

Docket No. 18-2574

**United States Court of Appeals
for the Third Circuit**

SHARONELL FULTON, et al., Appellants

v.

CITY OF PHILADELPHIA, et al., Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania (No. 18-cv-02075)
Honorable Petrese B. Tucker

**Brief of Intervenors-Appellees Support Center for Child Advocates and
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenors-Appellees Support Center for Child Advocates and Philadelphia Family Pride represent that they do not have any parent entities and do not issue stock.

/s/ Catherine V. Wigglesworth
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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the First Amendment or the Pennsylvania Religious Freedom Protection Act require the City to grant a private agency a contract to provide government services using religious eligibility requirements that violate the City's laws and policies.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has been before this Court on Appellants' motion for an injunction pending appeal. Intervenor Appellees are not aware of any related cases currently pending before this Court.

STATEMENT OF THE CASE

The City of Philadelphia is legally obligated to care for children who are in the City's custody because they cannot remain safely in their homes. Appx. 165-67, 423-24. Some of these children must be placed with foster families.

Appx. 422. Like many state and local governments across the country, the City contracts out much of its public child welfare services work to private agencies.

Appx. 423, 429-30. One of those agencies is Catholic Social Services (CSS). *Id.*

For many years, CSS has contracted with the City to provide a variety of public child welfare services including case management (coordination of services for children in DHS care), the operation of congregate care facilities (including group homes for dependent children who cannot be in family foster homes and children who are adjudicated delinquent), and family foster care services.

Appx. 303-04, 355-56, 370-71, 380, 386, 429-431, 1018-41. Through these programs, CSS provided service for 1500 children last year. Appx. 356. 120 of these children were served through CSS's family foster care program. Appx. 304. Under its 2017-2018 contract, the City paid CSS over \$19 million in taxpayer funds. Appx. 1019-20. As of June 2018, CSS had approximately 100 licensed foster families who were caring for approximately 107 of the more than 5000 children in family foster care in Philadelphia. Appx. 304, 422, 423, 1154 (86% of the 6,000 children in out-of-home placement are in family foster care).

The only area of CSS's contracted services at issue in this case is family foster care services. The 2017-18 contract with CSS contained the same terms as the City's contracts with the other 29 agencies that provide family foster care services. Appx. 423, 429-30. CSS agreed to recruit, screen, train, and certify foster parents. *Id.*, Appx. 1033. And, as was true for the other 29 agencies, the contract prohibited CSS from discriminating against prospective families on the basis of race, sex, religion, sexual orientation and other characteristics covered by the Philadelphia Fair Practices Ordinance or otherwise rejecting families that meet DHS's standards. Appx. 503-07, 1071, 1114-15. These requirements help the City to assemble the largest and most diverse pool of foster families possible. Appx. 422, 426. Every child has unique needs, many children experience significant challenges, and not every family is a good fit for every child.

Appx. 572-73. The more families that are licensed and the more diverse the pool, the better each child's prospects are of being placed in a family that is well matched to meet his or her needs. Appx. 426, 428-29. The City has a special need for more families who will be supportive of older youth who identify as LGBTQ and has tried to recruit more families from within the LGBTQ community to help address this need. Appx. 426-27, 572.

In March of this year, the City learned that CSS is unwilling to accept prospective foster families who do not meet CSS's religious criteria, regardless of their qualifications and the needs of the children in Philadelphia's foster care system. Specifically, the DHS Commissioner was informed that two contracting agencies—CSS and Bethany Christian Services—were unwilling to certify same-sex couples as foster parents because they felt doing so would conflict with their religious beliefs. Appx. 432-33, 481-82. The Commissioner confirmed this with both CSS and Bethany, then called other faith-based foster care agencies to determine if any others had such a policy, and did not learn of any others.

Appx. 433-34. During the course of this litigation, the City learned that CSS enforced additional religious eligibility criteria for prospective foster families—excluding families that are unable to obtain a “pastoral letter” proving that they are observant in a religion, as well as families headed by unmarried different-sex couples. Appx. 310, 362, 363-64. (After the pastoral letter requirement was

revealed by a CSS official in court testimony, CSS wrote a letter to the district court stating that it would discontinue that requirement. Appx. 1186.)

Because CSS and Bethany Christian Services would not accept same-sex couples, in violation of the City's non-discrimination requirements, the DHS Commissioner suspended referrals of children to these agencies except where necessary to place children with relatives, siblings, or families with whom they had a prior relationship. Appx. 434-35, 486-87. City officials tried to persuade CSS to comply with the contract requirements. Appx. 583-84. *See also* Appx. 1013-14 (expressing that the City does "not wish to see our valuable relationship with CSS regarding foster care services come to an end" and its hope that CSS will be prepared to provide foster care services to all families that meet the City's standards). However, CSS was unwilling to change its policy. Bethany Christian Services agreed to comply with the City's non-discrimination requirements and the City intends to renew its contract with that agency. Appx. 491-92.

The City's 2017-18 contract with CSS expired on June 30. Appx. 388. The City offered CSS new contracts for fiscal year 2019 that continue as usual the provisions for case management and congregate care services and pays CSS over \$18 million for those services. Appx. 380, 1177-78. With respect to foster care services, the City advised CSS that it would renew that contract too if CSS would agree to comply with its non-discrimination requirements and accept all qualified

families including same-sex couples. Appx. 1175. Otherwise, the City said, it would be willing to enter into a limited foster care contract under which the City would continue payment to CSS to care for children who remain with CSS foster families, but would make no new child referrals absent special circumstances such as a child's prior relationship with a family or to keep siblings together.

Appx. 488-91. CSS says that as foster children cycle out of its families' care and are not replaced through new referrals, it will no longer have sufficient income to support its foster care staff, which will have to be let go. Appx. 344-46, 374, 387. Initially CSS said that would happen by July. Appx. 344.

When foster care agencies close for any reason, the foster parents can transfer their licenses to another agency and the children in their care can remain with them. Appx. 175.

In May 2018, CSS and three of its licensed foster parents sued the City and moved for a preliminary injunction requiring the City to resume referrals of children to CSS and to resume operating under the 2017-18 contract or enter into a new contract to provide foster care services for children in the public child welfare system even though CSS refuses to certify a class of qualified families solely because they do not meet its religious litmus test, in violation of the City's requirements. Complaint at 39, *Fulton v. City of Philadelphia*, No. 2:18-cv-02075, ECF 1 (E.D. Pa.); Memorandum of Law in Support of Plaintiffs' Motion for a

Temporary Restraining Order and Preliminary Injunction at 1-2, *Fulton v. City of Philadelphia*, No. 2:18-cv-02075, ECF 13-2 (E.D. Pa.). Because the 2017-18 contract expired on June 30, the only requested injunctive relief that is not moot is the request that the Court order the City to enter into a new contract with CSS on CSS's preferred terms. Appellants asserted that the Free Exercise Clause, the Free Speech Clause and the Pennsylvania Religious Freedom Protection Act entitle them to such relief.

On July 13, 2018, after a three-day evidentiary hearing, the district court denied Appellants' motion for a preliminary injunction, concluding that they are not likely to succeed on the merits of any of their claims, that they failed to demonstrate irreparable harm absent an injunction, and that the balancing of the equities does not support granting the requested relief. Appx. 3-69. Appellants appealed the denial of the preliminary injunction.¹

Intervenor-Appellee Support Center for Child Advocates serves as counsel for children in dependency proceedings for children in foster care in Philadelphia and advocates for public policy that supports their well-being. Order Granting Motion to Intervene at 3-4, *Fulton v. City of Philadelphia*, No. 2:18-cv-02075,

¹ While this appeal was pending, Appellants sought an emergency injunction pending appeal from this Court and from the Supreme Court, both of which were denied. Order Denying Motion for Injunction Pending Appeal, *Fulton v. City of Philadelphia*, No. 18-2574 (3d Cir. July 27, 2018); Order, *Fulton v. City of Philadelphia*, No. 18-2574, 585 U.S.____ (Sept. 5, 2018) (Alito, J.).

ECF 69 (E.D. Pa.). Intervenor-Appellee Philadelphia Family Pride is a membership organization of LGBTQ+ parents and prospective parents (including foster and adoptive parents) and their children, and works to recruit more foster parents from the LGBTQ+ community. *Id.* at 3-4. Intervenors moved to intervene as defendants because of the impact of this case on the children and families they represent and on their organizations. *Id.* at 4. Their motion was granted on August 13, 2018. *Id.*

STANDARD OF REVIEW

A district court's decision to deny a preliminary injunction is reviewed for abuse of discretion. *Tenaflly Eruv Ass'n Inc. v. Borough of Tenaflly*, 309 F.3d 144, 156 (3d Cir. 2002). Conclusions of law are reviewed de novo. *Id.* In cases involving First Amendment claims, the court of appeals conducts a more searching review of the record, but findings of fact are entitled to deference when they concern witnesses' credibility. *Id.* at 156-57; *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir. 1998).

SUMMARY OF ARGUMENT

There is no basis in law for Appellants' extraordinary claim that the City can be forced to enter into a contract with a private faith-based organization to provide government services on terms that violate the City's policies because that organization has a religious objection to complying with the policies. Thus, the

district court correctly concluded that Appellants failed to demonstrate a likelihood of success on the merits of any of their claims.

Neither the right to free exercise protected by the First Amendment nor the Pennsylvania Religious Freedom Protection Act (RFPA) gives anyone a right to a taxpayer-funded contract to provide a government service in accordance with one's religious beliefs. Faith-based agencies have the same right as others to compete for government contracts to perform public services and the First Amendment guarantees them equal treatment; it does not give them the right to dictate the terms of the contract or the services the government will provide. Nor does the RFPA.

The consequences of CSS's position are staggering. If faith-based organizations had a constitutional or statutory right to a contract that allows them to offer government services only to those who meet their religious criteria, that would apply to an organization whose religious beliefs prevent it from accepting members of other faiths or no faith, interfaith or interracial couples, or anyone else. Moreover, if government-contracted agencies had a right to opt out of any contract provisions that do not accord with their religious beliefs, it would apply equally to a foster care agency that, based on its religious beliefs, allowed sick and injured children in its care to be treated only with prayer and not with medical intervention. Such a ruling would elevate individual agency beliefs above the legal imperative of serving the best interests of children in foster care. It would also

have implications for government-contracted work outside of the child welfare context, inviting limitless claimed rights to effectively dictate how government programs are run, making it impossible for governments to partner with the private sector in the provision of social services and other government programs.

Appellants contend that the City is only enforcing its non-discrimination requirements against CSS because the City is hostile to CSS's religious beliefs about same-sex marriage. The district court rejected this contention, however, because it has no support in the record. CSS's beliefs about same-sex marriage have long been known and the City continues to contract with CSS (and pay the agency millions of dollars) for numerous child welfare services. And there is no evidence that the City allowed any exceptions to its non-discrimination requirements for secular reasons and is targeting only religious-based violations. Thus, even if any statements made by City officials were considered to be disrespectful of CSS's religious beliefs, that by itself would not entitle Appellants to an injunction compelling the City to contract with CSS on terms that violate City policy. Neither *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), nor any other case supports such a claim.

Because the City's non-discrimination requirements are neutral and generally applicable, they are subject to rational basis review. But even if strict scrutiny were applicable, the City's requirements easily satisfy that standard. The

City has compelling interests in maximizing the pool of foster families to meet the needs of the thousands of children in Philadelphia's foster care system and preventing discrimination against Philadelphia residents in a government program. If agencies are permitted to turn away same-sex couples or any class of families based on characteristics that have no bearing on their ability to care for a child, children can lose out on families they desperately need, and which the City is obligated to provide.

The existence of other agencies that accept all qualified families does not, as Appellants' assert, alleviate these harms. There is no reason to assume, as CSS does, that CSS would be the only agency in Philadelphia that would choose to discriminate in the event such discrimination were authorized, and their premise that all agencies are fungible is contradicted by the record. More importantly, this statement ignores how discrimination impacts communities and society. The availability of other venues that do not discriminate has never been a basis to permit discrimination. And if the City were to officially sanction discrimination against same-sex couples within the public child welfare system in Philadelphia, the message to same-sex couples interested in fostering would be loud and clear—coming forward to care for a child in need comes with the risk of being subjected to the humiliation of discrimination. The City cannot afford such a deterrent to families who would open their hearts and homes to a child.

Appellants' free speech claim fares no better. The City is not compelling anyone to say anything; no one is compelled to accept taxpayer dollars to provide government services. And when an agency chooses to provide public services pursuant to a government contract, its services under the contract are not private speech.

Finally, the Constitution forbids the City from acceding to CSS's demands that it permit the agency to use religious criteria to exclude same-sex couples. The Establishment Clause prohibits the use of religious eligibility criteria in the provision of a government service, whether that service is provided by government employees or organizations contracted by the government for that purpose. Just as the City itself could not reject prospective foster parents based on a religious test, neither can the City hire and pay a private agency to do so. Furthermore, the City would violate the Equal Protection Clause if it allowed a government-contracted agency that provides public child welfare services to turn away same-sex couples.

This Court should affirm the denial of Appellants' motion for a preliminary injunction.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an

injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The burden is on the movant. *See Opticians Ass’n of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 192 (3d Cir. 1990). The first two factors are “gateway factors” that both must be met. *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). If both of those factors are met, then the court considers the remaining factors and determines if all four factors, taken together, favor granting the preliminary injunctive relief requested.

I. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS BASED ON THE FREE EXERCISE OF RELIGION

Appellants assert that the City’s refusal to enter into a new contract with CSS for family foster care services that permits CSS to exclude prospective families headed by same-sex couples violates their right to the free exercise of religion protected by the Free Exercise Clause of the First Amendment and the Pennsylvania RFPA. The district court correctly held that they do not have a likelihood of success on these claims.

A. There is no free exercise right to a government contract to provide public services according to one’s religious beliefs.

There is no right under the Free Exercise Clause to a government contract to provide public services according to one’s religious beliefs. CSS makes the extraordinary claim that the First Amendment and RFPA give it the right to force

the City to give it a contract to provide government services—and get paid millions of taxpayer dollars for it—even though it is unwilling to provide the services in accordance with the City’s requirements. The fact that a government contractor is a faith-based organization does not give it the right to dictate how contracted government services are provided. There are no cases identified by CSS that stand for such an extraordinary proposition.²

The Free Exercise Clause and RFPA protect against government burdens on the exercise of religion. The Supreme Court has made clear that the government’s refusal to fund constitutionally protected activity does not constitute a burden on the exercise of that right. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”) (citing *Harris v. McRae*, 448 U.S. 297, 317, n.19 (1980)); *id.* (“[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”) (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)). This is no less true when the right at issue is the free exercise of religion. *See Locke v. Davey*, 540 U.S. 712 (2004) (state’s decision not to fund religious instruction in its scholarship program did not violate the Free Exercise Clause). Moreover, “[t]he Free Exercise Clause

² Appellants’ reliance on *Masterpiece Cakeshop*’s discussion of the right of clergy not to perform religious wedding ceremonies is misplaced because religious wedding ceremonies are not government-sponsored activities.

simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”

Bowen v. Roy, 476 U.S. 693, 699 (1986). The City’s decision not to renew a contract with CSS to provide government services absent the agency’s agreement to the City’s terms does not constitute a burden on CSS’s exercise of religion.³

In *Teen Ranch v. Udow*, 479 F.3d 403 (6th Cir. 2007), the Sixth Circuit Court of Appeals considered a free exercise claim similar to the one asserted by Appellants and rejected the notion that there is a free exercise right to provide government-funded public services in accordance with one’s religious beliefs. In that case, a state-contracted agency that provided residential care to youth in state custody was incorporating religious programming in its services. Because this

³ Appellants’ reliance on *Holt v. Hobbs*, 574 U.S. ____, 135 S. Ct. 853 (2015), and *Chosen 300 Ministries v. City of Philadelphia*, No. 12-3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012), is misplaced because neither case involves government-contracted government services. In *Holt*, the Court struck down a prison grooming regulation barring beards after holding that the regulation substantially burdened prisoners’ exercise of religion. In *Chosen 300 Ministries*, the court held that a city ban on distributing food to the homeless in certain locations substantially burdened the religion of groups called by their faith to feed the homeless. 2012 WL 3235317, at *56-57. Those ministries were not operating under government contracts; they were independently volunteering to engage in food distribution. Had the ministries’ food distribution program been a government service provided under city contract, the Free Exercise Clause would not have given them the right to dictate the operation of the program. *Sherbert v. Verner*, 374 U.S. 398 (1963), is also inapposite because it involved a government bar to the right to access a public benefit available to everyone, not a right to government funding of one’s religious exercise.

violated state policy, the state issued a moratorium against further placements of children with Teen Ranch. Teen Ranch sued the state, claiming—much like Appellants here—that the moratorium on placements “violate[d] the Free Exercise Clause because it conditions the receipt of a governmental benefit on Teen Ranch’s surrender of its religious beliefs and practices and burdens the free exercise of Plaintiff’s religious beliefs. . . .” *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 837 (W.D. Mich. 2005). The Sixth Circuit affirmed the district court’s rejection of this claim after concluding that the Free Exercise Clause’s protection against government encroachment on religious beliefs and practices does not mean the government is required to fund religious activity. *Id.* at 838-39.⁴

In *Dumont v. Lyons*, No. 17-CV-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018), a federal district court in Michigan recently rejected the identical free exercise claim asserted by Appellants here. In that case, the primary issue was whether a state that permits government-contracted child placing agencies to use

⁴ CSS attempts to distinguish *Teen Ranch* by noting that the case included discussion of the issue of whether the teens had a “true private choice” regarding their placement, while here, they say, prospective foster parents have a private choice among 30 agencies. CSS Br. at 32 n. 111. However, just like the youth in Teen Ranch’s care, *children* in the Philadelphia foster care system do not have a choice of which agency cares for them. Moreover, this attempted distinction relates only to a separate issue in *Teen Ranch*—whether government funding of the religious activity is direct enough to violate the Establishment Clause—not the court’s holding that the Free Exercise Clause does not entitle one to government funding of religious activity.

religious criteria to exclude same-sex couples violates the Establishment Clause. (See pp. 39-43 *infra*, discussing the court's denial of motions to dismiss that claim). But the court, in denying defendants' motions to dismiss, also considered and rejected the argument made by a religiously-affiliated child placing agency that to prohibit it from using religious eligibility criteria in its state-contracted child welfare work would violate the agency's free exercise rights. *Dumont*, 2018 WL 4385667 at *28-31 (the court was "unconvinced that St. Vincent can prevail on a claim that prohibiting the State from allowing the use of religious criteria by those private agencies hired to do the State's work would violate St. Vincent's Free Exercise or Free Speech rights.").

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017), does not support Appellants' claim. In *Trinity Lutheran*, the Supreme Court established that the government cannot disqualify religious organizations from a public benefit because of their religious identity. *Id.* at 2021. A government contract to perform a government service is not a "public benefit." *Teen Ranch*, 479 F.3d at 409. But even if it were, as the district court found after a three-day evidentiary hearing, the City did not suspend referrals to CSS or decline to renew its contract because it is Catholic or because it holds particular religious beliefs but, rather, because of its refusal to comply with the City's non-discrimination requirements going forward. Appx. 13-15, 40-44; see pp. 19-26 *infra*. *Trinity*

Lutheran guarantees religious organizations equal treatment; it offers no support for Appellants' position that a government contractor's religious beliefs give it the right to opt out of requirements applicable to all other contractors. *See Dumont*, 2018 WL 4385667, at *28 (recognizing that *Trinity Lutheran* does not mean government must allow state-contracted faith-based organizations to use government funds to employ religious eligibility criteria).

Appellants' RFPA claim fails for the same reasons the free exercise claim fails. The City's decision not to continue paying taxpayer dollars to CSS to certify foster families if it will not comply with its non-discrimination requirements does not "constrain or inhibit conduct or expression mandated by a person's sincerely held religious beliefs," "significantly curtail[] a person's ability to express adherence to the person's religious faith," "den[y] a person a reasonable opportunity to engage in activities that are fundamental to the person's religion," or "compel[] conduct or expression which violates a specific tenet of a person's religious faith." 71 P.S. § 2403.

The consequences of the legal ruling CSS is seeking are staggering. If a government-contracted agency's religious beliefs give it the right to a government contract allowing it to offer government services only to those who meet its religious criteria, that would apply equally to an agency whose religious beliefs

prevent it from accepting members of different faiths or no faith,⁵ interfaith couples, interracial couples, single people, people who don't keep the Sabbath—or don't keep the “right” Sabbath—or who don't go to church, or otherwise fail to adhere to the agency's religious requirements. Requiring the City to allow each foster care agency to implement its own religious criteria for foster families could result in a patchwork of exclusions unrelated to the ability to care for a child, creating even more barriers to increasing the pool of qualified foster homes for children.

In addition, if Appellants' position is accepted, it would apply equally to an agency whose religious beliefs say it cannot provide medical treatment to children

⁵ In Texas, which has a law authorizing religious-based discrimination by state-contracted child placing agencies, several state-contracted agencies accept only Christian families. *See e.g.* Arrow Child & Family Ministries, <http://www.arrow.org/services-programs/foster-care/meeting>; Christian Homes and Family Services, <https://christianhomes.com/foster-care/>; Loving Houston Adoption Agency, <https://lovinghoustonadoptionagency.files.wordpress.com/2017/04/questionnaire.pdf>; South Texas 4 Kids, <https://www.4kidsofstx.org/>. *See* Brief for the States of Texas, Alabama, Arkansas, Louisiana, Missouri, Nebraska, Oklahoma, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin as Amici Curiae in Support of Appellants and Urging Reversal (Texas et al. Br.) at 6 (providing link to state website listing contracted foster care and adoption agencies). Other signatories to the States' brief also contract with agencies that limit eligibility to people of a particular faith. *See, e.g.*, Christian Heritage Nebraska, http://www.chne.org/foster_care/are_you_called_to_foster_care.html; *see* Nebraska Foster Care (April 27, 2017, <http://dhhs.ne.gov/publichealth/Documents/FosterCare2PerPage.pdf> (identifying Christian Heritage as a contracted agency)).

who are sick or injured. And it would apply to an agency whose religious beliefs say it must discipline children using corporal punishment that violates DHS's child abuse policies. Such a ruling would have implications for all government-contracted work, inviting limitless claimed rights to effectively dictate how government programs and projects are run, making it impossible for governments to partner with the private sector in the provision of social services and other government programs.⁶ The freedom of religion entitles faith-based organizations to participate in government programs on equal terms as other contractors; it does not entitle them to alter the government services provided to conform to their religious beliefs.

B. There is no basis for CSS's claim that the City targeted CSS because of its religious beliefs.

Appellants contend that the City is "excluding [CSS] and its foster families simply because [CSS] is part of the Catholic Church, and the City disagrees with the Church's views about same-sex marriage" (CSS Br. at 1). This has no basis in fact and was, thus, properly rejected by the district court, which found based on the evidence presented that "there is no evidence in the record that either DHS or

⁶ Perhaps this is why Appellants' *amici* Texas et al and 43 United States Senators and Members of the United States House of Representatives as *Amici Curiae* in Support of Plaintiffs-Appellants and Reversal (Senators et al. Br.) declined to engage on the free exercise and free speech claims that are before the Court.

Philadelphia has withheld a new contract or contractual compensation to CSS on religious grounds.” Appx. 37-38.

1. The City’s refusal to grant CSS a new contract that allows it to exclude same-sex couples was not based on anti-religious hostility.

Invoking *Masterpiece Cakeshop*, Appellants argue that the City’s insistence that CSS comply with its non-discrimination requirements was based on the City’s hostility toward CSS’s religious beliefs about same-sex marriage. They claim that the City is “waging a purely ideological fight to punish [CSS] for its views on same-sex marriage, and to punish foster parents merely for working with [CSS].” CSS Br. at 69. The suggestion that the City is punishing CSS for its beliefs is belied by the fact that most of the City’s contracted programs with CSS remain in effect. Appx. 380. CSS’s work providing case management and operating congregate care facilities—which represents more than 90 percent of its services to children to children in the foster care system and the bulk of the funds received from the City—continues unaffected. Appx. 304, 345, 356, 380. As Appellants noted, the Catholic Church’s views on same-sex marriage have long been known, (CSS Br. at 1), but this has never stopped the City from partnering with CSS.

The claimed evidence that the City’s actions were based on anti-religious bias does not support Appellants’ contention. The City continued to contract with CSS—including for the family foster care services at issue here—for years after

the mayor's comments expressing disagreement with the Archdiocese about various subjects.⁷ And the DHS Commissioner's comment that "it would be great if we listened to the teachings and the words of our current Pope Francis" was made in the course of her effort to maintain the foster care contractual relationship with CSS. Appx. 583-84; Appx. 42 (finding that the evidence, including that City offered to renew the contract if CSS would comply with the terms, showed the City's strong desire to keep CSS as a foster care agency).⁸ Moreover, the court credited the Commissioner's testimony as to the policy reasons behind the decision to suspend referrals. Appx. at 33-36.

Based on the entirety of the record, the court found that "there is insufficient evidence to support the conclusion that DHS has explicitly targeted CSS for religious reasons." Appx. 42, 44. *See also id.* at 44.⁹ The City's refusal to permit CSS to exclude same-sex couples was not based on the fact that CSS is a Catholic

⁷ In addition, the district court credited the testimony that the decision to suspend referrals to CSS was made by the DHS Commissioner and was not influenced by the mayor, Appx. 13-15, 39-42.

⁸ Appellants also cite a City Council resolution calling for an investigation and referencing the fact that the City's laws protect against "discrimination that occurs under the guise of religious freedom." This resolution is irrelevant given that the court credited the testimony that the decision to suspend referrals was made by the DHS Commissioner. Appx. 41. In any case, contrary to Appellants' suggestion, the resolution read in its entirety does not indicate religious-based targeting regardless how one may view that one excerpted clause out of context.

⁹ Appellants' Establishment Clause claim is based on the same alleged targeting of CSS for its religious beliefs and fails for the same reasons discussed here.

agency that espouses Catholic doctrine regarding same-sex marriage. It was based on the City's non-discrimination requirements that it applies to all agencies providing family foster care services, which are important to the City's child welfare policy goal of having the broadest possible pool of families for children and its interest in preventing discrimination against Philadelphia residents in government programs. The fact that CSS's non-compliance with the City's non-discrimination requirements is based on its religious beliefs does not mean that the City's enforcement of its requirements constitutes anti-religious hostility.

Finally, even if any of the comments made by City officials that were highlighted by CSS are deemed to be disrespectful of CSS's religious beliefs, absent a showing that hostility toward those beliefs was the reason for the City's enforcement action, or that the City selectively enforced its non-discrimination requirements only against religiously motivated violations (which, as discussed in section I(B)(2), *infra*, Appellants failed to demonstrate), that is not a basis to enjoin the City from including these requirements in government service contracts with CSS.

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. *Masterpiece Cakeshop* certainly says no such thing. In that case, the Court invalidated the

Colorado Civil Rights Commission's adjudication of unlawful discrimination by a business because it deemed the adjudicative process tainted by the adjudicatory body's hostility toward the business owner's religious beliefs. This conclusion was based on statements made by members of the Commission as well as the Commission's different treatment of other conscience-based objections to providing service. *Masterpiece Cakeshop*, 138 S.Ct. at 1729-30. Moreover, the Court did not enjoin the Commission from enforcing its law. There is no case supporting Appellants' request for an order forcing the City to abandon its policy decision to prohibit its contracting agencies from discriminating against prospective foster parents.

2. There is no basis for Appellants' contention that the City's non-discrimination requirements were selectively applied to agencies with religious objections to same-sex marriage.

Appellants claim that the City's non-discrimination requirements are not neutral or generally applicable under *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), because, they say, these requirements have never been applied to secular agencies. CSS Br. 30. But they offer no evidence that the City permits any agencies to violate these requirements.

In an attempt to support this assertion of selective enforcement, Appellants say "referrals [of prospective foster parents to other agencies] are made all the time." CSS Br. at 31, 34-35. But as the district court found based on the evidence

presented, while agencies are permitted to inform families of other agencies that may be better suited for their needs (because, for example, they have expertise in caring for medically needy children), they are not permitted to refuse to accept families that want to work with them. *See* Appx. 44; Appx. 127, 211-13, 284.

“There is no evidence in the record to show that DHS has granted any secular exemption to the requirement that its foster care agencies provide their services to all comers.” Appx. 43-44. Because there are no exceptions permitted to the non-discrimination requirements, this case bears no resemblance to *Tenaflly Eruv Ass’n, Inc.*, 309 F.3d 144, *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), or *Church of Lukumi Babalu Aye., Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the defendants permitted secular exemptions to laws but denied exemptions sought for religious purposes.

Appellants say the requirements at issue are “newly-minted policies” created just to single out CSS. But these requirements are in the contract the City uses with all foster care agencies. *See* Appx. 503-07, 1071; 1114-15.¹⁰ Even if that was

¹⁰ Appellants contend that foster care agencies are not public accommodations within the meaning of the Fair Practices Ordinance because, they say, they are not open to the public. However, the ordinance defines a “public accommodation” to include “[a]ny . . . provider . . . whether licensed or not, which solicits or accepts the patronage or trade of the public or whose . . . services . . . are extended, offered . . . or otherwise made available to the public; including all . . . services provided by any public agency or authority; any agency, authority or other instrumentality of . . . the City, its departments, boards and commissions.” Phila. Code Ch. 9-1100, Fair Practices Ordinance. And foster care agencies are clearly

not clear to CSS, once it came to the City's attention that an agency it pays with taxpayer dollars to find families for children in the public foster care system was unwilling to accept a class of potentially qualified families, it had no obligation to continue working with the agency. It was free to determine that it is not in the interests of Philadelphia's children for agencies to cast aside potentially qualified families for reasons unrelated to ability to care for a child.¹¹ The fact that the

open to all, even if only those who meet the standards for licensing can be certified. The public accommodations law at issue in *Abukhalaf v. Morrison Child & Family Servs.* No. CV 08-345-HU, 2009 WL 4067274 (D. Or. Nov. 20, 2009), cited by Appellants, defines public accommodation much more narrowly. *Id.* at *7-8. Moreover, the district judge in that case declined to adopt the magistrate's determination that a foster care agency is not a place of public accommodation. In *Doe v. County of Centre*, 60 F. Supp. 2d 417 (M.D. Pa. 1999), *reversed on other grounds*, 242 F.3d 437 (3d Cir. 2001), the court concluded that a family that was excluded from participation in a county foster care program because of a family member's disability was protected by the public accommodation provision in the Americans with Disabilities Act. *Id.* at 432.

Appellants further argue that foster care agencies cannot be public accommodations because DHS expects agencies to consider criteria banned by the Fair Practices Ordinance when doing home studies such as race and disability. CSS Br. at 31. The City does not permit agencies to turn away applicants because of their race or because they are disabled. The testimony made clear that a child's race or disability may be a factor considered in making a particular child placement, Appx. 515-17; there was no testimony that agencies may refuse to certify families because of their race or the fact that a family member is disabled. The fact that state law directs that home studies consider "existing family relationships" does not amount to discrimination based on family status or marital status. And issues of mental or emotional stability are only a potential issue for approval if they "might have a negative effect on a foster child." 55 Pa. Code § 3700.64(a)(2). A physical or mental disability is not inherently or necessarily a barrier to certification.

¹¹ For example, if the City learned that a contract agency refused to accept Republican prospective foster parents, even though there is no contract provision

refusal to certify a class of potentially qualified families has not arisen with any secular agencies does not mean that the City is permitting secular agencies to discriminate against any classes of families.

Moreover, any confusion about what the 2017-2018 contract did or did not require could be relevant to a claim for damages, but cannot stop the City from including non-discrimination requirements in any contract going forward. At this point, since the 2017-2018 contract has expired, the clarity or lack of clarity in that contract is not the issue.

Appellants say the fact that the DHS Commissioner contacted only faith-based agencies to inquire about their practices regarding same-sex couples after learning about CSS and Bethany's policies of exclusion demonstrates that the City applies its contract requirements only to faith-based agencies. The record does not support this conclusion. Given that CSS and Bethany's stated reason for excluding same-sex couples was a religious objection, it was logical for the Commissioner to inquire about whether other faith-based agencies were doing the same. She had no reason to believe that secular agencies had any objections to accepting same-sex couples, Appx. 483, thus, no reason to go through the motions of reaching out to

explicitly stating that they must accept Republicans or that they cannot discriminate based on political affiliation, the City would have every right to make the decision to enter into new contracts only with agencies that will accept all qualified families regardless of political affiliation.

secular agencies with the same question. This fact does not support the conclusion that the City permits secular agencies to violate its non-discrimination requirements.¹²

C. The City’s non-discrimination requirements satisfy any level of constitutional scrutiny.

The City’s non-discrimination requirements are neutral and generally applicable policies and, thus, any free exercise challenge to them is subject to rational basis review. *See Smith*, 494 U.S. 872. The Supreme Court has made clear that non-discrimination policies, including those covering sexual orientation, and “all comers” policies are well within the government’s authority to enact. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *Masterpiece Cakeshop*, 138 S. Ct. at 1727. And because, as discussed above, the government’s decision not to fund the exercise of religion does not constitute a substantial burden

¹² Appellants also try to shoehorn this case into *Lukumi* by noting that DHS makes case-by-case exceptions to the CSS intake freeze as needed to protect the best interests of children, but won’t make exceptions for CSS’s religious exercise. But the exceptions to the intake freeze are not exceptions to the non-discrimination requirements. They have nothing to do with how any agency treats prospective foster parents seeking certification. Referring children to CSS in cases where current CSS families have prior relationships with a child or are caring for a child’s sibling does nothing to undermine the purposes of the non-discrimination requirements.

on the exercise of religion, *see supra*, pp. 12-19, strict scrutiny is not triggered under the RFPA claim either.

Nevertheless, even if strict scrutiny were warranted here, the City has compelling interests in requiring its contractors to comply with its non-discrimination requirements, and these requirements are the least restrictive means of furthering those interests. *See* 71 P.S. § 2404(b); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (for free exercise claim, a law failing neutrality or general applicability requirements must be justified by a compelling interest and must be narrowly tailored to advance that interest).

The City has a compelling interest in prohibiting its contract agencies from turning away or deterring prospective families based on religious criteria that have no bearing on their ability to care for a child. It also has a compelling interest in prohibiting discrimination against Philadelphia residents in government programs, as well as ensuring that LGBTQ youth in foster care do not receive the harmful message that the City permits discrimination against their kind. Appx. 484. These interests independently satisfy strict scrutiny but are very much intertwined.

The Supreme Court has long recognized that governments have a compelling interest in preventing discrimination. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Bob Jones University v. United States*, 461 U.S. 574, 604 (1983). That is because discrimination “deprives persons of their individual

dignity and denies society the benefits of wide participation in political, economic, and cultural life.” *Roberts*, 468 U.S. at 625. A number of courts have recognized that government has the same compelling interest when the discrimination is based on sexual orientation discrimination. *See Barrett v. Fontbonne Acad.*, 33 Mass. L. Repr. 287 (Mass. 2000); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987); *N. Coast Women’s Care Med. Grp., Inc. v. Superior Court*, 44 Cal.4th 1145, 1158-59 (Cal. 2008); *cf. Masterpiece Cakeshop*, 138 S.Ct. at 1727 (“Our society has come to the recognition that gay 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.”).

Prohibiting government-contracted agencies from discriminating against same-sex couples and any other potentially qualified foster parents who fail to meet their religious criteria also serves the City’s critically important interest in caring for wards of the City who need to be placed in foster care. There are more than 5,000 children in family foster care in Philadelphia. Appx. 1154. There is a need for more families—and more diverse families—to ensure that children are placed with families who are well-matched to meet their needs. Appx. 426-29. That means that the City cannot afford for its contract agencies to intentionally turn away any qualified families who are willing and able to open their hearts and

homes to a child. Allowing agencies to exclude a class of potentially qualified families for religious reasons unrelated to the families' ability to care for a child means children can lose out on families they desperately need. There is no less restrictive means of achieving the City's interest in ensuring that contract agencies welcome all potential prospective foster parents prohibiting discrimination based on characteristics unrelated to ability to care for a child.

Appellants say that allowing CSS to discriminate would cause no harm to children in need of families or families seeking to care for them because if Appellants prevail in this action, they say, the other 29 city-contracted agencies would be available to certify same-sex couples. CSS Br. at 62. Thus, they say, there is no danger of a "long list" of exceptions to non-discrimination protections and "community wide" stigma against same-sex couples that the Supreme Court was wary of in *Masterpiece Cakeshop*. *Id.* at 30. However, there is no basis for Appellants' assumption that if government-contracted agencies were given permission to refuse to certify same-sex couples based on religious objections, CSS would be the only agency engaging in such conduct. If the City were to authorize such discrimination, Bethany Christian Services, which had a policy of excluding same-sex couples until the City advised that it would not permit such conduct by its contractors (Appx. 432-33, 481-82), might well return to its prior policy. And it is unknown how many other faith-based agencies under contract

with the City¹³ would exclude same-sex couples—or implement other religious-based exclusions—if given the option. Moreover, if CSS’s legal position is accepted and faith-based government contractors can opt out of non-discrimination requirements that conflict with their religious beliefs, that would not be limited to child welfare contractors and LGBTQ people could face discrimination in countless contexts.

Furthermore, Appellants’ assertion that the existence of agencies that do not discriminate eliminates the damage of discrimination ignores how discrimination impacts communities and society. The Supreme Court has long recognized the humiliation and stigma of discrimination. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727; *Roberts*, 468 U.S. at 625 (discrimination “deprives persons of their individual dignity”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (“Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public. . . .”). And it has never tolerated limited access to service providers for some classes of people. *See, e.g., Newman v. Piggie Park Enter., Inc.*, 390 U.S.

¹³ Of the 26 contracted foster care agencies listed on the Philadelphia DHS website, at least eight indicate an association with a faith tradition or mission on their websites. *See Foster Care Licensing Agencies* (contracted by Philadelphia DHS), available at <https://www.phila.gov/media/20180705141450/2018-DHS-Foster-care-agency-providers.pdf>.

400 (1968). It was not an answer in *Newman* to say that African Americans could get a meal at other restaurants in town, even if they were “just a few blocks” away (CSS Br. at 68). It mattered not to the Court how many other restaurants would be willing to serve African Americans. The existence of family foster care agencies that don’t discriminate does not prevent the stigma that would occur should the City create a public foster care system in which discrimination against same-sex couples is allowed, and these families are denied access to the full set of agency options available to different-sex couples.

And the consequences of this treatment of same-sex couples would fall directly on children in the City’s foster care system. If discrimination against them were officially sanctioned within the public child welfare system in Philadelphia, the message to same-sex couples interested in fostering would be loud and clear—coming forward to get licensed to participate in this important government program comes with the risk of being subjected to the humiliation of discrimination. The City cannot afford such a deterrent for families who would be willing to open their hearts and homes to a child. Of course it’s impossible to know how many families would be deterred from coming forward because of fear of discrimination or the challenges and indignity of navigating a system that authorizes discrimination against them. But the need to ensure that children have access to all available families has led the child welfare community to establish

professional standards strongly opposing discrimination in the public child welfare system as undermining the needs of children in care.¹⁴

Allowing discrimination by agencies would, thus, undermine the City's policy goals of preventing discrimination and expanding family options for children even if all foster care agencies were fungible. But the fact is that agencies are not all the same. DHS works with a range of foster care agencies with different specialties. Appx 181. For example, some agencies have special expertise working with children who have serious medical needs. Appx. 211. DHS's website specifically advises prospective foster families to explore the various agencies to find the one that is the best fit for them. Appx. 500, 1016-17. The foster parent Appellants themselves, who are seeking an injunction to be able to continue working with their preferred agency, recognize that agencies are not all interchangeable. Thus, it is no answer to say that same-sex couples can just go to another agency. There may not be another agency that is appropriate for the family or for the kind of foster care they seek to provide. If an agency specializing in

¹⁴ See, e.g., Child Welfare League of America, LGBT Issues in Child Welfare, citing CWLA's Standards of Excellence for Adoption Services and Standards of Excellence for Family Foster Care Services, available at <https://www.cwla.org/our-work/advocacy/race-culture-identity/lgbtq-issues-in-child-welfare/>; Donaldson Adoption Institute, Expanding Resources for Children III, Research-Based Best Practices in Adoption by Gays and Lesbians, at 5, available at https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2011_10_Expanding_Resources_BestPractices.pdf.

caring for medically needy children was permitted to, and chose to, exclude same-sex couples, medically needy children may lose potential families to care for them.

CSS further contends that prohibiting discrimination against prospective families actually undermines the City's interest in having more families because, they say, they have 35 CSS families who have unfilled foster homes. Contrary to Appellants' suggestion, nothing is stopping those families from transferring their licenses to other agencies, as families often do when agencies close, Appx. 175, and the City would welcome their continued service. Appx. 553. Moreover, with nearly 5,000 same-sex couples living in Philadelphia¹⁵ and the City's need for not only quantity but diversity of families to meet the needs of children, Appx. 426-29, the impact on the operation of its child welfare system of authorizing discrimination against same-sex couples outweighs the possible impact should one or more of CSS's families choose to discontinue fostering rather than work with one of the agencies they say same-sex couples should use.¹⁶

Nor is there any basis for CSS's—or their *amici's*—Orwellian claim that permitting CSS to turn away qualified families would increase the number of foster

¹⁵ Williams Institute, Pennsylvania Census Snapshot: 2010, available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Pennsylvania_v2.pdf.

¹⁶ None of the plaintiff foster parents testified that they would do so. They all said they were not sure yet what they would do if CSS closed. Appx. 65-66, 135-36, 146, 151.

children placed in loving homes. CSS Br. at 64. This is directly refuted by the record. Appx. 16-17 (finding that the City’s closure of CSS’s intake “had little or no effect on the operation of Philadelphia’s foster care system.”). And the district court noted that in other states, when some faith-based government-contracted child placing agencies chose to close their doors when the states did not permit them to exclude same-sex couples, services to children continued without incident. In those cases, the court noted, the agencies transferred their caseloads—in some cases, along with their staff—to other agencies in their regions. Appx. 20-22.¹⁷

The erroneous premise of Appellants and their *amici*’s contention seems to be that there would not be enough agencies to find families for children in the foster care system if faith-based agencies were not allowed to refuse same-sex couples. Appellants’ *amici* assert that requiring that they comply with non-discrimination requirements would mean an end to faith-based agencies in the public child welfare system. ADF et al. Br. at 15-23; Senators et al. Br. at 27-30; Texas et al. Br. at 4-6, 9-10. But it is simply untrue that all or most faith-based

¹⁷ The sources cited in *amici* Alliance Defending Freedom, the Ethics & Religious Liberty Commission of the Southern Baptist Convention, Family Research Counsel, and Focus on the Family (ADF et al.) purportedly showing that children suffered a loss of families when Catholic Charities chose to close in other states—advocacy pieces published by the Heritage Foundation (Br. at 19)—offer no factual support for this claim. *Amici* misleadingly imply that Catholic Charities’ decision to close in Boston caused a shortage of foster families, but the source cited made clear that the need for more families was due to the opioid crisis.

foster care agencies are unwilling to certify same-sex couples. Indeed, with the exception of CSS, every faith-based foster care agency in Philadelphia accepts same-sex couples.¹⁸

Appellants claim that a less restrictive means of achieving the City's interests is to permit agencies to "refer families elsewhere" for religious reasons. As discussed at pages 23-24 *supra*, referring to CSS's practice as making "referrals" does not change that fact that what they are talking about is refusing service. *Newman* would not have come out any differently had the restaurant described its practices as "referring" African Americans elsewhere rather than serving them. And permitting agencies to refuse to accept same-sex couples compromises the City's interrelated interests in maximizing its pool of families and preventing discrimination against Philadelphia residents in government programs.

II. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THEIR FREE SPEECH CLAIMS

Appellants contend that the City is compelling CSS to engage in speech by barring it from discriminating against same-sex couples in its government-

¹⁸ See Senators et al. Br. at 29 (noting that 24 of the 26 contracted agencies listed on the Philadelphia DHS website "will partner with any qualified applicant regardless of . . . sexual orientation . . ."); note 13 *supra* (noting that at least eight foster care agencies on the Philadelphia DHS website are religiously affiliated); Appx. 491-92 (Bethany Christian Services has agreed to comply with the City's non-discrimination requirements).

contracted work. They assert that providing certifications of same-sex couples would constitute compelled speech that conflicts with their religious beliefs about marriage. This argument fails because when a private agency provides public services pursuant to a government contract, its services under the contract are not private speech but rather, an “instance[] . . . ‘in which the government uses private speakers to transmit information pertaining to its own program.’” *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 533 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). See also *Teen Ranch*, 389 F. Supp. 2d at 840 (applying the same reasoning in rejecting government-contracted youth service provider’s free speech challenge to state’s requirement prohibiting it from providing religious programming to the youth in its care).

In *Agency for Int’l Dev. v. All. For Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013), the Supreme Court expressly distinguished between “conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.” *Id.* at 214-15. The former are perfectly constitutional while the latter are not.

Here, the requirement that contract agencies issue certifications on a nondiscriminatory basis goes to the heart of the services under contract with the City and does not regulate the speech of foster care agencies outside of the

performance of the contracted services. As the district court found, the City has “not conditioned CSS’s Services Contract on CSS changing its activities, views, opinions outside the context of the Services Contract.” Appx. 57. For the same reason, the court in *Dumont* rejected the identical free speech argument asserted by a child-placing agency that is unwilling to license same-sex couples as foster parents due to its religious beliefs. *Dumont*, 2018 WL 4385667 at *28-31.¹⁹

Appellants claim that certifications and home studies constitute private speech outside of the scope of the funded program because the contract funds CSS based on the number of children in its families’ care, not the number of home studies performed. But regardless of the payment arrangements for the contract, as the district court found, certification is part of the contracted services. In entering into its contract for foster care services with the City, CSS agreed to recruit, screen, train, and certify foster parents. Appx. 1033. State law provides that the screening

¹⁹ Appellants have previously relied on *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), which recognized the free speech rights of government contractors. But this case offers no support for their claim. In *Umbehr*, the Court applied the *Pickering* standard for public employee speech to the speech of government contractors. As the Court explained in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), speech in the course of a government employees’ official duties is not First Amendment-protected speech. *Id.* at 420. The First Amendment “does not invest [government employees] with the right to perform their jobs however they see fit.” *Id.* at 422. The free speech clause, like the free exercise clause does not give an organization the right to enter into a government contract to perform a government service and then provide that service however it sees fit, regardless of the terms of the contract.

of foster parents includes an assessment of the family's home and capacity to care for a child. 55 Pa. Code §§ 3700.66 et seq. The suggestion that home studies and certifications are "private speech" outside of the contracted services is absurd, as they serve no purpose except to allow an agency to provide foster care services under the contract with the City. Indeed, but for the contract, CSS would not have any reason to—and, in fact, would not be permitted to—certify foster families.

Appellants' free speech retaliation claim fares no better. They cherry pick phrases from City documents and statements in an attempt to characterize the City's enforcement of its non-discrimination requirements as motivated by CSS's religious beliefs as opposed to CSS's refusal to comply with those requirements. The fact that City officials acknowledged that CSS's policy of refusing to certify same-sex couples was based on its religious beliefs does not support the conclusion that the reason the City objected to CSS's conduct is that it was religiously motivated. As discussed in section I(B), *supra*, the district court concluded, based on the entirety of the record, that the City's enforcement of its contract requirements had nothing to do with animus towards CSS's religious beliefs.

III. IF THE CITY PERMITTED THE USE OF RELIGIOUS ELIGIBILITY CRITERIA TO EXCLUDE SAME-SEX COUPLES IN THE PUBLIC CHILD WELFARE SYSTEM, IT WOULD VIOLATE THE CONSTITUTION

For the reasons discussed above, the City is permitted to require its contracted foster care agencies to comply with its non-discrimination requirements.

This does not violate Appellants' First Amendment rights or RFPA. In fact, were the City to permit agencies to use religious eligibility criteria to exclude same-sex couples from this government program, that would violate the Establishment Clause and the Equal Protection rights of children and families in Philadelphia, including those represented by Intervenors. In *Dumont*, a federal district court in Michigan recently denied motions to dismiss in a case challenging precisely such a practice, concluding that the allegations that the State permitted such conduct by its contracted agencies stated Establishment Clause and Equal Protection claims. 2018 WL 4385667, at *6-27.

A. Allowing the use of religious eligibility criteria for participation in a government program would violate the Establishment Clause.

Allowing a government-contracted, taxpayer-funded foster care agency to use religious criteria to exclude prospective foster parents for children in government custody would violate the Establishment Clause. It would constitute the endorsement and promotion of religion, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971), for at least three reasons: (1) the State may not delegate a public function and allow it to be performed using religious standards; (2) public funds may not be used for religious purposes; and (3) the government may not privilege religion to the detriment of third parties.²⁰

²⁰ Appellants' *amici* Senators et al. contend that the Establishment Clause would not be implicated by the use of religious criteria by City-contracted foster care

1. Delegation of a government function to be performed using religious criteria would violate the Establishment Clause.

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. In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Supreme Court invalidated a municipal ordinance that gave churches discretion to veto a liquor license application for any premises located within 500 feet of a church. The ordinance at issue “delegate[d] to private, nongovernmental entities . . . a power ordinarily vested in agencies of government.” *Id.* at 122. There, the Court concluded that the relevant provision merely “could be employed for explicitly religious goals.” *Id.* at 125. The Court invalidated the ordinance, reasoning that vesting governmental power in a religious organization to be exercised pursuant to religious strictures presents the “danger of political oppression through a union of civil and ecclesiastical control” that motivated the Framers to draft the Establishment Clause. *Id.* at 127 n.10. If the City delegated public child welfare services to agencies with permission to use

agencies because such agencies are not “state actors.” Senators et al. Br. at 20. But they cite cases discussing the requirements to hold a private actor liable as a state actor under 42 U.S.C. § 1983. If Philadelphia were to permit the use of religious criteria in its public child welfare system, the City would be in violation of the Establishment Clause regardless of whether its contracted agencies could be subject to section 1983 liability as state actors. *See Dumont*, 2018 WL 4385667 at *24-27 (when the government permits a contract agency to use religious eligibility criteria in providing a government service, that is state action).

religious eligibility criteria, it would violate the Establishment Clause principle that “civil power must be exercised in a manner neutral to religion.” *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) (religious community’s control over public education policy violated Establishment Clause).²¹ *See Dumont*, 2018 WL 4385667, at *18-20 (relying on delegation case law).

2. Allowing government-funded agencies to use religious criteria in screening prospective families would constitute impermissible government funding of religious activity.

The Supreme Court has made clear that the Establishment Clause prohibits recipients of government funds from using those funds for religious purposes. While mere participation of faith-based organizations in government-funded programs does not violate the Establishment Clause,²² when such organizations do receive government funds, they may not use those funds to advance religion. *See*,

²¹ *See also Doe v. Porter*, 370 F.3d 558, 564 (6th Cir. 2004) (school board violated Establishment Clause by “ced[ing] its supervisory authority over [certain] classes to Bryan College, which requires its students and faculty to subscribe to a sectarian statement of belief”); *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 486-88 (D. Mass. 2012) (permitting religious organization to disburse taxpayer-funded services according to religious criteria violated Establishment Clause).

²² Although Appellants’ *amici* spill much ink arguing that the Constitution does not prohibit the government from contracting with religious providers, *see e.g.*, Senators et al. Br. at 13-18, 22-23, Texas et al. Br. at 2, 11-14, Intervenors have never suggested anything to the contrary. It is only a constitutional violation when the government permits taxpayer funded agencies to provide government services in a religious manner.

e.g., *Bowen v. Kendrick*, 487 U.S. 589, 608-609 (1988); *Teen Ranch*, 389 F. Supp. 2d 827. The Supreme Court recognized that religious discrimination in the provision of government-funded services is one form of impermissible advancement of religion with government funds. *Bowen*, 487 U.S. at 609.

3. Allowing government-contracted foster care agencies to use religious criteria in screening prospective families would violate the Establishment Clause by privileging religious exercise to the detriment of others.

The Establishment Clause forbids “accommodations” of religion that impose substantial burdens on third parties. In *Estate of Thornton v. Caldor, Inc.*, the Supreme Court struck down a statute requiring that “those who observe a Sabbath . . . must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers.” 472 U.S. 703, 708-09 (1985). The Court rejected the notion that the government can accommodate religion even when it causes harm to third parties.²³

Allowing government-contracted child placing agencies to use religious eligibility criteria when performing public child welfare services runs afoul of the

²³ See also *Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring) (“[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents . . . as to become an establishment.”); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989) (plurality opinion) (invalidating tax exemption for religious periodicals that “burden[e]d nonbeneficiaries markedly”); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (“[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”).

Establishment Clause because it imposes a significant burden on children, who lose out on qualified families, and on the families who are turned away.

For all of the above reasons, if the City were to agree to allow contracted agencies to exclude prospective families based on religious criteria, it would violate the Establishment Clause.

B. Allowing discrimination against same-sex couples in the public child welfare system would violate the Equal Protection Clause.

The Equal Protection Clause requires the government to treat all similarly situated persons alike. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). At a minimum, this prohibits the government from making “distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.” *Lehr v. Robertson*, 463 U.S. 248, 265 (1983). The Equal Protection Clause also prohibits the government from deferring to the disapproval of others. *See Paltore v. Sidoti*, 466 U.S. 429 (1984) (reversing child custody order transferring custody away from mother because of social disapproval of her interracial marriage as violation of equal protection); *Cleburne Living Center*, 473 U.S. at 478 (in striking down special zoning restriction on homes for developmentally disabled adults, court rejected asserted government interest in avoiding negative reaction from community members).

If the City were to allow its contract agencies to turn away same-sex couples based on religious objections to such families, that would violate the Equal

Protection Clause. Such a policy would have to be evaluated under heightened scrutiny because it would subject families to unequal treatment based on sexual orientation. *See, e.g., Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014). But a policy of permitting discrimination against same-sex couples based on agency religious objection would fail any level of equal protection scrutiny.

First, as the Supreme Court recognized in *Obergefell v. Hodges*, the government cannot “deny gays and lesbians [the] many rights and responsibilities intertwined with marriage”—expressly including “adoption rights.” 576 U.S. ____, 135 S. Ct. 2584, 2601, 2606 (2015). Allowing contract agencies to exclude same-sex couples from fostering would deny married same-sex couples “all the benefits afforded to opposite sex couples” with respect to the related area of foster care. *Id.* at 2604. *See Campaign for S. Equality v. Mississippi Dep’t of Human Servs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016) (enjoining state’s practice of excluding same-sex couples from adopting out of the foster care system because it “interfer[ed] with the right to marry” and thereby “violate[d] the Equal Protection Clause.”).²⁴

²⁴ Courts around the country have similarly applied *Obergefell* to many aspects of parenting. *See, e.g., Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (both spouses in same-sex couples must be permitted on children’s birth certificates); *McLaughlin*

Moreover, allowing contract agencies to cast aside a class of families based on reasons unrelated to their ability to care for a child would advance no legitimate child welfare interest. Indeed, it would undermine the City's acknowledged need for more families to meet the needs of children in foster care. *See Dumont*, 2018 WL 4385667 at *23.

IV. THE BALANCING OF THE EQUITIES STRONGLY WEIGHS AGAINST PERMITTING CONTRACTED FOSTER CARE AGENCIES TO USE RELIGIOUS CRITERIA TO EXCLUDE FAMILIES HEADED BY SAME-SEX COUPLES

The district court found that Appellants failed to demonstrate irreparable harm absent the requested injunctive relief. It concluded that the injuries claimed by CSS—that it would not be able to afford to continue paying staff and operating if the City does not resume referrals of children—are economic injuries that could be addressed through damages. Appx. 64. The court also rejected the foster parent Appellants' claim that transferring to another agency if CSS closes its operation rises to the level of irreparable harm, noting that when other agencies have closed, their families have successfully transferred to new agencies. Appx. 65-66.

In contrast, if the City is ordered to permit the use of religious criteria to exclude prospective foster families headed by same-sex couples in the public child

v. *Jones*, 401 P.3d 492, 498 (Ariz. 2017) (presumption of parenthood for spouse of woman who gives birth must apply equally to same-sex couples), *cert. denied*, 138 S. Ct. 1165 (2018).

welfare system, as discussed in section I(C), *supra*—and as recognized by the district court, Appx. 35-37—it would undermine several important interests of the City. First and foremost, it would prevent the City from maximizing the breadth and diversity of the pool of foster parents for children by ensuring that qualified families are not turned away or deterred from coming forward altogether by a system that authorizes agencies to discriminate against them. It would also undermine the City’s interest in ensuring that government services are accessible to all Philadelphians who are qualified, and that same-sex couples are not subjected to the humiliation of discrimination and the stigmatizing impact of a public child welfare system that accepts the premise that same-sex couples may be deemed unsuitable parents. And it would compromise the City’s interest in supporting all youth in the foster care system by sending the damaging message to LGBTQ youth in care that the City permits discrimination against people like them. Appx. 484. For those LGBTQ youth who are in the care of an agency that excludes same-sex couples, the message would be even more damaging—that the agency they depend on for care and support considers them unsuitable to be parents when they grow up. All of these interests are shared by the public, including Intervenors Support Center for Child Advocates and Philadelphia Family Pride and the children and families they represent.

CONCLUSION

For the foregoing reasons, Intervenors-Appellees Support Center for Child Advocates and Philadelphia Family Pride respectfully request that this Court affirm the district court's denial of Appellants' request for a preliminary injunction.

Dated: September 27, 2018

Respectfully submitted,



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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: September 27, 2018

/s/ Catherine V. Wigglesworth
Catherine V. Wigglesworth

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1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d) and 32(a)(7)(B) because this brief contains 12,004 words, excluding the parts of the brief exempted by Federal R. App. Proc. 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.
3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard paper copies of the brief.
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CERTIFICATE OF SERVICE

I, Catherine V. Wigglesworth, hereby certify that I electronically filed the foregoing Brief of Intervenors-Appellees Support Center for Child Advocates and Philadelphia Family Pride on September 27, 2018 on the Court's electronic filing system, where it is available for printing and viewing.

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