No. 18-2574

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SHARONELL FULTON, et al.,
PLAINTIFF-APPELLANTS,

v.

CITY OF PHILADELPHIA, et al.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
CASE NO. 18-CIV-2075 (THE HON. PETRESE B. TUCKER)

BRIEF OF CHURCH-STATE SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

JOSHUA MATZ
Counsel of Record
JOHN C. QUINN
MATTHEW CRAIG
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118
(212) 763-0883
jmatz@kaplanhecker.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are Church-State scholars with substantial expertise in the Religion Clauses. They submit this brief to explain why the Free Exercise Clause claim advanced by Catholic Social Services (CSS) lacks merit—and to warn that granting CSS's proposed injunctive relief would violate the Establishment Clause.

A full list of *amici* is attached as an appendix to this brief.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

I. The Constitution affords our elected officials broad latitude in deciding which public and private programs to fund. It also vests them with "the authority to impose limits on the use of such funds to ensure they are used in the manner [intended]." *Agency for Int'l Dev. v. Alliance for Open Society Int'l*, 133 S. Ct. 2321, 2328 (2013). In an exercise of that authority, the City has long required that its contractors—secular and religious alike—adhere to a non-discrimination policy in rendering city services with city funds. This command is written into the City's Home Rule Charter and applies to virtually every City contract. *See* Home R. Ch. § 8-200(2)(d). The City thereby guarantees that its monies will not support activities characterized by forms of exclusion at odds with its commitment to equality.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

There is no evidence that the City's general non-discrimination requirements were born of anti-religious animus, or that they have been applied in a manner that privileges secular over religious concerns. Nonetheless, CSS claims that the Free Exercise Clause prohibits the City from including a non-discrimination policy covering sexual orientation in its FY 2019 contract for foster care services. Put differently, CSS claims the Constitution requires the City to fund a discriminatory governmental program that a private party wants to carry out on its behalf. CSS rests this argument on three premises: first, that the City has limited authority to include non-discrimination clauses in contracts with religious entities; second, that the City's decision to require a non-discrimination policy is based on hostility toward CSS's religious beliefs; and third, that the City has elevated secular over religious considerations by allowing other exemptions from its non-discrimination policy.

It is clear that CSS holds its religious beliefs concerning same-sex couples in good faith. As a matter of constitutional law, however, CSS's claim lacks merit. The City is free to include a general non-discrimination clause in its service contracts. That holds true even if some groups would rather decline the funds than accept this condition. Of course, funding conditions cannot be added in an effort to harm religious groups or express disapproval of their beliefs. But here, the City has long prohibited *all* government contractors from excluding qualified foster parents on the basis of protected traits. Further, nothing in the City's response to CSS's non-

compliance with the contract suggests any improper motive. At all times, the City has written and applied its non-discrimination rule in a neutral, general manner, thus ensuring that religious and secular groups are treated the same.

II. The only live claim for relief is CSS's request for an injunction requiring the City to offer it an exemption from the non-discrimination policy. Granting this relief would violate the Establishment Clause. First, it would allow a religious entity to impose explicitly religious criteria on access to a City-funded program rendering core governmental services. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). Second, even as CSS demands access to public funds for its foster service program, it describes its involvement in that program as a form of religious practice—failing to recognize that the City can't fund religious practice. *See Bowen v. Kendrick*, 487 U.S. 589, 608 (1988). Finally, affording CSS the exemption that it seeks would impermissibly shift substantial burdens to foster children and LGBTQ persons. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 713, 720 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

ARGUMENT

I. THE CITY DID NOT VIOLATE CSS'S FREE EXERCISE RIGHTS

A. The City May Require that Contractors Who Receive Public Money Render Governmental Services in a Non-Discriminatory Manner

CSS devotes most of its opening brief to case-specific allegations of religious hostility. We address those claims below. But at times, CSS appears to advance the

broader contention that the Constitution prohibits the City from including *any* non-discrimination policy in its service contracts with religious entities who might object. Because this argument rests on clear legal error, we address it at the outset.

The Free Exercise Clause forbids the government from "act[ing] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). To assess whether a law has violated this command, courts frequently ask whether it is "neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law lacks neutrality when it "target[s] religiously motivated conduct either on its face or as applied in practice." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004). A law fails the general applicability requirement if it "proscribes particular conduct only or primarily when religiously motivated." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002).

This case concerns a non-discrimination policy that is facially neutral and generally applicable. As written, the policy has no exemptions and applies the same way to all contracting agencies, regardless of their secular or religious status and regardless of their denomination or beliefs. It draws no lines by reference to religion. It simply reflects the City's view that tax dollars should not be directed to fund foster

service programs at agencies that discriminate on prohibited grounds—regardless of whether those agencies are religious or not.

In the public accommodations context, non-discrimination rules like this one satisfy the Free Exercise Clause's neutrality and general applicability requirements. The Supreme Court has said so time and again, most recently in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1727 (citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n.5 (1968) (*per curiam*), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995)).

There is, of course, a notable distinction between *Masterpiece* and this case: *Masterpiece* involved the application of a law regulating public accommodations, whereas this case arises in the realm of government contracting. This is a distinction with a difference. In crafting service contracts for public and private partners, the City's prerogative to include a non-discrimination policy is at a constitutional zenith.

This conclusion follows directly from precedent holding that the government enjoys broad discretion in deciding what programs to fund and on what terms—even when these decisions implicate activities constitutionally protected from regulation. *See generally Rust v. Sullivan*, 500 U.S. 173 (1991). For example, a state may choose to fund public schools, but not private schools, even though parents have a right to send their kids to the latter. *See Norwood v. Harrison*, 413 U.S. 455, 462 (1973). Likewise, the government may fund childbirth programs but refuse to fund abortion

procedures, notwithstanding a woman's right to terminate an early-stage pregnancy. *See Maher v. Roe*, 432 U.S. 464, 475 (1977).

These cases explain that because people can exercise rights without public funding, a decision "not to subsidize the exercise of a fundamental right does not infringe the right." *Rust*, 500 U.S. at 193. These cases also clarify that, "[a]s a general matter, if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds"—even "when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *AID*, 133 S. Ct. at 2328.

Locke v. Davey exemplifies the application of this rule in the free exercise context. There, Washington State had created a scholarship program to assist students with postsecondary education expenses, but it prohibited scholarship recipients from using funds to pursue a degree in devotional theology. 540 U.S. 712, 716 (2004). Joshua Davey filed suit, contending that this program was not "neutral" toward religion. *Id.* at 720. Writing for the Court, Chief Justice Rehnquist distinguished between laws that target religious activities with "criminal [or] civil sanctions," and decisions "not to fund a distinct category of instruction." *Id.* at 720-21. In the latter case, he explained, "the State's disfavor of religion (if it can be called that) is of a far milder kind." *Id.* at 720. The Chief Justice added that claims of religious hostility were undercut by the State's efforts to make this public benefit

available to religious actors—so long as they didn't major in devotional theology, a course of study that Washington State reasonably viewed as raising Establishment Clause concerns. *See id.* at 724. Accordingly, the Court upheld Washington's program.

Here, the City structured its foster service program through contracts with private parties. One of the contract terms reflects the City's desire not to fund a particular activity: the provision of City services in a manner that excludes qualified LGBTQ foster parents. This neutral policy does not burden free exercise rights. CSS has no entitlement to a government subsidy for its religious practice of refusing to serve same-sex couples. *See Locke*, 540 U.S. at 720-24; *Rust*, 500 U.S. at 194. And if CSS concludes that adhering to a condition of city funding while rendering a city service would conflict with its beliefs, it is free to decline those funds. *See AID*, 133 S. Ct. at 2328. There is no basis for CSS's view that it can unilaterally decide to apply for a City contract and then demand that the City rewrite the contract to match its religious beliefs. *See Teen Ranch v. Udow*, 479 F.3d 403 (6th Cir. 2007); *Dumont v. Lyons*, No. 17-cv-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018).[2]

In suggesting otherwise, CSS erroneously relies on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). There, Missouri awarded grants

[2] Accordingly, this case is much easier than *Locke v. Davey*. Whereas the conditions in Washington's program *explicitly* targeted religion, the condition here makes no reference to religion and is equally applicable to secular agencies.

to resurface playgrounds but categorically refused to fund any church or religious organization. *Id.* at 2017. The Supreme Court invalidated this policy on the ground that it "disqualified [churches] from a public benefit solely because of their religious character." *Id.* at 2021. Whereas Joshua Davey had been denied public funds "because of what he proposed to *do*," Trinity Lutheran Church, whose playground was open to daycare children of all religious backgrounds, was excluded from a competitive bidding process "simply because of what it *is*—a church." *Id.* at 2023 (emphasis added). *Trinity Lutheran* thus made clear that states cannot exclude religious organizations from public funds just because of their religious status. The City's policy here is consonant with that holding. The City has not defunded *religious groups*; to the contrary, it still funds CSS in many closely-related programs and continues to fund other religious groups for this foster services program. Rather, the City has defunded *an activity*—refusals to serve same-sex couples—regardless of whether a contractor engages in that activity for secular or religious reasons.

Accordingly, there can be no doubt that the City may constitutionally include this facially neutral and generally applicable non-discrimination policy in its foster service contracts. The real question is whether it did so for legitimate reasons or as part of an effort to denigrate particular religious beliefs.

B. The District Court Correctly Held that the City's Non-Discrimination Policy for Service Contracts is Neutral and Generally Applicable

The Constitution prohibits government action based on hostility to religion or an improper privileging of secular over religious values. *See Lukumi*, 508 U.S. at 533. In assessing a law's compliance with these strictures, courts consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece*, 138 S.Ct. at 1732.

In this case, CSS contends that the City's decision to include an express non-discrimination requirement in its FY 2019 foster service contract violates the Free Exercise Clause. The gravamen of its complaint is that the City seeks to condemn and burden its religious beliefs concerning same-sex marriage. Although CSS breaks this claim into several sub-arguments, they are linked into a broader narrative: this policy didn't exist until last year; it has now been invented to punish CSS; the decision to do so was made in a climate of hostility to CSS's religious beliefs; and the pretextual nature of this policy is proven both by the City's willingness to violate it elsewhere and by the fact that it grants exemptions for non-religious reasons.

If CSS's contentions were true, that would surely be cause for concern under the Free Exercise Clause. But they aren't true. The premises of CSS's constitutional

argument are unsupported by the record, grounded in strained interpretations of the facts, or infected by errors of law. Therefore, CSS's claim cannot succeed.

1. The City's Relationship with CSS and the Non-Discrimination Policy

CSS alleges that the City is "waging a purely ideological fight to punish [CSS] for its views on same sex marriage." Br. at 69. To evaluate that claim, it is essential to understand the history of the relationship between CSS and the City, as well as the City's reasons for incorporating a non-discrimination clause into its FY 2019 foster service contract. This background makes clear the implausibility of CSS's claim that the City is out to punish CSS for its religious beliefs.

The City has long contracted with CSS—and other religious organizations—to provide a range of public child welfare services. *See, e.g.*, Appx. 307. It continues to do so and to value its partnerships with CSS and other religious groups. *See id.* Perhaps most striking, the City has partnered with CSS for many years with a full awareness of CSS's views regarding same-sex marriage. *See* CSS Br. at 1; City Br. at 34. Indeed, even since this dispute arose, the City has maintained substantial contracts with CSS for congregate care and case management services. *See* Appx. 191, 370-72. Together, those services reach over 1,000 children, comprising nearly 90% of children served by CSS through its contracts with the City. *See* Appx. 355-56. Finally, in seeking to resolve this dispute, the City has not singled out CSS for

any burden, but rather has offered CSS the same contract that it offered to other foster agencies. *See* Appx. 374, 388-89.

There is no evidence here that the City has ever considered CSS's beliefs about same-sex marriage as a reason to treat it less favorably than other agencies. CSS does not (and cannot) explain why the City, which is supposedly eager to persecute it for its beliefs, has long respected those beliefs and funneled millions of dollars to CSS for social programs.

The absence of animus is confirmed by an assessment of why (and when) the City adopted a non-discrimination policy covering LGBTQ persons. Whereas CSS describes the City's policy as a bolt from the blue—invented last year to exclude it from the foster services programs—the Fair Practices Ordinance has forbidden sexual orientation discrimination since 1982 and Philadelphia's Home Rule Charter has required a sexual orientation non-discrimination clause in nearly every City contract since 2010. *See* City Br. at 7; Home R. Ch. § 8-200(2)(d). There is no evidence that either of these provisions was born of anti-religious motives.

Although CSS asserts that a non-discrimination policy has never applied to foster service contracts, the District Court correctly found otherwise. *See* Op. at 17-19. This finding follows from the plain language of the contract repeatedly signed by CSS. *See* Appx. 503-07, 1114-15. The District Court's finding is also supported by testimony showing that DHS always understood the non-discrimination policy to

apply and, consistent with that view, never authorized providers to turn away qualified prospective foster parents solely by virtue of a protected trait. *See* Appx. 204-05, 551. Last but not least, there is common sense to consider: why would the City have authorized excluding otherwise-qualified foster parents on a basis it had repudiated everywhere else in its public policy?[3]

As DHS Commissioner Figueroa explained, the City's motives for including a non-discrimination policy have nothing to do with religion. They rest, instead, on a general concern for equal protection and on concerns unique to this particular program. At a general level, excluding qualified parents solely because of their sexuality would do a disservice to children in the foster system and send "a very strong signal to [the LGBTQ] community that [its] rights are not protected." Appx. 483-84. "More importantly," DHS's large LGBTQ youth population would receive the message that while "we support you now, we won't support your rights as an adult." *Id.* at 484. In light of these secular concerns, which are reflected throughout its legal code, the City does not want to discriminate "against one particular community" by "excluding [its members] from allowing to become foster parents." *Id.* at 483; *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (holding that

[3] Even if this Court holds that CSS's older contracts did not actually incorporate the FPO, the fact remains that the City reasonably *thought* it did—and did not then act with anti-religious animus when it added a clear non-discrimination clause to its contracts after it was presented with a case of discrimination.

same-sex couples may exercise the right to marry, which "safeguards children and families").

In 2018, the City first learned that CSS was not complying with its service contract. Faced with CSS's unexpected assertion that the non-discrimination requirement didn't apply to it, the City decided to resolve any ambiguity by adding an even more explicit non-discrimination clause to its FY 2019 contract with all foster service providers. *See* Appx. 859-62. The inclusion of this clause thus reflects nothing more than best practices in contract writing: an effort to make clear what the contract (and the law) always required, not to assail CSS's religious beliefs. There is no reason to doubt—and every reason to believe—that the City would apply this term in exactly the same manner to *any* agency found to have violated it.

2. Neutrality: Allegations of Religious Targeting and Improper Statements

CSS contends that the City's illegitimate motives are revealed by Figueroa's decision to call mainly religious providers upon learning of non-compliance by two religious groups. CSS adds that official hostility to its religious beliefs is confirmed by several statements emanating from the Philadelphia government over the past several years. CSS is mistaken on both accounts.

First consider CSS's claim that the City's anti-religious animus is proven by its decision to target particular foster agencies for compliance checks. CSS Br. at 30-31. If DHS had suddenly decided to review compliance at all religious agencies, but

no secular ones, that would indeed suggest "selective enforcement." *Id.* at 31. But here, the trigger for DHS's investigation was a newspaper report that two providers, CSS and Bethany Christian, refused on religious grounds to serve same-sex couples. *See* Appx. 432. Presented with this information, Figueroa called CSS and Bethany Christian, who confirmed it. *See id.* at 432-33. Lacking any reason to believe that secular agencies objected to serving same-sex couples, Figueroa then checked with other agencies that might have similar, religious objections (in addition to calling a friend at one secular agency). *See id.* at 482-83. This approach does not reveal anti-religious enforcement. It simply reflects a reasoned judgment about who to contact in light of new reports about religious objections.

CSS tries to cast Figueroa's outreach to religious groups in a nefarious light by linking it to a series of statements made by City officials. *See* Br. at 26-27. But as the District Court found, this alleged City-wide conspiracy played no role in Figueroa's initial decision to close intake on grounds of CSS's non-compliance with the foster service contract. Nor did any statements by other City officials affect DHS's subsequent decision to dispel confusion about contractors' obligations by making the longstanding non-discrimination requirement explicit in the contract.

In particular, the District Court concluded that the Mayor's public statements criticizing the Catholic Church—most of which were made several years ago—were irrelevant because he did not influence Figueroa's decisions here. *See* Op. at 35-36.

Further, read in their entirety, the statements by the Philadelphia Commission on Human Relations and the City Council—neither of which controlled DHS's decision—reflect only due concern for implementing City-wide non-discrimination policies.

CSS hangs most of its argument on a claim that Figueroa told its leadership to "follow the City's view of 'the teachings of Pope Francis' and that it was not '100 years ago.'" CSS Br. at 27. But read in context, as they must be, neither of these statements support the conclusion that the City's non-discrimination requirement was a pretext to punish CSS for its religious beliefs concerning same-sex marriage. Figueroa's reference to Pope Francis appear to have represented her own religious view "as a Catholic who was educated by the Jesuit order." Op. at 37. And she explained her reference to the past as follows:

> [CSS] indicated that they had been doing this service for 100 years. And I explained that women didn't have the rights and African Americans didn't have the rights, and I probably would not be sitting in the room if it was 100 years ago.

Appx. 584. It cannot be religious hostility for political officials to observe that policies against discrimination have changed over time and that agencies must comply with those policies. This is particularly true given that Figueroa remains closely enmeshed with CSS on other foster service contracts, has worked hard to preserve the relationship with CSS, has never raised concerns about CSS despite

prior knowledge of its religious beliefs concerning same-sex marriage, and has never done more than require CSS to adhere to its contractual obligations.

In sum, Figueroa's statements on their own are hardly suggestive of religious targeting. If anything, her remarks and conduct suggest a desire for strong relations with CSS. And all of the other evidence cited by CSS as evidence of hostility to its religious beliefs is either irrelevant, outdated, or reflective of a valid, secular desire to enforce contractual policies. This evidentiary record simply does not suggest that the City applied its non-discrimination policy to CSS in a hostile or targeted manner.

3. General Applicability: Allegations that the City Privileges Secular Over Religious Concerns in Allowing Exemptions to its Policy

In addition to its claims of religious targeting, CSS alleges that the City has permitted violations of its non-discrimination policy for secular but not religious reasons. *See* Br. at 34-38. This contention rests on two errors concerning general applicability analysis, and on a misunderstanding of how the City's policy operates.

To see why, it's helpful to start by restating the basic rule. As this Court put it in *Blackhawk v. Pennsylvania*, "a law fails the general applicability requirement if it burdens a category of religious motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." 381 F.3d 202, 209 (3d Cir. 2004).

In testing a policy for compliance with that requirement, the first and most important step is to accurately identify the specific policy from which exemptions are allegedly being made. In *Combs v. Homer-Cent. Sch. Dist.*, for example, a group of parents brought a free exercise challenge to Pennsylvania's law imposing reporting and record-keeping requirements on those who decide to home-school their children. 540 F.3d 231, 242 (3d Cir. 2008). They argued that parents who chose other alternatives to public schooling did not face such requirements, and that they were thus deprived of an exemption afforded to other parents. *See id.* But as this Court noted, their argument rested on a flawed premise. Pennsylvania required that all children receive education and offered several routes to satisfying that mandate, none of which constituted an exemption to the relevant policy of compulsory public education. *See id.* Moreover, the parents "cite[d] no statutory waiver mechanism that gives the school districts the authority to waive or exempt some parents from the disclosure and review requirements" of the specific policy at issue. *Id.* Once the policy was properly identified, it became clear that there were no exemptions to it—and no mechanisms for waiving requirements for secular but not religious parents.

The next step is to ascertain whether the alleged exemptions "undermine[d] the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Blackhawk*, 381 F.3d at 209. Not all exemptions are equally

damning; only when exemptions are of the same kind do we ask if the government has privileged secular over religious reasons in deciding which one to grant.

That rule is illustrated by *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). There, to promote uniformity in police officers' public appearance, Newark forbade officers from growing beards. Two Muslim officers filed suit, contending that the policy violated the Free Exercise Clause because Newark allowed exemptions for medical but not religious reasons. The Court agreed: both exemptions would undermine the purpose of this policy to the same degree, and Newark lacked any legitimate reason for allowing a secular exemption while disallowing a religious one. *See id.* at 365. But the Court then emphasized that it did *not* view Newark's exemption for undercover officers as problematic. For obvious reasons, this exemption did not undermine Newark's goal of ensuring a uniformity in police appearance before the public. *See id.* at 366. Thus, in deciding whether the government has improperly allowed secular but not religious exemptions, only exemptions of a similar kind—that undermine the purpose of a policy—are relevant to assessing Free Exercise Clause compliance.

Here, CSS missteps twice. It first identifies the wrong policy in claiming that the City permits secular but not religious exemptions, *Combs*, 540 F.3d at 242, and then it treats as "exemptions" a distinct set of policies that do not undermine the purposes of the City's non-discrimination rule, *Fraternal Order*, 170 F.3d at 366.

To start, CSS misidentifies the relevant City policy. This case concerns the City's requirement that foster care agencies not engage in the blanket exclusion of prospective parents based solely on protected traits. *That* is the relevant policy. Notably, CSS points to no other instance in which an agency was allowed to exclude all qualified prospective parents for a reason barred by the City's non-discrimination policy. CSS is alone in seeking an exemption to engage in such conduct. Because the City has never allowed *any* exemptions, it can't be true that the City has privileged secular over religious motives in deciding which exemptions to grant.

CSS seeks to evade this conclusion by arguing that the City allows agencies to discriminate based on protected traits *elsewhere* in the foster system. Specifically, CSS contends that the City "expects" foster care agencies to consider race, disability, and marital status in conducing home studies and deciding where particular children should be placed. *See* CSS Br. at 31, 36. But these "exemptions" are not exemptions from the challenged policy, which requires agencies to work with *all* qualified parents who approach them without regard to protected characteristics.

Moreover, the "exemptions" CSS purports to identify are irrelevant because, unlike CSS's requested exemption, they do not undermine the purposes of the non-discrimination policy. As explained above, that policy exists to avoid the exclusion of otherwise-qualified parents on grounds unrelated to the best interest of children, and to signal to children in the foster care system that the City respects their rights.

See supra at 12. Consideration of mental health, ethnicity, and family relationships while making a holistic decision about where to place children is consistent with the goals of the non-discrimination policy. Indeed, the factors identified by CSS may be considered *only* insofar as they serve the best interests of a specific child. They may thus be invoked only to advance, not undermine, the purpose of the non-discrimination policy.

As a matter of law and common sense, allowing case-by-case and holistic consideration of protected traits to secure the best interests of a particular child while matching him or her to a new family is profoundly different than a categorical exclusion of qualified parents solely on a protected basis. Treating these practices differently reflects a neutral and secular judgment, not hostility to religion.

This analysis also requires rejection of CSS's claim that the City has allowed secular but not religious exemptions to its non-discrimination policy through a practice of "referrals." CSS Br. at 34-35. It is undisputed that agencies sometimes advise prospective parents that it might be preferable to work with an agency located closer to where the prospective parents live, or with an agency better equipped to handle a child's medical needs. Appx. 318-19. Some foster agencies specialize in recruiting parents from certain communities, including the LGBTQ community. Appx. 319-21. But there is no evidence that any agency has ever been allowed, for any reason, to deny its own services to prospective parents based on protected traits.

When a qualified parent approaches a foster services agency, he or she is entitled to be served by *that* agency, even if the parent subsequently decides to go elsewhere. CSS's claim thus fails: nonbinding agency recommendations that seek to advance the interests of prospective parents or foster children are not exemptions to a policy that prohibits agencies from refusing service to qualified parents.

Ultimately, there is no indication on these facts that exemptions of any kind have occurred, let alone that secular reasons have been privileged over religious ones in granting them. CSS's claim that the Free Exercise Clause requires an exemption from this policy in the City's proposed FY 2019 contract is without merit.

C. CSS Errs in Arguing that Evidence of Religious Hostility Requires *Per Se* Invalidation of a Governmental Policy

If the Court were to conclude that CSS has identified some evidence of religious hostility, that fact alone would not end the case. CSS misstates free exercise doctrine when it claims that "[g]overnment actions based on 'impermissible hostility toward . . . sincere religious beliefs' are *per se* unconstitutional." CSS Br. at 26 (quoting *Masterpiece*, 138 S. Ct. at 1729). Time and again, the Supreme Court has held that laws targeting religion for unequal treatment are subject to strict scrutiny. *See Trinity Lutheran*, 137 S. Ct. at 2019; *Lukumi*, 508 U.S. at 533. This Court has echoed that holding. *See, e.g.*, *Tenafly Eruv Ass'n*, 309 F.3d at 172; *Blackhawk*, 381 F.3d at 212. The question, then, would be whether the City's non-discrimination policy is justified under strict scrutiny. As Appellees explain, the answer is "yes."

See City Br. at 43-45; Intervenors Br. at 27-36. That is because the City had legitimate motives for this policy and those motives survive strict scrutiny.

CSS suggests that *Masterpiece* held otherwise, silently overturning decades of Supreme Court precedent to create a rule of *per se* unconstitutionality whenever a plaintiff adduces evidence of religious hostility. That is incorrect.

Masterpiece arose in an adjudicative setting, not in the context of legislative or administrative policymaking. 138 S. Ct. at 1729-30. The Supreme Court relied heavily on that fact to explain and justify its outcome. *See id.* at 1730 (emphasizing that "the remarks [here] were made in a very different context—by an adjudicatory body deciding a particular case"). And while it may make sense to automatically reverse the case-specific verdict of an adjudicative body when the decisionmaking process is tainted by religious animus, taking that approach to public policymaking would invite endless mischief. As Intervenors emphasize, "the suggestion that a disrespectful statement by a government official by itself could forever preclude the government from enforcing a non-discrimination policy has no support in the case law and makes no logical sense." Br. at 22. Imposing a rule of *per se* invalidity in cases with any trace of religious hostility would also throw free exercise jurisprudence wildly out of sync with First Amendment and Equal Protection cases, including those cited in *Lukumi*. *See* 508 U.S. at 532-542. The better path would be to follow Supreme Court precedent, which applies strict scrutiny to mixed-motive

cases involving evidence that improper motives played a role in decisions by legislative and executive bodies. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

But as we explained above, this should all be academic, given the absence of any indication that the City has violated CSS's rights. Further, as we explain below, commanding the City to provide CSS with a service contract that excludes the non-discrimination clause would raise substantial Establishment Clause questions.

II. CSS'S PROPOSED INJUNCTIVE RELIEF WOULD VIOLATE THE ESTABLISHMENT CLAUSE

As a remedy for the City's alleged Free Exercise Clause violation, CSS seeks a preliminary injunction commanding the City to grant it an exemption from the non-discrimination policy. That relief, however, would violate the Establishment Clause.

A. Improper Fusion of Religious and Governmental Functions

The most fundamental problem with the proposed injunction is that it would vest a core governmental function, rife with discretionary judgments, in a religious entity that has committed to exercise that responsibility on the basis of religious criteria. In Philadelphia, like in most other jurisdictions, the protection of vulnerable children, the identification of qualified foster parents, and the placement of children in temporary custody are core governmental responsibilities. As a result, this case does not involve run-of-the-mill contracts. Through these agreements, the City contracts for the provision of a vital social service that only the government—and

its agencies—may lawfully provide. There is no private alternative; potential foster parents and children *must* proceed through a system run by government-authorized providers. The agencies, in turn, are entrusted with public money and the authority to make life-altering, discretionary judgments.

While the City may contract with religious and secular agencies for the provision of services, it may not empower a religious entity to impose religious tests or enforce religious criteria on applicants for City programs. This follows from *Larkin v. Grendel's Den, Inc.*, which held that "the core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.'" 459 U.S. at 126. As *Larkin* explained, "the Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Id.* at 127; *accord Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 698 (1994).

There is thus a deep irony in CSS's invocation of religious neutrality. CSS (incorrectly) claims that the City failed to treat it with neutrality. As a remedy, it claims the right to violate the neutrality principle in rendering governmental services to the public on behalf of the City (and with City funds). But this contention, too, must fail. The City cannot delegate a core function to a private party that will apply religious criteria to citizens seeking access to that City service.

B. Limitations on Government Funding of Religious Practice

The irony in CSS's position runs deeper still. On page 30 of its brief, CSS contends that providing foster care services is akin to performing marriages. It then reasons that because the City can't require religious officiants to perform same-sex marriages, the City can't require CSS to serve prospective LGBTQ parents. But the government is never *required* to fund religious rituals such as marriage—and, under the Establishment Clause, it is rarely (if ever) permitted to do so. *See Bowen*, 487 U.S. at 608-09. CSS cannot sensibly argue that its religious practice is being burdened and then demand government funding for that same religious practice.

C. Third-Party Harm

Finally, CSS's requested relief collides with a distinct Establishment Clause principle: the prohibition on accommodations that harm third parties. An original purpose of the Establishment Clause was to prohibit government from requiring one person to support another's faith. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785). Forcing a class of non-adherents to suffer in order to accommodate adherents is the regulatory equivalent of taxing one group to support another's faith. *See Kiryas Joel*, 512 U.S. at 725 (Kennedy, J., concurring in the judgment) ("There is a point . . . at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment."); *accord Cutter*, 544 U.S. at 713, 720; *Thornton*, 472 U.S. at 709-10.

Here, granting CSS's requested relief would inflict substantial dignitary harm on fragile LGBTQ youth in the City's care. *See* Appx. 483-84. CSS's policy would also burden those children—and many others—by depriving them of qualified families. *See* Appx. 483-84. And it would send a signal to LGBTQ residents that people like them will be treated worse with respect to a profound personal decision. *See Obergefell*, 135 S. Ct. at 2600. The Free Exercise Clause doesn't require this result. To the contrary, the Establishment Clause forbids it. *See Masterpiece*, 138 S. Ct. at 1727 ("[G]ay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.").

* * * * *

CSS insists that all it seeks is a mere accommodation from the City's non-discrimination policy. But that isn't correct. In filing this lawsuit, CSS seeks the constitutional right to impose religious criteria on access to a social welfare program run (and funded) by the City. And it seeks that right on the basis of arguments that would radically transform—or overturn—core free exercise doctrines.

The stakes of this case are far-reaching. If CSS has a right to impose religious criteria in rendering foster care services, so do all other contractors. Consider, for example, a religious agency that excluded families in which women work outside the home. Or one that believed atheists or veterans fail to meet their religious criteria.

Or one whose religious beliefs mandated severe corporal punishment of children. Would they be allowed to ignore applicable provisions of their contracts? If not, how will that line be drawn without establishing favored religious interests?

This parade of horribles isn't necessarily hypothetical. Cases like these will inevitably be filed if this Court rejects the rules that have long structured contractual relationships between religious entities and government programs. The better path—which avoids such quagmires, adheres to precedent, and respects the Establishment Clause—is to hold that CSS must either comply with its contract or decline City funds. This may not be an easy choice for CSS. But it is required by the Constitution. And it allows cities to serve the public in partnership with the private sector without fear that some contractors will have a unique prerogative to rewrite their agreements in ways that undermine legitimate policy goals by establishing religious law.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that this Court should affirm the judgment below with respect to CSS's free exercise claims.

Dated: October 4, 2018

Respectfully Submitted,
/s/ Joshua Matz

JOSHUA MATZ
Counsel of Record
JOHN C. QUINN
MATTHEW CRAIG
KAPLAN HECKER & FINK LLP
350 Fifth Avenue | Suite 7110
New York, NY 10118
(212) 763-0883
jmatz@kaplanhecker.com

Counsel for Amici Curiae

APPENDIX A:
LIST OF *AMICI CURIAE*

Caroline Mala Corbin
Professor of Law
University of Miami School of Law

Frederick Gedicks
Professor of Law
Brigham Young University School of Law

Richard C. Schragger
Perre Bowen Professor of Law
Joseph C. Carter, Jr. Research Professor of Law
University of Virginia School of Law

Micah Schwartzman
Joseph W. Dorn Research Professor of Law
University of Virginia School of Law

Elizabeth Sepper
Professor of Law
Washington University Law School

Nelson Tebbe
Professor of Law
Cornell Law School

CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certifies that this brief contains 6,491 words, based on the "Word Count" feature of Microsoft Word 2016. Pursuant to Federal Rule of Appellate Procedure 32(f), this word count does not include the words contained in the Table of Contents, Table of Authorities, and Certificates of Counsel. Counsel also certifies that this document has been prepared in a proportionally spaced typeface using 14-point Times New Roman in Microsoft Word 2016.

Dated: October 4, 2018

By: */s/ Joshua Matz*
JOSHUA MATZ
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

Counsel for *amici curiae* certifies that on October 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 4, 2018

By: */s/ Joshua Matz*
JOSHUA MATZ
Attorney for *Amici Curiae*