

No. 18-2574

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

SHARONELL FULTON, CECELIA PAUL, TONI LYNN SIMMS-BUSCH,
AND CATHOLIC SOCIAL SERVICES,

Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, PHILADELPHIA DEPARTMENT OF HUMAN
RESOURCES, AND PHILADELPHIA COMMISSION ON
HUMAN RELATIONS,

Defendants-Appellees,

and

PHILADELPHIA FAMILY PRIDE and
SUPPORT CENTER FOR CHILD ADVOCATES,

Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Honorable Petrese B. Tucker
Case No. 2-18-cv-02075

**BRIEF FOR ALLIANCE DEFENDING FREEDOM, THE ETHICS &
RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST
CONVENTION, FAMILY RESEARCH COUNCIL, AND FOCUS ON THE
FAMILY AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-
APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certify that (1) *amici* do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amici*.

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INTEREST OF AMICI CURIAE¹

Amici Alliance Defending Freedom, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, Family Research Council, and Focus on the Family are non-profit organizations that work with foster-care and adoption-service providers, families, birth moms, and children to ensure the health, safety, and welfare of our nation's children by maximizing the number of providers recruiting families to provide loving homes for children who need them. Amici The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

Amici have produced research and articles highlighting the effectiveness of faith-based child welfare providers at serving children who require foster care or adoption services as a result of maltreatment, abuse, and neglect. They have participated in educational seminars highlighting the stories of children, birth moms,

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(2) & (c)(5), amici state that all parties have consented to the filing of this brief, no counsel for any party authored this brief in whole or in part, and no person or entity other than amici and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and families who lives have been forever changed by faith-based providers' compassionate care.

Amici are also dedicated to preserving our First Amendment freedoms, including the free exercise of religion. These freedoms are directly implicated by the City of Philadelphia's efforts to banish faith-based providers simply because they are unwilling to compromise their beliefs as they serve their communities.

INTRODUCTION

Religious organizations like Catholic Social Services are key players in the American child-welfare system and have been for centuries. They are highly successful in recruiting and training foster families and provide thousands of loving homes each year for vulnerable children. In a time of urgent need and scarce resources, the City of Philadelphia requires their help more now than ever. But the City has instead chosen to kick Catholic Social Services out of the foster-care system, punishing it and the children and families it serves because of the organization's religious beliefs about marriage.

No less than 29 providers in Philadelphia actively recruit and accredit same-sex couples. Yet the City now insists on implementing a religious test for participating in the foster-care system. *Cf.* U.S. Const. art. VI, cl. 3. Those who affirm same-sex unions may enter; those who do not are excluded. This action will not help a single child in need find a loving home. Instead, the City's actions will

remove effective providers from the system, depriving vulnerable children of foster and adoptive families.

Anyone who cares about children should be deeply concerned by the City's religious discrimination. It has placed the culture wars over children's best interests and, in so doing, violated the free-exercise protections that make a diverse and pluralistic society work. Driving high-performing religious charities out of the public sphere over disagreements about religious beliefs will cause real-world harm to children who have suffered too much already. This Court should rule that all people, including those motivated by faith, are welcome in American society and worthy of helping our country's most vulnerable children.

BACKGROUND

The Archdiocese of Philadelphia and Catholic Social Services have cared for vulnerable children in the City of Philadelphia for over 100 years. For at least the last 20 years, that arrangement has been formalized in a contract between Catholic Social Services and the City. Because the City controls all foster-care placements in Philadelphia, that contract is the only way that Catholic Social Services and affiliated families can help serve the more than 100 children in Catholic Social Services' care on any given day. About 40% of those foster children find a permanent home each year either by returning to their birth families or through foster-family adoption. The City of Philadelphia has recognized this record of

success, ranking Catholic Social Services highly. Catholic Social Services' effectiveness has also been attested to by social workers like Ms. Simms-Busch, a foster parent who formerly interacted with foster-care providers on a daily basis and saw Catholic Social Services' quality firsthand.

In March 2018, the longstanding partnership between the City and Catholic Social Services abruptly came to an end. The reason was not a lack of high standards or loving care. Nor was it a complaint. It was merely a newspaper article in the Philadelphia Inquirer that faulted Catholic Social Services and another religious nonprofit for referring same-sex couples to dozens of other foster-care providers in the city that are happy to endorse them. Julia Terruso, *Two foster agencies in Philly won't pace kids with LGBTQ people*, Philadelphia Inquirer (Mar. 13, 2018), <https://bit.ly/2PJwNZs>. What the article failed to note is that Philadelphia child-welfare providers make referrals to other providers all the time, for a great many reasons, including geographical convenience, capacity, and personality. The City has chosen to single out just one kind of referral—those made for religious reasons.

The Catholic Church believes marriage is defined as the union of one man and one woman, and that such family units are the best environment to raise a child. See, e.g., United States Conference of Catholic Bishops, *Made For Each Other: A Catechetical and Educational Aid on Sexual Difference and Complementarity* (2010), available at <https://bit.ly/2otlYOp>. So the Philadelphia Inquirer story hardly

broke news. But it provided an opening for the City to further an aggressive political agenda by swiftly condemning and punishing Catholic Social Services for its beliefs. Two days after the article's publication, the City Council called for an investigation of religious foster-care providers. That very same day, news reports informed Catholic Social Services that the City of Philadelphia had banned it—without any discussion or notice—from receiving any new foster-care referrals. The City's mayor, Jim Kenney, added to this official pile-on by criticizing groups like Catholic Social Services in the press, while the Philadelphia Human Relations Commission began an official investigation of Catholic Social Services' policies and practices, though not a single same-sex couple had requested its assistance or filed a complaint.

Tellingly, this is not the first time that Mayor Kenney has tried to publicly tar and feather the Catholic Church. In a wide variety of anti-Catholic tweets, he has (1) said he “could care less about the people at the Archdiocese” of Philadelphia,² (2) declared that the Archdiocese “don't [sic] care about people” and that its time for Pope Francis “to kick some *ss here,”³ (3) accused the Church of losing its

² Jim Kenney (@JimFKenney), TWITTER (June 25, 2012, 6:44 AM), <https://bit.ly/2N20s1m>.

³ Jim Kenney (@JimFKenney), TWITTER (Nov. 14, 2014, 6:06 AM), <https://bit.ly/2oroxAC>.

“moral authority,”⁴ and (4) opined that the “sisters” (presumably Catholic Nuns) “will be the only ones who save the Catholic Church.”⁵ Mayor Kenney has left no doubt which side he will support when conflicts arise between supporters of same-sex marriage and people of faith who believe that marriage is between one man and one woman: “We’re still working hard to keep our Number 1 rating for LGBT equality!”⁶ And the Mayor has even disparaged Philadelphia Archbishop Chaput as “not Christian,” as part of a Twitter war over the circumstances in which Jesus Christ would or would not deny receipt of Holy Communion to a communicant.⁷

Meanwhile, Catholic Social Services sought to do what it has always done—provide homes for as many needy children as possible. It never stands in the way of same-sex couples serving as foster or adoptive parents, nor does it have such extraordinary power. As a private religious non-profit, Catholic Social Services simply refers same-sex couples to dozens of other capable providers. For this “crime,” the City banned anyone affiliated with Catholic Social Services from

⁴ Jim Kenney (@JimFKenney), TWITTER (July 29, 2013, 6:11 PM), <https://bit.ly/2C64x0i>.

⁵ Jim Kenney (@JimFKenney), TWITTER (Apr. 23, 2012, 7:33 AM), <https://bit.ly/2wEdAzE>.

⁶ Jim Kenney (@JimFKenney), TWITTER (Dec. 17, 2015, 3:27 PM), <https://bit.ly/2C5nIr7>.

⁷ Jim Kenney (@JimFKenney), TWITTER (July 6, 2016, 2:47 PM), <https://bit.ly/2opzqTv>.

receiving new foster children, even when no other home-placements are available and a group-home placement is required. This general ban applies when a child already knows and trusts a particular foster parent, or when a foster family already cares for a child's siblings. But the City is prepared to split up families and sibling groups to push its political agenda. And because the City refuses to discuss any possible religious accommodation, it is now poised to remove *all* of the children in Philadelphia that Catholic Social Services has placed in loving foster homes.

Below, the district court refused to grant Catholic Social Services and its foster parents a preliminary injunction that would enable them to serve children in Philadelphia during a time of severe foster-parent shortage. The court accepted uncritically the City's novel interpretation of its longstanding contract with Catholic Social Services and ruled predominantly on that menial basis. What the court did not do is answer why the City would diminish its own foster-care system by excluding religious foster parents and child-welfare providers or offer any serious analysis of the First Amendment questions presented in this case.

ARGUMENT⁸

I. Religious families and nonprofits play an essential role in American life and are among the best the foster-care system has to offer.

People of faith do not like to sing their own praises. But it is impossible to

⁸ Where online reports or articles lack pagination, the pinpoint citations in this brief are to the page on which text appears after the document was saved as a PDF.

appreciate the significance of what the City of Philadelphia has done without a basic understanding of the essential role that religious people and organizations play in the American social-safety net. When the government calls for foster-parents or other aid, it is religious communities that answer. Millions of believers volunteer their time and their money to improve their fellow citizens' lives. They are particularly dedicated to helping vulnerable children in times of crisis and serve both them and the foster-care and adoption system well. No rational basis exists for the City's decision to turn them away.

A. Religious charities like Catholic Social Services play an essential role in the American social-safety net.

In some countries, the government provides nearly all educational, health, and social services. Our nation chose a different path. Religious nonprofits make enormous contributions to the American healthcare, education, and social-services network and—in some places—serve as its main providers. Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. OF RES. ON RELIGION Article 3 at 28 (2016), <https://bit.ly/2dPJyR8>. Americans generally prize faith-based providers because they galvanize religious volunteers, which reduces costs and provides recipients with a human touch that government and for-profit providers simply cannot match. Scott Shackford, *Is This Where Libertarians and the Gay Community Part Ways?*, Reason.com at 7 (July 1, 2015), <https://bit.ly/2BQgosis>; Melissa Buck, *Catholic*

adoption agencies: A private-public adoption system that works, The Hill at 2 (Mar. 6, 2018), <https://bit.ly/2MOTkWO>.

For centuries, religious organizations served as a cornerstone of the child-welfare system both here and abroad. Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, The Heritage Foundation at 2 (May 22, 2018), <https://herit.ag/2ojc56d>. Rather than losing their efficiency and know-how, the American government chose to work hand-in-hand with religious nonprofits to provide a sizeable portion of children's social-safety net. Thomas C. Berg, *Symposium: Religious Liberty and the Free Society: Celebrating the 50th Anniversary of Dignitatis Humanae*, 91 Notre Dame L. Rev. 1341, 1353 (2016). Our nation benefits from the altruism and drive of millions of volunteers from roughly 345,000 religious congregations spread across the country's vast urban, suburban, and rural landscape. Grim & Grim, *supra*, at 28.

So there is nothing unusual about a religious nonprofit like Catholic Social Services providing foster care and adoption services in Philadelphia. In America, that is how things work. Over 1,000 private foster care and adoption providers are spread across the United States, and many of them are religious. Ryan Anderson and Sarah Torre, *Adoption, Foster Care, and Conscience Protection*, The Heritage Foundation at 4 (Jan. 15, 2014), <https://herit.ag/2Lrh8dM>. States and localities rely heavily on these faith-based providers to connect children with families, stretch

every public dollar, and supplement them with a variety of private aid. Goodnow, *supra*, at 2, 4.

In fact, at least 32 states have some recruiting effort specifically targeted to increase the number of religious adoptive or foster parents. Michael Howell-Moroney, *The Empirical Ties between Religious Motivation and Altruism in Foster Parents: Implications for Faith-Based Initiatives in Foster Care and Adoption*, Religions Vol. 5, Issue 3, 720, 721 (2014), <https://bit.ly/2MC2NRn>. Those efforts are significantly aided by strong working relationships between government and religious charities because people of faith want to work with providers that reflect their values and often would not serve as foster or adoptive parents without them. Monica Burke, *Philadelphia Sabotages Its Own Adoption and Foster-Care System*, The Heritage Foundation at 2 (Apr. 6, 2018), <https://herit.ag/2wpHYgT>; Kathryn Jean Lopez, *Foster Children in Philadelphia Deserve Better than Unnecessary Limbo as Religious-Liberty Dispute Lingers*, National Review at 4 (June 12, 2018), <https://bit.ly/2LMdbkk>, Anderson & Torre, *supra*, at 8.

B. The American foster system is in dire need, and people of faith have answered the call.

Approximately 437,500 children are in the American foster-care system today. Press Release, U.S. Dep't of Health and Human Services, Admin. for Children and Families, Number of children in foster care continues to increase (Nov. 30, 2017), <https://bit.ly/2B07SN1>. This national tragedy is partly fueled by the

opioid crisis. Goodnow, *supra*, at 3, 6. In 2015, for instance, more than half of the 16,000 Pennsylvania children in foster care were there because of a parent's or guardian's drug abuse. Burke, *supra*, at 3. Finding relatives to care for these displaced children is difficult because opioid abuse often runs in families. Goodnow, *supra*, at 6. Moreover, the power of drug addiction is strong, and children who enter into foster care for this reason often stay in the system longer and present more challenging issues. *Id.* at 14.

Foster parents today thus face a particularly difficult task. They are more likely than ever to care for children who are medically fragile, emotionally disturbed, or have special needs. Kathleen M. Kirby, *Foster Parent Demographics: A Research Note*, 24 J. OF SOCIOLOGY & SOC. WELFARE 135 (1997), <https://bit.ly/2MSvtVr>. One study showed that 75% of foster parents cared for physical-abused children, 66% cared for children who were sexually abused, and 61% had emotionally-disturbed children in their homes. *Id.* at 138. States and localities need all the help they can get finding compassionate and high-quality foster homes for thousands of traumatized kids. *Id.* at 7.

The City of Philadelphia recognized as much when it put out an urgent call for 300 new foster families right before the City suspended its relationship with Catholic Social Services. Burke, *supra*, at 2. Philadelphia had not orchestrated such a large-scale recruitment effort in a decade. Goodnow, *supra*, at 11. Yet the City

chose to stop making new placements with Catholic Social Services-affiliated families even though the struggle to recruit new foster families and maintain existing ones is perpetual and well known. Howell-Moroney, *supra*, at 721. This effort to single out Catholic Social Charities for punishment is truly remarkable because the City knows full well that recruitment and retention of foster families is crucial to helping vulnerable kids. Burke, *supra*, at 2. Foster families are a critical resource that is always in short supply. Howell-Moroney, *supra*, at 721. Yet the City made its precipitous decision without so much as a conversation with its long-time religious partner.

Harm to children is certain to result. Unsurprisingly, studies prove that many foster parents in the United States are religious. Jill Schreiber, *The Role of Religion in Foster Care*, Presentation at the N. Am. Ass'n of Christians in Social Work Convention at 10 (2010), <https://bit.ly/2Mvkfqx>. In fact, foster parents attend religious services more regularly than the general population and consider faith to be a key factor in successful fostering. *Id.* at 10-11. People of faith are more likely not only to consider becoming foster parents but also to go one step further and ultimately adopt a child in foster care. Burke, *supra*, at 2. And it is basic common sense that having more and diverse agencies in the recruiting mix will result in more families for children who need homes. Goodnow, *supra*, at 14.

C. Religious families and providers are highly dedicated to children's welfare and no reason exists for turning them away.

Faith-based nonprofits like Catholic Social Services mobilize religious families to serve as foster parents, and they do so in a particularly effective way. Anderson & Torre, *supra*, at 6. Countless families do not take even the first step towards fostering a child because they fear red tape, an inefficient bureaucracy, and outrageous intrusions into their daily lives. *Id.* at 3. Religious foster-care providers are particularly good at assuaging these concerns and providing emotional and spiritual support that government agencies simply cannot offer. *Id.* at 4. Some religious nonprofits even supplement the money that foster parents receive to help with costs associated with children's school events, clothing, and athletics that the government does not cover. Goodnow, *supra*, at 2, 4.

Keeping foster parents in the system is a serious issues. Many burn out after the first year. Goodnow, *supra*, at 11. But once religious foster families enter the system, groups like Catholic Social Services excel at keeping them there. As one foster mother testified:

Staff answered our late night worried phone calls, assuaged the biological parents when they became hostile, and accompanied us on countless doctor visits to treat our children's numerous medical issues. The staff at St. Vincent didn't just save the lives of my children; they accompanied us in the joy of giving them new ones.

Buck, *supra*, at 2. Support from people who share their faith and values encourages religious foster parents to persevere. *Id.* This matters because recruiting and training

foster families is costly and time consuming, and expends precious resources that could be used elsewhere. Howell-Moroney, *supra*, at 721.

Religious providers also often equip foster parents with special training and encouragement to welcome children who are the most difficult to place. Goodnow, *supra*, at 4. For example, Catholic Charities does not just place a significant number of special needs children in foster homes each year, it also serves a high percentage of large sibling groups and teens that many foster parents deem undesirable. Anderson & Torre, *supra*, at 5; Goodnow, *supra*, at 5. Religious foster parents' and providers' willingness to take the "hard cases" is unmatched.

The assistance that Catholic Social Services and other religious providers offer is vital because foster parents with altruistic motives are best, and that is often who they serve. Howell-Moroney, *supra*, at 722. Evidence shows that religiously-motivated foster parents are more altruistic than their secular peers. *Id.* at 733. In fact, one study showed that religious foster parents were 14% more likely to be motivated by keeping children out of government institutions and over 30% more likely to serve as foster parents based on a desire to help their community or society at large. *Id.* at 725.

Such altruistic motives have real-world effects. People of faith are more likely to have a high level of commitment to helping children in foster care. *Id.* at 729. Practicing Christians are, for example, 50% more likely to become foster parents.

Goodnow, *supra*, at 13. Indeed, people of faith are not just more likely to have one foster child in their homes, but also to have a greater number of foster children as well. Howell-Moroney, *supra*, at 732. As a result, foster parents with religious and altruistic motivations serve more children. *Id.*

In sum, religious foster parents and providers are among the best of the best. No rational basis exists for the City of Philadelphia’s decision to turn them away in the face of a critical foster-parent shortage. Some children in the foster-care system are devout, want to be part of a religious community, and take advantage of the unique coping strategies that faith provides. Schreiber, *supra*, at 9, 14; Shackford, *supra*, at 7. Government should be maximizing the potential that they—along with all other vulnerable children—can find a foster home where they will thrive. Shackford, *supra*, at 7. Instead, the City of Philadelphia has told these children and other people of faith “you are not welcome here.” This exclusionary practice may further the City’s political agenda, but it does not serve any child’s best interests or improve the foster-care system as a whole.

II. Allowing the City to exclude religious foster parents and providers will have a devastating impact on vulnerable children and give same-sex couples no discernable benefit.

The City of Philadelphia’s solemn duty is to act in foster children’s best interests. But instead of putting kids first, the City has prohibited religious foster parents and child-welfare providers from helping them find homes. The City did so

not based on a lack of quality care: evidence shows that religious foster-parents and providers like Catholic Social Services are among the best. Rather, the City acted based on disagreement with these providers' religious beliefs about same-sex unions. But shutting down religious charities does not help LGBT couples foster or adopt kids. All it does is worsen the foster-parent shortage and leave children without the supportive family environment they need to have a bright and successful future.

A. Religious foster families and providers serve children well and excluding them from the social welfare system harms kids.

People of faith serve both vulnerable children and the foster system well. *See supra* Part I.C. In fact, the City of Philadelphia honored Mrs. Paul as one of its Foster Parents of the Year. But the City no longer prioritizes such real-world results. Mrs. Paul's award-winning foster home stands empty, and the City plans to keep it that way. All this based on the City's fear of the hypothetical possibility—never actually realized—that a same-sex couple would disregard well-known Catholic teaching, request Catholic Social Services' assistance, and be compassionately referred to over two dozen other child-welfare providers that are happy to endorse them.

Instead, the City demands that Catholic Social Services and other religious nonprofits certify and place children in violation of their deepest religious convictions about what is best for the children—or else. The City does not explain

why this newfound absolutism is necessary because it cannot. Catholic Social Service is just one private provider among many and holds no monopoly power. Regardless, the City would rather *actually* lose high-quality religious foster parents and providers than *potentially* have same-sex couples encounter moral disagreement that in no way prevents them from serving as foster parents.

This calculus does not add up, and it ignores that Catholic Social Services' superior performance is a direct result of—not in spite of—its religious principles and identity. Berg, *supra*, at 1343, 1364. Faith-based charities in our country have long provided social services consistently with their beliefs. *Id.* at 1343; Anderson & Torre, *supra*, at 7. American government nearly always accommodated them because it knew that religious charities cannot sacrifice their sincerely-held beliefs to preserve their charitable works. Berg, *supra*, at 1354.

The City of Philadelphia has long been aware of Catholic Social Services' religious beliefs, and it embraced (or at least tolerated) that religious charity until the political winds shifted. Then the City suspended all work with Catholic Social Services out of hand. Instead of talking to its long-time partner and potentially considering a religious accommodation, the City wounded its own foster-care system—in a time of severe foster-parent shortage—by reducing the number of families and private providers working to remove children from group homes and make them part of a family. Burke, *supra*, at 3. Approximately 250 children in

Philadelphia are eligible to live in private rather than group homes. Goodnow, *supra*, at 10. But the City placed politics above their welfare and instigated a campaign against families and charities that hold certain religious views.

So rather than working alongside Catholic Social Services and other religious groups to place vulnerable children with foster families, the City has stigmatized their religious beliefs and excluded them from the foster system. This religious animus harms children and the foster-care system at large. Anderson & Torre, *supra*, at 7. Money that could be used to help traumatized kids is being used instead to fund litigation aimed at stopping religious people from caring for them. Elizabeth Kirk, *Forcing Faith-Based Organizations Out of foster Care and Adoption Hurts Children*, The Public Discourse (Oct. 3, 2017), <https://bit.ly/2yIKbDz>. The only possible explanation is that spending precious resources on opposing Catholic Social Services' religious beliefs is more important to the City than finding and keeping children in high-quality foster homes. *Id.* at 3.

Such needless hostility is deeply concerning because children's best interests are not served by forcing religious foster-care and adoption providers to shut down. Lopez, *supra*, at 5. Nothing required the City to take sides on a hotly-debated question of sexual morality: it did so voluntarily and could approve a religious exemption at any time. Shackford, *supra*, at 7. Private child-welfare providers rightly target different populations in recruiting and supporting foster and adoptive

homes. Goodnow, *supra*, at 13. Their ideological diversity maximizes the number of families in the foster system and the opportunity for each child to find a loving home. Burke, *supra*, at 3. No one in society benefits from shutting religious providers like Catholic Social Services down. Anderson & Torre, *supra*, at 7. It simply results in children without families, remaining foster parents being overrun, and an already vulnerable foster-care system spiraling deeper into crisis.

Importantly, Catholic Charities provided roughly 10,500 children with either foster-care or adoption services in 2016 alone. Goodnow, *supra*, at 5. Forcing the Catholic Church and other religious providers out of the public realm will deprive thousands of American children of families and send the national foster-care apparatus into a tailspin. Anderson & Torre, *supra*, at 7. When Illinois forced Catholic Charities to end its foster-care and adoption programs, somewhere between 2,000-3,000 children had their lives thrown into uncertainty and turmoil. Goodnow, *supra*, at 3. Particularly relevant here is Boston's experience after the city forced Catholic Charities, which had found homes for tens of thousands of children, to exit the foster system. Massachusetts is now so low on foster families that in the last 12 months it issued 50% more "overcapacity waivers" to pack more troubled children into overcrowded homes where they get less individualized attention. *Id.* at 10.

Seemingly, no price is too high to punish those who maintain a traditional religious view of marriage. But that is not the government's place. The City's only

legitimate interest here is in maximizing the population of potential foster and adoptive parents. Goodnow, *supra*, at 7. Because many foster parents take only children of a specific age, sex, or medical condition in their homes, recruiting the most foster families possible is essential. *Id.* at 11. Excluding religious people and institutions from the foster system may serve the City's ideological agenda, but it does not help children find homes. Anderson & Torre, *supra*, at 2. If the facts make anything clear, it is that the City has abrogated its duty to put children's best interests first. *Id.* at 9-10.

B. Protecting Catholic Social Services' free-exercise rights will not harm same-sex couples but it will help children find homes.

Over two dozen social services providers in Philadelphia stood ready to accredit and place children with same-sex couples when this case began. They remain happy to do so today. Nothing prohibited same-sex couples from serving as foster or adoptive parents then or now. Berg, *supra*, at 1372. The City of Philadelphia—the only government actor involved in this case—is an active proponent of LGBT causes and an avowed opponent of religious charities.

All of the state's power is currently brought to bear against Catholic Social Services and those who share its religious beliefs. The City controls all foster-care placements in Philadelphia and prohibited Catholic Social Services-affiliated families from serving new children even when their homes are sitting empty and they have a pre-established relationship with a foster child. The City Council called

for an investigation of religious child-welfare providers, and the City Human Relations Commission answered that call by opening an investigation of Catholic Social Services. Meanwhile, the City's Mayor criticized Catholic Social Services in the press. The City's steadfast refusal to talk with Catholic Social Services and even consider a religious accommodation resulted in this lawsuit.

Such a bare-knuckled campaign telegraphs the City's disagreement with Catholic Social Service's theology and excludes those who share its religious beliefs from serving children. But it does not help same-sex couples foster or adopt. Roughly 93% of the child-welfare providers in Philadelphia did that already. Catholic Social Services has never stood in their way and is ready and willing to refer same-sex couples to them. All Catholic Social Services declined to do was endorse a view of marriage inconsistent with Church teachings by itself placing children with same-sex couples. Terruso, *supra*, at 6. Never in two decades had the City interpreted its contract with Catholic Social Services to require that. Why should it? A wide variety of government and other private providers actively recruit same-sex couples in Philadelphia who can readily access the same pool of foster children through them. Shackford, *supra*, at 6.

Yet the City now insists that every private child-welfare provider perform every type of foster-care or adoption service. Anderson & Torre, *supra*, at 2. That absolutist policy sounds good in theory until one considers its real-world effects.

Catholic Social Services traditionally strives to place children with family members. When that is not possible, it seeks out a married foster father and mother or alternatively places children with single foster parents as long as they are not cohabitating with another adult. In none of these contexts does Catholic Social Services inquire about sexual orientation. Goodnow, *supra*, at 9. There is nothing bigoted or mean-spirited about Catholic Social Services' work. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned”). Catholic Social Services merely serves children in keeping with Catholic religious beliefs. Elizabeth Kirk, *The ACLU Fights a Michigan Law Protecting Faith-Based Adoption Agencies*, National Review at 3 (Mar. 10, 2018), <https://bit.ly/2LsbHeI>. Because Catholic Social Services will not compromise those well-known beliefs, the City wants to shut it down.

But forcing Catholic Social Services to close its doors will not help same-sex couples foster or adopt. In fact, it will not help *anyone* foster or adopt because the child-welfare aid that Catholic Social Services provides in the City of Philadelphia will cease to exist. The net effect of the City's policy is not adding private providers that will help same-sex couples, but subtracting private providers that specialize in serving religious families—a group particularly dedicated to foster care. Goodnow,

supra, at 2, 4, 7; *supra* Part I.C. In other words, the City’s absolutist policy will not increase the number of LGBT foster homes, but it will decrease the number of foster parents and private child-welfare providers working to help children. Burke, *supra*, at 3; *Goodnow, supra*, at 13. Kids will needlessly suffer as a result, even though the City can allow all private providers—including those inspired by faith—to serve all children at any time. Burke, *supra*, at 4.

III. The City’s expulsion of Catholic Social Services fails as a matter of rational child-welfare policy and constitutional law.

Many Catholic and Protestant evangelical groups devote millions of dollars and countless volunteer hours each year to serving the public good. Berg, *supra*, at 1352-53. They want to help society rather than withdrawing from it and advancing solely their own members’ interests. *Id.* at 1354. What the City of Philadelphia is telling these religious charities is that is no longer possible to remain true to their faith and work as community organizations. *Id.* at 1348. Groups like Catholic Social Services that have served children in Pennsylvania for over a hundred years now must choose between serving their communities and fidelity to their beliefs.

If groups like Catholic Social Services are forced to pick between their faith and community outreach, faith wins. So what the City is actually doing is forcing religious charities to be insular. The law already allows religious nonprofits to employ, house, and educate only their own members, although few actually limit their ministries in this way. *Id.* at 1365. If Philadelphia conditions serving the

community at large on faith-based groups renouncing their deepest convictions, they will have no choice but to assist only church members in their efforts to become foster parents or adopt children. This means that non-members will get worse social-services overall. *Id.* Making as much room as possible for religious charities promotes the common good. *Id.* at 1360. But the City's course of action just handicaps vulnerable kids and those who wish to aid them. It is a senseless answer to a non-existent problem that fails to promote children's best interests. Burke, *supra*, at 3. As such, the City's actions fail even the rational-basis test.

Yet a more stringent constitutional standard applies because the City's campaign against certain religious charities and foster parents implicates their First Amendment rights. It does so in at least five ways.

1. Preference. Our Constitution teaches that government cannot officially prefer one religious denomination over another, *Larson v. Valente*, 456 U.S. 228, 246 (1982), or lend its power to one side of a religious controversy, *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). By allowing only religious denominations who approve same-sex unions to serve foster children, the City has done both. The City officially prefers religious denominations who approve same-sex unions and lends the government's weight to their moral teachings.

2. Coercion. The City coerces religious nonprofits to adopt a particular model of participation in public affairs, *i.e.*, religious beliefs should play no role in the

public services that faith-based groups provide. Berg, *supra*, at 1349. But the state cannot interfere with internal decision-making “that affects the faith and mission” of religious organizations. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012). The Constitution places such theologically-based decisions firmly outside of the government’s control. *Id.* at 188.

3. Hostility. The City’s suspension of all new foster-care placements with Catholic Social Services during a foster-parent shortage without so much as a conversation with a decades-old partner shows that it acted with “a clear and impermissible hostility toward” certain religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018). Without so much as considering a religious accommodation, the City declared that certain “religious beliefs and persons are less than fully welcome” in Philadelphia’s foster-care community. *Id.* All of the City Council’s, Mayor’s, Commission on Human Relation’s and Department of Human Resources’ actions and statements condemning Catholic Social Services confirm this fact, including many of the Mayor’s pre-termination comments exhibiting his personal hostility toward the Catholic Church generally and the Archdiocese of Philadelphia in particular. Yet the Free Exercise Clause bars even “subtle departures from neutrality” and bars government actions that raise “even slight suspicion” of religious hostility. *Id.* at 1731. Catholic Social Services has demonstrated far more than a suspicion of

religious hostility here.

4. Stigmatization. The City stigmatized Catholic Social Service’s religious beliefs and made all who share them outsiders—not full members—of the political community, whereas it made all who oppose them political insiders worthy of participation in city life. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (explaining that the First Amendment “guarantees the free *exercise* of religion, not just the right to inward belief (or status)”). This creates social balkanization of the worst sort. *Berg, supra*, at 1365. Our Constitution forbids the religious divisiveness and social conflict the City intentionally courted by preventing an entire class of religious foster-parents and providers from helping children in need. *Santa Fe*, 530 U.S. at 311.

5. Selective enforcement. The Free Exercise Clause means that the government may not “in a selective manner impose burdens only on conduct motivated by religious belief.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). This prohibition “protects religious observers against unequal treatment.” *Trinity Lutheran*, 137 S. Ct. at 2019 (cleaned up). Here, the City has selectively imposed burdens in precisely this prohibited way. As things stand, an adoption agency can refer a potential foster or adoptive couple to other agencies for any reason (*e.g.*, geographical convenience, too busy, poor fit, etc.) save

one—the agency’s religious beliefs about marriage. The Free Exercise Clause prohibits this.

The district court failed to meaningfully address any of these grave violations of religious freedom or apply strict-scrutiny review. Nor did it properly hold the City to its burden of proving the constitutionality of its startling actions. *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). For these reasons, and others raised by Catholic Social Services, this Court should reverse and remand with instructions for the district court to preliminarily enjoin the City from excluding religious families and providers from the foster-care system.

CONCLUSION

The City’s intolerance for religious views that disagree with those of City officials puts politics above children’s best interests and violates our nation’s fundamental law. Driving faith-based agencies like Catholic Social Services out of the adoption and foster-care service market will mean fewer families recruited, fewer services offered, and fewer children finding permanent, loving homes. This Court should reverse the district court’s judgment.

Respectfully submitted this 4th day of September, 2018.

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Pursuant to Third Circuit Local Rule 28.3(d), 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 and that Kristen K. Waggoner, John J. Bursch, David A. Cortman, and J. Matthew Sharp are also members of the bar of this Court.

Dated: September 4, 2018

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3. This brief complies with the requirements of Local Rule 31.1(c) because the text of the brief electronically filed with the Court via CM/ECF is identical to the text of the paper copies filed with the Court. I further certify that a virus scan was run on the electronic version of this brief using Palo Alto Traps v. 4.2.0 and no viruses were detected.

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I hereby certify that on September 4, 2018, I electronically filed the foregoing *amici* brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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