No. 18-2574

United States Court of Appeals for the Third Circuit

SHARONELL FULTON, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, ET AL.,
Defendants-Appellees.

On Appeal from the U.S District Court for the
Eastern District of Pennsylvania,
No. 2:18-cv-02075-PBT (Hon. Petrese B. Tucker, U.S.D.J.)

Reply Brief of Appellants Sharonell Fulton, Cecelia Paul, Toni-Lynn Simms-Busch, and Catholic Social Services

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Catholic Social Services represents that it does not have any parent entities and does not issue stock.

/s/ Mark Rienzi
Mark Rienzi

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SUMMARY OF ARGUMENT

Defendants (and their amici) fill reams of paper with things this case is not about. This case is not about whether gay couples can be foster parents. LGBTQ couples and individuals have fostered children in Philadelphia for years and will continue to foster children regardless of what happens here. This case is not about the City adopting the religious beliefs or message of the Catholic Church. The City has made its views about Catholic's beliefs exceedingly clear. This case is not about a parade of horribles that would be unleashed if Catholic is permitted to abide by its faith. Rather, hundreds of pages of briefs now confirm that such dire predictions are baseless. There is simply no evidence that Catholic's religious exercise has prevented or even deterred anyone from becoming a foster parent—no evidence from the City, no evidence from Intervenors, and no evidence from amici.

Defendants focus on hypothetical questions because they know the answer to the actual questions in this case. Can the City use its contracting power to target an unpopular religious group and force it to act and speak in violation of its beliefs? Can the City repeatedly change its position about which policy it is enforcing and still say it is enforcing a

neutral and generally applicable law? Can the City tell a church which actions violate its religious beliefs and which ones do not? Can the City force private speakers to speak in favor of the City's views about marriage?

Six months ago, Philadelphia cut off foster care intake for Catholic Social Services, winding down the operations of a well-regarded agency and refusing to place children in award-winning foster homes. Many of Catholic's homes sit empty right now, even though Philadelphia is in the midst of a well-documented shortage of foster families. Appellants have demonstrated that the City has violated their rights in multiple ways and that they meet the standards for a preliminary injunction. That injunction should be granted so that Catholic can continue its century-old service to the children of Philadelphia, and so that children can be placed with qualified foster parents who have been callously sidelined by the City.

ARGUMENT

I. Catholic has shown a reasonable probability of success on its Free Exercise Clause claims.

A. The City targeted Catholic.

The City's brief lays the issues bare: it "remains willing to offer CSS a full contract," CityBr.54, only if Catholic provides certifications for same-sex couples. Appx.0861 ("[A]ny further contracts with CSS will be explicit in this regard."). The City thus proposes to change its foster care contract specifically to prohibit Catholic's religious exercise. Br.17.[1] This is not in response to any complaint against Catholic, nor any evidence that Catholic's work ever prevented same-sex couples from fostering. Philadelphia is doing so after the following actions, which it never denies:

- The City Council passed a resolution calling for an investigation to weed out "discrimination" committed under the "guise" of religious freedom[2];

[1] While the City claims it "understood the prior contract" to prohibit Catholic's policy, CityBr.33, it makes no effort to defend that understanding using the actual language the parties agreed to.

[2] Appx.0838-39.

- PCHR opened an inquiry and threatened subpoenas[3];
- The Mayor, who has publicly disparaged the Archdiocese, prompted the inquiry by DHS[4];
- DHS targeted its investigation at *religious* foster agencies[5];
- DHS's commissioner summoned Catholic's leadership to headquarters and told them to follow the City's view of "the teachings of Pope Francis"[6];
- DHS shut down Catholic's foster care intake.

This is religious targeting.

Defendants[7] attempt to distinguish *Masterpiece*: they claim that only Figueroa's statements are relevant, that the statements here were less inflammatory than in *Masterpiece*, that *Masterpiece* is about neutral adjudicators, and that Catholic needs proof of disparate treatment. CityBr.34-36; Invr.Br.20-23. Each argument fails.

Even in isolation, Figueroa's statements were evidence of religious targeting, and DHS's letter justifying its actions compared Catholic's

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[3] Appx.1009-10.

[4] Appx.1009; Appx.0585-86.

[5] Appx.0582-83.

[6] Appx.0324-25, 0583-84.

[7] "Defendants" refers to the City and Intervenors collectively.

policy to anti-Catholic discrimination and race discrimination. Br.27; *see Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (noting commissioner's statement that he "can list hundreds of situations where freedom of religion has been used to justify discrimination"). These are not stray remarks, but statements of decisionmakers in the course of decisionmaking. *See Masterpiece*, 138 S. Ct. at 1729.[8]

Contemporaneous statements of decisionmakers are only one factor: "Factors relevant to the assessment of governmental neutrality include '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'" of decisionmakers. *Masterpiece*, 138 S. Ct. at 1731 (quoting *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993)). The City asks this Court to ignore all other statements and actions, contrary to *Lukumi* and *Masterpiece*. CityBr.34-36.

[8] Figueroa's testimony about whether she acted alone is contradictory. Appx.0585-86.

On this point, the City wants the Court to look narrowly at the decision to shut down intake. CityBr.35-36. But elsewhere, the City wants the Court to look exclusively at the new contract. CityBr.42; *see also* Invr.Br.6. Is the Court to believe that the investigation ordered by City Council, Appx.0838, the statements of the mayor, the opinions of DHS and its Commissioner, and the position of the City's Human Rights Commission are irrelevant, and this is a sudden and unrelated contract revision? Religious targeting taints both the intake shutdown and the various straws at which the City has grasped since—the "must certify" policy, the FPO, and the alleged new contract.

Nor is *Masterpiece* limited to neutral adjudicators: "'*all officials* must pause to remember their own high duty to the Constitution and to the rights it secures.'" *Masterpiece*, 138 S. Ct. at 1731 (emphasis added) (internal citations omitted). Here, the adjudicators were not neutral and the City did not wait for their decision. DHS took adverse action against Catholic on the basis of its own religiously targeted investigation. Meanwhile, PCHR opened an investigation "at the request of the Mayor" and threatened subpoenas. Appx.0864-65.

The City claims PCHR's actions were proper because it can initiate its own investigations. CityBr.33 n.10 (citing Phila. Charter § 4-701). But to do so, it must "sign and file a complaint," "promptly serve notice," notify the entity charged of its "procedural rights," and provide opportunity to "answer the complaint in writing." Phila. Code § 9-1112-13. Only *after* these steps may PCHR initiate an investigation and issue subpoenas. Phila. Code § 9-1115. PCHR never took any of those steps.[9] Where government agencies imposed penalties without adjudication, and the supposed neutral adjudicator disdained due process, there was no hope of the "neutral and respectful consideration to which [Catholic] was entitled." *Masterpiece*, 138 S. Ct. at 1729.

Finally, the City claims that Catholic must prove disparate treatment. CityBr.34-35. *Masterpiece* discussed disparate treatment, but that was not the sole basis for its decision. *See Masterpiece*, 138 S. Ct. at 1730 ("*Another* indication of hostility is the difference in treat-

[9] *See* Appx.0847 (asserting lack of jurisdiction), 864-65 (no claim that formal complaint was filed).

ment . . . .") (emphasis added). Regardless, there is ample evidence of disparate treatment. Br.30-37.

B. The City's actions were neither neutral nor generally applicable.

The City's claim that it acted pursuant to a neutral and generally applicable law ignores the first condition precedent: a law. Catholic demonstrated that the City never had an intelligible rule that applied to Catholic's actions, Br.30-37, and the City fails to rebut that showing. Absent an actual law that applies to Catholic, the City's action could only be considered either targeting or an individualized assessment of Catholic's actions, both of which trigger strict scrutiny. Br.26-30, 37-38.

In its May 7 letter, the City identified what Catholic calls the "must certify" policy—a policy that does not permit any agency to refer prospective families elsewhere—as a reason for its actions. Appx.0860 (citing Contract Section 3.21). Its Deputy Commissioner testified at length about the supposed policy.[10] The District Court relied upon this policy

[10] *See, e.g.*, Appx.0204-06, 0216-17. This testimony was disputed. *See, e.g.*, Appx.0126-29, 0318-21.

as the basis for its determination that the City has an "all comers" policy like that in *CLS v. Martinez*, 561 U.S. 661, 698 (2010).[11]

Now the City abandons that policy as the basis for its actions. CityBr.32.[12] The City has therefore forfeited any claim that adverse actions taken pursuant to this exception-ridden policy are legitimate. The Court need go no further.

Next, the City assures the Court it has a different, more carefully defined neutral and generally applicable policy it would rather defend: "the City's non-discrimination requirements." CityBr.40. The question, again, is which requirements? The requirement that only applies to public accommodations, about which the City makes only the most cursory argument?[13] That requirement is newly-minted, illusory and not generally applicable: the City never applied it to its own staff or ac-

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[11] Appx.0028-30, 0036-37; *see also* Appx.0039, 0043-44, 0051-53, 0057, 0061-62, 0069.

[12] The City disclaims the policy, but insists that agencies can provide information to couples, but not decline to perform home studies. This claim was disproved, as Catholic discussed at length, Br.30-31, 34-36, and the City offers nothing new to rehabilitate it.

[13] *See* CityBr.41-42.

tions[14] and never told secular agencies about it.[15] Or does the City mean the requirement in a proposed contract that is not before this Court and indeed, was never presented to Catholic for review?[16]

The truth is the City has no set policy but this one: Catholic's home study policy must be wrong, and so the City was "motivated to object" and prohibit it. CityBr.32. That is not a neutral and generally applicable law, but an outcome the City keeps making up policies to reach.

The Sixth Circuit rejected a similar attempt to apply an unwritten policy to prohibit a religious exercise: "[T]he University says that the department had a policy of disallowing *any* referrals during practicum. Where? . . . . Ample evidence supports the theory that no such policy existed—until Ward asked for a referral on faith-based grounds." *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012) (emphasis removed). The same is true here.

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[14] *See* Appx.0513-14.

[15] *See* Appx.0582-83.

[16] *See* CityBr.42. The City cites its City Charter, which applies to the City itself and not Catholic, and is an argument never raised below. CityBr.33; *compare* Dkt.45 (City's proposed findings of fact).

The only non-discrimination policy before the Court is the FPO, and it never applied because Catholic is not a "public accommodation." Br.31-33. The City has no response on this point, and it is therefore conceded. Intervenors claim the FPO applies because home studies are a service offered to the public. Invr.Br.24 n.10. But home study certifications cannot be a service offered to the public, as their outcome is designed to be selective. The City is clear that its interest is in whether an agency is "willing to certify 'otherwise qualified' same-sex couples." CityBr.11-12 n.1. That certification is based upon selective, discretionary criteria; it is nothing like buying a cup of coffee, train ticket, or hotel room.

Under the FPO, one of two things must be true: (1) home studies are *not* a public accommodation, and therefore the City had no generally applicable policy; or (2) home studies *are* a public accommodation, in which case the City permits—indeed, mandates—that agencies disre-

gard the FPO when making home study certifications. Br.36-37. Both paths lead to strict scrutiny.[17]

The City responds by pointing out that HHS sometimes permits consideration of race and disability. CityBr.41. How *HHS* frames its policies says nothing about whether *Philadelphia*'s law is neutral and generally applicable. This Court rejected a similar argument in *Fraternal Order of Police v. City of Newark*, where Newark argued that the ADA justified its differential treatment of secular and religious exceptions. 170 F.3d 359, 365 (3d Cir. 1999) (rejecting Newark's "contention that it provides a medical exception, but not a religious exception, because it believes that 'the [ADA] may require' a medical exception.") (citation omitted).

None of this is relevant to the question at hand: whether the City had a generally applicable policy that applied here. It did not. Home studies require consideration of factors including disability and family

[17] The City attempts to avoid relying on the FPO alone. But it identified the FPO and the "must certify" policy as the reasons for its actions, *see* Appx.0859-60, and it has not demonstrated that any other city law or regulation applies to Catholic.

or marital status. Br.36-37 (citing 55 Pa. Code § 3700.64); CityBr.15 ("providers consider state-mandated factors to determine whether a prospective foster parent can be certified."). These exceptions "undermine[] the purposes of" the FPO, and the City refuses to exempt religious conduct that (allegedly) undermines that same law. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).[18]

The City offers no response for its most vindictive action: penalizing Mrs. Paul, Ms. Fulton, and Ms. Simms-Busch by refusing to place any more children in their homes. The City claims their rights are "derivative." CityBr.55. But they have been directly harmed by the inability to carry out their religious calling. Without injunctive relief, they will also be unable to work with the agency that is "the best fit" for them—an ability the City argues is central to its actions. Appx.1017; CityBr.58-59. The City has deprived them of that choice, and its decision is unrelated to "the[] stated ends," since the treatment of already-certified foster

[18] The City defends its own consideration of race, disability, and other factors in placing children. The problem with the City's actions is not that such considerations are unwarranted, but that they demonstrate that the FPO never applied to foster care until the City needed a reason to justify its actions against Catholic.

families has nothing to do with future certifications. *Lukumi,* 508 U.S. at 538.

Finally, the City's attempt to focus only on contract renewal does no good. *See* CityBr.42; Invr.Br.6. The City freely admits that it has amended its contract language in order to make it "explicit" that Catholic's religious practice is prohibited. Appx.0861; CityBr.42 ("now that the City was aware of this compliance issue, going forward, it was clarifying that non-discrimination requirements apply to working with prospective foster parents."). Those amendments to the contract are designed to prohibit a particular religious exercise. Such policies are impermissible. *Lukumi*, 508 U.S. at 533 ("[A] law targeting religious beliefs as such is never permissible"); *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) (government may not "impose special disabilities on the basis of religious views or religious status"); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) ("[W]hen the State conditions a benefit in this way, *McDaniel* says plainly that the State has punished the free exercise of religion.").

C. The City used individualized assessments.

Catholic demonstrated that the City's actions involve individualized assessments. Br.37-38. The City claims these are irrelevant because they do not undermine the FPO. CityBr.41 n.13. But these individualized exceptions apply to the same contract provision upon which the City relied until switching gears in its latest brief. *See* Appx.1012; Appx.1071-72. The City's actions should face strict scrutiny.[19]

D. The City's contract does not shield it from the First Amendment.

Philadelphia admits Catholic is fully qualified to renew its contract but refuses to enter into one due to Catholic's religious exercise. The Supreme Court has held that the harm in such cases is "the inability to compete on an equal footing in the bidding process." *Trinity Lutheran*, 137 S. Ct. at 2022. *Trinity Lutheran* involved the exclusion of a church "from the benefits of a public program for which [it] is otherwise fully qualified." *Id.* A "[p]ublic program" includes government contracting: *Trinity Lutheran* relied upon *Northeastern Fla. Chapter, Associated*

[19] The City offers no justification for its refusal to extend any exception from its referral freeze to already-certified parents like Mrs. Paul. This is a separate reason to apply strict scrutiny.

Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 666 (1993), a government contracting case, for this conclusion. *Trinity Lutheran*, 137 S. Ct. at 2022. Defendants attempt to distinguish between government contracts and "public benefits," but that distinction cannot be sustained in light of *Trinity Lutheran*. *Id.*[20]

Trinity Lutheran is not the first case "recogniz[ing] the right of independent government contractors not to be terminated for exercising their First Amendment rights." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 686 (1996); *see also Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006) (First Amendment "extends to independent contractors").

Similarly, this Court has ruled in favor of "[c]ontractors [who] were able and ready to bid" on contracts with Philadelphia, "but could not do so for failure to meet" an unconstitutional city policy. *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 995-96 (3d Cir. 1993). In

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[20] Defendants rely on *Dumont*, but that decision distinguished *Trinity Lutheran* because plaintiffs alleged the government was actually funding the challenged religious activity. *Dumont v. Lyon*, No. 17-CV-13080, 2018 WL 4385667, at *28-29 (E.D. Mich. Sept. 14, 2018). Here, it is not. *See infra* at 29-30, 37-38. Moreover, *Dumont* merely denied a motion to dismiss, and that decision will be supplemented or supplanted as the case develops.

such cases, injunctive relief removing the unlawful barrier to contracts is the proper remedy. *See Contractors Ass'n of E. Pa. v. City of Philadelphia*, 893 F. Supp. 419, 447 (E.D. Pa. 1995) (issuing permanent injunction), *aff'd*, 91 F.3d 586 (3d Cir. 1996); *see also Adarand Constructors v. Pena*, 515 U.S. 200, 211 (1995) (government contractor could bring claim for injunctive relief against allegedly unlawful barrier to contract). Here, since the City asserts that the unlawful barrier is the but-for cause of Catholic's exclusion, an injunction directing the City to remove that barrier and proceed with the normal contract renewal is proper.[21]

Defendants rely heavily on *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 410 (6th Cir. 2007). The Sixth Circuit found an Establishment Clause violation because there was no "true private choice" and Teen Ranch "coerc[ed] children into participating in religious activities." *Id.* at 409, 406. Catholic, unlike Teen Ranch, participates in a system of true private choice where potential foster parents choose from 30 separate pro-

[21] Alternatively, Catholic asked for a preliminary injunction directing the City to resume referrals and continue operating under the old contract, which is regularly done. Appx.0618.

viders in order to, in the City's words, find "the best fit for you." Appx.1017.

It is no surprise that the Sixth Circuit found no Free Exercise violation where an Establishment Clause violation had already been found. The court dismissed Teen Ranch's Free Exercise claims in two sentences. *Teen Ranch*, 479 F.3d at 409-10. The cursory Free Exercise determination, like the district court's, relied upon *Locke v. Davey*, 540 U.S. 712 (2004). But *Locke* was premised upon the "historic and substantial state interest" in not providing "funding for vocational religious instruction alone." *Locke*, 540 U.S. at 725. *Locke* has since been limited by *Trinity Lutheran*. 137 S. Ct. at 2023-24.

The City's contention that it can simply decline to fund some constitutionally protected activities misses the point. City.Br.26 (citing *Rust v. Sullivan*, 500 U.S. 173, 178 (1991)). Catholic "would be breaking the law" if it tried to provide foster children with loving homes without the City's approval. Appx.308-09. Declining the contract, like withholding a license, extinguishes the ministry.

Finally, Intervenors warn of "staggering" consequences if the Free Exercise Clause or RFPA protect Appellants. Invr.Br.17-19. Their ar-

gument is devoid of evidence. The federal government and 21 states have RFRAs.[22] Ten states have laws specifically protecting religious child welfare providers.[23] Yet Intervenors (and amici) point to precisely zero evidence that any child welfare agencies have used these laws to shield actions that harm children.

The slippery slope argument also ignores Catholic's long and successful history of serving Philadelphia children. A ruling for Catholic does not open the floodgates. It merely prevents the City from unlawfully refusing to renew a contract with a group it admits is fully qualified to care for children.

The real danger is one that has plenty of precedent: the successive shutdown of religious child welfare agencies in Boston, Illinois, and Washington, DC, and the resulting loss of options for foster parents and at-risk children. *See* Appx.0020-22. If accepted, Intervenors' arguments would not just enable, but mandate, agency closures nationwide. *See infra* Part III.B.

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[22] *See* Federal and State RFRA Map, https://www.becketlaw.org/research-central/rfra-info-central/map/.

[23] *See* Brief for the State of Texas, et al. at 2.

II. Appellants have a reasonable probability of success under RFPA.

Even if the City's laws were neutral and generally applicable, Catholic would still be entitled to an exemption under RFPA. 71 Pa. Stat. § 2402(1). Catholic's religious exercise of providing foster care to Philadelphia children consistent with its religious beliefs is substantially burdened. Br.42-51.

The City concedes that Catholic's foster care is religious exercise. CityBr.47. Then the City claims there is no substantial burden because Catholic is just mistaken about whether completing the certification violates its religion, because the City thinks the certification does not really endorse same-sex marriages. CityBr.48-49. But the record is clear that Catholic sincerely believes the required statements in the home study would constitute a forbidden "written endorsement" of the same-sex relationship, and that "to provide a written certification endorsing a same-sex marriage" through a home study would "violate the religious exercise of Catholic Social Services."[24] State law requires consideration

[24] Appx.0312, 0389, 0549. The City avoids quoting the testimony it relies upon to make its argument, for good reason. Amato testified that it

of "existing family relationships" and the "[a]bility . . . to work in partnership" with the foster agency, resulting in a "decision to approve, disapprove or provisionally approve the foster family."[25]

The City asks the Court to second-guess the Archdiocese's determination about the moral import of a decision to certify a couple as foster parents. But "[i]t is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [their] creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Neither the government nor courts can serve as "arbiters of scriptural interpretation." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Instead, "[t]he narrow function of a reviewing court . . . is to determine whether there was an . . . honest conviction that [the act in question] was forbidden by his religion." *Id.* Philadelphia admitted that "Catholic viewed their position as a religious one," CityBr.54, and that the City is "not challenging

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was "not in the state regulations" that "that marriage is required." Appx.0366. This is a clear reference to Catholic's policy that couples be married to receive a certification. *Id.*; *see also* Appx.0360-64 (discussing these requirements). This is not some incidental, discretionary policy, but Catholic's way of dealing with the moral implications of approving a couple to serve as foster parents.

[25] 55 Pa. Code §§ 3700.64, 3700.69.

the sincerity of the religious belief or the doctrine." Appx.0358. The City might prefer a different interpretation of Catholic doctrine—indeed, it has said so—but the religious body's determination controls.

The City next claims there is no substantial burden because Catholic can simply engage in other religious exercise. But ministries, like children, are not interchangeable widgets. Congregate care serves teenagers, not young children. The CUA provides different services and is restricted to serving one portion of the City. *See* CityBr.8. The same argument was rejected in *Chosen 300 Ministries, Inc. v. City of Philadelphia*, No. 12-CV-3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012). There, because Philadelphia's proposed alternative changed the location and nature of the ministries' service, the court found that "[s]uch reductions in the number and quality of congregant relationships are inconsistent with the PRFPA." *Id.* at *20.

The Supreme Court unanimously rejected the same type of argument in *Holt v. Hobbs*. 135 S. Ct. 853, 862 (2015) (internal quotation omitted) (availability of "other forms of religious exercise" does not eliminate burden on foreclosed exercise). It is no answer to say that Catholic can do *other* things to serve *other* children.

The same is true of the individual appellants, each of whom testified to the difficulties their families would endure if they lost Catholic's support.[26] This is more than enough to show their religious conduct has been "constrain[ed] or inhibit[ed]" and that they have been denied a "reasonable opportunity" to engage in their religious exercise. 71 Pa. Stat. § 2403.

Since the City has substantially burdened Appellants' religious exercise, its actions must pass strict scrutiny. They cannot. *See supra* 44-51.

III. Appellants have a reasonable probability of success on their Establishment Clause claim.

City officials targeted religious groups for a special investigation, invoked supposed rules that were never announced to secular agencies, called the religious group into a government office, told them their beliefs were outdated, told them which religious leader to listen to and how to apply his teachings, and punished the group when it failed to comply. If those facts were a law school hypothetical for an Establishment Clause violation, the professor would scrap it as too easy.

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[26] Appx.0135-36; Appx.0150-52; Appx.0144-47.

Unable to muster a substantive defense, the City instead pretends one aspect of the argument was waived and claims that it somehow needed to take these actions to avoid violating the Establishment Clause.[27] The Intervenors then argue at length about supposed Establishment Clause violations that have no basis in fact or law.

A. Accommodating Catholic's religious beliefs does not violate the Establishment Clause.

The Intervenors assert that the City's targeted exclusion of Catholic is *required* by the Establishment Clause. Invr.Br.40. Not so. Under either the "private choice" analysis in *Zelman* or the historical analysis mandated by *Van Orden* and *Town of Greece,* allowing Catholic to continue its work easily passes constitutional muster.

Intervenors ignore the most apt test, the "private choice" test of *Zelman v. Simmons-Harris.* 536 U.S. 639, 662–63 (2002). As this Court recognized, *Zelman* upheld a "school voucher program . . . because parents' genuine and independent choices determined where children went to school." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 174

[27] The waiver argument is easily dispatched. The City cites the wrong pages of the transcript. The argument was made below at Appx.0692-93.

(3d Cir. 2002). Following *Zelman*, the Seventh Circuit upheld a program that allowed parole violators to choose between three secular and one religious halfway houses—even though the religious program involved mandatory Bible studies. *Freedom from Religion Found. v. McCallum*, 324 F.3d 880, 882–83 (7th Cir. 2003). Applying *Zelman*, the court held that the parolees had genuine "private choice," and that the fact that the programs were paid by government contract rather than voucher changed nothing. *Id.*; *see also Am. Jewish Cong. v. Corp. for Nat'l. & Cmty. Serv.*, 399 F.3d 351, 357-58 (D.C. Cir. 2005) (upholding AmeriCorps although 328 out of 1608 AmeriCorps-eligible schools were religious and some participants volunteered to teach religion classes).

More recently, the Supreme Court has emphasized the importance of historical practice in Establishment Clause analysis. In his controlling concurrence in *Van Orden v. Perry*, Justice Breyer found it "determinative" that the Ten Commandments display had existed for "40 years" prior to legal challenge. 545 U.S. 677, 702 (2005). And in *Town of Greece v. Galloway*, the Supreme Court held that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 572 U.S. 565, 1819 (2014) (quotation omitted).

Catholic's five decades of service to Philadelphia children under City contracts, unchallenged until 2018, easily passes muster under *Zelman* or the historical practices test. Philadelphia families seeking foster family certification have 30 agencies from which to choose, both religious and secular. Families choose Catholic out of genuine "private choice" and often *because* of its religious mission.[28] Catholic has operated in accord with its religious beliefs for over 100 years, and has maintained a contract with the City of Philadelphia for decades.[29] This "historical practice[]" of allowing both secular and religious groups to partner with the government to provide essential social services easily passes the test.

B. Government is not constitutionally liable for the actions of private actors.

The City argues that allowing Catholic to "impose religious criteria in certifying foster parents and to treat same-sex married couples less favorably than other couples" would "cause the City to violate the Establishment Clause as well as the Equal Protection Clause." CityBr.46.

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[28] Appx.0132-136, 0143-145, 0148-150.

[29] Appx.0305; 0307-309.

Intervenors make a similar argument. Invr.Br.40-41 n.20. This argument hinges on the theory the government becomes liable for all the actions of a private party simply by contracting with that party—even when that party is not deemed a state actor. But the Defendants cite no controlling case law for their novel theory; nor could they.

The Supreme Court has made clear that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible." *Id.* at 1004-05; *see also DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) (government not liable for the actions of private parties even if it is "aware" and does not stop them). This Court has similarly held that a plaintiff "cannot show the deprivation of a constitutional right through state action because his claims amount to nothing more than inaction on the part of the public officials." *Jackman v. McMillan*, 232 F. App'x 137, 139 (3d Cir. 2007).

Here, the City has not coerced or significantly encouraged Catholic's religious practice—far from it. The City has acknowledged that "what faith-based contractors do on their own time with their own resources is their own business."[30] The City testified that it has "nothing to do" with home studies, Appx.0532-34, and has acknowledged that "certifications and home studies" are "not expressly funded under the contract."[31] And the City's contract specifically states that Catholic is an independent contractor, not a City agent. Appx.1103. Thus, this Court should reject Defendants' attempt to impermissibly "impos[e] on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

Intervenors' argument would make the City responsible for all actions of faith-based agencies and prohibit the government from contracting with those agencies, even if the government wanted to do so.

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[30] Resp. in Opp'n to Emergency Appl. for Inj. Pending Appellate Review (hereinafter "Opp"), at 20, *Fulton v. City of Philadelphia*, No. 18A118 (U.S. Aug. 13, 2018).

[31] Opp.26. This concession distinguishes this case from *Dumont*, which hinged on the allegation the state funded the challenged actions. *See Dumont*, 2018 WL 4385667, at *28-29.

Such a rule would strike down faith-based foster care partnerships nationwide, triggering devastating consequences for foster children and families.

C. The Establishment Clause does not prohibit religious organizations from receiving government funding or partnering with the government.

Intervenors argue that the "Establishment Clause forbids the government from delegating a government function to a religious organization and then allowing that government function to be performed using religious criteria," as well as "using" government "funds for religious purposes." Invr.Br.41-42.

This argument misses the mark, both because the City doesn't pay Catholic for home studies and because the City is not just seeking to avoid *funding* Catholic, but rather seeks to *prohibit* Catholic from participating in family foster care in Philadelphia at all.

In any event, even if the case were just about funding, the Supreme Court has repeatedly affirmed that "[a]cts of private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). So long as the government has not "com-

pelled" the private action, "state regulation, even if extensive and detailed," does "not make a [private entity's] actions state action." *Id.* (quotation marks omitted). This is even true if "a private entity performs a function which serves the public," so long as it is not an "exclusive" government function. *Id.* at 842. Thus, the Court held that a private school was not a government actor even where the government referred students to the school under a state law and the school received over 90% of its funds from government funding. *Id.* at 830.

Similarly, this Court has recognized that "the provision of care to children in foster homes" is not "a traditionally exclusive government function." *Leshko v. Servis*, 423 F.3d 337, 343 (3d Cir. 2005) (noting that foster care in Pennsylvania began "as a service of private societies"). Even though foster parents receive "funds" from the state and may "serv[e] the state," their actions cannot "be fairly treated as that of the State itself." *Leshko*, 423 F.3d at 339, 341 (quotations omitted). The same is true of Catholic's actions here, which are not funded by the contract nor carried out under the contract. *See* Br.54-57.

Furthermore, the Establishment Clause does not prohibit government from contracting with religious organizations and providing fund-

ing to perform social services. For example, in *Bowen v. Kendrick*, the Supreme Court stated, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." 487 U.S. 589, 609 (1988). If the opposite were true, it would "jeopardize" a range of social service partnerships across the country, including with organizations like "religiously affiliated hospitals," homeless shelters, soup kitchens, refugee resettlement programs, and many others. *Id.* at 613. The Court noted that if there is an Establishment Clause challenge to a funding program, courts look to whether government dollars are actually "fund[ing] a specifically religious activity." *Id.* at 613, 621.

Here, the challenged activity is not an exclusive government function—it is a private agency's performance of a home study to determine whether the agency can certify the family for foster care. The City admits home studies are "not expressly funded under the contract." Opp.26. There can be no Establishment Clause violation where the government funds are not actually flowing to the challenged religious activity. Further, even if government funds were flowing to religious activi-

ties, the "appropriate remedy" would be to "withdraw" funds for that activity—not strike down the program. *Bowen*, 487 U.S. at 622.

The cases Intervenors cite to the contrary are inapposite. In *Larkin v. Grendel's Den*, the Supreme Court struck down a Massachusetts statute that granted churches and religious schools the power to veto liquor licenses within a 500-foot radius of their property. 459 U.S. 116 (1982). This law was deficient on multiple grounds that do not apply here. First, the law discriminated against secular organizations "who are otherwise similarly situated to churches." *Id.* at 120. Here, the opposite is true: The City allows all agencies to have different requirements for certifying foster parents, and it claims it has now updated its contracts to forbid Catholic's religious practice. Appx.0644-650.[32] Second, in *Larkin* the government granted a religious organization "unilateral and absolute power" to block private entities from obtaining a liq-

[32] Similarly, in *Bd. of Educ. of Kiryas Joel v. Grumet*, the Supreme Court struck down a statute that carved out a special school district exclusively for practitioners of a strict form of Judaism because the state "singl[ed] out a particular religious sect for special treatment" and there was no evidence that similar school districts would be offered for other religious groups. 512 U.S. 687, 706 (1994).

uor license. *Larkin*, 459 U.S. at 127. In contrast here, the City partners with 30 different foster agencies, all of whom can work with families. That is precisely why after three days of hearings, the City was unable to point to a single family who had been blocked from becoming a foster family because of Catholic's religious beliefs. Appx.0497-98. Like a minister who does not wish to perform a particular wedding, Catholic can stand aside, but unlike the churches in *Larkin* it cannot stand in the way and prevent licensure.

D. The Establishment Clause allows accommodation of religious organizations.

Intervenors argue that "The Establishment Clause forbids 'accommodations' of religion that impose substantial burdens on third parties," and rely on *Estate of Thornton v. Caldor* for this principle. Invr.Br.43. But in *Caldor*, the Supreme Court invalidated a state law requiring that private employers give Sabbatarians their preferred day off, no matter the cost to the employer. 472 U.S. 703, 708 (1985). An across-the-board legal obligation imposed on private third parties is the opposite of laws narrowly exempting private religious organizations on a case-by-case basis. The Court distinguished *Thornton* in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 n.15 (1987). The

Thornton statute "had given the force of law to the employee's" religious practice by requiring the private employer to follow it. *Id*. But in *Amos*—as here—the accommodation simply refrained from imposing a burden on the Church, and "it was the Church[,] . . . and not the Government, who put [the employee] to the choice of changing his religious practices or losing his job." *Id*.; *see also Protos v. Volkswagen of Am.*, 797 F.2d 129, 136 (3d Cir. 1986) (exempting an employee from Sabbath labor maintained "our 'happy tradition' of avoiding unnecessary clashes with the dictates of conscience").

In *Thornton*, Justice O'Connor likewise distinguished between the statute there and exemptions from government burdens: the *Thornton* statute "attempts to lift a burden on religious practice that is imposed by private employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause." *Thornton*, 472 U.S. at 712 (O'Connor, J., concurring) (emphasis removed). Thus, the Supreme Court has made clear that giving the religious adherent's practice "the force of law" (as in *Thornton*) is "very different" from exempting a religious practice from government-imposed

burdens, in which case "it [is] the Church[,] . . . and not the government" who affects third party's interests. *Id.*

The Supreme Court has refused to apply *Thornton* to a situation where "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). In *Burwell v. Hobby Lobby Stores,* the Court explained that such "consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest" under strict scrutiny. 134 S. Ct. 2751, 2781 n.37 (2014) (quoting *Cutter*, 544 U.S. at 720). Intervenors' claims fail because the burdens on third parties will be considered as part of the strict scrutiny analysis. Here, the analysis shows that the City's actions are unjustified. Another case might turn out differently. This balancing test is perfectly consistent with the Establishment Clause.

IV. Appellants have a reasonable probability of success on their compelled speech claim.

Defendants make two arguments in response to Catholic's compelled speech claim: First, that state-mandated home studies are services for which the City compensates Catholic under their contract; second, that

"simply" certifying same-sex couples does not constitute an "endorsement" of their relationship. CityBr.50, 53. Neither argument has merit.

The foster care contract does not compensate Catholic for certifying foster families. Foster parent certifications are—like many licensing requirements—contract prerequisites. Defendants cannot point to a single sentence within the services portion of the contract (those provisions delineating Catholic's contractual obligations) that either requires Catholic to perform home studies or compensates Catholic for them. Instead, the generic language it cites comes from a separate perambulatory paragraph titled "Problems and Issues to be Addressed," which outlines the overarching problems facing Philadelphia foster children. It discusses the importance of an "increased focus" on recruiting foster parents, but neither requires Catholic to perform a certain number of home studies nor regulates them in any way. Appx.1033. In a contract over 80 pages long, such an omission is telling.

Having failed to find supportive contractual language, the City resorts to flawed reasoning. It notes that "[a] foster parent cannot care for children for CSS unless that foster parent has gone through a home study." CityBr.52. Then, based on this single premise, it concludes that

certifications are "integral" to the contract. CityBr.52; Invr.Br.30. That argument is logically flawed: contract *prerequisites*—like licenses, certifications, or even college or graduate degrees—are not the same as contracted-for *services*. *See* Br.56. For example, clients do not contract with law firms for the *service* of their lawyers' bar memberships, even though bar membership is a prerequisite to providing the client with legal advice.

Philadelphia's logic also runs headlong into *AOSI*, which warned that "the definition of a particular program can always be manipulated to subsume the challenged condition," and cautioned courts to ensure governments do not simply "recast a[n] [unconstitutional] condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Agency for Int'l Dev. v. AOSI*, 570 U.S. 205, 215 (2013) (internal citations and quotations omitted). Here, the City attempts to subsume the certification process within the contract by forcing Catholic to comply with new conditions on certifications, or stop providing foster care. *See* CityBr.26. This "result[s] in an unconstitutional burden on [Catholic's] First Amendment right." *AOSI*, 570 U.S. at 214.

The City further attempts to distinguish *AOSI* by arguing that Catholic misunderstands its own religious beliefs. They suggest Catholic should certify same-sex couples because, in their view, doing so is not the same as making a "policy statement" on same-sex marriage. CityBr.53. In short, they claim that merely certifying same-sex couples cannot *possibly* violate Catholic's religious beliefs. Thankfully, Philadelphia does not get to make that call. *See supra* at 20-22.

V. The City retaliated against Catholic for protected activity.

The City does not deny its actions are meant to deter Catholic's religious exercise, nor could it. The City relies completely on the argument that Catholic was "unwilling[] to abide by the terms of its contract." CityBr.54. The City's only response to Catholic's retaliation claim *assumes* that foster care certifications are services provided by Catholic and paid for by the City. But, as explained above, the City does not compensate Catholic for performing home studies, nor can the City point to a contract provision treating certifications as contracted-for services.

Without this assumption, the City's brief no longer contains a single justification for its retaliatory conduct. Similarly, it is clear the City has

put an unconstitutional condition (contract non-renewal) on Catholic's protected First Amendment activity. *See McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("[T]o condition the availability of benefits . . . upon this appellant's willingness to violate a cardinal principle of his religious faith . . . effectively penalizes the free exercise of [his] constitutional liberties." (internal citations and quotation marks omitted)); *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.,* 138 S. Ct. 2448, 2476 (2018) (noting that speech on the issue of sexual orientation "occupies the highest rung of the hierarchy of First Amendment values and merits special protection." (internal quotations omitted)).[33]

[33] Even if the contract did compensate Catholic for foster care certifications, there is ample evidence showing that the City's actions resulted from animus toward Catholic's religious beliefs and protected speech. *See* supra I.A, B and V. This is all Catholic needs to show, since the City has not contested the fact that non-renewal of Catholic's contract is retaliatory conduct. *See Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010).

VI. The Equal Protection Clause does not require the City to exclude Catholic and its certified families from serving foster children.

The Court observed in *Obergefell v. Hodges* that Appellants' and others' beliefs about the nature of marriage are "based on decent and honorable religious or philosophical premises" that are "central to their lives." 135 S. Ct. 2584, 2602, 2607 (2015). Intervenors ask this Court to rule that those "decent and honorable" beliefs disqualify Catholic from contracting with the City and, therefore, preclude foster families certified by Catholic from receiving foster children. Invr.Br.44-45. That contention founders on two shoals.

First, the City's decades-long relationship with Catholic has never implicated the Equal Protection Clause. Catholic is not a state actor. *See infra* Part III.B. Catholic's foster care program preexists its City contract and, across its programs, Catholic's services to Philadelphia operate at a multi-million-dollar loss. Appx.0309, 0313-14. And the City's contract could not be clearer: Catholic "shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City." Appx.1103, 0534.

Treating all foster care agencies as state actors would have disruptive consequences. Some organizations discriminate on the basis of disability so that foster families can request to serve a child with serious medical needs.[34] Additionally, some agencies target or recruit heavily from specific groups, including the Latino and Native American communities.[35] Defendants' arguments would transform these actions into state action and subject them to Equal Protection challenges.

Second, even if Catholic's beliefs could be ascribed to the City, the City does not violate the Equal Protection Clause by allowing Catholic to refer couples. Merely remedying a non-neutral law (or lifting a government-imposed burden) does not require the City to make a sexual orientation classification.[36] Accommodating Catholic's beliefs would therefore "be upheld against equal protection challenge if there is any

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[34] Appx.0318, 0126-28, 0174-75, 0208-09.

[35] Appx.0216-17, 0318-21, 0128-29.

[36] Intervenors argue for heightened scrutiny, citing *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013) (invalidating DOMA) and *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014). Unlike this case, *Windsor* and *Whitewood* involved legislation that facially drew a classification by defining marriage to the exclusion of same-sex unions, and so are inapposite.

reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 313 (1993). The rational bases for an inclusive foster care regime are straightforward: accommodating faith-based foster care organizations would alleviate "governmental interference with the exercise of religion," *Amos*, 483 U.S. at 339, and expand the pool of foster families, allowing Catholic to continue its work, which the district court acknowledged "has benefitted Philadelphia's children in immeasurable ways." Appx.0006.

Intervenors rely on cases where the government itself made classifications based on sexual orientation, not where the government protected private action while still welcoming gay couples. Mississippi's statute banning same-sex couples from adopting children was state action and was rejected as inconsistent with *Obergefell*. Invr.Br.45 (citing *Campaign for S. Equality v. Mississippi Dep't of Human Servs.*, 175 F. Supp. 3d 691, 697 (S.D. Miss. 2016)). So was Arkansas's statute requiring birth certificates to record a mother's opposite-sex spouse but not a same-sex spouse. Invr.Br.45 n.24 (citing *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017)). But here, there is no such state action, and exclud-

ing Catholic from foster care would only diminish the pluralism the Supreme Court has directed the courts to respect. *See Masterpiece*, 138 S. Ct. at 1731; *Obergefell*, 135 S. Ct. at 2602, 2607.

Equal protection principles prevent states from excluding same-sex couples "from becoming foster parents based upon morality and bias." *See Dep't of Human Servs. v. Howard*, 238 S.W.3d 1, 6 (Ark. 2006). Those principles also protect Catholic. The same appeal to government neutrality that was used as a shield to defend same-sex couples' access to foster care, Intervenors now wield as a sword to exclude Catholic from serving foster children outright. This case is not about whether state majorities can exclude same-sex couples from foster care. It is about whether a municipality can require faith-based foster care agencies to violate their sincere religious beliefs about marriage—beliefs that may well offend the majority in Philadelphia—as a condition for serving foster children.[37]

[37] *See* Appx.0583-84 (advising Catholic to change its religious beliefs because it is "not 100 years ago" and "times have changed.").

Having failed to prove that the City's actions were justified by another constitutional provision, the City must face strict scrutiny.

VII. The City's actions fail strict scrutiny.

A. The City fails to carry its burden.

The City bears the burden of proving it used the "least restrictive means" of serving a "compelling governmental interest." *Holt*, 135 S. Ct. at 863. Doing so would require coming forward with evidence of an "actual problem in need of solving." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799-80 (2011) (internal quotation marks and citation omitted). As the City well knows, it must adduce actual "evidence" because even "plausible hypotheses are not enough to satisfy strict scrutiny." *City of Philadelphia*, 6 F.3d at 1008. "[A]mbiguous proof will not suffice." *Brown*, 564 U.S. at 800.

The City utterly fails to carry this burden, offering less than a page-and-a-half of generalizations, complete with zero citations to the over 1,100-page record developed below. CityBr.43-45. This failure is no surprise, because the three-day hearing revealed not a single same-sex couple who has approached Catholic asking for a home study, and the City never considered foster care to be a "public accommodation" subject to its FPO until this case. Br.31-33, 36-37.

B. Intervenors fail to carry the City's burden.

Intervenors at least try to carry the City's burden, but they too fail. Invr.Br.27-36. Their arguments unwittingly do more to support Catholic's position than the City's. Intervenors rely on what they obviously consider a failure of evidence: "it is unknown how many other faith-based agencies" would have objections, Invr.Br.30-31; "LGBT people *could* face discrimination" in other contexts, Invr.Br.31 (emphasis added); "Of course it's impossible to know how many families would be deterred from coming forward," Invr.Br.32.

Intervenors are certainly correct about the failure of the City to prove, with evidence, any alleged parade of horribles. But Intervenors miss the crucial point: where the best the government has is guesswork, it fails strict scrutiny.

Intervenors' arguments also strongly support Catholic's view that it is counter-productive and harmful to children for the City to continue refusing to place children with Catholic's families. Intervenors correctly note that: "[t]here is a need for more families," Invr.Br.29; that "the City cannot afford" to lose "any qualified families," Invr.Br.29-30; that excluding qualified families "means children can lose out on families

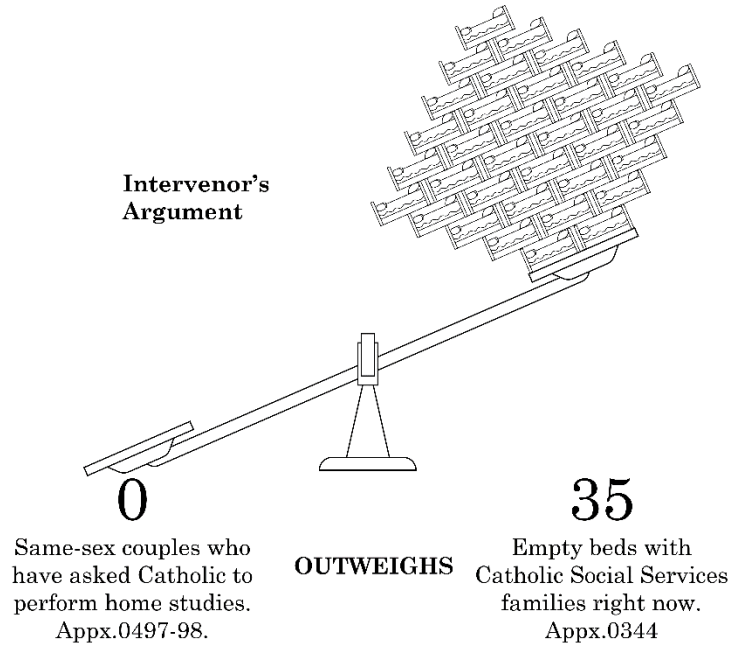
they desperately need," Invr.Br.30; and that children should "have access to all available families," Invr.Br.32.

Yet somehow, Intervenors think it would be "Orwellian" to conclude that excluding *Catholic's* families from foster care would harm children. Invr.Br.34. Under this 2+2=5 logic, even if some of Catholic's qualified families would be lost—meaning that children would "lose out on families they desperately need," Invr.Br.30—that harm is "outweigh[ed]" by the harm from allowing "discrimination," Invr.Br.34.

It is not Mr. Orwell, but rather basic arithmetic applied to the evidentiary record, that Intervenors should consult. The record is clear that (a) there is no evidence of a single same-sex couple who has ever sought this service from Catholic (much less a single one that would *only* work with Catholic) Br.67-68; (b) there is undisputed evidence that—right now—there are at least 35 qualified and available families whose beds are empty just because they work with Catholic, Appx.0344; and (c) there is undisputed evidence that families currently working with Catholic would be devastated if forced to transfer away from Catholic and some are unsure whether they could even continue providing foster

care—and exercising their religious ministry—without Catholic's vital support.[38]

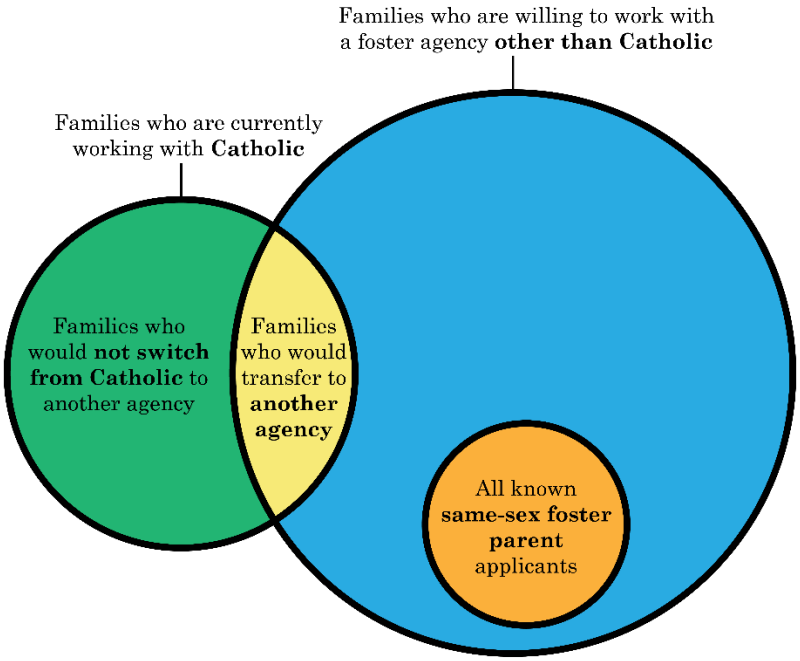
The absurdity of Intervenors' claim that the harm to children caused by Catholic's exclusion is "outweigh[ed]" by the benefit of stopping discrimination is depicted in Figure 1 below:



Declaring that the empty 35 beds are "outweighed" by zero requests does not make it so, particularly for the children who could be cared for in those homes.

[38] Appx.0118-19, 0131-32, 0143-44, 0148-49, 0999.

Indeed, Intervenors' argument fails as soon as it is confronted by the evidence. Figure 2 graphically illustrates how excluding Catholic will result in fewer qualified families serving children in need, while continuing to work with Catholic will not prevent or deter anyone.



While some of Catholic's families *might* transfer to other agencies (the yellow section), record evidence highlights the deep connections and relationships of trust these families have built with Catholic. As they testified, it would be difficult if not impossible to start over with another agency. Appx.0135-36, 0146. Families that would find it too difficult to

continue fostering without Catholic's support are highlighted in green—these families have already been certified and have a track record of excellent service. Appx.0143. All known same-sex couples who have sought certification fall within the orange section; not one has sought a home study from Catholic. If Intervenors seriously wish to ensure no qualified family is excluded and children do not "lose out on families they desperately need," Invr.Br.10, the evidence points in one direction: Catholic must be allowed to continue serving children in need.

Finally, Intervenors suggest that the City must exclude Catholic because doing otherwise might send a "harmful message" to LGBTQ youth that the City "permits discrimination against their kind." Undisputed evidence said otherwise. Appx.0663-665. More importantly, this theory would require rewriting cases which allow and often *require* the government to allow religious groups to engage in what Intervenors label discrimination. *See, e.g.*, *Masterpiece*, 138 S. Ct. at 1727 (clergy may decline to perform same-sex weddings); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (declining to apply ADA to church and minister). The ACLU's theory would also invalidate

long-standing federal civil rights laws like Title VII and Title IX which contain religious exemptions.

In any case, even if the City actually thought it had a compelling interest in the message sent by a third party, it has obvious less restrictive alternatives available, including expressly distancing itself from the religious limitations of contractors. Appx.1103, 0534. *See also* Br.64.

Finally, Intervenors and amici argue that allowing Catholic to respectfully refer couples to other agencies will cause "dignitary harm." Catholic is committed to affirming the inherent dignity of every person, which is one of the reasons it engages in foster care work: to "show respect for each person created in God's image" and serve the "vulnerable[] and disadvantaged." Appx.1032-33.

Yet the Supreme Court has cautioned against the government using its own notions of dignitary harm to silence speech. In *Boos v. Barry*, the Court rejected the argument that an "interest in protecting the dignity" of those confronted with offensive ideas gives the government a basis to burden speech. 485 U.S. 312, 322 (1988). And in *Hurley*, the Court cautioned that the government cannot interfere with speech to eradicate "biases" against LGBTQ individuals, "however enlightened"

such a tack "may strike the government." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 579 (1995).

The City's proposed solution, targeting Catholic and shutting down its foster care ministry, has already caused dignitary harm to its residents. As Sharonell Fulton testified, "It is insulting and hurtful for me to observe the government of the city in which I live needlessly denigrate and publicly condemn my own religious beliefs in such a discriminatory fashion." Appx.993.

In sum, neither the City nor Intervenors has come close to satisfying strict scrutiny.

VIII. The remaining preliminary injunction factors favor Appellants.

Defendants have failed to explain why a *status quo* that has existed for decades will cause irreparable harm if maintained during this litigation. By comparison, there is no doubt that Catholic's continued exclusion from Philadelphia's foster care system will result in available foster homes remaining empty, the closure of Catholic's foster agency and the likely removal of children from families that work with Catholic before this litigation is complete—a drastic measure and an irreparable harm. Appx.0377-80, 0830-32; *see also* Letter to the Court 2, ECF 49.

What is more, an interim contract will not—despite the City's claim, CityBr.18, 56—prevent Catholic's closure. Such a contract is the standard means to wind down a foster agency. Appx.0489-90. Thus, while Catholic will continue to receive some funding to supervise the ever-dwindling number of children in its care, once a critical mass of children move to permanent homes or are transferred elsewhere, Catholic's program will be forced to close; this will most likely occur months if not *years* before litigation is complete. App.1150. The City continues to fault Catholic for acting as any good employer would and doing everything in its power to avoid laying off staff. CityBr.19, n.7. But as Catholic has already explained, this is temporary relief for an inevitable result. Br.64-67.

Similarly, Defendants cannot point to a single equitable factor that favors shutting down Catholic. All Defendants can point to are generic interests that are not even advanced by the City's actions. First, Defendants focus on "maximizing the breadth and diversity of the pool of foster parents" but they do not explain *how* closing a well-regarded foster care agency with a broad network of qualified foster families will advance that interest. Invr.Br.47; CityBr.58. Having fewer agencies

does not "maximize the breadth and diversity of the pool"—it shrinks the pool.

Second, Intervenors point to "the City's interest in ensuring that government services are accessible to all Philadelphians." Invr.Br.47. But this too is a red herring: Defendants cannot point to a *single* person actually harmed by Catholic's policy. In short, there is no evidence that Catholic's continued charitable works are discouraging or excluding anyone from becoming a foster parent. By contrast, refusing to place children with Catholic's certified foster families while this litigation continues sends a strong message to those who share Catholic's beliefs: namely, that the City does not value your charitable works because of your religious beliefs. The equities therefore favor granting a preliminary injunction and permitting children in need to be placed with Catholic's certified foster parents.

CONCLUSION

For the foregoing reasons, the District Court's ruling should be reversed and the case remanded with instructions to grant the preliminary injunction.

Dated: October 5, 2018

Respectfully submitted,

/s/ Mark Rienzi

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: October 5, 2018

/s/ Mark Rienzi
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND L.A.R. 31.1

I hereby certify that the following statements are true:

1. This brief is filed pursuant to a pending, unopposed motion for leave to exceed the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B) by filing a brief of up to 9,750 words. That motion was filed Tuesday, Oct. 2. The brief contains 9,749 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 29.1(b).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.
3. This brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and Windows Defender has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 5th day of October 2018.

/s/ Mark Rienzi
Mark Rienzi

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to counsel who have appeared for the parties and are CM/ECF participants.

Executed this 5th day of October 2018.

/s/ Mark Rienzi
Mark Rienzi