IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BETHEL MINISTRIES, INC.,	*	
Plaintiffs,	*	
v.	*	No. 1:19-cv-01853-SAG
DR. KAREN B. SALMON, *et al*.,	*	
Defendants.	*	

* * * * * * * * * * * *

MOTION TO STAY

For the reasons stated in the accompanying memorandum, defendants move under Federal Rule of Civil Procedure 7(b) and Local Rule 105 to stay the case in light of the Supreme Court's February 24, 2020 order granting certiorari in *Fulton v. City of Philadelphia*, 19-123. A proposed order is attached.

Respectfully submitted,

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March 6, 2020

CERTIFICATE OF SERVICE

I certify that, on this 6th day of March, 2020 the foregoing was served by CM/ECF on all registered CMF users.

/s/ Sarah W. Rice

Sarah W. Rice

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MEMORANDUM IN SUPPORT OF MOTION TO STAY

INTRODUCTION

This Court should stay the proceedings in this case in light of the Supreme Court's February 24, 2020 order granting certiorari in *Fulton v. City of Philadelphia*, 19-123, and its decision to hold certiorari petitions in *Arlene's Flowers Inc., et al. v. Washington, et al.*, 19-333 and *Ricks v. Idaho Contractor's Board, et al.*, 19-66. The Court's grant of certiorari in *Fulton* may result in significant changes to the law set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990), the establishment clause case that has been the foundation of state and local government decisions concerning conflicts between religion and government regulation. Hence, the Supreme Court's decision to hear *Fulton* is of "extraordinary public moment." *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936). And, while *Fulton v. City of Philadelphia* may not resolve all factual and legal questions presented by Bethel here, "in all likelihood it will settle many and simplify them all." *Landis*, 299 U.S. at 256.

The Supreme Court's grant of certiorari and subsequent actions with respect to other cases presenting the same issues indicate that those proceedings will likely be particularly instructive for resolving the "novel problems of far-reaching importance to the parties and the public" presented by both cases. *Landis*, 299 U.S. at 256. Here, *Fulton* will tackle the novel and difficult issue of reconciling the First Amendment's protection of religious exercise and religious speech with the enforcement of state nondiscrimination laws. These issues implicate interests well beyond that of the parties before the court in *Fulton* or before this Court here; states and municipalities are often at the forefront of recognizing new classes of citizens that need protection from discrimination in public accommodations, *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995), and those government actors require guidance to fulfill their obligations under the First Amendment.

ARGUMENT

THIS COURT SHOULD STAY PROCEEDINGS PENDING SUPREME COURT REVIEW IN *FULTON V. PHILADELPHIA*.

This Court has the inherent power to stay the proceedings in this case pending Supreme Court review in *Fulton v. City of Philadelphia* "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254-55 (holding that "proceedings in one suit may be stayed to abide the proceedings in another" where the parties to the suits and the issues are not the same); *see also* Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1360 (3d ed.) (explaining that a stay "may be justified when a

similar action is pending in another court" and collecting cases at footnote 30). "The determination by a district [court] in granting or denying a motion to stay proceedings calls for an exercise of judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket." *United States v. Georgia Pacific Corp*., 562 F.2d 294, 296 (4th Cir.1977) (citing *Landis*, 299 U.S. at 254). "The factors to consider when deciding a motion to stay are: '(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the nonmoving party.'" *CX Reinsurance Co. Ltd. v. Johnson*, No. GJH-18-2355, 2020 WL 406936, at *3 (D. Md. Jan. 24, 2020) (quoting *Hunt Valley Presbyterian Church, Inc. v. Baltimore Cty.*, No. CCB-17-3686, 2018 WL 2225089, at *2 (D. Md. May 15, 2018)).

Courts routinely grant stays when closely analogous cases are under appellate review. When the disposition of a case on appeal "will prove helpful to resolution of a central issue in this case," a stay is appropriate. *Kendzior v. Gates*, No. CIV.A. ELH-12-2184, 2014 WL 773330, at *1 (D. Md. Feb. 24, 2014). It is not necessary for a trial court to "ruminate on the likelihood" that the relevant precedent will be "overturn[ed]. . . . It is sufficient to conclude that the [appellate court] is faced for the first time with a question that bears heavily on the core dispute . . . ." *CX Reinsurance Co. Ltd. v. Johnson*, No. GJH-18-2355, 2020 WL 406936, at *6 (D. Md. Jan. 24, 2020).

Here, the cases are closely analogous to the arguments Bethel has raised. *Fulton* involves a contract between the City of Philadelphia and Catholic Social Services. The City of Philadelphia discontinued the contract because Catholic Social Services would

not provide "home studies or endorsements for unmarried heterosexual couples or same-sex couples," which Philadelphia found to be inconsistent with its fair practices ordinance. Petition for Writ of Certiorari, *Fulton v. City of Philadelphia*, 2019 WL 3380520, 8 (U.S. Jul. 22, 2019). In *Fulton*, petitioners requested that the Court consider whether (1) "free exercise plaintiffs can only succeed by proving . . .that the government would allow the same conduct by someone who held different religious views" or whether courts must also "consider other evidence that a law is not neutral and generally applicable"; (2) "*Employment Division v. Smith* should be revisited"; and (3) it "violates the First Amendment" to "by condition[] a religious agency's ability to participate in" a government program "on taking actions and making statements that directly contradict the agency's religious beliefs." *Id.* at i. After the Court granted certiorari, it did not redistribute the petitions in *Arlene's Flowers* or *Rick's*, effectively "holding" those petitions in light of the similar issues they present.[1] In *Arlene's Flowers*, petitioners have asked the Court to consider "[w]hether the State violates a floral designer's First Amendment rights to free exercise and free speech by forcing her to take part in and

[1] In the two cases, the Supreme Court's docket reflects that the petitions for writ of certiorari were not redistributed after they were considered at the February 21, 2020 conference. *See* United States Supreme Court, Docket Search Results: *Arlene's Flowers Inc., et al. v. Washington, et al.*, 19-333, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-333.html (last accessed March 6, 2020); United States Supreme Court, Docket Search Results: *Ricks v. Idaho Contractor's Board, et al.*, 19-66, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-66.html (last accessed March 6, 2020) (showing no distribution of the petitions after Feb. 14, 2020). There have been two conferences after the February 21, 2020 conference. United States Supreme Court, Supreme Court Calendar 2019, https://www.supremecourt.gov/oral_arguments/2019TermCourtCalendar.pdf.

create custom floral art celebrating same-sex weddings or by acting based on hostility toward her religious beliefs." Petition for a Writ of Certiorari, *Arlene's Flowers, Inc. v. State of Washington*, 2019 WL 4413355, i (U.S. Sep. 11, 2019). *Ricks* asks, identical to *Fulton*, whether *Employment Division v. Smith* should be revisited. Petition for a Writ of Certiorari, *Ricks v. State Of Idaho Contractors Bd.*, 2019 WL 3075895, ii (U.S. Jul. 10, 2019).

If the Court were to substantially revisit *Employment Division v. Smith*, it would substantially impact the Establishment Clause claims at issue here, adding an additional interpretive source beyond the three cases considered by this Court in its memorandum opinion resolving the preliminary injunction: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); and *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017). ECF 41, 15-16. Even if the basic premise that a neutral law of general application may be permissibly applied to a religious organization, the test articulated in *Employment Division v. Smith*, remains largely unchanged, it is very likely that the Court will have something more to say about how a Free Exercise claim can be proven. In fact, one of the questions posed by *Fulton* is directly applicable to the Free Exercise claims in this case; namely, whether it is necessary to prove that an adherent or nonadherent of a different religious background was treated differently in order to set forth an Establishment Clause claim. *See* ECF 41, 20.

It also appears probable, given the Court's hold of *Arlene's Flowers*, a case not directly implicating *Employment Division v. Smith*, that the Court views the issues

presented in *Fulton* as also overlapping with the type of Free Speech clause claim brought here, where a state agency acts to regulate conduct along the speech-expression continuum in order to enforce its nondiscrimination law. Not only is this issue central to the resolution of this matter, it will have wide-ranging practical consequences for the many state agencies charged with enforcing the nondiscrimination laws in their programs and contracts.

Judicial economy weighs strongly in favor of granting a stay in this case. The current dispositive motions filing deadline is October 18, 2020, before *Fulton* will be heard or decided. Without a stay, discovery will proceed guided by this Court's January 21, 2020 memorandum opinion. ECF 41. That opinion set forth principles of existing constitutional law, including describing several areas for potential further discovery such as "(1) how many handbooks Defendants actually reviewed, (2) how many schools were flagged for follow-up correspondence, and (3) the breakdown of religious versus nonreligious schools for each of these groups." *Id.* at 27. The Court has also approved 50 deposition hours per side. ECF 47 (paperless order). However, what discovery might be necessary is likely to change depending on the outcome of *Fulton*. Because of the current procedural posture of the case, it is possible to avoid expending resources on discovery that needs to be duplicated. Moreover, dispositive motions and perhaps trial could occur prior to the outcome of *Fulton*. However, the interposition of any new law arrived at in *Fulton* could trigger "motions for reconsideration under Federal Rule of Civil Procedure 60" that, "if granted, would require substantial relitigation of th[is] case[] that would be avoided if" a stay were entered "now." *CX Reinsurance Co. Ltd. v. Johnson*, at *6.

Here, the contemplated stay is "limited in duration and . . . not unreasonably long," *Landis*, 299 U.S. at 258, because, the Supreme Court having accepted the case for argument, the outer limit of the stay is known by the Supreme Court's normal calendar to be sometime at the end of June, 2021. *See Hickey v. Baxter*, 833 F.2d 1005 (4th Cir. 1987) (stay proper "while awaiting guidance from the Supreme Court in a case that could decide relevant issues.").

First, the State has an interest in enforcing its duly enacted laws. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Staying the case will ensure that any injunction entered in this case will only issue if necessitated by the Constitution. Moreover, the State will need to expend significant resources in completing discovery, briefing dispositive motions, and potentially even moving to trial in this matter. If these efforts needed to be duplicated because of a shift in precedent, it would be a waste of public funds.

Second, while Bethel may have a current interest in obtaining an injunction to prevent collection efforts of the $102,600 Bethel received in BOOST scholarship money (ECF 1-10), Bethel does not currently have any non-moot interest in enforcement or non-enforcement of the BOOST nondiscrimination clause. As this Court described, "the 2017 nondiscrimination requirement, which resulted in Bethel's expulsion from BOOST, is no

longer operative."[2] ECF 41, 12. Enjoining its enforcement, as Bethel has requested in its complaint, ECF 1, 36, would have no effect. This Court also recognized that "courts are wary of finding irreparable harm where monetary damages can be easily calculated." ECF 41, 14. Bethel's interest in enjoining collection efforts, which have not yet commenced, is not one that requires any particular haste. For the reasons discussed below, the weighing of competing interests demonstrates that, for reasons of judicial economy, the Court, the parties, and the public are best served by entering a stay.

[2] It is undersigned counsels' understanding that Bethel has applied to the Textbooks and Technology Program under the 2019 law, but that the application has not yet been acted upon. Any claims that Bethel may or may not have from that application are not yet ripe, and would not fall within the current scope of the operative pleadings in this case.

CONCLUSION

For the reasons discussed above, this Court should enter a stay of the proceedings in this case pending the Supreme Court's decision in *Fulton v. Philadelphia*.

Respectfully submitted,

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March 6, 2020

CERTIFICATE OF SERVICE

I certify that, on this 6th day of March, 2020 the foregoing was served by CM/ECF on all registered CMF users.

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* * * * * * * * * * * *

ORDER

Having considered defendants' motion to stay and any response thereto, it is this _____ day of _____, 2020, hereby ORDERED:

All further dates and deadlines in this case are STAYED; and

This action is STAYED pending the decision of the Supreme Court of the United States in *Fulton v. City of Philadelphia*, 19-123.

_____
Stephanie A. Gallagher
United States District Judge