

**[J-91-2025] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

MOHAMAD ALSYRAWAN,	: No. 87 MAP 2024
	: :
Appellant	: Appeal from the Order of the
	: Commonwealth Court at No. 111
	: CD 2023 dated May 20, 2024
v.	: Affirming the Order of the
	: Department of Human Services,
	: Bureau of Hearings and Appeals
DEPARTMENT OF HUMAN SERVICES,	: at No. 514410449-002 dated
	: January 9, 2023
Appellee	: :
	: ARGUED: November 19, 2025

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT

DECIDED: October 5, 2026

My intuitions concerning the merits and the relevant jurisprudence align to a large degree with the views that Justice Mundy advances.¹ I am less sanguine, however, that, particularly after *Fulton v. City of Philadelphia*,² *Employment Division v. Smith*³ remains good law. At the very least, *Smith* can best be viewed as highly limited in application, and perhaps on life support. In any event, it is incontestable that the Supreme Court of the United States embarked many terms ago on a journey that has altered the course of First Amendment religion clause jurisprudence quite completely. While I rue this change of direction, as it departs from the text, history, and meaning of the First Amendment and undermines the Framers' genius in balancing the Establishment and Free Exercise

¹ See Conc. & Diss. Op. (Mundy, J.).

² 593 U.S. 522 (2021).

³ 494 U.S. 872 (1990).

Clauses,⁴ I believe that Justice McCaffery's Opinion for the Majority faithfully applies the contemporary precedent of the United States Supreme Court, precedent that we are bound to follow here. Perhaps some future majority of that Court will see the error of its ways and return to a sound understanding of the religion clauses. In the meantime, however, I believe that Justice McCaffery's Majority Opinion correctly assesses and channels the current state of play in Free Exercise clause jurisprudence.

With respect to neutrality and general applicability, both of which Justice Mundy deems satisfied by the 40/60 Rule in this case, it is worth remembering *why* neutral and generally applicable laws trigger rational-basis review rather than strict scrutiny. The concern reflected by the test involves the risk of bias inherent in allowing discretionary exceptions from a given policy as a matter of grace; such exceptions may be the product of unintentional or intentional bias. For this reason, laws and regulations that provide for discretionary exceptions are subject to strict scrutiny—but the same concern for bias inheres where exceptions are granted in the absence of a formal structure allowing for them. Here, notwithstanding Justice Mundy's observations,⁵ the parties stipulated that DHS had previously granted an individualized exception under circumstances that evidently bear some resemblance to the instant case.⁶ Alsyrwan thus had no burden to prove that what he and DHS agreed had happened did, in fact, happen. That no formal policy authorized the exception is beside the point: what matters is that DHS evidently

⁴ For an elaboration of my views in this area, see *generally* David Wecht, *Majoritarianism Run Riot: Christian Supremacism and the Religion Clauses*, 58 GONZAGA L. REV. 93 (2022-23).

⁵ See Conc. & Diss. Op. at 4 & n.6 (Mundy, J.).

⁶ See Maj. Op. at 13 n.17 (discussing *Jalil* and the exception to which that decision alluded); see DHS Bd. of Hearings & Appeals Adjudication at 17 (detailing the stipulation of the parties regarding the past grant of an exception to the 40/60 Rule “based on individualized circumstances”).

arrogated to itself the authority to grant one. And, where one might be granted, another might be withheld, plausibly for biased reasons—precisely the concern to which strict scrutiny responds.

Even granting *arguendo* that the record is thin on this point, the solution is not to apply or impose by fiat a rational-basis standard at this juncture. Rather, the correct solution is to remand for further consideration on this potentially dispositive point. In that regard, I believe that the Majority might be clearer on what is to happen as a consequence of its disposition. As suggested by Justice Mundy, I believe that the correct remedy here is to vacate the Commonwealth Court’s ruling⁷ and remand for further proceedings informed by the simple-burden approach to the threshold inquiry, examination of the content and sufficiency of the stipulation, the taking of any additional evidence on this point that the lower tribunal(s) deems necessary, and the subsequent application of the standard of review that the results of that inquiry call for.

Accordingly, although I agree with the Majority’s analysis of the proper threshold standard, I respectfully dissent from its election to reverse the Commonwealth Court’s determination outright. Better to vacate and remand to ensure full consideration and proper application of the now-clarified standard.

⁷ See Conc. & Diss. Op. at 10 n.10.