from the program.

The issue at stake is :

whether a state violates the religion clauses or equal protection clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious instruction.

So this is a case allegedly about 'educational choice", the camel in the Australian separation tent.

DOGS are watching the outcome of this particular case with interest.

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