

No. _____

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Philadelphia chose to exclude a religious agency from the City's foster care system unless the agency agreed to act and speak in a manner inconsistent with its sincere religious beliefs about marriage. The Third Circuit upheld that action under *Employment Division v. Smith*.

The questions presented are:

1. Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held?
2. Whether *Employment Division v. Smith* should be revisited?
3. Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

PARTIES TO THE PROCEEDINGS

Petitioners are Sharonell Fulton, Toni Lynn Simms-Busch, and Catholic Social Services.

Respondents are the City of Philadelphia, the Department of Human Services for the City of Philadelphia, and the Philadelphia Commission on Human Relations (all of whom are original defendants in the case), along with Defendant-Intervenors the Support Center for Child Advocates and Philadelphia Family Pride.

CORPORATE DISCLOSURE STATEMENT

Catholic Social Services does not have any parent entities and does not issue stock.

RELATED PROCEEDINGS

Emergency Application for Injunction Pending Appellate Review, or, in the alternative, Petition for Writ of Certiorari and Injunction Pending Resolution, *Fulton v. City of Philadelphia*, 139 S. Ct. 49 (2018). The application was denied by the Court on August 30, 2018. Justice Thomas, Justice Alito, and Justice Gorsuch would have granted the application.

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PETITION FOR WRIT OF CERTIORARI

Catholic Social Services (“CSS”) is a religious foster care agency and ministry of the Archdiocese of Philadelphia. CSS has been serving Philadelphia foster children for more than a century. But its foster care services are being shut down by the City of Philadelphia because the City disagrees with the Archdiocese about marriage. As a Catholic agency, CSS cannot provide written endorsements for same-sex couples which contradict its religious teachings on marriage. The mayor, city council, Department of Human Services, and other city officials have targeted CSS and attempted to coerce it into changing its religious practices in order to make such endorsements. The City’s actions are a direct and open violation of the First Amendment. Yet the lower courts have upheld them.

CSS’s beliefs about marriage haven’t prevented anyone from fostering. Philadelphia has a diverse array of foster agencies, and not a single same-sex couple approached CSS about becoming a foster parent between its opening in 1917 and the start of this case in 2018. Despite this history, after learning through a newspaper article that CSS wouldn’t perform home studies for same-sex couples if asked, the City stopped allowing foster children to be placed with *any* family endorsed by CSS. This means that even though no same-sex couples had asked to work with the Catholic Church, the foster families that actually chose to work with the Church cannot welcome new children into their homes at a time when Philadelphia has an admittedly “urgent” need for more foster parents.

It is no mystery *why* Philadelphia has punished CSS. Having worked in harmony with CSS for decades, Philadelphia is shutting down CSS because, it

said, it wants to prohibit “discrimination that occurs under the guise of religious freedom.”¹ But well aware that it can’t target religious exercise, Philadelphia started looking for a rationale to justify this predetermined result.

In its search for a rationale, Philadelphia first cited its Fair Practices Ordinance, even though that law has never been applied to foster care. Philadelphia then relied on a contractual provision, but that provision turned out to be inapplicable and permitted discretionary exemptions. So the City decided to revise its contracts to specifically prohibit CSS’s religious practice. It later argued that this change was required by the City charter, but that turned out to be inapplicable, too. Yet Philadelphia still claimed to be acting pursuant to a neutral, generally applicable law.

Despite ample evidence that Philadelphia’s policies were neither neutral nor generally applicable, the Third Circuit upheld those policies under *Employment Division v. Smith*, holding that both *Smith* and the nation’s civil rights laws would be a “dead letter” if the First Amendment protected CSS.² In doing so, the court joined the wrong side of a 6-2 circuit split over what a free exercise plaintiff must prove to prevail under *Smith* and *Lukumi*. Properly understood, *Smith* does not support the decision below, which turns the Free Exercise Clause upside down. But the propensity of lower courts to read *Smith* so narrowly is powerful evidence that *Smith* has confused rather than clarified the law and should be reconsidered.

¹ App. 147a.

² App. 38a.

The Third Circuit also distorted this Court’s caselaw on unconstitutional conditions, holding that Philadelphia’s exclusion of CSS because of the agency’s religious speech and actions could be treated as a mere limitation on the use of government funds. That claim fails where, as here, the government acts as the gatekeeper to determine who may engage in a particular activity.

In *Obergefell v. Hodges*, Chief Justice Roberts wrote that “[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage,” giving as an example “a religious adoption agency declin[ing] to place children with same-sex married couples.” 135 S. Ct. 2584, 2625-2626 (2015) (Roberts, C.J., dissenting). He predicted that “[t]here is little doubt” such a case “will soon be before this Court.” *Id.* at 2626. That prediction has now come true.

Here and in cities across the country, religious foster and adoption agencies have repeatedly been forced to close their doors, and many more are under threat. These questions are unavoidable, they raise issues of great consequence for children and families nationwide, and the problem will only continue to grow until these questions are resolved by this Court.

OPINIONS BELOW

The Third Circuit’s opinion (App. 1a-51a) is available at 922 F.3d 140 (2019). The District Court’s opinion (App. 52a-132a) is available at 320 F. Supp. 3d 661 (2018).

JURISDICTION

The court of appeals entered judgment on April 22, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution (App. 135a) provides, in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *.” U.S. Const. Amend. I.

STATEMENT OF THE CASE

I. The foster care crisis and Catholic Social Services.

Fueled in part by the opioid epidemic, the United States faces a foster care crisis, with a significant and growing shortage of foster families.³ In Philadelphia alone, more than 6,000 children are in foster care. In March 2018, Philadelphia’s Department of Human Services (DHS) made an “urgent” plea for 300 new foster homes.⁴

³ Emily Birnbaum and Maya Lora, *Opioid Crisis Sending Thousands of Children into Foster Care*, The Hill (June 20, 2018), <https://perma.cc/MBY4-Y772>.

⁴ Julia Terruso, *Philly Puts out ‘Urgent’ Call—300 Families Needed for Fostering*, Philadelphia Inquirer (March 18, 2018), <https://perma.cc/C7UH-GGWZ>.

Faith-based foster agencies like CSS have long played a crucial role helping to find loving homes for these children. CSS helps connect children with parents like petitioner Sharonell Fulton, who has lovingly fostered 40 children in over 25 years; petitioner Toni Simms-Busch, a longtime social worker who decided to foster and adopt two children; and plaintiff Cecelia Paul, who used her training as a pediatric nurse to foster infants born with drug addictions.⁵ Philadelphia even named Mrs. Paul a foster parent of the year.⁶ After fostering 133 children over 46 years, Mrs. Paul passed away in October 2018, so her rights can no longer be vindicated by this petition.⁷ Due to Philadelphia’s policies, Mrs. Paul spent her last months prevented from engaging in the loving ministry to which she had devoted so much of her life.

A. CSS’s long history serving at-risk children.

CSS is a non-profit charitable organization operating under the auspices of the Archdiocese of Philadelphia. It seeks to “continue[] the work of Jesus by affirming, assisting and advocating for individuals, families, and communities.”⁸ CSS serves the people of Philadelphia through immigration assistance, providing homes for unaccompanied minors, running residential homes for at-risk teens, providing food and

⁵ App. 225a-228a.

⁶ App. 226a.

⁷ App. 225a.

⁸ App. 201a.

shelter for the homeless, and other ministries. Finding and working with families to provide foster care for Philadelphia children has always been a crucial part of CSS's religious ministry, dating back to at least 1917—long before the City became involved in foster care.⁹

In the 1950s, the City (through its Department of Human Services) began partnering with private agencies to facilitate foster care. Because foster care placements are now controlled by the City, today “you would be breaking the law if you tried to provide foster care services without a contract.”¹⁰ CSS therefore cares for foster children through its annually renewed contract with the City. This relationship has been in place for decades.

B. Philadelphia's foster care system.

The City places no limit on the number of agencies that can obtain contracts to provide foster services. CSS is one of thirty foster agencies that contract with the City. Having this broad array of agencies helps serve Philadelphia's diverse population. Some agencies specialize in serving the Latino community, some focus on serving those with developmental disabilities, and several specialize in caring for children with special needs. Four agencies have the Human Rights

⁹ App. 252a-254a.

¹⁰ App. 256a.

Campaign’s (HRC) “Seal of Approval,” recognizing their excellence in serving the LGBT community.

When families are ready to foster, they can reach out to any of these agencies. Philadelphia tells families they should research agencies to “feel confident and comfortable with the agency” and to “find the best fit for you.”¹¹

If an agency is unable to partner with a potential foster family, the standard practice is to refer that family to another agency. Such referrals “are made all the time.”¹²

If an agency believes it can partner with a potential foster family, the agency will then conduct a detailed assessment of the applicant and the relationships of those living in her home. This process is called a home study. The minimum requirements for home studies and foster parent certifications are set by state law.¹³

Philadelphia acknowledges it has “ha[s] nothing to do” with home studies.¹⁴ They are “not expressly funded under the contract” between the City and the agency, because “compensation is based on the number of children in [an agency’s] care rather than on the number of home studies performed.”¹⁵

At the conclusion of a home study, the foster agency determines whether it can certify the family to work

¹¹ App. 256a.

¹² App. 183a-184a, 219a-220a, 230a-231a, 235a, 241a-242a, 261a-262a, 263a, 290a-291a; see also App. 212a-215a.

¹³ 55 Pa. Code §§ 3700.64, 3700.69.

¹⁴ App. 302a-303a.

¹⁵ Response in Opposition to Emergency Application at 26, *Fulton v. City of Philadelphia*, 139 S. Ct. 49 (2018) (No. 18A118).

with that agency to care for foster children. If so, the City then decides whether to place children in that family's home. Philadelphia pays CSS a *per diem* for each foster child placed in one of its certified homes; most of these funds go directly to foster parents to defray the costs of caring for children. CSS also raises private funds to cover costs that the *per diem* does not.

C. CSS's religious exercise.

CSS exercises its religion by caring for foster children and acting in accordance with its Catholic beliefs in the process. This means that CSS cannot make foster certifications inconsistent with its religious beliefs about sex and marriage. CSS sincerely believes that the home study certification endorses the relationships in the home, and therefore it cannot provide home studies or endorsements for unmarried heterosexual couples or same-sex couples.¹⁶ CSS would refer those couples to another agency,¹⁷ but as the Third Circuit noted, the record shows that no same-sex couple ever approached CSS seeking a foster certification.¹⁸

II. Philadelphia targets CSS.

In March 2018, a reporter from the *Philadelphia Inquirer* asked the Archdiocese about CSS's policy re-

¹⁶ App. 259a.

¹⁷ App. 265a.

¹⁸ App. 259a.

garding same-sex couples. The Archdiocese’s spokesperson confirmed CSS’s longstanding religious beliefs.¹⁹

Three days after the article was published, the City Council passed a resolution calling for an investigation into “discrimination” occurring “under the guise of” religion;²⁰ the Mayor (who had previously called the Archbishop “not Christian” and said he “could care less about the people at the Archdiocese,”) ²¹ prompted inquiries by both the Commission on Human Relations and DHS;²² and the Commission opened an inquiry into CSS, forgoing its required complaint and formal notice procedures.²³ The head of DHS, Commissioner Cynthia Figueroa, investigated whether *religious* agencies certified same-sex couples.²⁴ She did not investigate secular agencies, and later acknowledged

¹⁹ App. 188a.

²⁰ App. 147a.

²¹ App. 173a, 178a; 173a-176a; David O’Reilly, *Chaput Edict Draws Mixed Reviews; Kenney Calls it ‘Not Christian’*, Philadelphia Inquirer (July 6, 2016), <https://perma.cc/M229-HNLW>; Patrick Kerksta, *Jim Kenney’s Long War with the Archdiocese*, Philadelphia Magazine (July 9, 2016), <https://perma.cc/65K6-7BE7>.

²² App. 191a-192a; App. 304a, 306a-307a.

²³ App. 191a-193a. The Commission can only open an inquiry after receiving a complaint and serving notice. Philadelphia Commission on Human Relations Regulation 2.3(b), (e). Neither happened here.

²⁴ App. 278a.

that she had not informed secular agencies of any policy against such referrals.²⁵

The Commissioner summoned CSS for a meeting. There, she told CSS that it should follow “the teachings of Pope Francis,” and told CSS “times have changed,” “attitudes have changed,” and it is “not 100 years ago.”²⁶

Minutes after this meeting, Philadelphia cut off CSS’s foster care referrals. This meant that no new foster children could be placed with any foster parents certified by CSS.²⁷

Philadelphia informed CSS of its rationales in two letters.²⁸ The first letter claimed CSS had violated the Fair Practices Ordinance (FPO).²⁹ The second informed CSS that, unless it changed its religious practices, its annual contracts would no longer be renewed, meaning it could no longer provide foster care to Philadelphia children.

Shortly after receiving this second letter, CSS, together with Sharonell Fulton, Cecelia Paul, and Toni Simms-Busch, sued Philadelphia and sought a preliminary injunction. The district court denied that injunction after a hearing, and the Third Circuit affirmed.

²⁵ App. 304a.

²⁶ App. 267a-269a, 304a-306a.

²⁷ App. 140a, 279a-280a.

²⁸ App. 149a, 165a.

²⁹ App. 169a.

III. Philadelphia’s four post-hoc justifications.

A. The first post-hoc justification: the Fair Practices Ordinance.

As it explained itself in court over the next six months, Philadelphia at different times asserted four different justifications for its actions. But in its initial letter to CSS, it relied on only one: the FPO.³⁰

The FPO deems it unlawful to “discriminate based on” a variety of factors, including “race, ethnicity, color, sex, sexual orientation, gender identity, * * * disability, marital status, [or] familial status,” and city contractors agree not to engage in such discrimination in their “public accommodation practices.”³¹ But foster care has never before been treated as a public accommodation, and Philadelphia permits—indeed, expects—foster agencies to consider the marital status, familial status, and any mental disabilities of potential foster parents.

State law also mandates that foster care agencies “shall consider” a variety of factors including “existing family relationships,” “attitudes and expectations regarding the applicant’s own children,” and the family’s “demonstrated stable mental and emotional adjustment,” sometimes including a “psychological evaluation.” 55 Pa. Code § 3700.64. A failure to demonstrate healthy family relationships, positive relationships and expectations regarding children, or stable mental

³⁰ App. 149a-152a.

³¹ Philadelphia Code § 9-1106; App. 149a-150a.

health is a proper basis to reject a foster family. See *ibid.*; see also 55 Pa. Code § 3700.69. The City expects foster agencies to comply with this law.³² The record contains no prior examples of the City applying the FPO to home studies.³³

The FPO applies to “the City, its departments, boards and commissions,” § 9-1102(1)(w), but Philadelphia has not previously applied the FPO to its own foster care operations. At the preliminary injunction hearing, no witness could recall a time when the FPO was applied to foster care, and Commissioner Figueroa testified that she could not recall doing “anything [as Commissioner] to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work.”³⁴ The Commissioner acknowledged that Philadelphia considers prohibited bases like disability and race when making foster care placement decisions.³⁵

B. The second post-hoc justification: Provision 3.21.

After CSS explained that it was not a public accommodation,³⁶ Philadelphia sent a second letter. This letter invoked foster care contract provision 3.21 (“Provision 3.21”), which states that agencies “shall not reject a child or family for Services” unless “an exception is

³² App. 274a-276a.

³³ See App. 34a.

³⁴ App. 293a-294a, 249a-250a, 269a-271a, 292a-294a, 295a-301a.

³⁵ App. 249a-250a, 292a-296a, 299a-300a, 301a.

³⁶ App. 159a-164a.

granted.”³⁷ Although Philadelphia eventually admitted the provision applied only to “a rejection of referrals from DHS,” it claimed in the letter that Provision 3.21 meant no agency may refer a prospective foster family elsewhere for *any* reason.³⁸ This has variously been called the “no referrals” or “must certify” policy.

The difficulty with this argument is that, in practice, “referrals are made all the time.”³⁹ Specific examples include referrals for geographic proximity, medical expertise, behavioral expertise, specialization in pregnant youth, language needs, and tribal affiliation (or lack thereof) of would-be foster parents.⁴⁰ The City also acknowledged that agencies may decline to certify prospective foster parents if the agency does not have the specialization necessary to care for children with specific medical or behavioral needs.⁴¹

Provision 3.21 also expressly permits exceptions “by the Commissioner or the Commissioner’s designee, in his/her sole discretion.” But Philadelphia’s letter stated it has “no intention of granting an exception” for CSS.⁴²

³⁷ App. 167a-169a.

³⁸ App. 167-168a, 238a-239a, 246a-249a.

³⁹ App. 251a, 265a, 216a-218a, 219a-220a.

⁴⁰ App. 219a-221a, 230a-231a, 235a, 240a-242a, 261a, 263a, 290a-291a, 183a-184a.

⁴¹ App. 235a, 241a-245a.

⁴² App. 165a-172a.

C. The third post-hoc justification: new contract provision.

In the same letter, Philadelphia announced a new policy (the “Third Policy”) to ensure that agencies act according to Philadelphia’s “conception of equality.”⁴³ “[A]ny further contracts with CSS would be explicit” in requiring CSS to certify same-sex couples. The letter also compared CSS’s actions to racial discrimination and stated that, if CSS did not change its stance, Philadelphia would begin a “transition plan” to shut down CSS’s program.⁴⁴

As threatened, Philadelphia changed its contracts after the close of the record on the preliminary injunction motion. This new policy, which went into effect with all Fiscal Year 2019 contracts, is ostensibly incorporated into Provision 3.21, adding language that specifically prohibits sexual orientation discrimination against prospective foster parents. Philadelphia retains the ability to grant exemptions.

D. The fourth post-hoc justification: the City charter.

For the first time on appeal, Philadelphia identified a fourth justification: a City charter provision requiring that city contracts contain nondiscrimination language. But that provision expressly excludes professional services contracts, and foster care contracts are professional services contracts. Philadelphia Home Rule Charter § 8-200(2) (only applying to competitively bid contracts); App. 201a-203a (noting that

⁴³ App. 169a.

⁴⁴ App. 170a.

the foster care contract is not subject to § 8-200 of the Charter because it is a professional services contract).

IV. The proceedings to date.

A. The district court’s opinion and CSS’s emergency stay motion.

CSS filed this lawsuit on May 17, 2018, and sought a preliminary injunction shortly thereafter. That motion was heard in a three-day evidentiary hearing June 18, 19, and 21, 2018.

The district court denied the preliminary injunction. Citing an “absence of case law,” the court held that Philadelphia’s second policy was a neutral “all-comers” policy permissible under *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).⁴⁵

At the time, CSS was (and still is) operating under the transition plan, through which it can continue to serve the foster children who were already in its care in March 2018, but cannot welcome new foster children into its certified homes.⁴⁶ CSS’s best projections showed that it would be forced to close its program within months because of its dwindling number of children. CSS thus requested an emergency stay. Both the district and appellate courts rejected CSS’s request. See Denial of Plaintiffs’ Emergency Motion for Injunction Pending Appeal, *Fulton v. City of Philadelphia*, 30 F. Supp. 3d 661 (E.D. Pa. 2018); Denial of Plaintiffs’ Emergency Motion for Injunction Pending Appeal, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2018). On July 31, 2018, CSS filed an application with

⁴⁵ App. 81a.

⁴⁶ The City has made a few limited exceptions, such as to reunite siblings.

this Court, and on August 30, 2018, the Court denied relief, with Justices Thomas, Alito, and Gorsuch dissenting. *Fulton v. City of Philadelphia*, 139 S. Ct. 49 (2018).

B. The Third Circuit’s opinion.

The Third Circuit granted an expedited appeal and affirmed the district court’s ruling on April 22, 2019. The key question, according to the panel, was whether Philadelphia “treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs?” The court held that the answer was no, and therefore “[t]he City’s non-discrimination policy is a neutral, generally applicable law.”⁴⁷ Under *Smith*, Philadelphia’s exclusion of CSS was subject to only rational basis review.⁴⁸

The Third Circuit rejected CSS’s arguments that it had been targeted by city officials: the Commissioner’s admonition that CSS needed to follow the teachings of Pope Francis was merely “an effort to reach common ground” by “appealing to an authority within their shared religious tradition.”⁴⁹ The City Council’s statement calling CSS’s actions “discrimination * * * under the guise of” religion, was “a remark that * * * could merely state the well-established legal principle that

⁴⁷ App. 12a, 32a.

⁴⁸ App. 12a.

⁴⁹ App. 33a.

religious belief will not excuse compliance with general civil rights laws.”⁵⁰ The court concluded that Philadelphia was enforcing a neutral and generally applicable policy and therefore its actions were permissible even in the face of the City’s prior conduct.⁵¹

The Third Circuit also rejected CSS’s free speech claims, holding that because the City funded the foster care program generally, “the condition pertains to the program receiving government money,” and was therefore constitutional.⁵²

This petition followed.

C. Current status of CSS’s program.

Today, CSS’s foster care program continues to dwindle as foster children are adopted, age out of care, or return to their birth homes. Since last fall, delays in the family courts have caused a dramatic slowdown in adoptions from foster care.⁵³ This unexpected delay has meant that more children have remained in CSS’s foster homes than originally anticipated, but the program is still less than half its prior size, and is still being wound down by the City.

CSS was caring for more than 120 children when this lawsuit was filed, and is now caring for fewer than 60. Of an original staff of seven workers devoted full time to foster care, CSS has retained just three foster

⁵⁰ App. 32a.

⁵¹ App. 37a-38a.

⁵² App. 42a.

⁵³ Pat Loeb, *Backlog of 1,400 Adoption Cases Keeps Hopeful Philly Parents, Children Waiting*, Radio.com (February 19, 2019), <https://perma.cc/U3ER-3BZW>.

care employees who now split time with another program. This has allowed CSS to keep its program open, but it is only a temporary solution. Without the ability to care for any more children, CSS's numbers will continue to dwindle until its foster program must close.

REASONS FOR GRANTING THE PETITION

Philadelphia's actions here were baseless, discriminatory, and entirely unnecessary. CSS has been successfully providing foster care services to Philadelphia children for far longer than the City, and this religious ministry has never prevented a single LGBT couple from fostering. Yet the City is trying to exclude CSS from foster care because CSS refuses to embrace the City's beliefs about marriage. The City's shifting rationales prove that its actions were a result in search of a rule. In upholding those actions, the Third Circuit made it nearly impossible to prove a Free Exercise Clause violation in the circuit and contributed to a deepening split among the Courts of Appeals over how plaintiffs prove free exercise claims. It also departed from this Court's decisions in *Smith*, *Lukumi*, and *Masterpiece*. The lower courts' confusion over *Smith*, in this case and others, demonstrates that *Smith* should be reconsidered.

Free speech rights are also imperiled by the decision below, which allows governments to exclude religious foster and adoption agencies unless they speak the government's preferred message regarding marriage.

The Court should grant certiorari to resolve the confusion over *Smith* and to clarify that the First Amendment provides real protection for religious charities serving those in need.

I. The Third Circuit’s decision deepens a circuit split over the requirements for proving a free exercise violation.

The Third Circuit’s new free exercise standard puts it on the wrong side of a 6-2 circuit split over the application of the Free Exercise Clause. Specifically, in the Third Circuit, a free exercise plaintiff “*must* show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views.”⁵⁴ Similarly, the Ninth Circuit considers laws neutral and generally applicable so long as they proscribe “the same conduct for all, regardless of motivation.” *Stor-mans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015). Thus, in the Third and Ninth Circuits, a law is considered neutral and generally applicable unless plaintiffs can make one specific showing: that the government would allow the same conduct by someone who “held different religious views.”⁵⁵

By contrast, the Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits use a more capacious standard. In these Circuits, a free exercise plaintiff can rely upon different forms of evidence to prove that a law is not neutral or generally applicable. Plaintiffs may prove a claim by showing that the government issues individualized exemptions, that the law exempts secular conduct that undermines the government’s interest, or that law’s history indicates non-neutrality.

This Court’s decisions in *Lukumi* and *Masterpiece* confirm that the six circuits have it right and the Third

⁵⁴ App. 26a (emphasis added).

⁵⁵ App. 26a.

and Ninth Circuits have it wrong: free exercise plaintiffs have a variety of ways to prove their case. This Court should intervene to reject the Third and Ninth Circuits' standard.

A. The Third and Ninth Circuits require free exercise plaintiffs to show that the government discriminates according to religious views.

The Third Circuit's rule makes it almost impossible to prove a law is not neutral and generally applicable. In order to prevail under this rule, a free exercise plaintiff "*must* show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." App. 26a (emphasis added).

As described in the Statement, CSS demonstrated that the City permitted individualized exemptions from its policies, permitted various categorical exceptions from its policies, and admittedly altered its policies to prohibit CSS's religious practice. The Third Circuit ignored this evidence because it held that the *only* relevant evidence would be evidence of an exception for "another organization that did not work with same-sex couples as foster parents but had different religious beliefs[.]"⁵⁶ It determined that strict scrutiny would not apply absent evidence of "improper religious hostility on the City's part."⁵⁷

This aligns the Third Circuit with the Ninth Circuit on one side of the split. The Ninth Circuit considers laws neutral and generally applicable so long as

⁵⁶ App. 32a.

⁵⁷ App. 35a.

they proscribe “the same conduct for all, regardless of motivation.” *Stormans*, 794 F.3d at 1077. Here, as in *Stormans*, “there is much evidence that the impetus for the adoption of” the government policy “was hostility to” a group “whose religious beliefs * * * are out of step with prevailing opinion” in the jurisdiction. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433-2444 (2016) (Alito, J., dissenting). Yet both circuits uphold such laws.

In *Stormans*, the Ninth Circuit held that laws penalizing religious conduct were permissible so long as they applied “regardless of the motivation” of the person challenging the regulations. 794 F.3d at 1077. In *Stormans*, as here, the Ninth Circuit rejected the argument that the existence of secular exemptions, but not religious exemptions, subjects a policy to strict scrutiny.

There, the court considered a regulation that required pharmacies to stock the “morning-after pill,” and a related regulation that required them to provide, or “deliver,” that medication. The court discounted the multiple secular exceptions to the regulation requiring pharmacies to stock the morning-after pill, reasoning that those exceptions merely “allow[ed] pharmacies to operate in the normal course of business.” *Stormans*, 794 F.3d at 1080. In circular fashion, the court also determined that the delivery regulation was neutral because it “applies to *all* objections to delivery that do not fall within an exemption, regardless of the motivation behind those objections.” *Id.* at 1077. Thus the Ninth Circuit, like the Third Circuit, treats an exception-riddled law as neutral and generally applicable unless plaintiffs can prove that the law *only*

prohibits an action when it is religiously motivated. See *Stormans*, 794 F.3d at 1077.

This standard bars most consideration of the history of a government policy. Both the Third and Ninth Circuits considered the policies neutral despite significant evidence that they were prompted by hostility toward religious actions. The Third Circuit declined to credit such evidence absent proof that CSS was treated “worse than [Philadelphia] would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs.”⁵⁸ Similarly, in *Stormans*, there was “evidence of discriminatory intent” similar to that in *Lukumi*. *Stormans*, 136 S. Ct. at 2437 (Alito, J., dissenting). Yet the Ninth Circuit found no discriminatory intent, reasoning that “the Commission did not act solely in response to religious objections,” and its intent was “a patchwork quilt of concerns, ideas, and motivations.” *Stormans*, 794 F.3d at 1078. Both circuits consider *any* non-discriminatory purpose sufficient to overcome even substantial evidence of targeting.

B. The Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits consider evidence of non-religious exceptions and the history of the challenged policy.

Unlike the Third and Ninth Circuits, plaintiffs in six other circuits can prove a free exercise violation without showing that the government permits the exact same conduct by others who lack religious motivation.

⁵⁸ App. 32a.

1. The Sixth, Tenth, and Eleventh Circuits apply strict scrutiny if the government either uses a system of individualized exemptions or carves out other secular exemptions to its policies.

The Sixth Circuit applies strict scrutiny where “the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions.” *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012) (Sutton, J.). In this strikingly similar case, the Sixth Circuit considered a free exercise challenge by a counseling student who could not counsel LGBT clients with regard to their same-sex relationships and sought to refer them to other counselors. The university rejected her request and expelled her. *Id.* at 731-732.

The Sixth Circuit did not require an exact comparator, but held that strict scrutiny could apply where the government “permit[ted] referrals for secular—indeed mundane—reasons,” such as when a client could not pay. The university also permitted referrals for other values conflicts, such as conflicts over end-of-life counseling. *Ward*, 667 F.3d at 739. The Sixth Circuit held that this policy was not “neutral and generally applicable” because it “permit[ted] secular exemptions but not religious ones and fail[ed] to apply the policy in an even-handed” manner. *Id.* at 739-740.

Ward also affirmed that the availability of discretionary, individualized exemptions triggers strict scrutiny. The University offered various policies which it claimed prohibited Ward’s referral, but each was riddled with exemptions. *Ward*, 667 F.3d at 739. As Judge Sutton explained, “at some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of

a neutral and generally applicable policy * * *.” *Id.* at 740.

The Tenth Circuit likewise applies strict scrutiny where the government has in place a “case-by-case system” of determinations, noting that “greater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298-1299 (10th Cir. 2004). The Tenth Circuit applies this test even where the policy is otherwise “not pretextual but rather * * * neutral and generally applicable.” *Id.* at 1295.

Similarly, the Eleventh Circuit applies strict scrutiny “where a law fails to similarly regulate secular and religious conduct implicating the same government interests.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004). In *Midrash Sephardi*, the Eleventh Circuit considered a zoning ordinance that limited uses in a business district for purposes of “retail synergy.” The ordinance exempted nonprofit clubs and lodges, but not houses of worship. The court held this “violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town’s] interest in retail synergy as much or more than churches and synagogues.” *Id.* at 1235. The synagogue was not required to prove that other houses of worship were permitted in the business district, merely that the city permitted other exceptions that undermined its interest. See *id.*⁵⁹

⁵⁹ Although the discussion occurs under RLUIPA, the Eleventh Circuit analyzed it according to free exercise and equal protection precedent. *Midrash*, 366 F.3d at 1239.

Had the standard of the Sixth, Tenth, and Eleventh Circuits applied here, Philadelphia’s actions would have faced strict scrutiny. Philadelphia’s claimed policies are riddled with exemptions. Philadelphia claims CSS must follow the FPO, but has not applied the FPO to the City’s own foster care operations and expects agencies to depart from the FPO when doing home studies. See pp. 11-12, *supra*. Philadelphia claims no referrals can be made, but evidence shows that “referrals are made all the time” and for a variety of reasons. See p. 13, *supra*. Philadelphia allows exceptions, but “has no intention of granting an exception” to CSS.⁶⁰ Thus the Third Circuit’s rule cannot be squared with the Sixth, Tenth, or Eleventh Circuit rules, which apply strict scrutiny without requiring a separate showing that the law allows the exact same conduct by someone who “held different religious views.”⁶¹

2. Five circuits consider a law’s history to determine whether it is neutral under *Smith*.

The Second Circuit’s rule is that a law which is “prompted” by a particular religious practice must face strict scrutiny. *Central Rabbinical Cong. of U.S. & Canada v. New York City Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 195 (2d Cir. 2014). In *Central Rabbinical*, a New York regulation banned an Orthodox Jewish religious practice known as *metzitzah b’peh*. The government admitted that the regulation was “prompted” by the religious practice, and the court found that it was “the only presently known conduct’

⁶⁰ App. 167a.

⁶¹ App. 26a.

covered by the Regulation.” *Ibid.* Accordingly, the Second Circuit remanded for the lower court to apply strict scrutiny. 763 F.3d. at 186.

Similarly, in *Ward* the Sixth Circuit held the policy must face strict scrutiny where “[a]mple evidence support[ed] the theory that no such policy existed—until [Plaintiff] asked for a referral on faith-based grounds.” 667 F.3d at 739. Once again, a policy prompted by a request for a religious accommodation was evidence of religious targeting.

The Seventh and Eighth Circuits have also held that the series of events leading up to a policy may be sufficient to trigger strict scrutiny. The Seventh Circuit considers “the specific series of events leading to the enactment or official policy in question.” *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (“[W]e must look at available evidence that sheds light on the law’s object, including * * * ‘historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act’s] legislative or administrative history.’”) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)). The Eighth Circuit has also held that lack of neutrality “can be evidenced by objective factors such as the law’s legislative history.” *CHILD, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) (citing *Lukumi*, 508 U.S. at 535, 540).

The Tenth Circuit looks to the history of a particular government action and is explicit that a religiously discriminatory action is not saved by the fact that a decisionmaker can assert some secular justification: “the Free Exercise Clause has been applied numerous

times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities.” *Shrum v. City of Coweta*, 449 F.3d 1132, 1144-1145 (10th Cir. 2006) (McConnell, J.).

By contrast, the Third Circuit reads each new government policy on a *tabula rasa*, subjecting it to strict scrutiny only if the plaintiff can prove that the resulting policy treats it “worse than it would have treated another organization” that engaged in the exact same behavior but “had different religious beliefs.”⁶²

Had CSS’s claims been decided in the Second, Sixth, Seventh, Eighth, or Tenth Circuits, the ample historical evidence described above would have rendered the law non-neutral. See pp. 8-14, *supra*. But because the Third Circuit requires plaintiffs to prove that a policy (however it came about) applies differently based upon religious motivation, the extensive record of religious targeting was insufficient. Here, Philadelphia changed its contracts to ensure that “any further contracts with CSS will be explicit in” prohibiting CSS’s religious exercise.⁶³ The City explained this change was necessary to ensure contracts are per-

⁶² App. 32a.

⁶³ App. 170a.

formed “in a manner that is consistent with our conception of equality.”⁶⁴ Commissioner Figueroa confirmed that this change was made because of the dispute with CSS.⁶⁵

CSS has been the target of coordinated actions by every branch of City government: the City Council accused it of “discrimination” occurring “under the guise of” religion⁶⁶; the Mayor—who has a history of disparaging comments against the Archdiocese—prompted an inquiry by the Human Relations Commission; Commissioner Figueroa summoned CSS’s leadership to a meeting where she accused them of not following “the teachings of Pope Francis” and told them it was “not 100 years ago.”⁶⁷ What is more, the City acknowledged that its investigation was targeted at religious entities and it has never investigated secular agencies or informed them of its claimed policies.⁶⁸

None of this evidence mattered in the Third Circuit because, like the Ninth, this kind of historical showing cannot trigger strict scrutiny without proof that the law permits the exact same conduct by someone who “had different religious beliefs.”

⁶⁴ App. 169a.

⁶⁵ App. 310a-312a.

⁶⁶ App. 147a.

⁶⁷ App. 305a-306a.

⁶⁸ App. 278a-279a.

C. The Third Circuit’s approach directly conflicts with this Court’s decisions in *Smith*, *Lukumi*, and *Masterpiece*.

The broader free exercise standards used by six circuits correctly apply this Court’s decisions. The standard used by the Third Circuit does not.

This Court has long held that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Smith*, 494 U.S. 872, 884 (1990). But as described above, the Third Circuit declined to apply strict scrutiny to a policy that permits exemptions in the “sole discretion” of the Commissioner.⁶⁹

This Court, unlike the Third Circuit, asks whether the government permits nonreligious conduct that undermines the government’s interests “in a similar or greater degree than [religious conduct] does.” *Lukumi*, 508 U.S. at 543. *Lukumi* relied on exceptions permitting “hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia” as relevant comparisons under ordinances banning animal sacrifice. *Id.* at 537. But the Third Circuit held that CSS must prove that it was treated worse than “another organization that did not work with same-sex couples as foster parents but had different religious beliefs.”⁷⁰ If the Third Circuit’s rule applied in *Lukumi*, then only exceptions for other forms of ritual animal sacrifice would be relevant.

⁶⁹ App. 165a-172a; App. 207a.

⁷⁰ App. 32a.

Similarly, in *Masterpiece*, this Court considered evidence that other bakeries were permitted to decline to create cakes with anti-gay messages. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1730 (2018). The Court found it important that the “treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent,” while leaving open the question of “whether the cases should ultimately be distinguished.” *Ibid.* If the Third Circuit’s rule applied there, then the Court would have considered this inconsistent treatment only if the other conduct could not be distinguished.

The Third Circuit’s stingy standard also conflicts with the way *Masterpiece* treated historical background. This Court held that “factors relevant to the assessment of governmental neutrality include ‘the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.’” 138 S. Ct. at 1731. Yet the Third Circuit considered that history irrelevant absent proof that someone else engaging in the exact same conduct with different religious beliefs would have been treated better. The extensive record of religious targeting did not establish the “antipathy” the court thought necessary.⁷¹

⁷¹ App. 37a.

This error was compounded by the Third Circuit’s determination that a policy prompted by a religious practice was not subject to strict scrutiny. Philadelphia acknowledged that its contract change was a direct response to CSS’s actions.⁷² Yet the court concluded that “[i]f all comment on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation’s civil rights laws might be as well.”⁷³ This formulation puts the proverbial cart before the horse: the law is deemed neutral and generally applicable *before* the government’s “comment on religiously motivated conduct” ever gets assessed.⁷⁴ The Third Circuit’s decision cannot be squared with the decisions of this Court.

II. *Smith* should be revisited.

The Third Circuit’s reliance upon *Smith* demonstrates how *Smith* has fostered conflict and confusion among the lower courts. Although this Court has limited *Smith* in *Lukumi*, *Hosanna-Tabor*, *Trinity Lutheran*, and *Masterpiece*, this case illustrates how lower courts are slow to apply those exceptions and often construe them too narrowly. The Court thus should revisit *Smith* and return to a standard that can better balance governmental interests and fundamental rights. See *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (Alito, J., concurring). Surely the Court that decided *Smith* could not have envisioned that *Smith* would be used to permit Philadelphia to

⁷² App. 170a, 310a-312a.

⁷³ App. 37a-38a.

⁷⁴ App. 37a.

shut down a century-old ministry because the City disagrees with the Archdiocese over marriage. This is precisely the sort of church-state conflict the Free Exercise Clause was designed to prevent.

Smith “drastically cut back on the protection provided by the Free Exercise Clause.” *Kennedy*, 139 S. Ct. at 637 (Alito, J., concurring). *Smith* expressed the fear that allowing religious believers to challenge generally applicable laws would be “courting anarchy.” 494 U.S. at 888. But this view “is contrary to the deep logic of the First Amendment.” McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990). And thirty years of experience post-*Smith* have confirmed that courts are “up to the task” of engaging in “case-by-case consideration of religious exemptions to generally applicable rules,” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006), without creating “anarchy” or anything like it. See also *Cutter v. Wilkinson*, 544 U.S. 709, 722-723 (2005) (there is “no cause to believe” that the compelling-interest test could “not be applied in an appropriately balanced way”).⁷⁵

Meanwhile, as this case demonstrates, the supposedly more administrable *Smith* rule has created a muddle of conflicting decisions in the lower courts. See Laycock & Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 5-6, 15

⁷⁵ The Third Circuit rejected a claim under Pennsylvania’s RFRA in this case. App. 47a. But in doing so, it admittedly rested its decision on portions of the state law which are distinct from the analysis used by this Court in RFRA and free exercises cases. See App. 45a & n.12 (contrasting federal and Pennsylvania law); App. 47a & n.13 (same).

(2016). The *Smith* rule has not delivered on its central promise.

Smith also contemplated that governments would continue “to be solicitous of” religious liberty, 494 U.S. at 890—not that they would take *Smith* as an invitation to ride roughshod over religious exercise. “The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously,” *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2074 (2019), but *Smith* has become an impediment to that goal. This case presents an example of a government relying on *Smith* in precisely the wrong way: to shield religious targeting under the guise of a “neutral and generally applicable” policy that even the government decisionmakers struggle to identify.

Indeed, the Third Circuit’s decision reads as a defense of *Smith*:

[CSS’s argument] runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements. That CSS’s conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City’s desire to regulate that conduct springs from antipathy to those beliefs. If all comment on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then

Smith is a dead letter, and the nation’s civil rights laws might be as well.⁷⁶

This Court should reconsider *Smith* and restore free exercise to a more administrable rule that adequately protects a fundamental first amendment right.

III. The Third Circuit’s decision upholds unconstitutional conditions on free speech and religious exercise, departing from this Court’s decisions.

1. The City’s actions here place unconstitutional conditions on CSS’s first amendment activities: the City is threatening to deny CSS the ability to provide foster care to Philadelphia children unless CSS does and says things it believes it should not. This attempt to “compel the endorsement of ideas that [Philadelphia] approves” violates the First Amendment. *Knox v. SEIU*, 567 U.S. 298, 309 (2012). It effectively denies CSS a license if it does not speak and act as the government prefers.

This Court has repeatedly reaffirmed that the government does not have “unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.” *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018). The use of licensing requirements to stifle speech “pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.” *Id.* at 2374 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)); see also *Cantwell v. Connecticut*, 310 U.S.

⁷⁶ App. 37a-38a.

296 (1940) (denial of license); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (license tax to sell religious books door-to-door); *Follett v. McCormick*, 321 U.S. 573 (1944) (license tax).

The result is the same whether the government prohibits an activity outright or conditions benefits on the surrender of constitutional rights: “government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient’s constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance.” *Agency for Int’l Dev. v. AOSI*, 570 U.S. 205, 212 (2013). In *AOSI*, the government sought to “leverage” a government contract to control speech “outside the contours of the program itself.” *Id.* at 214-15.

And in the religious exercise context, this Court held “when the State conditions a benefit in this way, * * * the State has punished the free exercise of religion.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality op.)). *Trinity Lutheran* involved a grant program, but the Court analogized to cases involving government contractors. See 137 S. Ct. at 2022 (citing *Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993)). As the Court put it in both *Trinity Lutheran* and *Sherbert v. Verner*, decided 54 years apart: “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.” 374 U.S. 398, 404 (1963), *quoted in Trinity Lutheran*, 137 S. Ct. at 2022.

2. In contrast, here the Third Circuit upheld the requirement that CSS endorse same-sex relationships

because CSS “has chosen to partner with the government to help provide what is essentially a public service.”⁷⁷ The Third Circuit characterized the condition as merely directing “how to use the government’s money,” even if outside the funding context the condition would be an unconstitutional speech compulsion.⁷⁸

But here Philadelphia does not fund or control home studies—it says it has “nothing to do” with them.⁷⁹ And even if it did fund home studies, the Third Circuit’s reasoning works only when the funding recipient *can* “decline the funds” and continue engaging in the protected activity. See *AOSI*, 570 U.S. at 214; see also *id.* at 215 (rejecting government attempt to manipulate “the definition of a particular program” to “subsume the challenged condition”). Here, if CSS declines the contract, it will be completely excluded from Philadelphia’s foster care system. It might serve families in other ways, like its residential programs or temporary care for unaccompanied minors, but it cannot support Philadelphia children through the difficult process of entering foster care, finding families who can care for them for weeks to years, and supporting those families as they care for children through the uncertainties of family reunification or adoption. In this scenario, the condition is a license to carry out what would otherwise be “breaking the law.”⁸⁰

The Fifth Circuit has also recognized this distinction. In *Department of Texas, Veterans of Foreign Wars*

⁷⁷ App. 42a.

⁷⁸ App. 41a.

⁷⁹ App. 302a-303a.

⁸⁰ App. 256a.

of the *United States v. Texas Lottery Commission*, the en banc Fifth Circuit invalidated political-advocacy restrictions on the use of funds by charities with bingo licenses. 760 F.3d 427, 430-432 (5th Cir. 2014) (en banc). The court explained that “[t]he premise upon which” this Court’s funding-condition cases “are based—that the state has broad authority under its spending powers to attach conditions to its grant of public funds”—is “inapposite” where the government restriction is “akin to an occupational license.” *Id.* at 437. Unlike funding, a license constitutes “authority to conduct what would be illegal otherwise.” *Id.* at 436. The Fifth Circuit’s decision—unlike the Third Circuit’s here—is consistent with this Court’s funding condition cases.

Indeed, in *every* case in which this Court has upheld conditions on funding that restrict First Amendment activity, it has emphasized that the plaintiffs remained “free” to engage in the protected activity “without federal assistance.” *United States v. American Library Ass’n*, 539 U.S. 194, 212 (2003) (plurality); see also *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 551 (1983) (“The issue in this case is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby.”); *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (First Amendment rights not violated because funding recipient “may terminate its participation in the * * * program and thus avoid the [program’s] requirements”). The principle animating the funding-condition cases cited by the City, then—that the government doesn’t violate the Constitution by offering recipients a choice between accepting “funds * * * subject to the Government’s conditions * * * or declining the subsidy and financing their own

unsubsidized program,” *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991)—cannot apply. The Third Circuit’s decision departs from the decisions of this Court and splits with the Fifth Circuit.

IV. This case raises exceptionally important questions.

This case presents a question of profound importance with wide-ranging implications. Justices of this Court have predicted the thorny legal questions which would arise after *Obergefell*. See *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting). And a majority of this Court has begun to address those challenges by recognizing, for example, that certain religious exercises, like the inability of clergy to solemnize a same-sex marriage, are “an exercise [of religion] that gay persons could recognize and accept without serious diminishment to their own dignity and worth.” *Masterpiece*, 138 S. Ct. at 1727.

Here, CSS is asking that it not be compelled to affirm same-sex marriages as the price of continuing a religious ministry. Just as no LGBT couples are prevented from marrying because a particular church does not perform same-sex weddings, no LGBT couples are prevented from fostering because a particular church cannot provide an endorsement. Yet many churches will be prevented from exercising religion by caring for at-risk children, all due to a disagreement with the government about marriage. That is not the live-and-let-live world *Obergefell* promised.

The foster care crisis is not just in Philadelphia, but nationwide, and is becoming worse due to the opioid

epidemic.⁸¹ On any given day, over 400,000 children are in foster care nationwide.⁸² More than 100,000 of those children are awaiting adoption. Because the government cannot find enough foster and adoptive families on its own, it has historically relied on private groups and faith-based agencies.

It is no exaggeration to say that the decision below threatens the future of Catholic foster and adoption agencies throughout the country. In Boston, San Francisco, Buffalo, the District of Columbia and the State of Illinois, Catholic charities have already been forced out of foster care and adoption.⁸³ Many agencies have been forced to close before litigation can run its course, and therefore protection for Petitioners here is of out-sized public importance.

Absent this Court's intervention, the decision below will provide a roadmap for states, municipalities, and activist organizations to close down faith-based foster and adoption agencies across the country. Indeed, other agencies are fighting to keep their doors open. See, e.g., Complaint, *Rogers v. United States Dep't of Health and Human Servs.*, No. 19-01567 (D.S.C. May 30, 2019), ECF No. 1.; Complaint, *Marouf v. Azar*, No. 18-cv-00378 (D.D.C. Feb. 20, 2018), ECF No.1.

Ten states responded to this crisis by enacting laws that specifically protect conscience rights for religious social service providers. But as the *Rogers* and *Marouf*

⁸¹ See note 2, *supra*.

⁸² *Adoption Statistics*, Adoption Network Law Center, <https://perma.cc/K7N4-YL2B> (last visited July 22, 2019).

⁸³ App. 71a-72a.

cases illustrate, attempts to protect religious foster care providers are vulnerable to challenge.

This case presents an important opportunity for this Court to apply the First Amendment to a post-*Obergefell* system in which same-sex marriage co-exists with the “proper protection” owed to “religious organizations” as “they seek to teach the principles [about marriage] that are so fulfilling and so central to their lives and faiths.” *Obergefell*, 135 S. Ct. at 2607.

CONCLUSION

For all these reasons, the Court should grant a writ of certiorari.

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Respectfully submitted.

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JULY 2019

APPENDIX

1a

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 18-2574

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

Appellants

v.

CITY OF PHILADELPHIA; DEPARTMENT OF HU-
MAN SERVICES FOR THE CITY OF PHILADEL-
PHIA; PHILADELPHIA COMMISSION ON HUMAN
RELATIONS

SUPPORT CENTER FOR CHILD ADVOCATES;
PHILADELPHIA FAMILY PRIDE
(Intervenors in D.C.)

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-18-cv-02075)
District Judge: Honorable Petrese B. Tucker

Argued November 6, 2018
Before: AMBRO, SCIRICA, and RENDELL,
Circuit Judges

(Opinion filed: April 22, 2019)

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OPINION OF THE COURT

AMBRO, Circuit Judge

A reporter from the Philadelphia Inquirer informed the City of Philadelphia's Department of Human Services in March 2018 that two of its agencies would not work with same- sex couples as foster parents. Human Services investigated this allegation, which it considered a violation of the City's anti-discrimination laws.

When the agencies confirmed that, because of their religious views on marriage, they would not work with gay couples, Human Services ceased referring foster children to them. One of those agencies, Catholic Social Services (sometimes abbreviated to “CSS”), brought this action claiming that the City has violated its rights under the First Amendment’s Free Exercise, Establishment, and Free Speech Clauses, as well as under Pennsylvania’s Religious Freedom Protection Act. It seeks an order requiring the City to renew their contractual relationship while permitting it to turn away same-sex couples who wish to be foster parents. CSS sought preliminary injunctive relief to this effect from the District Court. When it denied the request after a three-day hearing, *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661 (E.D. Pa. 2018), CSS appealed.

Our question is not whether the City or CSS has behaved reasonably. Nor is our task to mediate a mutually agreeable compromise between the parties.¹

It is to determine whether the City’s actions were lawful. Did it have the authority to insist, consistent with the First Amendment and Pennsylvania law, that CSS not discriminate against same-sex couples as a condition of working with it to provide foster care services? Or, inversely, has CSS demonstrated that the City transgressed fundamental guarantees of religious liberty?

¹ That being said, District Judge Tucker commented that she “would prefer that the [p]arties seek* * * some compromise to their current dispute without court intervention.” *Id.* at 667. We agree, especially given the long and constructive relationship between the parties.

At this stage and on this record, we conclude that CSS is not entitled to a preliminary injunction. The City's non-discrimination policy is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exception from that policy. See *Emp't Div. v. Smith*, 494 U.S. 872, 877-78 (1990). It has failed to make a persuasive showing that the City targeted it for its religious beliefs, or is motivated by ill will against its religion, rather than sincere opposition to discrimination on the basis of sexual orientation. Thus we affirm.

I. Background

Catholic Social Services is a religious non-profit organization affiliated with the Archdiocese of Philadelphia that provides foster care services in Philadelphia. Created in 1917 as the Catholic Children's Bureau, it is part of a tradition of caring for children in need that stretches back even further, to the yellow fever outbreak of 1797. As an affiliate of the Catholic Church, CSS sees caring for vulnerable children as a core value of the Christian faith and therefore views its foster care work as part of its religious mission and ministry. When the Catholic Children's Bureau was founded, foster care was handled on a private basis, but over the following century that changed. Today that care is comprehensively regulated both by the Commonwealth of Pennsylvania and by the City of Philadelphia.

The Commonwealth, the City, and the private foster care agencies each play a role in the Philadelphia foster care system. State regulations set the criteria people or families must meet to become foster parents, as well as the duties of both foster parents and foster care agencies. See 55 Pa. Code § 3700.62 *et seq.* Those

agencies then develop relationships with individual foster families, which begin when a family approaches an agency seeking to become foster parents. It must evaluate the applicants under the Commonwealth's criteria to determine whether they would be suitable candidates. See 23 Pa. Cons. Stat. § 6344(d); 55 Pa. Code § 3700.64. One criterion concerns the “[e]xisting family relationships, attitudes and expectations regarding the applicant’s own children and parent/child relationship, especially as they might affect a foster child.” 23 Pa. Cons. Stat. § 6344(d)(2)(iv); 55 Pa. Code § 3700.64(b)(1).

When a child in need of foster care comes into the City’s custody, Human Services refers that child to one of the foster care agencies with which it has a contractual relationship. Once the City refers a child to an agency, that agency selects an appropriate foster parent for the child, although Human Services can oppose a child’s placement with a particular foster parent if necessary.

At the outset of this litigation, the City of Philadelphia had contracts with 30 foster care agencies, including CSS. These are one-year contracts renewed on an annual basis. Agencies are compensated by the City for their services; CSS’s contract provided for a per diem rate for each child placed in one of its affiliated foster homes. This payment did not cover its full expenses, meaning that CSS operated at a loss. The contract required it to certify its foster parents in accord with state regulations, but did not otherwise impose conditions on the certification process. It did, however, include language prohibiting CSS from discriminating due to race, color, religion, or national origin, and it incorporated the City’s Fair Practices Ordinance,

which in part prohibits sexual orientation discrimination in public accommodations.

This last requirement, and the parties' differing understandings of it, led to this controversy. CSS takes the position that it cannot certify a same-sex married couple as foster parents consistent with its religious views. As an affiliate of the Catholic Church, CSS adheres to the belief that marriage is between a man and a woman. It is not unwilling to work with LGBTQ individuals as foster parents. However, state regulations require it to consider an applicant's "existing family relationships" as part of the certification process. In applying this criterion, CSS will only certify foster parents who are either married or single; it will not certify cohabitating unmarried couples, and it considers all same-sex couples to be unmarried. So far as the record reflects, no same-sex couples have approached CSS seeking to become foster parents.

On March 9, 2018, a reporter from the Philadelphia Inquirer called Human Services and stated that two of the City's foster care agencies, CSS and Bethany Christian Services, would not work with same-sex couples as foster parents. The Inquirer published an article to this effect on March 13, 2018. In response, the Commissioner of Human Services, Cynthia Figueroa, called officials at both CSS and Bethany Christian asking if this report was true. Both organizations confirmed the report. James Amato, the Secretary of CSS, told Commissioner Figueroa that his agency would not certify same-sex couples because it was against the Church's views on marriage and, when told this was discrimination, replied that he was merely following the teachings of the Catholic Church. Commissioner Figueroa then called a number of other foster care

agencies asking whether they had similar policies; none did. All but one of the other agencies Figueroa called were religiously affiliated. As for the one secular agency, she testified that she had a “good relationship” with its CEO.

Shortly thereafter, Amato attended a meeting with Figueroa in an unsuccessful attempt to resolve the impasse. At this meeting, Amato invoked CSS’s hundred-year history of providing services to the City. Figueroa responded by noting that times had changed over the course of that relationship, that women and African-Americans did not have the same rights when it started, and that she herself would likely not have been in her position a century earlier. Figueroa, who is Catholic and Jesuit-educated, also remarked to Amato that it would be great if CSS could follow the teachings of Pope Francis. Amato later testified that Figueroa specifically stated that CSS should follow Pope Francis as opposed to the Archdiocese of Philadelphia or its Archbishop Charles J. Chaput; Figueroa denied mentioning anyone other than Pope Francis. Figueroa also indicated to Amato that the matter had the attention of the highest levels of City government, by which she testified she meant herself, her chain of command, and ultimately Mayor James Kenney. She also testified that prior to this meeting she spoke briefly with the Mayor; she told him that she was working to address the issue and would brief him after more decisions had been made.

Immediately after his meeting with Figueroa, Amato received a phone call from a representative of Human Services who informed him that it would no

longer refer new foster children to CSS, a policy known as an “intake freeze.”²

Figueroa testified that she implemented the freeze because of her serious concern that CSS’s relationship with Human Services might end in the near future. Given the preference for stability in placing foster care children, she did not want to send any new children to an agency they might well have to leave in a matter of months. This was not the first time Human Services had instituted an intake freeze out of a concern that it might not be able to continue working with a given agency. The freeze nonetheless did not affect children already placed with CSS.

Nor did it affect other aspects of CSS’s relationship with the City. Family foster care is only one component of Philadelphia’s framework for at-risk children. The City also employs private agencies to operate “congregate care” facilities, or group homes, for children in state custody who have not been assigned to a foster family for one reason or another. And it partners with “Community Umbrella Agencies” that work with children in the community to address problems in their home environment that might prevent them from remaining at home. CSS operates as a congregate care provider and a Community Umbrella Agency, and its services in those capacities were not affected by the intake freeze or any subsequent developments in this dispute pertaining to foster care. Indeed, in each unrelated area it continues working with the City to this day.

² This intake freeze also affected Bethany Christian, although, as noted below, Bethany has since worked out an agreement with the City and has resumed receiving foster care referrals.

On several occasions Human Services granted exceptions to the intake freeze where there were particularly strong reasons why CSS would be the best placement for an individual child—for example, if one of that child’s siblings had already been placed with a CSS family. It does not appear that any exemption requests were denied.

Meanwhile, on March 15, 2018, two days after the Inquirer article, the City Council passed a resolution authorizing the Philadelphia Commission on Human Relations to “investigate Department of Human Services’ policies on contracting with social services agencies that * * * discriminate against prospective LGBTQ foster parents.” The resolution stated that “the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom,” and declared that any “agency which violates City contract rules in addition to the Fair Practices Ordinance should have their contract with the City terminated with all deliberate speed.” The following day (March 16), lawyers for the Commission wrote to CSS with a battery of questions regarding its policies about working with same-sex couples or LGBTQ individuals. It responded on April 16, 2018, challenging both the legal basis for what it termed the “City’s unlawful suspension” of its contract and the Commission’s jurisdiction over the matter. Centrally, CSS argued that its screening of would-be foster parents was not a public accommodation and hence not subject to the Fair Practices Ordinance.

Lawyers from the City wrote back separately on the jurisdictional and substantive points on May 7,

2018. As to substance, the City asserted that its contract with CSS had not been formally suspended, and that it did not require any referrals to that agency. Therefore the City could not possibly have breached the contract by suspending referrals. The letter noted several provisions of the contract that, it argued, forbade CSS's policy of discrimination.

After setting out the City's legal interpretation of the contract, the letter stated its plan going forward:

Please also note that CSS's current contract expires on June 30, 2018, and the City is under no legal obligation to enter into a new contract for any period thereafter. We are hopeful that we can work out any differences before then, but please be advised that—except where the best interests of a child demands otherwise—the City does not plan to agree to any further referrals to CSS, and the City intends to assist with the transition of foster families to other agencies, absent assurances that CSS is prepared to adhere to its contractual obligations and, in implementing its City contract, to comply with all applicable laws, including those related to non-discrimination. We believe our current contract with CSS is quite clear that this is our right, but please be advised that any further contracts with CSS will be explicit in this regard.

The letter underscored “respect [for CSS's] sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services.” It stressed the importance of equality as “both a legal requirement, and an important City policy and value that must be embodied

in our contractual relationships.” In addition, the City reaffirmed that it did not want to see its “valuable relationship with CSS * * * come to an end,” but instead hoped that CSS would agree to comply going forward with the terms of the Fair Practices Ordinance.

As to jurisdiction, the City further asserted that foster care is a public accommodation, triggering both the Ordinance’s mandate and the Commission’s jurisdiction. The City requested a response to the questions in its March 16 letter within 10 days and threatened subpoenas if CSS did not comply. The latter responded by filing this lawsuit, alleging 16 causes of action against the City, Human Services, and the Human Relations Commission. Three individuals who had worked with CSS as foster parents—Sharonell Fulton, Cecilia Paul,³ and Toni Lynn Simms-Busch—were also listed as plaintiffs.⁴ On June 5, 2018, plaintiffs

³ Ms. Paul died during the pendency of this action. She fostered children for over 40 years, taking into her home more than 100 children, and personally adopting six. In 2015, the City of Philadelphia recognized her as the “Outstanding Foster Parent of the Year.” Thomas Paul, adopted son of Ms. Paul, “believes he was raised by a living saint.” Brief of Amici Curiae Former Foster Children and Foster Parents and the Catholic Association Foundation at 4.

⁴ We have doubts whether the individual plaintiffs have standing to bring this complaint, as the City took no direct action against them. Any harms to the individual plaintiffs were the consequence of the City’s actions against CSS. See *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (party seeking to assert the rights of others must show (1) a “close” relationship with the one who possesses the right, and (2) some “hindrance” to the possessor’s ability to assert its own rights). But the issue of standing was not raised, and the limits on third-party standing are not a matter of our constitutional jurisdiction under Article III but rather “stem from a salutary ‘rule of self-restraint.’” *Craig v. Boren*, 429

moved for a temporary restraining order and preliminary injunction. Their proposed order would have required the City to “resume providing foster care referrals to [CSS] and permitting children to be placed with the foster families it has certified without delay,” to “rescind its prior directive prohibiting any foster care referrals to [CSS,] * * * to resume all dealings with [it] on the same terms as they had proceeded prior to March 2018,” and also to “resume and to continue operating under the current Contract, without breach, termination, or expiration, or to enter into a new Contract identical in all material respects to the current Contract, while this matter remains pending.” Doc. #13-1 to *Fulton et al. v. City of Philadelphia et al.*, No. 2:18-cv-02075- PBT (E.D. Pa. 2018). (As noted below, that contractual arrangement has lapsed in any event.)

The District Court promptly held a hearing on plaintiffs’ motion for preliminary injunctive relief. The hearing, which spanned three days, included testimony from plaintiffs Simms- Busch, Paul, and Fulton, as well as from Amato,⁵ Deputy Commissioner of Human Services Kimberly Ali, Commissioner Figueroa,

U.S. 190, 193 (1976) (quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953)). In any event, the individual plaintiffs claim only that the City violated the Constitution by taking action against CSS. Hence we may safely analyze this case solely in terms of whether CSS’s rights have been violated.

⁵ At the hearing, Amato mentioned a CSS policy of which the City had been previously unaware, namely that CSS required would-be foster parents to submit a so-called “pastoral letter” from a religious figure (of any faith or denomination) certifying that they were actively religious, regularly attended services, etc. The City took issue with this policy, arguing that it violated both CSS’s contract with the City and the Establishment Clause of the First

and Frank Cervone, a child advocate who testified as an expert witness.⁶ (It was after this hearing that lawyers for the City informed the Court that it had resumed foster care operations with Bethany Christian when the latter agreed to cease discriminating against same-sex couples.)

The District Court denied the application for preliminary injunctive relief in a memorandum opinion, and plaintiffs appealed the same day. They argue to us that the District Court wrongly held that they were not likely to succeed on the merits of their Free Exercise, Establishment Clause, and Freedom-of-Speech claims, as well as under the Pennsylvania Religious Freedom Protection Act. Plaintiffs asked the District Court for injunctive relief pending appeal the following day, which it denied.

Plaintiffs—now appellants—also sought from our Court emergency injunctive relief pending appeal under Federal Rule of Appellate Procedure 8. We denied the motion by order.

Finally, appellants filed an emergency application to the Supreme Court for an injunction pending appeal

Amendment to the federal Constitution. CSS then informed the Court that, while it did not believe the “pastoral letter” requirement violated any applicable laws, it would abandon that requirement going forward “in order to eliminate any potential issue regarding how the parties would operate under a preliminary injunction.”

⁶ Plaintiffs contested the propriety of Cervone’s testimony, as he had signed legal papers in the case on behalf of the Center for Child Advocates, an organization seeking to intervene in the case (ultimately successfully), and Cervone had not yet withdrawn that appearance. In any event his testimony is not important to the issues on appeal.

or an immediate grant of certiorari. Justice Alito referred the application to the full Court, which denied it. *Fulton v. City of Philadelphia*, No. 18A-118, 2018 WL 4139298 (U.S. Aug. 30, 2018).

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 1331. Our jurisdiction to review the District Court's denial of a preliminary injunction stems from 28 U.S.C. § 1292(a)(1).

Ordinarily, when reviewing a district court's ruling on a motion for preliminary injunctive relief, we review findings of fact for clear error, conclusions of law de novo, and the ultimate decision to grant or deny preliminary relief for abuse of discretion. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). Because this case implicates First Amendment interests, however, we do not rely on the normal clear-error standard for factual review, but instead conduct an independent examination of the record as a whole. *Brown v. City of Pittsburgh*, 586 F.3d 263, 268–69 (3d Cir. 2009). Thus we defer to the District Court's factual findings only insofar as they concern witness credibility. *Tenaflly Eruv Ass'n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 156–57 (3d Cir. 2002).

When evaluating a motion for preliminary injunctive relief, a court considers four factors: (1) has the moving party established a reasonable likelihood of success on the merits (which need not be more likely than not); (2) is the movant more likely than not to suffer irreparable harm in the absence of preliminary relief; (3) does the balance of equities tip in its favor; and (4) is an injunction in the public interest? *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20

(2008); *Reilly*, 858 F.3d at 179. If a plaintiff meets the first two requirements, the District Court determines in its sound discretion whether all four factors, taken together, balance in favor of granting the relief sought. *Id.*

III. Discussion

A. The Free Exercise Clause

CSS principally contends that the City's actions violated its rights under the Free Exercise Clause. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This prohibition applies to the States through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Per *Employment Division v. Smith*, 494 U.S. 872, 877 (1990), the Free Exercise Clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires."

Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of doctrines it believes to be false, impose special disabilities on the basis of religious views of religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (internal citations and question marks omitted) (emphasis in original). Likewise, it forbids government acts specifically designed to suppress religiously motivated practices or conduct. *Id.* at 877–78.

The Free Exercise Clause does not, however, “relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). As Justice Felix Frankfurter stated nearly eighty years ago, “[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.” *Id.* at 879 (quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594–95 (1940) (Frankfurter, J.)). Among other things, this means that religious or conscientious objections do not supersede the basic obligation to comply with generally applicable civil rights laws provided those laws are applied neutrally. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Nevertheless, while * * * religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”); see also *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 694 n.24 (2010) (observing that, under *Smith*, the Free Exercise Clause did not require public law school to grant religious exemption to its “all-comers” policy forbidding discrimination by student organizations).

CSS contends that the City’s enforcement of its laws and policies was neither neutral nor generally applicable. It first argues that the City’s reliance on the Fair Practices Ordinance, which prohibits discrimination on the basis of sexual orientation in public accommodations, is misplaced because evaluating prospective foster parents is not a public accommodation.⁷ The District Court disagreed and held that the Ordinance did apply to CSS. We need not address this issue, however, as the contract between CSS and the City expired on June 30, 2018. As a result, requiring the City to comply with the terms of that agreement is now moot. What remains is whether it may insist on the inclusion of new, explicit language forbidding discrimination on the ground of sexual orientation as a condition of contract renewal, or whether it must offer CSS a new contract that allows it to continue engaging in its current course of conduct.⁸

⁷ CSS makes a similar argument toward what it calls the City’s “must-certify” policy, which it claims was the second basis for the City’s actions in addition to the Fair Practices Ordinance. CSS asserts that the City had never enforced such a policy before this dispute. The City, meanwhile, disclaims the policy’s existence, and says that it was solely enforcing its longstanding rules against discrimination. But as noted above, because the existing contract between CSS and the City has expired, we need not address whether any “must-certify” policy was a sufficiently neutral, general rule to support the City’s actions. (See below for a fuller discussion of the dispute over the “must-certify” policy as it relates to the City’s motivation.)

⁸ It should be noted that the remedy CSS seeks—an injunction forcing the City to renew a public services contract with a particular private party—would be highly unusual. CSS cites several affirmative action cases where courts granted equitable relief to government contractors, such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). But the injunctions in those cases

To support its claim that the City's proposed anti-discrimination clause is not permissible under *Smith*, CSS invokes cases where courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct. See, e.g., *Masterpiece Cakeshop*, 138 S. Ct. 1719; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). These cases, and similar decisions by our Court, clarify *Smith* by reaffirming that the government may not conceal an impermissible attack on religion behind a cloak of neutrality and general application. Thus, a challenger under the Free Exercise Clause must show that it was treated differently because of its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views.

The focus on different treatment of religious and secular conduct is clear in *Lukumi*, the font of this doctrine. There the City of Hialeah, Florida had adopted an ordinance prohibiting the slaughtering of animals except in certain recognized circumstances. The history of the law's adoption made plain, however, that this was no earnest piece of animal welfare legislation but rather an attempt to suppress the practice of Santeria, a fusion of traditional African religion and Catholicism that developed in Cuba in the Nineteenth

merely forbade government entities from enforcing their express affirmative action policies going forward. See *id.* at 210. We have some doubt, therefore, that CSS could be entitled to the relief it seeks. We do not rest our decision on that ground, however, as it involves novel and complex questions of remedies law, and instead address the merits of CSS's claims.

Century and incorporates animal sacrifice in many of its rituals. *Lukumi*, 508 U.S. at 524. The emergency sessions that led to the ordinance, held immediately after a Santeria church first tried to open in town, were rife with unrestrained hostility. Council members referred to supposed Biblical prohibitions on animal sacrifice except for consumption and asked “What can we do to prevent the Church from opening?” *Id.* at 541. The audience cheered these remarks and taunted the president of the Church, plus the chaplain of the city police department called Santeria “an abomination to the Lord.” *Id.* at 541-42.

Moreover, the ordinance itself, though ostensibly concerned with animal welfare, plainly reflected this hostility. Its restriction on animal killing was limited to “sacrifice,” and was further limited to the context of “a public or private ritual or ceremony.” *Id.* at 527. Although it did not apply if the killing was “for the primary purpose of food consumption,” or if the animals were “specifically raised for food purposes,” the ordinance did apply to ritual sacrifice even if the animal was eaten during the ritual, as would often happen in Santeria rituals. *Id.* at 527–28. As the Court noted, the “net result” of these definitions was that “few if any killings of animals are proscribed other than Santeria sacrifice. . . . Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.” *Id.* at 536. This “gerrymander” of the ordinance, *id.*, along with the striking hostility at the public meetings, left the Court with only “one conclusion: The ordinances had as their object the suppression of religion.” *Id.* at 542.

Masterpiece Cakeshop featured similar demonstrations of religious animosity and differing treatment of religious conduct.⁹ Denver baker Jack Phillips refused to make a cake for a gay couple’s wedding reception, citing his religious conviction that marriage is only the union of a man and a woman. Phillips believed that, were he “to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, [it] would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.” *Masterpiece Cakeshop*, 138 S. Ct. at 1724. The couple sued under Colorado’s public accommodations statute. The case was referred to the state’s Civil Rights Commission, which concluded that Phillips had engaged in prohibited discrimination and that neither Phillips’s religious free exercise nor his free speech rights were violated by applying this anti-discrimination law to him.

The Supreme Court ultimately reversed; while Colorado generally had the right to enforce its civil rights laws against Phillips, it was bound under the First Amendment to afford him a “neutral and respectful consideration.” *Id.* at 1729. Instead, the Commission expressed open hostility toward Phillips and his religion and treated him differently from others similarly situated because of that religion. The Court noted ambiguous expressions from commissioners that could be taken either as reflecting resentment toward Phillips’s religious views or simply the uncontroversial principle that “a business cannot refuse to provide services

⁹ Unlike *Lukumi*, where the impermissible hostility toward Santeria was apparent during the adoption of the animal sacrifice ordinance, in *Masterpiece* it came out in the conduct of the officials charged with executing the law.

based on sexual orientation, regardless of” those views. *Id.* (“One commissioner suggested that Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’ A few moments later, the commissioner restated the same position: ‘If a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.’”) (internal citations omitted).

These ambiguous statements were more sinister, however, in the context of another commissioner’s naked hostility toward religion.

Freedom of religion and religion ha[ve] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Id. This, the Court noted, disparaged Phillips’s religion “in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.” *Id.* By calling religion the “most despicable” way to justify hurting others, the comment also suggested that the commissioner thought Phillips’s actions were worse specifically because of their religious character.

The inference that Phillips was treated worse because of his religion was bolstered by the Commission’s different treatment of other bakers who refused

to bake cakes bearing homophobic expressions. The state Civil Rights Division found that these actions did not violate the state's civil rights laws because the requested message was offensive in nature. *Id.* at 1730–31. Thus it appeared that the state had “treated the other bakers’ conscience-based objections as legitimate, but [Phillips’s] as illegitimate—thus sitting in judgment of his religious beliefs themselves.” *Id.* at 1730.

Our Court’s Free Exercise Clause jurisprudence in the wake of *Smith* and *Lukumi* likewise asks whether challengers have been treated worse than others who engaged in similar conduct because of their religious character. For example, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), we held unconstitutional the Newark Police Department’s policy that officers could not have facial hair. The Department had granted exceptions to this policy due to medical need, but would not grant similar exceptions to Sunni Muslims whose religion forbade them to shave their beards. *Id.* at 360. This was “sufficiently suggestive of discriminatory intent * * * to trigger heightened scrutiny[.]” *id.* at 365, which the policy could not survive.

Similarly in *Tenaflly Eruv Association v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002), the Borough of Tenaflly had on its books an ordinance prohibiting the affixing of “any sign or advertisement, or other matter upon,” among other things, telephone poles. *Id.* at 151. In practice, this ordinance was almost never enforced, and it was common to see house number signs, lost animal signs, commemorative ribbons, holiday displays, wreaths, and various other fixtures on the town’s telephone poles. But when Orthodox Jewish residents

sought to erect an eruv by placing *lechis* on utility poles,¹⁰ the Borough refused to grant them a similar exemption and sought to enforce the ordinance. We held that the Borough thereby violated the Free Exercise Clause. Although the ordinance itself was general and neutral, such that *Smith* might apply, it had not been enforced evenhandedly. Instead, the Borough had an apparent practice of granting ad hoc exceptions but refused to make one for the Orthodox Jews' religious practice. This system of discretionary exemptions called for strict scrutiny (meaning they must be justified by a compelling government interest and narrowly tailored to achieve that compelling interest), and the Borough's actions could not survive.

These cases have in common that religiously motivated conduct was treated worse than otherwise similar conduct with secular motives. The ordinance in *Lukumi* was pretzeled to prohibit only Santeria ritual sacrifices and no other animal killings, even those no more humane or necessary. In *Fraternal Order of Police* the City of Newark granted exemptions to its facial hair policy for medical reasons but not for religious ones. In *Tenafly* an ordinance virtually never enforced was exacted exclusively on the religious practice of Orthodox Jews. And in *Masterpiece* the comments of Commission members, along with the disparate treatment of other bakers' secular claims of conscience,

¹⁰ An eruv is a ceremonially created space outside of the home wherein Orthodox Jews may engage in the otherwise proscribed activities of pushing and carrying objects on the Sabbath. This can be done by placing *lechis*, thin black strips made of hard plastic and nearly identical to the coverings on ordinary ground wires, on utility poles to mark the boundaries of the eruv. 309 F.3d at 152.

raised suspicion that Phillips had been treated more harshly because the Commission found his religious views offensive.

The question in our case, then, is whether CSS was treated differently because of its religious beliefs. Put another way, was the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? Based on the record before us, that question has a clear answer: no. The City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation.

As evidence that the City acted out of religious hostility, CSS first points to the City Council's resolution authorizing the Commission on Human Relations' inquiry, which stated that "Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom." But this comment falls into the grey zone identified by the Supreme Court in *Masterpiece*—a remark that could express contempt for religion or could merely state the well-established legal principle that religious belief will not excuse compliance with general civil rights laws. Unlike the commissioner in *Masterpiece* who suggested that religious justifications for discrimination are merely rhetorical, here City officials repeatedly emphasized that they respected CSS's beliefs as sincere and deeply held. The Commission's May 7, 2018 letter, for instance, stated that "[w]e respect your sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-

funded, secular social services.” This is the kind of respectful consideration found lacking in *Masterpiece*, and nowhere in the record did the City depart from this respectful posture.

CSS next points to Commissioner Figueroa’s statements during her meeting with Amato that “it would be great if we could follow the teachings of Pope Francis.” Taken out of context, some might think this remark improper, as it has clear religious overtones. But context is important: the comment was made during a negotiation attempting to find a mutually agreeable solution to this controversy. In that light, Figueroa’s statement is best viewed as an effort to reach common ground with Amato by appealing to an authority within their shared religious tradition. The First Amendment does not prohibit government officials working with religious organizations in this kind of partnership from speaking those organizations’ language and making arguments they may find compelling from within their own faith’s perspective. And though these attempts to persuade CSS were ultimately unsuccessful, the record does not suggest that the City then sought to punish it for this disagreement.

CSS also argues that Commissioner Figueroa’s decision to call mostly religious foster care agencies to ask if they had a similar policy is evidence that the City impermissibly targeted religion. But focusing her inquiries on religious agencies made sense: the only agencies Figueroa knew that refused to work with same-sex couples—CSS and Bethany Christian—did so for religious reasons. She had little reason to think that nonreligious agencies might have a similar policy.

In fact, no other religious agency besides the two mentioned by the reporter had this policy, and Figueroa did call one secular agency as well.

Finally, CSS points to several public statements (the most recent of which occurred in 2015) made by Mayor Kenney critical of the Archdiocese of Philadelphia and of Archbishop Chaput. No doubt the Mayor expressed concerns toward the local Catholic Church, with a particular focus on the Church's stance on gay rights. But CSS's claim that he "prompted" Human Services' 2018 inquiry in this case misstates the record. Figueroa testified that she discussed the issue with the Mayor prior to meeting with Amato and told the Mayor she would brief him once a decision had been made. There is nothing in the record before us suggesting that he played a direct role, or even a significant role, in the process.

The evidence CSS offers of religious bias or hostility appears significantly less than what was present in *Lukumi* or even in *Masterpiece*. Nor is there much to suggest that the City treated CSS differently because of its religion. It argues that it has been subject to selective enforcement, akin to that in *Tenafly* and *Fraternal Order of Police*, because the City adopted what CSS sees as novel legal arguments invented during this controversy to justify its actions against CSS. First, it claims that the City had never previously taken the position that the Fair Practices Ordinance applies to the screening of foster parents. But nothing before us suggests that the City took this position disingenuously or as a pretext for persecuting CSS. Its interpretation of the Ordinance, with which the District Court agreed, was hardly frivolous. Nor is it suspicious that the City had never previously taken this

position: the record contains no evidence of any foster care agencies discriminating in ways that would violate the Fair Practices Ordinance prior to this controversy. The issue simply seems not to have come up previously.

Second, CSS argues that the City created what CSS calls a “must-certify policy” as a justification for the actions against it. The City’s position, according to CSS, is that foster agencies must at least evaluate any applicants who come to them seeking to become foster parents rather than referring them to a different agency—although agencies would retain their discretion whether to certify an applicant as fit after evaluation. CSS perceives that the City would object to any referral, and it argues that this was a novel position adopted during this controversy. Amato testified that referrals from one agency to another are a routine way of finding the best fit for a given applicant. But the record here is unclear, both as to the City’s current position and as to its policy prior to this case. The former is not necessarily an objection to any referrals at all so much as an objection to referrals made for an improper basis, *i.e.*, that the referring agency refuses to work with members of a protected class. As to the latter, the referrals Amato described may have only involved an agency suggesting that a family might prefer a different agency rather than refusing to work with a particular applicant outright. It would be consistent for the City to insist that, while agencies are free to inform applicants if they believe a different agency would be a better fit, they must leave the ultimate decision up to the applicants. In any case, this dispute does not indicate improper religious hostility on the City’s part, only a routine regulatory disagreement.

Third, CSS argues that the City has acted inconsistently because Human Services will consider factors such as race or disability when placing foster children with foster parents. But there are many differences between CSS's behavior and the City's consideration of race or disability when placing a foster child. Most significantly, unlike CSS, Human Services never refuses to work with individuals because of their membership in a protected class. Instead it seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account.¹¹ And there is no instance in the record of Human Services knowingly permitting any other foster agency to discriminate against members of a protected class.

In sum, at the preliminary injunction stage CSS shows insufficient evidence that the City violated the Free Exercise Clause. The Fair Practices Ordinance has not been gerrymandered as in *Lukumi*, and there is no history of ignoring widespread secular violations as in *Tenafly* or the kind of animosity against religion found in *Masterpiece*. Here the City has been working with CSS for many decades fully aware of its religious character. It continues to work with CSS as a congregate care provider and as a Community Umbrella Agency even to this day despite CSS's religious views regarding marriage. And the City has expressed a constant desire to renew its relationship with CSS as a

¹¹ The issue of race in foster care and adoption is notoriously thorny and complex, and is the subject of considerable scholarly literature. See, e.g., PACT: An Adoption Alliance, *Biracial, Multiracial, Interracial Identity in Adoption* (accessed March 11, 2019), <http://www.pactadopt.org/resources/biracial-multiracial-adoption-identity.html> (collecting scholarly articles).

foster care agency if it will comply with the City's non-discrimination policies protecting same-sex couples.

CSS sees the City's non-discrimination policy as a pretext to exclude it from public life because of its religious character, and invokes *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), in which the Supreme Court held unconstitutional rules excluding religious organizations from a public grant program. CSS's counsel at oral argument described the proposed contract language expressly forbidding discrimination on the basis of orientation as a "poison pill." Tr. of Oral Arg. at 61. CSS likewise states in its brief that "[t]he City thus proposes to change its foster care contract specifically to prohibit [CSS's] religious exercise." Appellant's Reply Br. at 3. But it can point to no specific evidence demonstrating that the City acted other than out of a sincere commitment to equality and non-discrimination.

CSS's theme devolves to this: the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. It runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements. That CSS's conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs. If all comment on religiously motivated conduct by those enforcing neutral, gener-

ally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation's civil rights laws might be as well. As the Intervenors rightly state, 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." Intervenor's Br. at 22.

We thus believe the District Court did not abuse its discretion in finding that CSS has failed to demonstrate a sufficient likelihood of success on the merits of its Free Exercise Clause claim.

B. The Establishment Clause

CSS argues that the City's actions violated not only the First Amendment's Free Exercise Clause but also its Establishment Clause. "The clearest command of the * * * [Establishment] Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). In this case, the two Religion Clauses largely run together: insofar as CSS alleges that it has been black-listed for its religious beliefs, it is alleging both a Free Exercise violation (persecution for its religious views) and an Establishment Clause violation (the City declaring some religious viewpoints favored and others disfavored).

Insofar as the Establishment claim here is analytically independent of the Free Exercise claim, CSS contends the City has dictated its preferred religious viewpoint—that religious institutions should recognize the marriage of same-sex couples—and has conditioned CSS's future contract on adherence to that

perspective. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 588 (1992) (prayer at public high school graduation violated the First Amendment, in part because the government not only chose the clergyman but imposed guidelines on the composition of his prayer). To support this claim it focuses primarily on Commissioner Figueroa’s statement in her meeting with Amato that “it would be great if we could follow the teachings of Pope Francis.” CSS sees this as the City telling it which religious leaders to follow and how to interpret their teachings, and then “punishing” it when it refused to comply. *See* Appellant’s Br. at 38–40.

If the City truly were punishing CSS for refusing to adopt its preferred view of Catholic teaching, no doubt that would be an impermissible establishment of religion. But that is not what happened here. Human Services still works with CSS as a congregated care provider and a Community Umbrella Agency. It still works with Bethany Christian as a foster care agency, even though Bethany also maintains its religious opposition to same-sex marriage. This supports the view that CSS is not being excluded due to its religious beliefs. Indeed, the City has maintained its other relationships with CSS and has merely insisted that, if CSS wants to continue providing foster care, it must abide by the City’s non-discrimination policy in doing so. There is simply no evidence that this is a veiled attempt to coerce or impose certain religious beliefs on CSS.

The District Court thus did not abuse its discretion in finding that CSS has not shown a likelihood of success on the merits of its Establishment Clause claim.

C. Freedom of Speech

In addition to its claims under the First Amendment's Religion Clauses, CSS also claims that the City has violated its freedom-of-speech rights in two different ways: by compelling it to speak in ways it finds disagreeable and by retaliating against it for engaging in protected speech.

i. Compelled Speech

For over 70 years it has been axiomatic that the Free Speech Clause also protects the right not to speak. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) (“To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”). CSS claims it has been compelled to speak because Pennsylvania law imposes a requirement that, after evaluating prospective foster parents, an agency must “give written notice to foster families of its decision to approve, disapprove or provisionally approve the foster family.” 55 Pa. Code § 3700.69. Because the City forbids CSS from finding an applicant unqualified for a “discriminatory reason,” including their sexual orientation or same-sex relationship, it is therefore forcing CSS “to make written endorsements that violate its sincere religious beliefs.” Appellant’s Br. at 53.

The problem with this argument is that the ostensibly compelled speech occurs in the context of CSS’s performance of a public service pursuant to a contract with the government. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Supreme Court upheld conditions on gov-

ernment grants under Title X of the Public Health Service Act preventing grant programs from providing to their patients not only abortion services but also counseling or information about abortion. *Id.* at 193–200. The Court held that this was not an impermissible restriction on speech or viewpoint discrimination because the government is free to fund only those programs that comport with its own view on matters such as abortion.

Agency for International Development v. Alliance for Open Society International, 570 U.S. 205 (2013) (“*AOSI*”), clarified this rule by holding that, while the government may place conditions on the use of public grant monies, it may not require grant recipients to adopt the government’s views as their own. Thus, the requirement that organizations receiving money to combat HIV/AIDS not use that money “to promote or advocate the legalization or practice of prostitution or sex trafficking,” 22 U.S.C. § 7631(e), was acceptable under *Rust*. But the rule that no funds could be used by any organization “*that does not have a policy explicitly opposing prostitution and sex trafficking,*” *id.* § 7631(f) (emphasis added), unconstitutionally compelled speech. It did not simply tell grant recipients how to use the government’s money, but required them to affirm their own agreement with the government’s policy—not unlike the requirement in *Barnette* that schoolchildren recite the Pledge of Allegiance.

CSS argues that it has been required to adopt the City’s views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents, and that this violates the rule of *AOSI*. It contends that the speech in question is beyond the scope of its contract with the City because the requirement

of performing evaluations comes from state law rather than from the contract itself, and because the compensation formula in the contract is not tied to the number of evaluations performed. We disagree. The speech here only occurs because CSS has chosen to partner with the government to help provide what is essentially a public service. The exact allocation of responsibility between the Commonwealth and the City, or the funding structure in the contract, does not change that. Neither *Rust* nor *AOSI*, nor any other relevant precedent, focused on the precise funding structure of the government contracts at issue. Instead, the cases focus on whether the condition pertains to the program receiving government money, as the City's non-discrimination requirements do here.

The City would violate *AOSI* if it refused to contract with CSS unless it officially proclaimed its support for same- sex marriage. But to the contrary, the City is willing to work with organizations that do not approve of gay marriage, as its continued relationship with Bethany Christian, its continued relationship with CSS in its other capacities, and its willingness to resume working with CSS as a foster care agency attest. It simply insists that CSS abide by public rules of non- discrimination in the performance of its public function under any foster-care contract. Therefore CSS's compelled speech claim does not at this time have a reasonable likelihood of success, and the District Court did not abuse its discretion in so holding.

ii. Speech Retaliation

To prevail on a speech retaliation claim, a plaintiff must show that it engaged in constitutionally protected activity, that the government responded with retaliation, and that the protected activity caused the

retaliation. See *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004). This rule is a straightforward application of the First Amendment’s basic command that the government may not punish those who utter protected speech. Where the plaintiff is a government employee, additional considerations come into play, and the plaintiff’s speech is only protected if it occurred in his or her capacity as a citizen rather than as a public employee. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

CSS argues that it provides foster care services as a religious ministry protected by the First Amendment and that it “engages in protected speech when it evaluates families” as potential foster parents. *Id.* It also asserts retaliation against it for statements made to the Inquirer, and for its subsequent statements to Human Services confirming that it would not work with same-sex couples as foster parents.

This claim is unlikely to succeed because the City’s actions were regulatory rather than retaliatory in nature. The speech retaliation doctrine is implicated where the government has taken some action against an individual ostensibly unrelated to that individual’s protected speech yet motivated by a desire to retaliate. See, e.g., *Eichenlaub*, 385 F.3d at 282–85 (approving retaliation claim alleging that the Township denied building permit applications to punish a landowner’s speech at a public meeting). Here, on the contrary, the City has directly regulated the very conduct CSS claims is constitutionally protected: its refusal to evaluate or work with same-sex couples. Thus the City has “retaliated” against CSS only in the same way enforcement of any government regulation “retaliates” against those who violate it.

Insofar as CSS claims it was subject to retaliation for its statements to the Inquirer and to Human Services confirming that it engages in the discriminatory conduct to which the City objects, this too cannot support a valid retaliation claim. We do not read the City's actions as punishing CSS for those statements rather than for the discriminatory conduct itself. Once again, the District Court did not abuse its discretion in ruling that CSS has failed to establish a reasonable likelihood of success on its speech retaliation claim.

D. The Pennsylvania Religious Freedom Protection Act

CSS's final claim is under the Pennsylvania Religious Freedom Protection Act (RFPA), 71 Pa. Stat. Ann. § 2401 et seq. Similar in some ways to the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq., the RFPA generally provides that "an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability." It may do so, however, if it proves by a preponderance of the evidence that the burden both is "(1) [i]n furtherance of a compelling interest of the agency" and is "(2) [t]he least restrictive means of furthering the compelling interest." 71 Pa. Stat. Ann. § 2404. "Substantially burden" is defined as an action that does any of the following:

- (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs[;]
- (2) Significantly curtails a person's ability to express adherence to the person's religious faith[;]

(3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion[;]

(4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

Id. § 2403. CSS argues that all four forms of substantial burden exist here. Its argument as to each prong ultimately rests on this: CSS's foster care work is part of its religious ministry, its religious convictions prevent it from "endorsing" same-sex marriage, and under the City's policies it may not engage in its foster care ministry while abiding by its convictions. Thus, CSS must choose either endorsing a viewpoint that violates the tenets of its faith or ceasing its religious ministry of providing foster care.

Pennsylvania courts applying the RFPA scrutinize claims of religious burden to see whether the burdened activity is truly "fundamental to the person's religion." *See, e.g., Commonwealth v. Parente*, 956 A.2d 1065, 1074 (Pa. Commw. Ct. 2008) ("Parente never testified that his activities * * * constitute 'activities which are fundamental to his religion' * * *. Rather, at best, Parente's testimony merely establishes that he engaged in these activities based upon his religious beliefs or that they flowed from a religious mission.").¹²

¹² This is different than the federal Religious Freedom Restoration Act and Supreme Court jurisprudence, which does not delve into investigating a person's religious beliefs. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.").

In *Ridley Park United Methodist Church v. Zoning Hearing Board Ridley Park Borough*, 920 A.2d 953 (Pa. Commw. Ct. 2007), for instance, the Pennsylvania Commonwealth Court held that a church was not entitled to a RFPA exemption from a local zoning code in order to operate a daycare center on its property. While the daycare center “aided in carrying out the Church’s religious mission,” it was not a “fundamental religious activity of a church.” *Id.* at 960. By analogy, “ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that mission.” *Id.* Thus it appears that Pennsylvania courts consider an activity “fundamental to a person’s religion” if it is an inherently religious activity as opposed to something that could be done either by a religious person or group or by a secular one. The parallel here is direct: caring for vulnerable children can flow from a religious mission, but it is not an intrinsically religious activity under Pennsylvania law.

It thus seems unlikely that the Pennsylvania courts would recognize a substantial burden on CSS’s exercise of religion in this case. We have noted before, however, that this facet of RFPA jurisprudence “appears to create some tension between state and federal law,” as the “Supreme Court has cautioned against making religious interpretations in the First Amendment context.” *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 258 (3d Cir. 2008) (Scirica, J., concurring); see also *Smith*, 494 U.S. at 886–87 (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs * * * in the free exercise field * * * than it would be for them to determine the ‘importance’ of ideas * * * in the free speech field.”).

Thus we make clear that even if we were to assume there is a substantial burden here, CSS is not likely to prevail on its RFPA claim because the City’s actions are the least restrictive means of furthering a compelling government interest. It is black-letter law that “eradicating discrimination” is a compelling interest. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). And mandating compliance is the least restrictive means of pursuing that interest. See *Hobby Lobby*, 573 U.S. at 733 (“The Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”); see also *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 594 (6th Cir. 2018) (denying several alternative means of enforcing the government’s interest in preventing discrimination against transgender employee in favor of simply enforcing the ban on that discrimination).¹³

FN13 Note that this “strict scrutiny” test under RFPA is different from the strict scrutiny that would

¹³ Note that this “strict scrutiny” test under RFPA is different from the strict scrutiny that would apply under *Lukumi, Fraternal Order of Police*, and *Tenafly* if Catholic Social Services were able to demonstrate religious targeting or enforcement disparities. In the latter case, we would examine not the general interest behind the City’s anti-discrimination laws but the specific interest in the different enforcement of those laws against religious and secular groups. See *Tenafly*, 309 F.3d at 172 (applying strict scrutiny to the Town’s justifications for treating *lechis* differently from those violations of the ordinance it had long tolerated). That would be a more difficult burden for the City to bear than under the RFPA, where the question is simply the weight of the government’s interest in enforcing its anti-discrimination laws generally.

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CSS offers several reasons why the City has no compelling interest in enforcing the Fair Practices Ordinance here. First, it asserts that evaluating potential foster parents is not a public accommodation. Second, it calls the harm the City seeks to prevent speculative, citing *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 799–800 (2011), for the principle that “ambiguous proof” of speculative harms will not suffice to provide a compelling interest. Finally, it argues that the City cannot have a compelling interest in preventing it from discriminating because doing so will not increase the number of foster agencies willing to work with same-sex couples: either the City allows CSS to continue discriminating, in which case there are 29 agencies willing to work with those applicants, or it ceases operation altogether, in which case there will still be 29 agencies willing to work with those applicants.

These arguments miss the mark entirely. The government’s interest lies not in maximizing the number

of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do. And that interest is by no means limited to public accommodations as defined by the Fair Practices Ordinance. Thus, even if we were to assume that evaluating potential foster parents is not a public accommodation, the City would still have a compelling interest in adding a non-discrimination provision to future contracts.

Nor is the harm the City seeks to prevent speculative. *Brown* held that a law restricting violent video games, on the theory that they would make children become more violent, could not be sustained, in part due to the lack of sound empirical support for this theory. *See* 564 U.S. at 800–01. This has no application here, where the mere existence of CSS’s discriminatory policy is enough to offend the City’s compelling interest in anti-discrimination. CSS notes that no same-sex couples have ever—so far as the record reflects—approached it seeking to become foster parents. This is not surprising given the Philadelphia Archdiocese’s well-known opposition to gay marriage. But this is beside the point. The harm is not merely that “gay foster parents will be discouraged from fostering.” Appellant’s Br. at 63. It is the discrimination itself.

So even if CSS could show a substantial burden on its religious exercise as defined by the RFPA, the City’s actions appear to survive strict scrutiny. Thus the District Court did not abuse its discretion in determining that CSS has not established a reasonable likelihood of success on the merits of its RFPA claim.

E. Other Preliminary Injunction Considerations

We conclude, as the District Court did, that at the preliminary injunction stage and on the record before us, CSS is not reasonably likely to succeed on the merits of any of its claims. This alone defeats the request for a preliminary injunction. *See Reilly*, 858 F.3d at 179. In any event, we also agree with the District Court that CSS has not met the other factors considered for a preliminary injunction.

To prevail, CSS must show not only a reasonable likelihood of success but also that it is more likely than not to suffer irreparable harm without an injunction. It identified several alleged irreparable harms before the District Court, but on appeal it wisely focuses on the prospect that, without a contract from the City, it will go out of business. Arguably even this would be compensable through money damages. *Cf. Lehigh Valley Cmty. Mental Health Ctrs., Inc. v. Pa. Dep't of Human Servs.*, 2015 WL 6447171 at *3(E.D.Pa.2015) (finding that the threat of going out of business did not qualify as an irreparable injury). In any case, CSS has not met its burden of demonstrating that it is more likely than not to suffer this injury. Its congregate care and Community Umbrella Agency functions are unaffected, it has other foster care contracts with neighboring counties, and even as to its foster care services in Philadelphia CSS cites only to Amato's self-professed "guess" that it would have to cease those operations within months.

Even if CSS could establish both of the gatekeeping factors—likelihood of success on the merits and irreparable harm—neither the balance of the equities nor the public interest would favor issuing an injunction here. The District Court set out at length the City's

interests in requiring CSS to abide by its nondiscrimination policy, *see Fulton v. City of Philadelphia*, 320 F. Supp. 3d. at 703–04, and we agree that the City’s interests weigh substantially in its favor— particularly in ensuring that government services are open to all Philadelphians. Placing vulnerable children with foster families is without question a vital public service, no doubt why there are 29 other foster care agencies, including Bethany Christian, that provide this service. Deterring discrimination in that effort is a paramount public interest.

F. Conclusion

The City stands on firm ground in requiring its contractors to abide by its non-discrimination policies when administering public services. Under *Smith*, the First Amendment does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs. And while CSS may assert that the City’s actions were not driven by a sincere commitment to equality but rather by antireligious and anti-Catholic bias (and is of course able to introduce additional evidence as this case proceeds), the current record does not show religious persecution or bias. Instead it shows so far the City’s good faith in its effort to enforce its laws against discrimination.

Hence we hold that the District Court did not abuse its discretion in denying the motion for preliminary injunctive relief and affirm its thorough and well-reasoned decision.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

**SHARONELL FULTON, et
al.,**

Plaintiffs,

v.

**CITY OF PHILADELPHIA,
et al.,**

Defendants.

**CIVIL
ACTION**

NO. 18-2075

MEMORANDUM

Tucker, J.

July 13, 2018

The gratitude we owe to all those working to better the lives of Philadelphia’s most vulnerable children is too great to convey in words. While our gratitude is ultimately ineffable, the Court still begins by recognizing the Parties in this case for their many years of sacrifice and labor. The Court thanks Sharonell Fulton, Cecelia Paul, Toni Lynn Simms-Busch, Catholic Social Services (“CSS”), the City of Philadelphia, the Department of Human Services (“DHS”), and the Commission on Human Relations for their individual sacrifices and contributions in service of Philadelphia’s children and its families. As witnesses called to testify in this case have made clear, fostering children is challenging work, but challenging work that can form part of a full and good life.

Until recent events, the Parties have had a fruitful relationship; a relationship that has benefited Philadelphia’s children in immeasurable ways. For this reason, the Court would prefer that the Parties seek out

some compromise to their current dispute without court intervention. Creative problem solving through concerted and thoughtful discourse without court intervention is often the best method to avoid what may appear to the parties, or to other persons in the public, to be harsh legal results. Still, when parties place a matter before the Court, the Court must act pursuant to its obligations under the law. Accordingly, the Court turns to the legal matter presented in this case.

Before the Court are Plaintiffs' Motion For A Temporary Restraining Order And Preliminary Injunction ("Injunction Motion") (ECF No. 13),¹ The City Of Philadelphia's Memorandum Of Law In Opposition To Plaintiffs' Motion For Temporary Restraining Order And Preliminary Injunction (ECF No. 21), Proposed Intervenors' Memorandum of Law, Or, In The Alternative, Amicus Brief, In Opposition To Plaintiffs' Motion For A Temporary Restraining Order And Preliminary Injunction ("Amicus Brief") (ECF No. 34);² Defendants' Proposed Findings Of Facts And Conclusions

¹On June 7, 2018, Plaintiffs filed an Amended Motion for Temporary Restraining Order and Preliminary Injunction because of the Parties' concern that the initial Motion may not have adequately protected the privacy interests of certain minor children identified in the initial Motion. *See* Jun. 20, 2018 Order, ECF No. 32 (dismissing as moot and sealing the initial Motion). Accordingly, unless otherwise noted, the Court's references to the Injunction Motion are references to Plaintiffs' Amended Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 13).

²On June 18, 2018, the Court accepted the Intervenors' Opposition Brief as an amicus brief. The Court's acceptance of the Amicus Brief is memorialized by order dated June 20, 2018. Jun. 20, 2018 Order, ECF No. 33.

Of Law (ECF No. 45), and Plaintiffs' Proposed Findings Of Fact And Conclusions of Law (ECF No. 46). Upon careful consideration of the foregoing and all the evidence presented by the Parties in their written submissions and the evidentiary hearing held on June 18, 2018, June 19, 2018, and June 21, 2018, for the reasons explained below, Plaintiffs' Injunction Motion (ECF No. 13) is **DENIED**.

I. PROCEDURAL BACKGROUND

On May 17, 2018, Plaintiffs asserted sixteen causes of action against Defendants related to, among other things, Defendants' suspension of referrals of new children to Plaintiffs' care and Defendants' alleged violations of Plaintiffs' religious and free speech rights. *See generally* Compl., ECF No. 1; *but see* Mem. of Law Supp. Pl.s' Injunction Mot. 8 (asserting that CSS "filed a complaint in this Court on May 16, 2018"). Nineteen days later,³ on June 5, 2018, Plaintiffs filed their Injunction Motion seeking a court order to compel Defendants to resume referrals of children to Plaintiffs' care in advance of the June 30 expiration of Plaintiffs' current services contract with Defendants under which Plaintiffs provide various professional services in exchange for public funds. In view of the urgency of the matter, the Court set an expedited briefing schedule and ordered an evidentiary hearing. Jun. 6, 2018 Order, ECF No. 11. Less than two weeks later, on June

³ If the Court accepts Plaintiffs' asserted date of May 16, 2018 as the filing date for the Complaint, then Plaintiffs' Injunction Motion was filed twenty days after first filing suit.

18, 2018, the Court held an evidentiary hearing. The hearing concluded on June 21, 2018.⁴

⁴ During the evidentiary hearing, testimony by James Amato, Secretary and Executive Vice President of CSS, revealed that it is CSS policy to refuse to certify any prospective foster parent without a “clergy letter” from a religious minister. *See* Jun. 19, 2017 Hearing Tr. 34–35 (Amato) (testifying to Amato’s title and responsibilities at CSS); Jun. 19, 2017 Hearing Tr. 95–96 (Amato) (explaining that a clergy letter is required for certification by CSS because the letter “is a very good indication of [a prospective foster parent’s] commitment to their faith” and explaining that CSS will not, to Amato’s knowledge, certify a prospective resource parent without a clergy letter). While the religious affiliation of the minister writing the clergy letter does not matter, Amato explained that the receipt of a clergy letter on behalf of a prospective foster parent is an absolute condition to CSS’s certification of that prospective foster parent. Jun. 19, 2017 Hearing Tr. 95:12–16, 95:21–23 (Amato). It appears, therefore, that CSS will not certify prospective foster parents who are religious but whose religious exercise does not include a relationship with a minister, prospective foster parents who choose not to associate with any religious tradition, or prospective foster parents who associate with a religious tradition that does not have religious ministers willing or able to provide a clergy letter.

This evidence is disconcerting to the Court because it raises serious constitutional as well as contractual questions. Among other things, this policy appears to contravene CSS’s contractual obligations under its contract with DHS under Section 4.1(k). Section 4.1(k) prohibits CSS from discriminating against individuals based on the individuals’ religious beliefs. Section 4.1(k) provides that CSS:

shall inform all individuals to whom Services are provided, whether directly or indirectly, of the following: “The Philadelphia Department of Human Services’ selection of a faith-based provider of social services is not an endorsement of the Provider’s religious character, prac-

II. FACTUAL BACKGROUND⁵

A. CSS's Services Contract With DHS and Philadelphia

It is an intractable tragedy that children in our community are sometimes unable to remain in their own homes. Pennsylvania has, in response to this tragic reality, charged individual county agencies with the duty of establishing a system to address the well-being of these children consistent with the best interests of each child. Jun. 19, 2018 Hr'g Tr. 152:18–24 (Figueroa). In Philadelphia County, the county agency charged with this duty is DHS. In performing its duty, DHS contracts with a number of private foster care

tices or beliefs. No Provider of social services may discriminate against you on the basis of religion, a religious belief or your refusal to actively participate in religious practices.”

Decl. of James Amato Ex. B, ECF p. 29 of 39, ECF No. 13-4. Indeed, on June 25, 2018, Counsel for CSS delivered a letter to the Court representing that CSS “will agree not to require pastoral letters.” Letter from Mark Rienzi, Attorney for Plaintiffs, to Chambers of Judge Petrese B. Tucker (Jun. 25, 2018), ECF No. 40.

Still, as the questions CSS's pastoral letter requirement poses are not squarely before the Court, the Court will, for purposes of the Injunction Motion, refrain from further discussion of the matter.

⁵ The following findings of facts are set forth pursuant to Fed. R. Civ. P. 52(a)(2)(requiring that “[i]n granting or refusing an interlocutory injunction, the court must []state the findings and conclusions that support its action.”).

agencies. Jun. 18, 2018 Hr’g Tr. 87:2–4 (Ali). Presently, DHS has contracts with thirty private foster care agencies. Jun. 19, 2018 Hr’g Tr. 155:14–16 (Figueroa). Each of these private foster care agencies is expected to provide foster care services consistent with a services contract with DHS. *See, e.g.*, Jun. 19, 2018 Hr’g Tr. 162:2 – 12 (Figueroa) (indicating that CSS’s services, as a foster agency, are provided under contract with DHS and Philadelphia); Jun. 21, 2018 Hr’g Tr. 12:15–16 (Figueroa) (indicating that Bethany Christian Services, another foster agency, has a contract similar to the services contract between DHS and CSS).

In November 2015, DHS and CSS entered into Contract Number 16-20030 (“Services Contract”) for certain professional services. Decl. of James Amato Ex. A, ECF p. 13 of 52, ECF No. 13-3 (showing that the original contract was executed in November 2015 and recounting the various amendments since initial execution); *see also* Decl. of James Amato Ex. A, ECF p. 39 of 52, ECF No. 13-3 (identifying the Services Contract as a “Professional Services Contract . . . for Department of Human Services Contracts”). As provided in the Statement of Purpose section of the Services Contract, the Services Contract was:

made and entered into between Catholic Social Services (the Provider) and the Philadelphia Department of Human Services (DHS), and sets forth the services for general, kinship, and teen parent/baby resource home care.

Decl. of James Amato Ex. A, ECF p. 27 of 52, ECF No. 13-3. Under the Scope of Services section of the Services Contract, CSS was to ensure that, among other things, resource caregivers (foster parents) would be

“screened, trained, and certified by the Provider [CSS].”⁶ Decl. of James Amato Ex. A, ECF p. 28–29 of 52, ECF No. 13-3. The Services Contract reiterates that “[t]he specific issue to be addressed by [CSS] is to recruit, screen, train, and provide certified resource care homes.” Decl. of James Amato Ex. A, ECF p. 28 of 52, ECF No. 13-3.

CSS was to provide the services set forth under the Scope of Services section of the Services Contract in accordance with certain criteria, including criteria under Section 3.21 of the Services Contracts’ General Provisions and Article XV: Additional Representations and Covenants of Provider Relating to Certain Applicable Laws.

Section 3.21 limits the reasons that CSS may refuse to provide the services required under the Services Contract. Section 3.21 provides that CSS:

shall not reject a child or family for Services based upon the location or condition of the family’s residence, their environmental or social condition, or for any other reason if the profiles of such child or family are consistent with Provider’s Scope of Services or DHS’s applicable standards as listed in the [Services Contract],

⁶ Certification of prospective foster parents requires a licensed foster family care agency to evaluate prospective foster parents using the criteria set forth under 55 Pa. Code § 3700.64. *See e.g., Hinnerschitz v. Dep’t of Pub. Welfare*, No. 1977 C.D.2014, 2015 WL 5457824 (Pa. Commw. Ct. 2015) (not precedential) (concluding that Berks County Children and Youth Services’ denial of prospective foster parents’ application to become kinship foster parents was appropriate given the lower administrative courts’ proper consideration of the § 3700.64 factors).

unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.

Decl. of James Amato Ex. B, ECF p. 14 of 39, ECF No. 13-4.

Article XV of the Services Contract further limits the reasons that CSS may refuse to provide the services required under the Services Contract by incorporating into the Services Contract various laws, ordinances, regulations, and executive orders. In particular, Article XV incorporates provisions of the Philadelphia Fair Practices Ordinance relating to non-discrimination and serving all-comers who might seek services from CSS. Article XV stipulates that:

. . . Provider further represents, warrants and covenants that . . . Provider is in compliance with the laws, ordinances, regulations and executive orders described below.

15.1 Non-Discrimination; Fair Practices. This Contract is entered into under the terms of the Charter, the Fair Practices Ordinance (Chapter 9-1100 of the Code) . . . Provider shall not discriminate or permit discrimination against any individual because of race, color, religion or national origin. Nor shall Provider discriminate or permit discrimination against individuals in . . . public accommodation⁷ practices whether

⁷ The term "public accommodation" is defined under the Philadelphia Fair Practices Ordinance as:

Any [] provider, whether licensed or not, which solicits or accepts patronage or trade of the public

by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of . . . sex, sexual orientation, gender identity, marital status familiar [sic] status . . . or engage in any other act or practice made unlawful under the Charter . . .

Decl. of James Amato Ex. C, ECF p. 18–19 of 39, ECF No. 13-5 (emphasis added). In the event of CSS’s breach of its covenant under Article XV, DHS and Philadelphia would be permitted “in addition to any other rights or remedies available under this Contract, at law or in equity, [to] suspend or terminate this Contract forthwith.” Decl. of James Amato Ex. C, ECF p. 19 of 39, ECF No. 13-5.

In exchange for “the Services and Materials being provided under” the Services Contract, DHS and Philadelphia agreed to “set the amount of compensation payable to [CSS] for the current contract term at [\$19,430,999.00].” Decl. of James Amato Ex. A, ECF p. 15 of 52, ECF No. 13-3. Despite this lump sum amount, as a matter of practice, payment to CSS was made on a per diem basis pegged to the number of children under its care. *See* Jun. 21, 2018 Hr’g Tr. 11:4–7

or whose . . . services, facilities . . . 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.

Philadelphia Fair Practices Ordinance § 9-1102
(Definitions) at 4, Chapter 9-1100 of the Philadelphia Code.

(Figueroa) (testifying that many contractors are paid on a per diem basis); Jun. 21, 2018 Hr’g Tr. 139:20–24 (same) (Figueroa). That CSS was receiving significant public funds to perform its public service functions under the Services Contract is underscored by Section 3.30 of the General Provisions that provides “[CSS] shall identify the Department as a funding source in all literature, documents[,] reports or pamphlets which Provider publishes develops or produces in connection with this Contract.” Decl. of James Amato Ex. B, ECF p. 21 of 39, ECF No. 13-4.

CSS and DHS proceeded under the Services Contract without dispute until March 2018, when DHS learned that it is CSS policy to not serve all-comers. In particular, it is CSS policy to refuse service to same-sex couples CSS services under the Services Contract.

B. March 2018: DHS Learns Of CSS’s And Another Foster Agency’s Refusal To Comply With Services Contract’s All-Comers Provisions

On or about March 9, 2018, DHS Commissioner Figueroa came to believe that two of the foster care agencies with which DHS contracts, CSS and Bethany Christian Services, have policies that deny their publicly-funded services to married same-sex couples. Jun. 21, 2018 Hr’g Tr. 3 (Figueroa) (testifying that on March 9, 2010, a reporter contacted Figueroa and that Figueroa’s discussions with the reporter led Figueroa to believe that CSS and Bethany Christian Services had certain policies of refusing service to same-sex couples). Jun. 19, 2018 Hr’g Tr. 164 (Figueroa). Commissioner Figueroa formed this belief after discussions with a *Philadelphia Inquirer* reporter who called Figueroa seeking comment ahead of the publication of

an article on two DHS foster care agencies that reportedly maintained policies that would effectively permit these agencies to refuse services to same-sex couples. Jun. 19, 2018 Hr’g Tr. 164 (Figueroa). After Commissioner Figueroa’s discussion with the reporter, Figueroa contacted Bethany Christian Services, CSS, various DHS’s faith-based foster care agencies, and a nonfaith-based agency to determine what those agencies’ policies are in connection with serving same-sex couples. Jun. 19, 2018 Hr’g Tr. 164:16–165:4 (Figueroa); Jun. 21, 2018 Hr’g Tr. 103:6–9 (testifying that Figueroa contacted a nonfaith-based foster care agency).

Commissioner Figueroa’s phone call with James Amato at CSS provided greater clarity regarding what services CSS refused to provide to same-sex couples and why CSS refused to provide those services. Jun. 21, 2018 Hr’g Tr. 3:18–24 (Figueroa). James Amato explained that there were two services that CSS would not provide to same-sex couples: (1) CSS would not certify same-sex couples as prospective foster parents even if the couples were otherwise eligible foster parents under state regulations, and (2) CSS would not provide a same-sex couple with a home study as part of a same-sex couple’s application for adoption. Jun. 21, 2018 Hr’g Tr. 3:18–24 (Figueroa); see also Jun. 19, 2018 Hr’g Tr. 55:7–20 (Amato) (testifying that Commissioner Figueroa and another DHS officer asked Amato whether CSS would complete a home study for “a same-sex couple or individual” and that Amato confirmed that CSS would not complete such a home study for a couple and would only provide a home study for an individual if that individual was committed to living single). Amato explained that CSS would

not provide these services on religious grounds. Jun. 21, 2018 Hr’g Tr. 3:18–24 (Figueroa). Amato recalled that DHS “said to me that you are discriminating. I said that I am following the teachings of the Catholic Church.” Jun. 19, 2018 Hr’g Tr. 55:22–25 (Amato).

On March 13, 2018, the *Philadelphia Inquirer* published an article titled Two Foster Agencies in Philly Won’t Place Kids with LGBTQ People.⁸ The article recounted an incident in which a married same-sex couple traveled to a Bethany Christian Services informational event for prospective foster parents. On arrival, a Bethany Christian Services employee told the couple their attendance at the event would be a waste of time because Bethany Christian Services maintained a policy of refusing to serve same-sex couples. *See also* Jun. 19, 2018 Hr’g Tr. 164:5–10 (Figueroa). In the same story, the *Inquirer* reported that a representative for CSS confirmed that CSS maintained similar policies of refusing to serve same-sex couples.

On March 15, 2018, after meeting with James Amato and CSS’s legal counsel in person, Commissioner Figueroa “decided that it was in the best interest [of children] to close intake, so that [Figueroa] could look more deeply into” CSS’s and Bethany Christian Services’s policies. Jun. 19, 2018 Hr’g Tr. 166:6–21 (Figueroa); Figueroa Decl. ¶ 32, ECF No. 20-6; *see also* Jun. 18, 2018 Hr’g Tr. 96:2–3 (Ali) (testifying that, to Ali’s knowledge, Commissioner Figueroa herself decided to close CSS’s intake of new referrals). That day,

⁸ Julia Terruso, *Two Foster Agencies in Philly Won’t Place Kids with LGBTQ People*, *Philly.com* (Mar. 13, 2018, 9:05 AM), <http://www.philly.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html>.

Philadelphia City Council separately passed its own resolution authorizing the Committee on Public Health and Human Services to “investigate [DHS] policies on contracting with social services agencies that either discriminate against prospective LGBTQ foster parents and allow non-LGBTQ foster parents to discriminate against children.” City Council Resolution No. 180252 at 2, ECF No. 10-9.

On March 27, 2018, Deputy Commissioner Ali emailed various community umbrella agencies—responsible for case management activities—to communicate that foster agencies should “refrain from making any foster care referrals to Bethany Christian Services and [CSS],” but “[i]f you have questions about a case, please contact me by phone or email.” Ex. 1-E 3, ECF No. 10-12. Deputy Commissioner Ali further communicated that DHS is:

Committed to the safety and stability of children in our care and must consider the needs of the children and youth *currently* served by foster families licensed by these organizations. Our goal is to minimize placement disruptions, and to ensure that a child’s ability to reunify or to continue an adoption process is not delayed because of placement disruption.

Ex. 1-E 3, ECF No. 10-12.

C. Doe Foster Child #1

Plaintiffs spent some time at the evidentiary hearing exploring a situation involving a minor child identified as Doe Foster Child #1. Plaintiffs point to the situation involving Doe Foster Child #1 as an “example of the harm that has resulted from the City’s in-

take closure.” Pls.’ Proposed Findings of Fact and Conclusions of Law 27, ECF No. 46. The circumstances surrounding Doe Foster Child #1 are, as is often the case for children in foster care, complex. The Court notes, however, that by the time of the evidentiary hearing, DHS and CSS, working together, successfully obtained a Philadelphia Family Court order permitting Doe Foster Child #1’s removal from a different living situation and then placement with a CSS-certified foster parent. Ali Decl. ¶ 60, ECF No. 20-1. Through the concerted efforts of DHS and CSS staff, the situation involving Doe Foster Child #1 is now resolved.

Still, Plaintiffs contend that the situation with Doe Foster Child #1 would not have occurred but for DHS’s closure of CSS’s intake of new referrals, while DHS and Philadelphia contend that Doe Foster Child #1’s unique situation was resolved in a timely manner considering the complexity of the case. As a factual matter, the situation with Doe Foster Child #1 is unlikely to occur again given that DHS and CSS are both now fully aware that exemptions from the intake closure have been and continue to be granted consistent with the best interests of individual children. *See, e.g.*, Jun. 19, 2018 Hr’g Tr. 84:2–9 (Amato) (testifying that he is aware that DHS will grant exceptions in some cases for placements with Catholic Social Services when such placements are in the best interests of the child); Jun. 19, 2018 Hr’g Tr. 86:8 – 11 (Amato) (testifying that CSS has, in fact, sought out and received placements for children despite the intake closure when placements were in the best interests of the child).

D. Current Effects Of Closure Of CSS Intake Of New Referrals

In response to Plaintiffs' claims that CSS's intake closure has and will continue to negatively affect foster children, DHS offered evidence showing that the closure of CSS's intake of new referrals has had little or no effect on the operation of Philadelphia's foster care system. DHS Commissioner Figueroa testified that CSS's intake closure "has not resulted in a rise in children placed in congregate care."⁹ Jun. 21, 2018 Hr'g Tr. 86:4–87:9 (Figueroa). Further, Figueroa testified that CSS's intake closure "has not resulted in a rise in children staying in DHS's childcare room." Jun. 21, 2018 Hr'g Tr. 86:4–87:9 (Figueroa). Figueroa's testimony was based on her review of "weekly data" that Figueroa receives from DHS's "performance and technology team that . . . have . . . detailed data." Jun. 21, 2018 Hr'g Tr. 86:16–87:11 (Figueroa).

That the effects of closing CSS's intake have been small relative to size and breadth of the Philadelphia foster care system is, unfortunate, but unsurprising given Commissioner Figueroa's explanation that:

Kids are abused every day. They are neglected every day. They end up in [DHS's] placement, in [DHS's] care, because their families can't care for them. We are incredibly fortunate that we have foster care agencies, but it's not a one to one.

⁹ Congregate care is a broad term used to describe a variety of "nonfamily-like [foster care] settings." Jun. 18, 2018 Hearing Tr. 93:6 (Ali).

Jun. 21, 2018 Hr’g Tr. 93:23–94:7 (Figueroa). The number of cases and idiosyncrasies of each child involved in each case means that the mere fact that there are empty, available foster homes does not equate to fewer children in congregate care. Figueroa explained that assuming that “availability [at any one foster agency] [will] reduce the [use of] congregate care is an over [simplification] of the complication of our work.” Jun. 21, 2018 Hr’g Tr. 93:23–94:7 (Figueroa). That the negative effects of closing CSS’s intake have been relatively slight is also supported by the reality that, as of the evidentiary hearing date, at least three foster agencies had intake closures in place and the foster system nevertheless remained stable. See Jun. 21, 2018 Hr’g Tr. 5:14–15 (Figueroa) (testifying that “I have closed intake in other circumstances for other providers.”); Jun. 21, 2018 Tr. 8:24-25–9:1 (Figueroa) (testifying that the week before, DHS also closed intake for another agency); Jun. 21, 2018 Hr’g Tr. 12:9–21 (Figueroa) (testifying that Bethany Christian Services’s intake remained closed as of June 21).

E. Defendants’ Preference To Continue Work With CSS And Offer Of New Contracts

DHS and Philadelphia have explicitly stated a preference for continuing their relationship with CSS, despite CSS’s religious nature, so long as CSS complies with its contract responsibilities. *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 9:18–24 (Figueroa) (indicating that DHS would prefer to continue contracting with CSS); Jun. 19, 2018 Hr’g Tr. 120:7 – 11 (Amato) (testifying that DHS and Philadelphia were clear that they did “not plan to agree to any further referrals to CSS . . . absent assurances that CSS is prepared to adhere to

contractual obligations). Indeed, DHS and Philadelphia manifested their preference to continue working with CSS by offering CSS two different renewal services contracts. *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 10:1–10 (Figueroa). The first contract would be a renewal on the same terms as CSS’s current Services Contract. The second contract would be an alternate services contract to provide financial support to CSS even if CSS could not agree to certify same-sex couples consistent with the all-comers provisions of the standard services contract. *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 10:5–10. Such alternate contracts have been provided to other foster care agencies in the past to ensure the best interest of foster children. *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 10:20–11:16 (Figueroa). That Defendants have offered two contracts to CSS despite the Parties’ present dispute shows Defendants’ strong desire to keep CSS as a foster care agency.

III. STANDARD OF REVIEW

A. Temporary Restraining Order and Preliminary Injunctive Relief Factors

A preliminary injunction is “an extraordinary remedy never awarded as of right.” *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Preliminary injunctive relief is appropriate only “upon a clear showing that the plaintiff is entitled to such relief.” *Id.* (citing *Winter*, 555 U.S. at 22). Ultimately, “the decision to grant or deny a preliminary injunction is committed to the sound discretion of the district court.” *United States v. Price*, 688 F.2d 204, 210 (3d Cir. 1982) (citing *Stokes v. Williams*, 226 F. 148, 156 (3d Cir. 1915)). In deciding

whether to grant injunctive relief, the Court must consider whether: (1) Plaintiffs have demonstrated a likelihood of success on the merits; (2) Plaintiffs will be irreparably harmed by the denial of injunctive relief; (3) the balance of equities favors Plaintiffs; and (4) the public interest favors granting the injunction. *See, e.g., Del. Strong Families v. Att’y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015).¹⁰

The Third Circuit has explained that the first two factors of this analysis—likelihood of success on the merits, and irreparable harm—act as “gateway factors.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). Accordingly, when confronted by a motion for preliminary injunctive relief, a court must first determine whether the movant has met these two gateway factors before considering the remaining two factors—balance of harms, and public interest. *Id.* at 179. In short, “[i]f these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.” *Id.*

Esteemed jurists have acknowledged that the existence of complex questions of law and disputed matters of fact at the preliminary injunction phase of a case may create “doubt about the probability of [a]

¹⁰ The standard for issuing a temporary restraining order is the same as that for ordering a preliminary injunction. *Ride the Ducks, LLC v. Duck Boat Tours, Inc.*, No. CIV. A. 04-CV- 5595, 2005 WL 670302, at *4 (E.D. Pa. Mar. 21, 2005).

plaintiff's success to justify denying a preliminary injunction." *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp., Lancaster Cty., Pa.*, No. 5:17-CV-00715, 2017 WL 1283948, at *5 (E.D. Pa. Apr. 6, 2017) (citing *St. John of Jerusalem-Knights of Malta v. Messineo*, 572 F. Supp. 983, 990 (E.D. Pa. 1983)). Indeed, in *Transcon. Gas Pipe Line Co.*, the district court collected a number of cases supporting this general proposition. 2017 WL 1283948, at *5 (citing *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 605 (D. Del. 1971) for the proposition that "[a] Court should not decide doubtful and difficult questions on a motion for a preliminary injunction."); *see also id.* (citing *Coffee Dan's, Inc. v. Coffee Don's Charcoal Broiler*, 305 F. Supp. 1210, 1213 (N.D. Cal. 1969) for the proposition that "[o]n an application for a preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.").

Although there exists, in this case, a myriad of complex questions of law and a great number of disputed facts such that the Court could justifiably deny injunctive relief on these grounds alone, the Court nevertheless engages in the preliminary injunction analysis below to ensure that the reasons for the Court's decision are sufficiently articulated for the Parties.

IV. DISCUSSION AND CONCLUSIONS OF LAW¹¹

A. Factual Precedent: Faith-Based Foster Agencies In Other Jurisdictions

At the outset, the Court notes that while precise legal precedent on the issues raised in this case is absent, there exists some factual precedent. In 2006, for example, in the wake of Massachusetts's legalization of same-sex marriages, Catholic Charities in Boston shut down its foster care agency after it unsuccessfully sought permission from Massachusetts to withhold its services from legally married same-sex couples.¹²

In 2010, Catholic Charities in Washington, DC, like Catholic Charities in Boston, ended its foster care program in response to Washington, DC's legislation to legalize same-sex marriage.¹³ As a result, "Catholic Charities' caseload of 43 children and 35 foster families was transferred, along with seven staffers, to the Bethesda, Md.-based National Center for Children and Families so as not to disrupt client care."¹⁴

¹¹ The following discussion and conclusions of law are set forth pursuant to Fed. R. Civ. P. 52(a)(2).

¹² Patricia Wen, Catholic Charities Stuns State, Ends Adoptions, boston.com Mar. 11, 2006), http://archive.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/.

¹³ Julia Duin, Catholics End D.C. Foster-Care Program, (Feb. 18, 2010), <https://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/>.

¹⁴ *Id.*

In 2011, Catholic Charities in Illinois sued, among others, the State of Illinois after the State indicated that it would not renew its foster care contract with Catholic Charities because Catholic Charities’ “failure to provide services to unmarried cohabiting couples was in direct violation of” state law. Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield v. Madigan*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011). The Sangamon County Circuit Court granted the State’s Cross Motion for Summary Judgment on grounds that Catholic Charities had no cognizable right to a state government services contract. The court reasoned that Catholic Charities did “not have a legally recognized protected property interest in the renewal of its contracts for foster care and adoption services . . . [and] [t]he fact that [Catholic Charities] have contracted with the State to provide foster care and adoption services for over forty years does not vest the Plaintiffs with a protected property interest.” *Id.* After the Sangamon County Circuit Court’s decision, Catholic Charities in Illinois ended its foster care and adoption services and agreed to transfer “more than 1,000 foster care children and staff to other agencies in their regions.”¹⁵

In 2006, in contrast to the decisions by Catholic Charities in Boston, Washington, DC, and Illinois to

¹⁵ Manya A. Brachear, 3 Dioceses Drop Foster Care Lawsuit—Catholic Charities To End Service Rather Than Work With Parents In Civil Unions, ChicagoTribute.com (Nov. 15, 2011), http://articles.chicagotribune.com/2011-11-15/news/ct-met-catholic-charities-foster-care-20111115_1_civil-unions-act-catholic-charities-religious-freedom-protection.

end its foster care services, Catholic Charities in San Francisco chose to end its full service adoption agency to avoid providing services to same sex couples, but otherwise planned to “provide staff and financial resources to connect needy children to adoptive parents,” and formally collaborate with other adoption agencies who can provide full services to all-comers without violating San Francisco’s anti-discrimination efforts.¹⁶

Against this backdrop, the Court turns to the Parties’ legal arguments.

B. Services Contract Requires Contractors To Provide Services Consistent With Fair Practices Ordinance

1. The Unambiguous Terms Of The Services Contract Evinces The Parties’ Intent That The Fair Practices Ordinance Apply to CSS’s Services

As a threshold matter, the Parties disagree on whether the Services Contract requires CSS to provide its services to all-comers in accordance with the Fair Practices Ordinance because such services may or may not constitute a “public accommodation.” While briefing on this issue is scant, the Parties expended significant time arguing this issue at the evidentiary hearing. *See, e.g.*, Jun. 18, 2018 Hr’g Tr. 9:17–12:14 (Plain-

¹⁶ Elizabeth Fernandez, Catholic Agency Finds Way Out Of Adoption Ban/Alliance With other Groups Gets Around Same-Sex Parent Issue, SFGate.com (Aug. 27, 2006, 4:00 AM), <https://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Catholic-agency-finds-way-out-of-2470402.php>.

tiffs' Opening Statement); *see also* Pls.' Proposed Findings of Fact and Conclusions of Law ¶¶ 61–65. In view of the plain terms of CSS's covenant to be bound by the Fair Practices Ordinance as set forth in the Services Contract, and in view of the expansive, but plain, definition of "public accommodations" under the Fair Practices Ordinance, the Court concludes that the Fair Practices Ordinance applies to CSS's provision of services under the Services Contract.

It is well-established that:

[c]ontract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement. Courts assume that a contract's language is chosen carefully and that the parties are mindful of the meaning of the language used. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

Old Summit Mfg., LLC v. Pennsummit Tubular, LLC (*In re Old Summit Mfg., LLC*), 523 F.3d 134, 137 (3d Cir. 2008) (citing *Dep't of Transp. v. Pa. Indus. for the Blind and Handicapped*, 886 A.2d 706, 711 (Pa. Commw. Ct. 2008)); *see also D&M Sales, Inc. v. Lorillard Tobacco Co.*, No. CIV.A.09-2644, 2010 WL 786550, at *3 (E.D. Pa. Mar. 8, 2010) (providing that "the court's goal is 'to ascertain and give effect to the intent of the contracting parties,'" and "[w]hen the words of an agreement are clear and unambiguous, the court will ascertain the intent of the parties from the language used in the agreement.").

In this case, the Parties' intent that the Fair Practices Ordinance apply to CSS's services is manifest by

the clear and unequivocal terms of the Services Contract. In entering into the Services Contract, CSS agreed to the provisions enumerated under Article XV. CSS explicitly “represent[ed], warrant[ed], and covenant[ed] that . . . [CSS was] in compliance with . . . the Fair Practices Ordinance.” Decl. of James Amato Ex. C, ECF p. 18–19 of 39, ECF No. 13-5. Accordingly, the plain terms of the Services Contract manifest the Parties’ intent that CSS be bound by the Fair Practices Ordinance by expressly incorporating the Fair Practices Ordinance into the Services Contract.

Having concluded that the Services Contract evinces the Parties’ intent that the Fair Practices Ordinance apply to CSS’s services rendered under the Services Contract, the Court turns to the issue of whether the Fair Practices Ordinance would require CSS to provide foster parent certifications and home visits for prospective parents in accordance with the all-comers/nondiscrimination provisions of the Fair Practices Ordinance. The resolution of this issue turns on two questions: (1) whether CSS’s scope of services includes the provision of certification and home visits in connection with certification in the first instance, and (2) if so, whether those services fall within the meaning of a public accommodation under the Fair Practices Ordinance.

2. CSS’s Scope Of Services Requires CSS To Recruit, Screen, Train, And Certify Resource Caregivers

Here, as with all questions of parties’ obligations under a contract, the Court must look to the intent of the parties as embodied in the plain and ambiguous terms of the contract. In agreeing to perform the Scope of Services under the Services Contract, CSS agreed to

“recruit, screen, train, and provide certified resource care homes.” Decl. of James Amato Ex. A, ECF p. 28 of 52, ECF No. 13-3. Indeed, CSS’s obligation to recruit, screen, train, and certify resource caregivers is emphasized elsewhere in the Scope of Services. Decl. of James Amato Ex. A, ECF p. 28–29 of 52, ECF No. 13-3 (providing that “resource caregivers are screened, trained, and certified by [CSS]”); see also Decl. of James Amato Ex. A, ECF p. 27 of 52 n.1, ECF No. 13-3 (providing under the “Statement of Purpose” that “Provider Staff is responsible for recruiting and certifying foster and kinship homes”). The Court concludes that CSS’s certification of prospective foster parents and CSS’s provision of home studies “to assure [that prospective foster parents] are qualified and well prepared for the responsibility of foster care”¹⁷ are services that CSS agreed to provide under the Services Contract.

Having determined that certification and home studies are services that CSS was hired to provide under the Services Contract, the Court turns to whether these services constitute “public accommodations” under the Fair Practices Ordinance such that CSS’s provision of these services must be rendered in accordance with the all-comers, anti-discrimination provision of the Fair Practices Ordinance.

¹⁷ Foster Care & Adoption Services, <https://cssphiladelphia.org/adoption/> (last visited Jul. 1, 2018).

3. The Services That CSS Provides Are Public Accommodations Within The Meaning Of The Fair Practices Ordinance

In interpreting a municipal ordinance, a court must employ the same analysis that the court employs when interpreting a statute. *Tri-Cty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 83 A.3d 488, 509 (Pa. Commw. Ct. 2014); see also *Diehl v. City of McKeesport*, 432 A.2d 288, 290 (Pa. Commw. Ct. 1981) (providing that “[t]he rules of statutory construction are applicable to statutes and ordinances alike”). Accordingly, when interpreting an ordinance, a court must determine, as it must when interpreting a statute, the intent of the legislative body that enacted the ordinance. See *Tri-Cty. Landfill, Inc.*, 83 A.3d at 509 (citing 1 Pa. Cons. Stat. § 1921). Generally, the best indicator of the legislative body’s intent is the plain language of the ordinance. *Id.*

The Fair Practices Ordinance provides an expansive, but plain definition of the term “public accommodation.” Under the Fair Practices Ordinance, a public accommodation is:

Any [] provider, whether licensed or not, which solicits or accepts patronage or trade of the public or whose . . . services, facilities . . . 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.

Philadelphia Fair Practices Ordinance § 9-1102 (Definitions) at 4, Chapter 9-1100 of the Philadelphia Code.

In this case, CSS’s provision of services meets the definition of public accommodations and, therefore, CSS must provide its services in accordance with the Fair Practices Ordinance as incorporated by Article XV, § 15.1 of the Services Contract. CSS is a “licensed” “provider” under the Services Contract. CSS publicly solicits prospective foster parents and advertises to attract new foster parents.¹⁸ CSS provides professional “services” to the public. In return for its services, CSS receives public funds and the source of those funds are to be disclosed to the public when CSS disseminates information relating to its services under the Services Contract.¹⁹ CSS operates and maintains facilities that are used by staff and members of the public to carry out CSS’s work under the Services Contract. Jun. 19, 2018 Hr’g Tr. 36:18–22 (Amato). The Court concludes, therefore, that CSS’s services are public accommodations to be provided consistent with CSS’s covenant under Article XV, § 15.1, which requires CSS to serve all Philadelphians who seek out its services.

C. Likelihood of Success on the Merits

Having determined that the terms of the Services Contract, including the all-comers, nondiscrimination

¹⁸ See Jun. 18, 2018 Hearing Tr. 65:17 (Fulton) (testifying to seeing a television commercial about foster care); Foster Care & Adoption Services, <https://cssphiladelphia.org/adoption/> (last visited Jul. 1, 2018) (soliciting prospective foster parents through a website).

¹⁹ Decl. of James Amato Ex. B, ECF p. 35 of 39, ECF No. 13-4 (Services Contract providing that “[CSS] shall identify the Department as a funding source in all literature, documents reports or pamphlets which Provider publishes develops or produces in connection with this Contract.”).

provisions of the Fair Practices Ordinance incorporated into the Services Contract under Article XV, § 15.1, apply to CSS's provision of services, the Court turns to CSS's argument that it nevertheless need not comply with these all-comers, nondiscrimination provisions because compliance would violate CSS's rights under the Free Exercise and Establishment Clauses of the First Amendment, the Pennsylvania Religious Freedom Act ("RFPA"), and the Free Speech Clause of the First Amendment.

1. Free Exercise Clause Claim

i. The Services Contract And Fair Practices Ordinance Incorporated In The Services Contract Is A Neutral Law Of General Applicability Subject To Rational Basis Review

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (quoting U.S. Const. amend. I.) (alteration in original). The strictures of the Free Exercise Clause apply to state and local government under the Fourteenth Amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding the religious protections under the First Amendment apply to the states through the Due Process Clause of the Fourteenth Amendment). "Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 165.

When a challenged law “is ‘neutral’ and ‘generally applicable,’ and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection.” *Id.* at 165 (citing *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990)); see also *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (explaining that in cases involving state laws affecting religious freedoms, *Smith* is the appropriate framework for analysis because the federal Religious Freedom Restoration Act of 1993, passed by Congress in response to *Smith*, does not apply to state actions). Thus, the constitutionality of a neutral and generally applicable state or local law under the Free Exercise clause is evaluated using the rational basis standard.²⁰

By contrast, “if a law is not neutral . . . or is not generally applicable . . . strict scrutiny applies and the burden on the religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.” *Tenafly Eruv Ass’n, Inc.*, 309 F.3d 144 at 165 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993)). “A law is not neutral if it has as its ‘object . . . to infringe upon or restrict practices because of their religious motivation.’” *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (citing *Lukumi*, 508 U.S. at 533). “A law is not generally applicable when it ‘pro-

²⁰ “[R]ational basis review requires merely that the action be rationally related to a legitimate government objective.” *Tenafly Eruv Ass’n, Inc.*, 309 F.3d 144 at 165 n.24.

scribes particular conduct only or primarily when religiously motivated.” *Id.* at 275 (citing *Tenafly*, 309 F.3d at 165).

Even if a law is neutral and generally applicable on its face, if “government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator’s conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct.” *Tenafly Eruv Ass’n, Inc.*, 309 F.3d 144 at 165–66. Unless there is evidence of government targeting of religious conduct “for distinctive treatment” then the framework for analysis under *Smith*, 494 U.S. 872, will govern the review of a challenged law or action. *Tenafly Eruv Ass’n, Inc.*, 309 F.3d 144 at 167 (quoting *Lukumi*, 508 U.S. at 534).

In the absence of case law directly addressing the factual circumstances presented in this case, the Court finds the Supreme Court’s decision in *Christian Legal Soc’y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 698 (2010) instructive. In *Martinez*, the Supreme Court reviewed a law school’s policy requiring student groups who wished to take advantage of the benefits of official recognition by the law school to comply with an all-comers/nondiscrimination policy. A faith-based student group argued that the University’s insistence that the student group comply with the all-comers policy violated, among other things, the group’s right to the free exercise of religion. *Id.*

A group of law students at a public law school formed a chapter of the Christian Legal Society

(“CLS”) that required its members to sign a “Statement of Faith” and adhere to bylaws that would “exclude from affiliation anyone who engages in ‘unrepentant homosexual conduct.’” *Id.* at 672. CLS applied for registered student organization (“RSO”) status with the law school. RSO status would confer on CLS various benefits including subsidies of CLS’s events with funds originating from the school-wide mandatory student-activity fee, use of certain law school facilities, and the ability to advertise events to the student body using the law school’s communication channels and the use of the law school’s name and logo in advertising. *Id.* at 669–70. To qualify for RSO status, the law school required applicants to agree to a non-discrimination policy that would prohibit the applicant from discriminating against prospective members on the basis of “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.” *Id.* at 671. CLS would not adopt the nondiscrimination policy and, accordingly, the school withheld RSO status and its attending benefits from CLS. *Id.* at 673.

In upholding the law school’s conditioning of RSO status and attending benefits on CLS’s acceptance of the nondiscrimination policy, the Supreme Court reasoned that the law school’s policy was, in essence, a neutral “all comers” policy and that the law school, “caught in the crossfire between a group’s desire to exclude and students’ demand for equal access, may reasonably draw a line in the sand permitting all organizations to express what they wish but no group to discriminate in membership.” *Id.* at 694. The Supreme Court continued stating that:

[t]he question here . . . is not whether [the law school] could, consistent with the Constitution,

provide religious groups dispensation from the all-comers policy by permitting them to restrict membership to those who share their [sincerely held religious belief]. It is instead whether [the law school] must grant that exemption. This Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, . . . unequivocally answers no to that latter question.

Martinez, 561 U.S. at 694 n.24. The Supreme Court further considered the fact that RSOs “are eligible for financial assistance drawn from mandatory student-activity fees . . . the all-comers policy ensures that no [law] student is forced to fund a group that would reject her as a member.” *Id.* at 688. Ultimately, the Supreme Court held that the law school's policy was constitutional despite its incidental effect on CLS and its ability to receive RSO benefits, including financial support for its activities. *Id.* at 698.

The Court also considers the U.S. District Court for the Western District of Michigan's decision in *Teen Ranch, Inc. v. Udow*, 389 F.Supp.2d 827 (W.D. Mich. 2005), which was affirmed by the Sixth Circuit in *Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007), because the court's rationale in *Teen Ranch* provides some analytical assistance on the present facts.

In *Teen Ranch*, a faith-based residential home for troubled youth, Teen Ranch, sued a state agency, charged with placing troubled youth in protective care, after the state agency issued a moratorium against further placements of children with Teen Ranch due to Teen Ranch's policies and practices that violated laws prohibiting the use of state funds for sectarian activities. 389 F.Supp.2d at 829–32. *Teen Ranch* argued that the state's moratorium on new placements

with Teen Ranch “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 without satisfying the strict scrutiny standard.” *Id.* at 837. In rejecting *Teen Ranch*’s free exercise challenge, the district court reasoned that “[u]nlike [cases involving] unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit.” *Id.* at 838 (emphasis added). The district court relied on the Supreme Court’s decision in *Locke v. Davey* and explained that in *Locke*:

where the [Supreme] Court reviewed a state scholarship program that excluded any student who was pursuing a degree in devotional theology . . . [a]lthough the law was not facially neutral with respect to religion, the [Supreme] Court held that it did not violate the Free Exercise Clause [because the law] ‘imposes neither criminal nor civil sanctions on any type of religious service or rite . . . And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

Teen Ranch, 389 F. Supp. 2d at 838 (citing *Locke v. Davey*, 540 U.S. 712, 720–21 (2004)). The district court in *Teen Ranch*, thus, recognized that the context in which a purported burden on religious expression occurs is critical in determining whether the state has violated the Free Exercise Clause. There is a difference between fundamental benefits such as unemployment compensation and voluntary contracts for the

provision of government services. *Id.* at 838 (stating that there is no support for the proposition that “the State can be required under the Free Exercise Clause to contract with a religious organization”).²¹ On appeal, the Sixth Circuit stated “[a]fter thoroughly reviewing the record, we believe that the district court was correct in reaching its conclusions.” *Teen Ranch*, 479 F.3d at 410.

In this case, the Services Contract and the Fair Practices Ordinance incorporated into the Services Contract is, on its face, a neutral law of general applicability under *Smith*, therefore, the Court applies the rational basis test to determine the constitutionality of the Services Contract and its application to CSS.

First the Court concludes that the Services Contract and Fair Practices Ordinance are neutral with respect to religion because there is no evidence that the Services Contract or Fair Practices Ordinance were drafted or enacted with the object “to infringe upon or restrict practices because of their religious motivation.” *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275 (quoting *Lukumi*, 508 U.S. at 533) (emphasis added). The plain language of the Services Contract

²¹ The state court in *Catholic Charities of the Diocese of Springfield, et al. v. Madigan, et al.* similarly focused on context in granting summary judgment for the State of Illinois in a factually analogous dispute to the dispute in this case. See Section IV.A for a summary of the case in *Madigan*; see also Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield, et al. v. Madigan, et al.*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011) (concluding that despite Catholic Charities’ long history of participation in foster care, it did not have a right to a state contract for foster care).

and the plain language and history of the Fair Practices Ordinance as incorporated into the Services Contract demonstrate neutrality. Article XV, § 15.1 of the Services Contract makes no reference to religion except that § 15.1 would protect individuals receiving services under the Services Contract from religious discrimination. Decl. of James Amato Ex. C, ECF p. 18–19 of 39, ECF No. 13-5 (“Provider shall not discriminate or permit discrimination against any individual because of . . . religion.”). The plain language of the Fair Practices Ordinance likewise supports a finding of neutrality. The Fair Practices Ordinance makes no reference to religion except that it, again, prohibits service providers from discriminating on the basis of religion. Philadelphia Fair Practices Ordinance § 9-1106, Chapter 9-1100 of the Philadelphia Code.

The legislative history and intent of the Fair Practices Ordinance similarly supports a finding of neutrality. Philadelphia City Council first enacted the Fair Practices Ordinance in 1963 long before the present dispute between the Parties. Philadelphia City Council amended the Fair Practices Ordinance in 1982, thirty-six years before the events relevant to this case, to broaden the scope of its inclusion policy to protect Philadelphians on the basis of, among other things, sexual orientation. Indeed, the Legislative Findings section of the Fair Practices Ordinance explained the reasons for its enactment. The Fair Practices Ordinance provides that Philadelphia’s population:

Consists of people of every race, ethnicity, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, age, disability, mari-

tal status, and familial status . . . [and] [d]iscrimination in places of public accommodation causes embarrassment and inconvenience to citizens and visitors of the City, creates breaches of the peace, and is otherwise detrimental to the welfare and economic growth of the City.

§ 9-1101. The history and text of the Fair Practices Ordinance provide no basis to conclude that the Fair Practices Ordinance has as its object the infringement of religious rights. Accordingly, the Fair Practices Ordinance, as incorporated by the Parties into the Services Contract, is neutral.

The Services Contract and the Fair Practices Ordinance are also generally applicable. In this case, the Services Contract was, in fact, applied generally. The general applicability of the Services Contract and Fair Practices Ordinance is not only evident from the text of the Services Contract, but also from the actions DHS and Philadelphia took in this case. First, the Services Contract and Fair Practices Ordinance do not “proscribe particular conduct only or primarily when religiously motivated;” they proscribe only CSS’s ability to turn away qualified Philadelphians on the basis of particular character traits without regard to secular or religious reasons. *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275 (citing *Tenaflly*, 309 F.3d at 165). Among the character traits that CSS may not consider when refusing to serve qualified Philadelphians are “perceived race, ethnicity, color, sex, sexual orientation, religion, national origin, ancestry, age, disability, marital status, source of income, familiar [sic] status . . .” Article XV, § 15.1.

As applied in this case, the Services Contract and Fair Practices Ordinance were, in fact, implemented in a general manner. Not only has DHS confirmed that it would not permit any foster agency under contract, faith-based or not, to turn away potential foster parents for the foster parents' characteristics under the Services Contract and Fair Practices Ordinance, DHS also closed intake of new referrals by CSS and Bethany Christian Services for the same reason. This evidence supports the conclusion that DHS and Philadelphia are not applying the Services Contract or the Fair Practices Ordinance to target particular religious denominations for any religious reason.²²

Having concluded that the Services Contract and Fair Practices Ordinance are apparently facially neutral and generally applicable and appear to have been neutrally and generally applied in this case, the Court concludes that Defendants' enforcement of the Services Contract and Fair Practices Ordinance is rationally related to a number of legitimate government objectives. While the standard for rational basis review is well known, it bears repeating:

Under rational basis review, [a] statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might

²² This fact contradicts Plaintiffs' argument that DHS and Philadelphia specifically targeted CSS for its Catholic practices and association with the Archbishop of the Philadelphia Archdiocese. See below Section IV.C.2.ii addressing Plaintiffs' argument that strict scrutiny should apply in reviewing Defendants' actions because Defendants purportedly targeted Plaintiffs for Plaintiffs' religious beliefs.

support it, whether or not that basis has a foundation in the record.’ . . . The regulation must be reasonable and not arbitrary and it must bear ‘a rational relationship to a [permissible] state objective.’”

Lighthouse Inst. for Evangelism, Inc., 510 F.3d at 278 (internal citation omitted). While not directly applicable to the local contracting practices at issue in this case, the imposition of contractual conditions in government services contracts has a long and well-established history. Indeed, the courts, in reviewing federal contracts, have frequently upheld conditions placed on contractors through federal executive orders. See, e.g., Exec. Order No. 8802, 6 F.R. § 3109 (Jun. 25, 1941) (requiring “[a]ll contracting agencies of the Government of the United States . . . include in all defense contracts . . . a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin” even before the enactment of the Civil Rights Act of 1964); PA Exec. Order 2016-05 (Apr. 7, 2016), https://www.governor.pa.gov/executive_orders/executive-order-2016-05-contract-compliance/ (prohibiting “discrimination by reason of race, gender, creed, color, sexual orientation, or gender identity or expression” in the “award, selection, or performance of any contracts or grants issued by Commonwealth agencies”).

Here, Defendants have at least six permissible governmental objectives that are furthered by seeking CSS’s compliance with the Services Contract. First, DHS and Philadelphia have a legitimate interest in ensuring that when contractors agree to terms in a government contract, the contractors adhere to those

terms. Second, DHS and Philadelphia have a legitimate interest in ensuring that when its contractors voluntarily agree to be bound by local laws, the local laws are enforced. Third, DHS and Philadelphia have a legitimate interest in ensuring that when they employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the services. Fourth, in the context of foster care and adoption, DHS and Philadelphia have a legitimate interest in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers. Fifth, DHS and Philadelphia have a legitimate interest in ensuring that individuals who pay taxes to fund government contractors are not denied access to those services.²³ Sixth, DHS and Philadelphia have an interest in avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples.²⁴

²³ See *Martinez*, 561 U.S. at 688 (concluding that the fact that where University organizations may receive funding derived from a mandatory student-activity fee, that the University has an interest in ensuring that no student “is forced to fund a group that would reject her as a member.”).

²⁴ See, e.g., *Campaign for Southern Equality v. Mississippi Dep’t of Human Servs.*, 175 F.Supp.3d 691 (S.D. Miss. 2016) (granting injunction to same-sex couples against state department of human services on basis that state law prohibiting adoption by same-sex couples violated federal equal protection under *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)).

That Defendants have legitimate objectives in this case is clearer still in view of the Supreme Court's decision in *Martinez*, 561 U.S. 661 and the decision in *Teen Ranch*, 389 F. Supp. 2d 827. In *Martinez*, the Supreme Court explained that where a public law school was "caught in the crossfire between a group's desire to exclude and [an interest in] equal access, [the law school] may reasonably . . . permit[] all organizations to express what they wish but no group to discriminate in membership." 561 U.S. at 694. In this case, DHS and Philadelphia are in much the same position as the

The Court notes that while the Third Circuit rejected "avoiding 'an Establishment Clause controversy'" as a government interest in *Tenafly*, in that case, the Third Circuit concluded that strict scrutiny applied and, thus, a "possible" Establishment Clause controversy could not meet the exacting requirements of a "compelling" government interest. 309 F.3d at 172. Further, in *Tenafly*, the Third Circuit concluded that the existence of an Establishment Clause controversy was, in essence, impossible. Here, faced with the Supreme Court's ruling in *Obergefell*, recognizing marriage for same-sex couples and marriage's attending benefits, and faced with the fact that CSS conditions the provision of its services on prospective parents' procurement of a clergy letter, the possibility of an Equal Protection and Establishment Clause claim is not as remote a possibility as was the case in *Tenafly*.

The Court also notes here that although CSS has disclaimed responsibility as a government actor in connection with some aspects of its claims, CSS, otherwise has urged the Court to consider CSS as a government contractor "akin to a government employee" in connection with its argument on Free Speech grounds. Pls.' Br. 26, ECF No. 10-2. The Court need not decide whether CSS would qualify as a state actor at this time in connection with any possible Equal Protection or Establishment Clause claim.

law school in *Martinez* and, like the law school in *Martinez*, they may permit government contractors to express what the contractors wish but may also insist that their contractors adhere to contractual obligations to serve all-comers and not discriminate. To permit a contractor to avoid a contractual provision requiring the contractor to accept all those who seek their services unilaterally would permit what the Supreme Court explained could not be permitted in *Martinez*.²⁵

In this case, as in *Teen Ranch*, context matters. In *Teen Ranch*, the district court aptly drew a distinction between cases involving essential government benefits such as unemployment compensation or the ability to hold office, and “a state contract for youth residential services, which is not a public benefit.” 389 F. Supp. 2d at 838; see also Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield, et al. v. Madigan, et al.*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011) (granting summary judgment for State of Illinois reasoning that Catholic Charities did “not have a legally recognized protected property interest in the renewal of its contracts for foster care and adoption services”). There is no support for the proposition that “the State can be required under the Free Exercise Clause to contract with a religious organization.” *Id.* at 838. Here, CSS seeks, as the plaintiff in *Teen Ranch*

²⁵ When asked whether the public law school was required to exempt a faith-based student group’s decision from an all-comers/nondiscrimination policy, the Supreme Court answered that “[t]his Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, . . . unequivocally answers no to that . . . question.” *Martinez*, 561 U.S. at 694 n.24.

sought, a government services contract on terms that it deems acceptable, but unlike those cases where the government withheld essential benefits on religious grounds, CSS is not entitled to a government services contract to perform governmental work. It further bears repeating that there is no evidence in the record that either DHS or Philadelphia has withheld a new contract or contractual compensation to CSS on religious grounds. The Court concludes that the terms of Services Contract, as applied by Defendants in this case, would likely survive rational basis review.

ii. No Evidence Of Targeting To Trigger Strict Scrutiny

Although the Court concludes that rational basis review applies in this case, the Court addresses Plaintiffs' argument that strict scrutiny review should apply instead.

At the outset, the Court acknowledges the Parties' varying citations to the recent Supreme Court case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018). *Masterpiece Cakeshop*, however, has little bearing on this case in view of *Masterpiece Cakeshop's* narrow holding. Among other narrow propositions, *Masterpiece Cakeshop* stands for the unfortunately now-remarkable proposition that disputes such as the one before this Court "must be resolved with tolerance." *Id.* at 1732.

In an attempt to show that Defendants' actions are subject to strict scrutiny despite the facial neutrality and general applicability of the Services Contract provisions at issue, and DHS's and Philadelphia's expressed preference to continue contracting with CSS, Plaintiffs allege that Defendants have targeted CSS

“purely based on its religious beliefs.” Pls.’ Br. 17, ECF No. 13-2. In support of their claim of targeting, Plaintiffs point to (1) anti-Archdiocese of Philadelphia and anti-Archbishop of Philadelphia comments made by the Mayor of Philadelphia to show that DHS and Philadelphia intentionally sought to penalize CSS for its religious beliefs and exercise, and (2) the purported selective, discretionary enforcement of “laws or legal instruments in a way that burdens conduct for religious reasons but not secular reasons.” Pls.’ Br. 21, ECF No. 13-2. Plaintiffs draw too strong a conclusion from the Mayor’s comments and misapprehend the way in which “secular exemptions” might show a government’s actions are not neutral or generally applied so as to trigger strict scrutiny.

First, contrary to Plaintiffs’ contentions, the Mayor’s comments do not support the conclusion that DHS targeted CSS for its Catholic beliefs because (a) there was insufficient evidence at the preliminary injunction phase to show that the Mayor had any influence in DHS’s decisions in this case, thereby rendering the comments irrelevant to these proceedings, and (b) even comments the Mayor made relating to Catholicism do not demonstrate targeting in light of the fact that DHS also closed Bethany Christian Services’s referrals intake, a non-Catholic agency, that similarly would not comply with its obligation to serve all-comers under its foster agency contract.

Plaintiffs cite four comments involving the Mayor of Philadelphia that purportedly show that DHS

closed CSS's intake due to CSS's Catholic beliefs.²⁶ First, Plaintiffs cite a nearly three-year-old *Philadelphia Magazine* article about then mayoral candidate Jim Kenney in which Kenney appeared critical of policies of the Archdiocese of Philadelphia and the Archbishop of Philadelphia, but appeared otherwise approving of Pope Francis, Catholic sisters, and other Catholic orders and programs.²⁷ Second, Plaintiffs cite a nearly two year old *Philadelphia Inquirer* article in which Mayor Kenney was quoted as saying that Philadelphia Archbishop Chaput's guidelines on the implementation of a Catholic text, *Amoris Laetitia*, were "not Christian."²⁸ Third, Plaintiffs cite a March 16,

²⁶ The difficulty in Plaintiffs relying on the Mayor's statements, in part, stems from the fact that the Mayor himself was raised Catholic and, therefore, it is conceivable that when the Mayor has commented on Catholicism in the past, he was commenting on Catholic ideas as they related to his own faith. The Supreme Court has recently reminded the courts that they are to "take care not to engage in [] any judicial psychoanalysis" of lawmakers. *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at *37 (U.S. June 26, 2018) (Sotomayor, J., dissenting). This is why the courts, when determining the intent of legislators, generally confine their review to statements made contemporaneously with the legislation in question. *Id.*

²⁷ Patrick Kerkstra, [Jim Kenney's Long War With The Archdiocese](https://www.phillymag.com/citifed/2015/07/09/jim-kenney-catholic-archdiocese-charles-chaput/), Phillymag.com, (July 9, 2015, 11:23 PM), <https://www.phillymag.com/citifed/2015/07/09/jim-kenney-catholic-archdiocese-charles-chaput/>.

²⁸ David O'Reilly, [Chaput Edict Draws Mixed Reviews: Kenney Calls It 'Not Christian'](http://www.philly.com/philly/news/20160707_Cha-), Philly.com, (Jul. 6, 2016, 11:04 PM), http://www.philly.com/philly/news/20160707_Cha-

2018 comment by the Mayor where the Mayor stated “we cannot use taxpayer dollars to fund organizations that discriminate against people because of their sexual orientation or because of their same-sex marriage status . . . It’s just not right.”²⁹ Fourth, Plaintiffs cite a May 7, 2018 letter indicating that the Philadelphia Commission on Human Relations was investigating CSS’s policy of turning away certain persons based on their status as same-sex and married at “the request of the Mayor.” See (initial) Injunction Motion Ex. 1-G (sealed), ECF No. 10-14.

Plaintiffs rely too heavily on these four citations to draw a sweeping conclusion that CSS has suffered impermissible hostility at the hands of the Mayor. The evidence submitted at the three-day evidentiary hearing is insufficient to draw the conclusion Plaintiffs would have the Court draw. There was no evidence to show that the Mayor directed DHS to close CSS’s intake of new referrals or to insist that CSS comply with its contractual obligation to serve all Philadelphians. See Jun. 19, 2018 Hr’g Tr. 166:6–21 (Figueroa) (testifying that Commissioner Figueroa herself “decided that it was in the best interest [of children] to close

put_edict_draws_mixed_reviews_Kenney_c_all_s_it_not_Christian_.html. See Mot. for Temporary Restraining Order or Preliminary Injunction Ex. 1-J, ECF No. 10-17.

²⁹ Tom MacDonald, Philly Halts Foster Placements With 2 Faith-Based Agencies Shutting Out LGBT Couples, WHYY.com, (Mar. 16, 2018), <https://whyy.org/articles/philly-halts-foster-placements-2-faith-based-agencies-shutting-lgbt-couples/>. This article was cited in Plaintiffs’ Brief and is attached as Exhibit 1-U to Plaintiffs’ initial Injunction Motion. See Mot. for Temporary Restraining Order or Preliminary Injunction Ex. 1-U, ECF No. 10-28.

intake, so that [Figueroa] could look more deeply into” CSS’s and Bethany Christian Services’s policies); Figueroa Decl. ¶ 32, ECF No. 20-6 (same); Jun. 18, 2018 Hr’g Tr. 96:2–3 (Ali) (testifying that, to Ali’s knowledge, Commissioner Figueroa herself decided to close CSS’s intake of new referrals); Jun. 21, 2018 Hr’g Tr. 108:11–13, 108:18–20 (Figueroa) (testifying that Commissioner Figueroa did not know the Mayor’s views on CSS when Figueroa met with CSS, nor did Figueroa “discuss cutting off intake with the Mayor’s office”).

That DHS made its own decision to close intake is supported by the fact that DHS has closed intake for other foster care agencies in the past for a number of reasons and, thus, intake closure is a relatively unremarkable DHS administrative action that may be taken to address a number of agency concerns. See, e.g., Jun. 21, 2018 Hr’g Tr. 5:14–15 (Figueroa) (testifying that “I have closed intake in other circumstances for other providers.”); Jun. 21, 2018 Tr. 8:24-25–9:1 (Figueroa) (testifying that the week before, DHS also closed intake for another agency). In short, there is insufficient evidence in the record to show that the Mayor was involved in DHS’s decision to close CSS’s and Bethany Christian Services’s intake of new referrals. Therefore, the Mayor’s comments are irrelevant to this case and cannot support Plaintiffs’ claim of religious hostility and intentional targeting.

Each of Plaintiffs’ four citations purportedly showing DHS’s intentional targeting of CSS on religious grounds cannot support Plaintiffs’ conclusion for a number of other reasons. Plaintiffs’ first two citations are three and two years old, respectively. The events that precipitated this case occurred in March 2018.

These first two citations, as a matter of timeliness, if not substance, are irrelevant. Plaintiffs' third citation to the Mayor's comment that "we cannot use taxpayer dollars to fund organizations that discriminate against people because of their sexual orientation or because of their same-sex marriage status . . . It's just not right" is, by its plain terms, not about religious views, but about whether publicly funded service providers may refuse to serve all Philadelphians, including those that are in same-sex marriages. Plaintiffs' fourth citation, to a May 7, 2018 letter in which the Philadelphia Commission on Human Relations indicated that the Commission would undertake an investigation, in part, at the request of the Mayor, was sent after DHS made an independent decision to close CSS and Bethany Christian Services's intake. The letter, therefore, cannot support a conclusion that the Mayor was involved in DHS's decision.

Plaintiffs also have pointed to Commissioner Figueroa's statement at the May 15 meeting between DHS officers and CSS management that "it would be great if we listened to the teachings and the words of our current Pope Francis" as another ground on which to rest its targeting and preference allegations. Jun. 21, 2018 Hr'g Tr. 106:1-3 (Figueroa). As with the Mayor's comments, Plaintiffs draw too broad a conclusion from the Commissioner's statement. The fact remains that DHS closed intake for both CSS and Bethany Christian Services, a non-Catholic organization. This fact undercuts Plaintiffs' position that DHS has targeted CSS for its Catholic beliefs. Further, Commissioner Figueroa's words themselves are unclear whether references to "we" and "our current Pope

Francis” were references to her own beliefs as a Catholic who was educated by the Jesuit order, or as a representative of DHS. Jun. 19, 2018 Hr’g Tr. 149:5–18. As cautioned by Justice Sotomayor, the Court will not engage in judicial psychoanalysis on these facts. *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at *37.

In an another attempt to show that DHS has targeted CSS on religious grounds, Plaintiffs argue that DHS has granted secular exemptions to the Services Contract’s fair practices provisions, but now refuse a religious exemption to CSS. Plaintiffs, however, misapprehend how religious targeting may be proven through the government’s provision of “secular exemptions.” On this issue, the Third Circuit’s decision in the case *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, provides the framework for determining whether the government is impermissibly providing secular exemptions to a regulation, and not providing comparable religious exemptions to the same regulation in violation of the First Amendment. 170 F.3d 359 (3d Cir. 1999).

In *Fraternal Order of Police*, the Third Circuit considered a police department regulation that prohibited its officers from wearing beards to maintain uniformity among the officers. 170 F.3d at 361. The regulation applied generally to all officers, but the police department carved out a categorical exemption for officers who had medical reasons for keeping a beard. *Id.* By contrast, the police department refused to carve out a categorical exemption for officers who had religious reasons for keeping a beard. *Id.* Then Circuit Judge Alito wrote for the Third Circuit that the police department’s exemption from the no-beard policy on medical

grounds “raise[d] concern because it indicate[d] that the [police department] ha[d] made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not.” *Id.* at 366 (emphasis added). The focus of analysis must be on whether the government exempts activities that would violate the policy at issue for secular reasons, but not for religious reasons. Thus, in *Fraternal Order of Police*, the focus was on the police department’s provision of a secular exemption from the no-beard policy.

Here, the policy at issue is the fair practice provisions of CSS’s Services Contract, that is the all-comers, nondiscrimination provisions. The question is whether DHS grants exemptions to the fair practice provisions of foster agency contracts for secular reasons, but denies CSS an exemption for religious reasons thereby evidencing an impermissible governmental value judgment that secular motivations for violating fair practice provisions are more important than religious motivations. The answer to this question is no. 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. Plaintiffs have not alleged, nor have Plaintiffs presented, any evidence that DHS has granted exemptions to any secular agency to permit a secular agency to refuse its services to all comers in contravention of any fair practices provisions of any foster services contract.

The purported secular exemptions to which Plaintiffs point to show religious targeting are not, in fact, exemptions to the fair practices requirements and, as

such, cannot be considered evidence of targeting. CSS complains that DHS has permitted “referrals of families for a variety of secular reasons, including proximity, expertise in caring for medical needs, expertise in addressing behavioral needs, ability to find foster placements for pregnant youth, expertise working in a ‘kin care’ program, and other specialties or areas of focus.” Pls.’ Br. 21, ECF No. 13-2. These “secular reasons,” however, are not exemptions from fair practices requirements. DHS permits agencies to “refer” prospective foster parents to specialty agencies equipped to handle certain special needs, but nowhere is there evidence in the record that DHS permits agencies to refuse to provide their services to prospective foster parents in violation of the fair practices policies contained in government contracts or local law. While CSS has represented that it would euphemistically “refer” same-sex couples to other foster agencies willing to serve same-sex couples, CSS’s “referral” to another agency would nevertheless amount to CSS’s refusal to serve that same-sex couple.

As there is insufficient evidence to support the conclusion that DHS has explicitly targeted CSS for religious reasons, strict scrutiny is inapplicable in this case.

2. Establishment Clause Claim

Plaintiffs also assert a claim under the Establishment Clause based on Defendants’ alleged “engag[ment] in denominational preference and targeting.” Pls.’ Br. 24, ECF No. 10-2. The First Amendment to the U.S. Constitution provides that “there should be ‘no law respecting an establishment of religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting

the First Amendment)). The Supreme Court has provided two tests for deciding whether government action runs afoul of the Establishment Clause: the “endorsement test” and the Lemon test. *Doe v. Indian River School Dist.*, 653 F.3d 256, 282–83 (3d Cir. 2011). Plaintiffs have not articulated how, if at all, Defendants’ actions fit under either test. Instead, Plaintiffs have simply asserted that Defendants have “demonstrate[d] a preference for some religious groups over CSS.” Pls.’ Br. 24, ECF No. 13-2. The Court cannot conclude that Plaintiffs have met their burden of showing entitlement to relief under the Establishment Clause. The Court will, nevertheless, address Plaintiffs’ Establishment Clause arguments as they have articulated them below, despite Plaintiffs’ failure to articulate a claim under the endorsement test or the Lemon test.

In support of Plaintiffs’ Establishment Clause claim, Plaintiffs cite to the same purported evidence of religious targeting that they cited in connection with their free exercise claim, that is, evidence of the Mayor’s alleged bias against the Archdiocese of Philadelphia and the Archbishop of Philadelphia. Plaintiffs argue that the Mayor’s comments in tandem with DHS’s actions “demonstrate an intent to target Catholic Social Services based upon disagreement with [CSS’s] religious beliefs.” Pls.’ Br. 25, ECF No. 10-2. As discussed in connection with Plaintiffs’ religious targeting argument, above, the evidence does not support Plaintiffs’ sweeping conclusion.

In pursuing its Establishment Clause claim, CSS glosses over the fact that it has not been singled out for its policy of refusing to serve all qualified Philadel-

phians. DHS closed Bethany Christian Services's intake of new referrals for the same reason DHS closed CSS's intake. Jun. 21, 2018 Hr'g Tr. 12:9–23 (Figueroa) (testifying that DHS closed Bethany Christian Services's intake and that its intake remains closed, however, Bethany Christian Services has represented that it will enter into a new contract with the DHS for the coming year and comply with the fair practices requirements under its contract). That DHS closed intake for CSS, which operates under the command of the Archdiocese of Philadelphia, and also closed intake for Bethany Christian Services, not associated with the Archdiocese of Philadelphia, militates against concluding that DHS has engaged in denominational preference and targeting. The Mayor's allegedly anti-Archdiocese of Philadelphia and anti-Archbishop of Philadelphia comments offer no support to Plaintiffs' argument of denominational preference and targeting because DHS also closed Bethany Christian Services's intake, which is not associated with the Archdiocese of Philadelphia or the Archbishop of Philadelphia.

Plaintiffs have not demonstrated entitlement to relief under the Establishment Clause.

3. Pennsylvania Religious Freedom Act Claim

Plaintiffs' next lodge a statutory claim under the Pennsylvania Religious Freedom Act ("RFPA"). 71 Pa. Cons. Stat. Ann. §§ 2401–2407. Before turning to the substance of Plaintiffs' claim, the Court emphasizes that Plaintiffs' claim is a state law claim. Under certain circumstances a district court may abstain from ruling on a state law issue, such as the issue in this

case, in favor of allowing the state courts an opportunity to address the issue. Indeed, in *Combs v. Homer-Center School Dist.*, the Third Circuit vacated a district court order awarding a defendant summary judgment on a RFPA claim and ordered the district court to remand the matter to the appropriate state court for adjudication. 540 F.3d 231, 253–254 (3d Cir. 2008). The Third Circuit explained in *Combs*, that “[b]ecause all federal issues have been decided on summary judgment and since [the plaintiffs’] RFPA claim raises a novel and potentially complex issue of State law, we will decline to exercise supplemental jurisdiction over [the plaintiffs’] pendent state law claim.” 540 F.3d at 254. Notwithstanding the Third Circuit’s guidance that the district courts remain wary of intruding upon state law matters, the Court will address Plaintiffs’ RFPA claim in view of the procedural posture of this case.

At the preliminary injunction stage, the Third Circuit has advised that considerations of the novelty and potential complexity of a state law question “have very little weight.” *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Educ.*, 654 F.2d 868 (3d Cir. 1981) (concluding that the concerns implicated by the Pullman doctrine, which permits courts to abstain from deciding certain complex state law matters are of less import at the preliminary injunction stage). While the state law matters presented in this case are complex, the Court finds that state court precedent provides a sound basis for a decision on Plaintiffs’ RFPA claim at the preliminary injunction stage.

Section 2401 of RFPA provides:

- (a) General rule. Except as provided in subsection (b), an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability.
- (b) Exceptions. An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following:
 - (1) In furtherance of a compelling interest of the agency.
 - (2) The least restrictive means of furthering the compelling interest.

71 Pa. Cons. Stat. Ann. § 2404 (emphasis added).

While RFPA would appear, on its face, to protect a wide range of religious activity, the Third Circuit has noted that “[s]ignificantly, not all burdens on the exercise of religion trigger the RFPA’s heightened scrutiny.” *Brown v. City of Pittsburgh*, 586 F.3d 263, 285 (3d Cir. 2009). The Third Circuit has explained that the nature of our society is such that “virtually all legislation . . . imposes an incidental burden at some level by placing indirect costs on an individual’s activity.” *Id.* at 285 (internal quotation omitted) (alteration in original). When the costs of legislation may affect religious freedoms, the Pennsylvania General Assembly has “identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action.” *Id.* at 285 (citing *Combs v. Homer-Center School Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring)). RFPA further “requires ‘as a threshold matter’ that persons invoking its

protections ‘prove . . . that their free exercise of religion has or will likely be substantially burdened’ by ‘clear and convincing evidence.’” *Id.* at 285 (citing *Combs*, 540 F.3d at 253 (per curiam)) (emphasis added). The Third Circuit has quoted Chief Judge Scirica’s concurring opinion in *Combs* for the proposition that “by requiring proof of ‘a substantial burden’ by clear and convincing evidence, Pennsylvania appears to have set a higher threshold than other religious restoration statutes.” *Id.* at 285 (citing *Combs*, 540 F.3d at 262 (Scirica, C.J., concurring)) (emphasis added).

Under RFPA, a law substantially burdens a person’s fundamental religious exercise if it:

- (1) Significantly constrains or inhibits conduct or expression mandated by a person’s sincerely held religious beliefs.
- (2) Significantly curtails a person’s ability to express adherence to the person’s religious faith.
- (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person’s religion.
- (4) Compels conduct or expression which violates a specific tenet of a person’s religious faith.

71 Pa. Cons. Stat. Ann. § 2403. In determining whether the government substantially burdens a person’s free exercise of religion under RFPA, a state law, the Court looks to the way in which the state law has been interpreted and applied by state courts.

In *Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park*, 920 A.2d 953 (Pa. Commw.

Ct. 2007), the Commonwealth Court reviewed a church's claim that a town zoning ordinance prohibiting the operation of a church-run religious childcare center on the church's property violated the church's free exercise under RFPA. The Commonwealth Court framed the issue presented as "whether the Church would be 'substantially burdened' if it was precluded from operating a daycare center because it would lose 'a reasonable opportunity to engage in activities which are fundamental to [its] religion.'" 920 A.2d at 960 (quoting 71 Pa. Cons. Stat. Ann. § 2403). The Commonwealth Court resolved the issue by concluding that:

nothing here impinges on the religious activities of the Church. While it aided in carrying out the Church's religious mission, the daycare is not a fundamental religious activity of a church. For example, ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that mission.

Id. at 960. Thus, the Commonwealth Court concluded the zoning ordinance "does not violate the RFPA" because "the [c]hurch failed to meet its burden of proving that it was substantially denied a reasonable opportunity to engage in activities that were fundamental to its religion." *Id.*

In *Staple v. Dep't of Corrections*, the Commonwealth Court considered a situation in which the Pennsylvania Department of Corrections confiscated religious texts from an inmate. 2014 WL 2927286 at *4 (Pa. Commw. Ct. 2014) (not precedential). While *Staple* involved the application of a specific carve out under RFPA that grants correctional facilities greater

authority to burden inmates' religious freedoms, the case, nevertheless, provides some insight into the limits of RFPA. A person's access to religious texts would ostensibly be one of the most fundamental religious rights, and yet, even under RFPA, a state agency may confiscate and prohibit an individual's access to such texts. *Id.* at 4. The result in *Staple*, thus, would confirm the Third Circuit's observation in *Brown* that "Pennsylvania appears to have set a higher threshold than other religious restoration statutes" and that RFPA does not provide protection in many circumstances. *Id.* at 285 (citing *Combs*, 540 F.3d at 262 (Scirica, C.J., concurring)); *see also Brown*, 586 F.3d at 288 (holding that RFPA provides only as much protection to religiously motivated expression as the First Amendment's Free Speech Clause).

In *Commonwealth v. Parente*, the Commonwealth Court addressed a defendant's assertion that a city noise control ordinance prohibiting the defendant's use of a hand-held microphone with speakers to "exercise his religious beliefs" in accordance with "the dictates of his conscience and serv[ing] God by peacefully preaching and counseling people," violated his rights under RFPA. 956 A.2d 1065, 1073 (Pa. Commw. Ct. 2008). The Commonwealth Court held that the application of the ordinance and the defendant's conviction thereunder did not violate the defendant's rights under RFPA because "the defendant failed to establish that the activities he engaged in were fundamental to his religion." *Id.* at 1074. Instead, the defendant proved only that "he engaged in these activities based upon his religious beliefs or that [the activities] flowed from a religious mission." 956 A.2d at 1074 (emphasis added). In so holding, the Commonwealth Court drew

a distinction between those activities that are fundamental to a person's religion and those activities that may be inspired by or flow from a religious mission.

These state court decisions interpreting RFPA highlight what the Third Circuit has noted in other cases: the analytical framework established by RFPA “appears to create some tension between state and federal law.” *Combs*, 540 F.3d at 258. While the “United States Supreme Court has cautioned against making religious interpretations in the First Amendment context,” the Pennsylvania General Assembly and the Commonwealth's courts appear to require courts to “inquire into . . . whether an activity is fundamental to a person's religion.” *Id.*

In this case, Plaintiffs have articulated their fundamental religious exercise as “providing foster care to Philadelphia children.” Pls.' Br. 13, ECF No. 13-2; *see also* Pls.' Proposed Findings of Fact and Conclusions of Law ¶ 120, ECF No. 46 (stating that “[c]aring for foster children is a fundamental religious exercise for Plaintiffs); Jun. 19, 2018 Hr'g Tr. 37 (Amato) (testifying that “the church's care for orphans . . . at-risk children . . . [is] intrinsic to who we are and what we do.”). Although the decision in *Ridley Park* raises significant doubt about whether Pennsylvania courts would consider foster care to be a fundamental religious exercise,³⁰ the Court will assume, for purposes of the In-

³⁰ As discussed in detail above, the Commonwealth Court held that childcare “is not a fundamental religious activity of a church” even if childcare may “aid[] in carrying out the Church's religious mission.” *Ridley*, 920 A.2d at 960. Indeed, the Commonwealth

junction Motion, that “providing foster care to . . . children” constitutes a fundamental religious exercise under RFPA. Pls.’ Br. 13, ECF No. 10-2.

Assuming that providing foster care to children constitutes a fundamental religious exercise, the next question under RFPA analysis is whether holding CSS to its obligations under the Services Contract, in particular its obligation to provide its services to all-comers in accordance with the Fair Practices Ordinance, substantially burdens CSS’s provision of foster care to children. The Court concludes that CSS’s provision of foster care to children is not substantially burdened in this case because CSS is not reasonably likely to show by clear and convincing evidence that its fundamental religious exercise has been substantially burdened under any of the four definitions of “substantial burden” provided under RFPA.³¹ Requiring CSS’s compliance

Court reasoned that while “ministering to the sick can flow from a religious mission . . . it is not a fundamental religious activity of a church.” *Id.* at 960. There is little question that “providing foster care to . . . children” likely flows from and aides CSS’s religious mission, but it is not as clear, that foster care is a fundamental religious exercise under Ridley Park.

³¹ Plaintiffs claim that “all four types of burden” considered “substantial” under § 2403 of RFPA are implicated in this case. Plaintiffs assert that DHS’s actions “[s]ignificantly constrain[] or inhibit[] conduct or expression mandated by [Catholic Social Services] religious beliefs” and “[d]en[y] [CSS] a reasonable opportunity to engage in activities which are fundamental to the [agency’s] religion.” Pls.’ Proposed Findings of Fact and Conclusions of Law ¶ 126, ECF No. 46 (alterations in original); *see also* Pls.’ Br. 12, ECF No. 10-2 (asserting same burdens using verbatim language). Elsewhere, Plaintiffs also state that DHS’s actions “curtail . . . Catholic Social Services’ ‘ability to express adherence’

with the terms of the Services Contract does not: constrain or inhibit CSS from conduct or expression mandated by its religious beliefs, curtail CSS's ability to express adherence to CSS's religious faith, deny CSS a reasonable opportunity to "provide foster care to children," or compel CSS to engage in conduct or expression that violates a "specific tenet" of CSS's religious faith.

Resolution of the issue of "substantial burden" requires the Court to focus on what precisely CSS has been asked to do in this case and whether doing it necessarily results in a conflict with CSS's religious beliefs. CSS has been asked, and indeed CSS agreed when it entered into the Services Contract, to serve all persons who seek CSS's services consistent with the all-comers provisions of the Fair Practice Ordinance. Compliance with the all-comers provisions would, as discussed above, require CSS to provide certification services to prospective parents regardless of, among other things, religion, race, marital status, sexual violence victim status, sex, sexual orientation, gender identity, or age. CSS contends that compliance with the all-comers provision of the Services Contract necessarily compels it to engage in "conduct and expression contrary to Catholic teaching," in particular, Catholic teaching about marriage. Pls.' Br. 14, ECF No. 10-2.

to its faith, and attempt to '[c]ompel[] conduct or express which violates a specific tenet of [Catholic Social Services'] religious faith.'" Pls.' Br. 14, ECF No. 10-2 (alterations in original).

CSS contends that the provision of certification services for same-sex couples would require CSS to express its religious approval of same-sex relationships in contravention of Catholic teaching about marriage. This is not the case. To illustrate this point, if, for example, CSS were to certify a couple where one spouse is previously divorced, CSS's certification would not suggest that CSS approved of divorce as a religious matter. In short, CSS was hired to provide a scope of services to the citizens of Philadelphia that is narrower than CSS contends.

The Services Contract requires CSS to "recruit, screen, train, and provide certified resource care homes" consistent with the all-comers provisions of the Fair Practices Ordinance Decl. of James Amato Ex. A, ECF p. 28 of 52, ECF No. 13-3. The Services Contract does not require CSS to do anything in connection with prospective foster parents but certify prospective foster parents as meeting state guidelines for foster care. CSS is imbuing its certifications with meaning that is not required or compelled by the Services Contract. The Services Contract does not require CSS to express its religious approval or disapproval of persons seeking out its services. The Services Contract does not require CSS to do or say anything else in connection with CSS's religious views.

With this understanding in mind, the Court concludes that DHS has not and is not constraining Plaintiffs' ability to engage in the provision of foster care to children by imposing on CSS a contractual condition that would require CSS to violate its religious beliefs or curtail CSS's ability to express its religious beliefs. In essence, if CSS provides its services consistent with the minimal requirements of the all-comers provisions

of the Fair Practices Ordinance, then CSS may continue to provide foster care to children. This does not constitute a substantial burden on CSS's religious exercise of providing foster care to children. As to the individual Plaintiffs, as discussed in detail below and in connection with the irreparable harm prong, the individuals are not constrained by Defendants' actions in connection with CSS in their fostering of children because the individual Plaintiffs are, as they always have been, entitled to be foster parents with any of the thirty foster care agencies with whom DHS has contracted.

4. Free Speech Claims

Plaintiffs allege two claims under the Free Speech Clause of the First Amendment. First, Plaintiffs allege that the services CSS provides under the Services Contract relating to certification of prospective foster parents are services for which CSS is not paid, therefore, by requiring CSS to provide certifications DHS is compelling CSS to engage in unpaid for speech. Second, Plaintiffs contend that DHS and Philadelphia retaliated against CSS for CSS's comments published in the March 13 *Philadelphia Inquirer* article in violation of the Free Speech Clause. The Court rejects both claims. First, in hiring CSS to perform services under the Services Contract, DHS and Philadelphia did not seek to create a forum for private speech nor did they seek to promote speech at all. Rather, DHS contracted for specific services relating to DHS's responsibility of providing foster care services to the citizens of Philadelphia, including certification services and home visits for prospective foster parents. This is the case whether CSS was paid in a lump sum or per diem as CSS contends. Second, there is insufficient evidence to

conclude that DHS retaliated against CSS for CSS's religious views as opposed to CSS's confirmation that its policies directly contradict the Services Contract.

i. Compelled Speech

In resolving Plaintiffs' claim that DHS and Philadelphia are impermissibly conditioning CSS's contract on unconstitutionally compelled speech, the Court begins by identifying the purpose of the contract because the purpose of the contract is the springboard for analysis.³²

The U.S. Supreme Court's decision in *Legal Services Corp. v. Velazquez* advised courts to look to the purpose of a government program when analyzing whether a government condition to participation in the program is constitutional under the First Amendment. 531 U.S. 533 (2001). In *Legal Services Corp.*, a group of lawyers employed by the New York City Legal Services Corp., sought a declaration that Congress's imposition of a funding condition on legal services under the Legal Services Corporation Act was an unconstitutional restriction of their freedom of speech. *Id.* at 536. Congress's funding condition prohibited legal services corporations' use of federal funds to "amend or

³² The Court disagrees that DHS and Philadelphia are conditioning the grant of a contract to CSS on CSS's agreement to "adopt [a] particular belief." Pls.' Proposed Findings of Fact and Conclusions of Law 67, ECF No. 46. DHS and Philadelphia ask only what they would ask of any contracting party, that CSS enter into the contract consistent with the duty of good faith and fair dealing. DHS and Philadelphia have asked CSS to confirm that, to the extent CSS would enter into an agreement that CSS could perform in accordance with the contract's fair practices provisions.

otherwise challenge existing welfare law.” *Id.* In ruling that the funding condition of the Legal Services Corporation Act was unconstitutional, the Supreme Court focused on the purpose of the law. The law was “designed to facilitate private speech, not promote a governmental message.” *Id.* at 542. Indeed, advice from legal services corporation attorneys to their clients, the Supreme Court concluded, “cannot be classified as governmental speech even under a generous understanding of the concept.” *Id.* at 543.

As the Legal Services Corporation Act’s purpose was to facilitate private speech, and as the speech in which legal services corporation attorneys were engaged was not governmental speech, the Supreme Court held that the law’s funding condition was unconstitutional. In so holding, the Supreme Court, however, also acknowledged that “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” *Legal Servs. Corp.*, 531 U.S. 533, 541–42 (2001) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)) (emphasis added).

In this case, DHS’s purpose in entering into the Services Contract with CSS and its other foster care agencies is for CSS and the other twenty-nine foster care agencies to provide foster care services. The Services Contract is not intended here, in contrast to the Legal Services Corporation Act in *Legal Servs. Corp.*, to create a forum for private speech or to facilitate private speech. CSS and its sister agencies were hired to perform governmental functions for DHS and Phila-

delphia. That CSS's services under the Services Contract parallel many of DHS's own, provides support for the conclusion that CSS is performing governmental work, including the dissemination of governmental messages. For example, CSS is required under the Services Contract to recruit prospective foster parents, and, in fact, CSS has recruited prospective foster parents in much the same way that DHS has recruited prospective foster parents. Compare Jun. 18, 2018 Hr'g Tr. 65:14–19 (testifying that she saw television commercials soliciting prospective foster parents) and Foster Care & Adoption Services, <https://cssphiladelphia.org/adoption/> (last visited Jul. 1, 2018) (advertising CSS's foster care and adoption services to members of the public through a website) *with* Jun. 18, 2018 Hr'g Tr. 101:19–101:2 (Ali) (describing phone bank recruiting event) and Jun. 19, 2018 Hr'g Tr. 161:23–162:1 (Figueroa) (describing recruitment as a general foster-care responsibility). That CSS's work under the Services Contract was governmental in nature, is further supported by the fact that the Services Contract stipulated that written materials published by CSS relating to services rendered under the Services Contract were to identify DHS as a funding source. CSS's work under the Services Contract is, thus, an extension of DHS's own work and CSS's speech, to the extent any is required under the Services Contract, constitutes governmental speech under *Legal Servs. Corp.*

As CSS's speech, to the extent any is required under the Services Contract, constitutes governmental speech, DHS is permitted to “take legitimate and appropriate steps to ensure that its message,” that foster

care services in Philadelphia are provided to all Philadelphians consistent with the all-comers provision of the Fair Practices Ordinance, was and is “neither garbled nor distorted by” CSS. *Legal Servs. Corp.*, 531 U.S. 541–42.

Plaintiffs rely on *Cradle of Liberty Council, Inc. v. City of Philadelphia*, in support of their argument that Defendants have impermissibly conditioned CSS’s public contract on compelled speech. 851 F. Supp. 2d 936, 948 (E.D. Pa. 2012). Plaintiffs’ reliance on *Cradle of Liberty*, however, is misplaced for at least two reasons. First, *Cradle of Liberty* is not binding on this Court. Second, *Cradle of Liberty* is otherwise not persuasive because the facts at issue in that case are not analogous to the facts at issue here. *Cradle of Liberty* concerned a Boy Scout troop that was using a city-subsidized building to carry out youth activities, all while refusing membership to prospective gay Boy Scouts. The City attempted to change the Boy Scout troop’s general policy on membership for prospective gay Scouts by conditioning the lease of the building on a policy change. Ultimately, the district court concluded that the City could not use the lease to change the tenant Boy Scout troop’s general policies when the policies were not related to the use of the building.

The critical difference between *Cradle of Liberty* and this case is that in *Cradle of Liberty*, the City attempted to use a lease agreement to change a tenant’s policy that was unrelated to the lease. *See id.* at 943 (emphasis added) (providing that the City had informed the tenant that “it had to completely abandon its practice of denying membership to homosexuals, even in contexts unrelated to the subsidized building”). In this case, by contrast, Defendants’ insistence

that CSS serve all-comers consistent with the Services Contract is central to the purpose of the Services Contract. Defendants have not conditioned CSS's Services Contract on CSS changing its activities, views, opinions outside the context of the Services Contract. CSS may continue to refuse its private services to same sex couples outside the confines of the Service Contract and outside of CSS's role as a DHS foster care agency.

ii. Retaliation

CSS concedes that “[a]s a contractor, Catholic Social Services is treated as ‘akin to a government employee’ addressing matters of ‘public concern.’” Pls.’ Br. 26, ECF No. 13-2. For a public employee, to prevail on a retaliation claim, the employee must show that “(1) his speech is protected by the First Amendment and (2) the speech was a substantial or motivating factor in the alleged retaliatory action, which, if both are proved, shifts the burden to the employer to prove that (3) the same action would have been taken even if the speech had not occurred.” *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454, 466 (3d Cir. 2015). The Third Circuit has noted that the “second and third stages of this analysis present questions for the fact finder and are not subject to review. *Baldassare v. New Jersey*, 250 F.3d 188, 194–95 (3d Cir. 2001) (citations omitted).

Plaintiffs’ retaliation claim fails on elements two and three. There is no evidence that it was CSS’s viewpoint, as opposed to CSS’s verbal and written confirmation that its policies directly conflicted with the Services Contract, that motivated DHS to close CSS’s intake of new referrals. Even if CSS’s engagement in protected activity, namely CSS’s commenting to the

Philadelphia Inquirer about CSS's policies in connection with a public services contract, was a substantial or motivating factor for DHS's alleged retaliation, the Court concludes that DHS would likely prevail in establishing that it would have taken the same action had CSS not spoken with the *Philadelphia Inquirer* about its policies.

For purposes of this analysis, the Court assumes that CSS's statements to the *Philadelphia Inquirer* and the publication of those statements constitute constitutionally-protected activity. Assuming that CSS has engaged in constitutionally-protected activity, the next analytical step is determining whether CSS's protected activity was a substantial or motivating factor in the alleged retaliatory action. While CSS would have the Court conclude that the evidence in the record shows that DHS closed CSS's intake of new referrals because of CSS's viewpoint as communicated to the *Philadelphia Inquirer*, in fact, the evidence shows that DHS closed CSS's intake of new referrals because CSS confirmed that its policies violate CSS's contractual obligations under the Services Contract. On this issue, the Eleventh Circuit's decision in *Keeton v. Anderson-Wiley* is instructive. 664 F.3d 865 (11th Cir. 2011).

In *Keeton*, the Eleventh Circuit confronted a situation in which the plaintiff, a graduate student in the Counselor Education Program at Augusta State University, sued the University for First Amendment violations after the faculty asked the plaintiff to complete a remediation plan before she could participate in the University's clinical practicum. 664 F.3d at 867. The faculty required the plaintiff to complete the remedia-

tion plan as a condition to her actively counseling students as part of a clinical practicum because the faculty learned that the plaintiff intended to “convert students from being homosexual to heterosexual” once the plaintiff obtained access to the clinic. *Id.* at 868–69. University officials concluded that the plaintiff’s intended actions would violate various provisions of the American Counseling Association’s Code of Ethics, a mandatory code of ethics for all universities providing counseling programs. *Id.* at 869. Ultimately, the plaintiff confirmed that she would not participate in any “remediation plan that I already know I won’t be able to successfully complete.” *Id.* at 871. The University then withdrew the plaintiff from the counseling practicum and the plaintiff filed suit. *Id.*

In concluding that the plaintiff’s free speech rights had not been violated, the Eleventh Circuit focused on the evidence of why the University asked the plaintiff to engage in a remediation plan and why the University ultimately withdrew the plaintiff from the counseling practicum. *Id.* The Eleventh Circuit explained that the plaintiff “confuse[d] her viewpoint-based objections to ASU’s officials’ actions with viewpoint discrimination.” *Id.* at 875. In other words, the mere fact that the plaintiff disagreed with the legitimate reasons for the University’s actions did not transform the University’s legitimate actions into illegitimate retaliatory actions. Indeed,

the evidence shows that, in requiring Keeton to learn about and interact with the GLBTQ population, to read articles in counseling or psychological journals about counseling the GLBTQ population, and to become familiar with the ALGBTIC Competencies for Counseling Gays and

Transgender clients, ASU's officials sought to teach her how to effectively counsel GLBTQ clients in accordance with the ACA Code of Ethics.

Keeton, 664 F.3d at 874. The Eleventh Circuit reiterated elsewhere that:

the record shows that ASU's officials imposed the remediation plan, not because she expressed her personal religious views regarding homosexuality, but because she was unwilling to comply with the ACA Code of Ethics. That this unwillingness to abide by ASU's curriculum and her chosen profession's ethical standards initially became apparent through her writings and class discussions does not cloak it in First Amendment protection.

Id. at 878 (emphasis added). Accordingly, the decision in *Keeton* demonstrates that a plaintiff lodging a First Amendment retaliation claim must establish a causal link between the alleged retaliation and that plaintiff's alleged protected activity. See also *Briscoe v. City of Philadelphia*, 1996 WL 684316 (E.D. Pa. Nov. 27, 1996) (concluding that a contractor who was not offered a new contract was not retaliated against as result of the contractor's testimony in court against a city program because the contractor failed to prove that decision not to offer her a new contract was causally linked to her protected activity).

Here, the evidence shows that DHS's closure of CSS's intake of new referrals was not based on CSS's viewpoint as expressed in the *Philadelphia Inquirer* article, but instead, based on CSS's admission that it would not comply with the all-comers provisions of the Services Contract. CSS misperceives the closure of its

intake as having to do with its viewpoint in the same way the plaintiff in *Keeton* misperceived “her viewpoint-based objections to [the university’s] officials’ actions with viewpoint discrimination.” 664 F.3d at 875. Although CSS expressed its position on same-sex relationships, it was not that expression that motivated DHS’s actions. Instead, it was CSS’s indication that it maintains a policy in direct conflict with its obligations under the Services Contract. See, e.g., Jun. 19, 2018 Hr’g Tr. 120:7–11 (Amato) (emphasis added) (quoting from Defendants’ letter indicating that Defendants do “not plan to agree to any further referrals to CSS . . . absent assurances that CSS is prepared to adhere to contractual obligations.”).

Testimony established DHS’s reason for closing intake. Commissioner Figueroa testified that she “decided that it was in the best interest [of children] to close intake, so that [Figueroa] could look more deeply into” CSS’s and Bethany Christian Services’s policies. Jun. 19, 2018 Hr’g Tr. 166:6–21 (Figueroa); Figueroa Decl. ¶ 32, ECF No. 20-6; see also Jun. 18, 2018 Hr’g Tr. 96:2–3 (Ali) (testifying that, to Ali’s knowledge, Commissioner Figueroa herself decided to close CSS’s intake of new referrals). CSS witness James Amato further testified that he understood that DHS’s position was that CSS was “not complying with the public accommodation requirements” under the Services Contract. Jun. 19, 2018 Hr’g Tr. 60:11–13 (Amato); see also Jun. 19, 2018 Hr’g Tr. 56:9–13 (Amato) (testifying that he understood DHS’s concerns were about CSS “not completing home studies for same-sex individuals and couples”). CSS is not reasonably likely to show that DHS retaliated against CSS for its religious views and comments relating to those views.

Even if CSS could establish that its engagement in protected activity was a substantial or motivating factor for DHS's decision to close intake and not offer CSS a new services contract, DHS would likely meet its burden under the third prong of the retaliation claim that it would have taken such action in the absence of CSS's protected activity. In addition to testimony that DHS would not permit any agency to refuse service to qualified Philadelphians protected by the all-comers provisions of the Fair Practices Ordinance, perhaps the strongest evidence that DHS would have taken the same course of action even in the absence of CSS's purported protected activity is the fact that DHS, indeed, took the same course of action in connection with Bethany Christian Services—who also made comments to the Philadelphia Inquirer, that has similar policies in contravention of its services contract. DHS also called all other faith-based agencies and a non faith-based agency to examine their policies on same-sex couples.

D. Irreparable Harm

Plaintiffs have identified five purported irreparable harms that will result absent injunctive relief: (1) violations of Plaintiffs' religious rights will result in irreparable harm as a matter of law, (2) violations of Plaintiffs' free speech right will result in irreparable harm as a matter of law, (3) without a new government services contract CSS will be forced to lay off staff and possibly shut down its operations entirely, (4) with the closure of CSS, the individual Plaintiffs and other CSS-certified foster parents will not be able to use their skills to foster children, and (5) the closure of CSS will result in a rise in the number of children in congregate care or DHS's overnight foster care room. The Court disagrees because these alleged harms are

either not present on these facts or are otherwise not irreparable for purposes of preliminary injunction analysis.

The first two harms to which Plaintiffs point are harms that would occur only if Plaintiffs First Amendment rights have been violated. As the Court explained at length above, Plaintiffs are unlikely to prevail on the merits of their First Amendment claims. Accordingly, while a loss of First Amendment freedom may be considered irreparable³³ these alleged harms are not present on the facts before the Court.

Plaintiffs' third alleged irreparable harm is the possibility that CSS, without a new government services contract, may lay off staff or shut down its operations. It is hornbook law that the "irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages . . . this is not an easy burden." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484–85 (3d Cir. 2000) (internal citations omitted); see also *Lehigh Valley Cmty. Mental Health Ctrs., Inc. v. Pa. Dep't of Human Servs.*, 2015 WL 6447171 at * 3 (E.D. Pa. Oct. 26, 2015) (concluding that "going out of business" and "thousands of clients . . . left without proper mental health care" did not meet the standard for irreparable

³³ See *McTernan v. City of York*, 577 F.3d 521, 528 (3d Cir. 2009) (noting that the district court "acknowledged that loss of First Amendment freedom for any period of time can be considered irreparable harm," but holding no First Amendment violation occurred where police arrested religiously motivated protesters who blocked access to a public performance stage and other facilities).

harm). That this burden is particularly exacting was made clear in the Third Circuit's decision in *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989).

In *Air Freight*, the Third Circuit reversed a district court injunction prohibiting the respondent from terminating a pivotal contract with petitioner. *Id.* at 798. The contract accounted for eighty percent of petitioner's business and, thus, the termination of the contract would have caused the petitioner to "lose the main portion of its business, many if not all of its employees, and its goodwill and reputation." *Id.* at 799. Termination of the contract, the petitioner claimed would "undoubtedly . . . force[] [the petitioner's] shut-down or significantly curtail its operation." *Id.* In reversing the district court's injunction order, the Third Circuit reviewed the petitioner's allegations of irreparable harm including the potential that it would lay off its employees, and close its operations. *Id.* at 802. The Third Circuit, however, was unconvinced that such harms could not be compensated by money damages since possible damages could be calculated with relative precision. *Id.*

As to CSS's claim it will be forced to lay off staff and close its operation unless the Court issues an injunction, the Court finds these harms are economic harms that are insufficient to meet the irreparable harm standard for a preliminary injunction. Evidence shows that CSS is compensated by DHS under the Services Contract and that CSS is paid on a per diem basis. See Decl. of James Amato Ex. A, ECF p. 15 of 52, ECF No. 13-3; Jun. 21, 2018 Hr'g Tr. 11:4–7 (Figueroa) (testifying that many contractors are paid on a per diem basis); Jun. 21, 2018 Hr'g Tr. 139:20–24 (same)

(Figueroa); Jun. 19, 2018 Hr’g Tr. 41:5–6 (Amato) (testifying that CSS “subsidized [foster care] services to the tune of \$3.8 million”). Given the Parties’ familiarity of their financial relationship, the Court concludes that CSS’s possible harm in the form of lost revenue under the Services Contract can be quantified and may be fully compensable through money damages.

Plaintiffs have also not established the imminence of their financial collapse in the absence of injunctive relief because CSS has testified that it also has foster care contracts with Montgomery County, PA and Bucks County, PA. Jun. 19, 2018 Hr’g Tr. 89:3–9 (Amato). There are also interim financial arrangements that are available to CSS. DHS Commissioner Figueroa explained that in the past, when foster care agencies have shut down, DHS, in fact, has provided temporary funding to those foster care agencies to ensure smooth transitions of their staff, foster parents, and the children. Jun. 21, 2018 Hr’g Tr. 10:23–11:9 (Figueroa). Accordingly, the economic harms to which Plaintiffs point in support of injunctive relief are insufficient to meet the exacting standard of irreparable harm.

Plaintiffs’ fourth alleged irreparable harm is the purported inability of CSS-certified foster parents to continue providing foster care services if CSS closed its operations and the foster parents were forced to transfer to other agencies. To prove this point, Plaintiffs called each of the four individual plaintiffs in this case to testify to the harms that they would expect to suffer if CSS closed its operations. Ms. Simms-Busch testified that if CSS closed its foster program that she, as of the time of the hearing, had “no idea” how she or her foster children would be impacted. Jun. 18, 2018

Hr’g Tr. 52:16–23 (Simms-Busch). Ms. Simms-Busch also was unsure whether she could or could not transfer to another foster care agency. Jun. 18, 2018 Hr’g Tr. 53:2–7 (Simms-Busch). Ms. Paul likewise was unsure what impact CSS’s closure would have on her ability to provide foster care and was unsure whether she could or could not transfer to another foster care agency. Jun. 18, 2018 Hr’g Tr. 63:11–25 (Paul). Ms. Fulton was similarly unsure what impact CSS’s closure would have on her provision of foster care, though she would be emotionally devastated. Jun. 18, 2018 Hr’g Tr. 68:20–23 (Fulton). Each of the individual plaintiffs expressed that CSS’s closure would be emotionally burdensome.

While transferring to another agency may be difficult, uncertain, and emotionally challenging, transferring to other agencies is neither impossible nor unlikely to be successful. Decl. Kimberly Ali ¶¶ 27–29, ECF No. 20-1 (explaining the process by which resource parents transfer from one agency to another); Decl. Kimberly Ali ¶¶ 34–36, ECF No. 20-1 (describing how Lutheran Children and Family Service of Eastern Pennsylvania’s voluntary closure was handled and explaining that there were no significant issues in transferring families to other agencies). The Third Circuit, although acknowledging how individuals can suffer mental anguish in connection with litigation, has held that emotional difficulty alone cannot justify the imposition of an injunction.

In *Adams*, the Third Circuit concluded that even where the denial of injunctive relief would force patients to switch doctors and medical providers and that such a switching of doctors would prove “emotionally draining” and could present some medical risk,

such harms were not the type of irreparable harm “contemplated by the preliminary injunction standard.” 204 F.3d at 489. The Third Circuit continued stating that “injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties.” *Id.* at 490. In this case, in the event CSS closes its operations, the individual plaintiffs and other non-party CSS-certified resource parents may transfer to other agencies and continue using their skills to provide foster care to children, even though such transfers may be challenging.

Finally, Plaintiffs argue that in the event CSS closes its operations, the number of children in congregate care living situations will increase or the number of children in DHS’s overnight foster care room will increase. As provided above, in connection with the factual background of this case, DHS has shown that the closure of CSS’s intake of new referrals has had little or no effect on the operation of Philadelphia’s foster care system. DHS Commissioner Figueroa testified that CSS’s intake closure “has not resulted in a rise in children placed in congregate care.” Jun. 21, 2018 Hr’g Tr. 86:4–87:9 (Figueroa). Further Commissioner Figueroa testified that CSS’s intake closure “has not resulted in a rise in children staying in DHS’s child-care room.” Jun. 21, 2018 Hr’g Tr. 86:4–87:9 (Figueroa). Figueroa’s testimony was based on her review of “weekly data” that Figueroa receives from DHS’s “performance and technology team that . . . have . . . detailed data.” Jun. 21, 2018 Hr’g Tr. 86:16–87:11 (Figueroa). To the extent CSS closes its operations, it would not be the first foster agency to do so in Philadelphia. Decl. Kimberly Ali ¶¶ 34–36, ECF No. 20-1 (explaining that Lutheran Children and Family

Service of Eastern Pennsylvania closed its operations in March 2016 and its over 100 foster children were transferred to other foster agencies over a three-month period). Plaintiffs have not established with sufficient evidence that irreparable harm in the form of increased use of congregate care or the DHS overnight foster care room will result absent an injunction.

E. Balancing Of The Harms And The Public Interest

As the Court has concluded that Plaintiffs are not likely to succeed on the merits of their claims and have presented insufficient evidence of irreparable harm, the Court need not spend undue time analyzing the remaining two factors of the preliminary injunction standard— balancing of the equities, and the public interest. See *Reilly*, 858 F.3d at 180 (providing that the first two factors of the preliminary injunction standard are gateway factors).

In connection with the balancing of harms prong of the analysis, Defendants called Frank Cervone as an expert to testify to the harms that might occur if the Court granted injunctive relief.³⁴ The Parties disagree on whether Cervone's testimony should be considered for a variety of reasons. The Court, however, need not, and has not relied on Cervone's testimony in deciding the Injunction Motion, and therefore, the Court will

³⁴ Cervone serves as the executive director of the Center for Child Advocates. Jun. 21, 2018 Hr'g Tr. 153:5–9 (Cervone). Cervone has had, and continues to have, a long and distinguished career in advocating for children. The Court thanks Mr. Cervone for his dedication to a life of public service.

not address the Parties' arguments on the propriety of Cervone's testimony.

Here, even in the absence of Cervone's testimony, the balance of the equities tilts in favor of Defendants. If the Court were to grant Plaintiffs' Injunction Motion, the Court would, in essence, cast aside DHS's and Philadelphia's reasonable objectives in seeking the enforcement of the Services Contract and the Fair Practices Ordinance incorporated into the Services Contract. As discussed in connection with Plaintiffs' claim under the Free Exercise Clause, Defendants' interests in this case are manifold, but at a minimum, include six important governmental objectives.

First, DHS and Philadelphia have a legitimate interest in ensuring that when contractors agree to terms in a government contract, the contractors adhere to those terms. Second, DHS and Philadelphia have a legitimate interest in ensuring that when its contractors voluntarily agree to be bound by local laws, the local laws are enforced. Third, DHS and Philadelphia have a legitimate interest in ensuring that when they employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the services.

Fourth, in the context of foster care and adoption, DHS and Philadelphia have a legitimate interest in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers. Fifth, DHS and Philadelphia have a legitimate interest in ensuring that individuals who pay taxes to fund government contractors are not denied access to those services. Sixth, DHS and Philadelphia have an interest in

avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples.³⁵

Granting an injunction in the face of the foregoing legitimate interests would be in direct conflict with the balance of harms and the public interest. Accordingly, the Court concludes that the balance of harms and the public interest militate in favor of denying the Injunction Motion.

V. CONCLUSION

For the reasons set forth above, and having considered all four factors implicated by the preliminary injunction standard, Plaintiffs' Amended Motion for

³⁵ Preventing discrimination in the provision of public services is undeniably a legitimate interest. As the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States* proclaimed:

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 because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

379 U.S. 241, 292 (1964).

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Temporary Restraining Order and Preliminary Injunction (ECF No. 13) is **DENIED**. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

**SHARONELL FULTON,
et al.,**

Plaintiffs,

v.

**CITY OF PHILADELPHIA,
et al.,**

Defendants.

**CIVIL
ACTION**

NO. 18-2075

ORDER

AND NOW, this 13th day of July, 2018, upon careful consideration of Plaintiffs' Motion For A Temporary Restraining Order And Preliminary Injunction ("Injunction Motion") (Doc. 13), The City Of Philadelphia's Memorandum Of Law In Opposition To Plaintiffs' Motion For Temporary Restraining Order And Preliminary Injunction (Doc. 21), Proposed Intervenor's Memorandum of Law, Or, In The Alternative, Amicus Brief, In Opposition To Plaintiffs' Motion For A Temporary Restraining Order And Preliminary Injunction ("Amicus Brief") (Doc. 34),¹ the matters heard at the evidentiary hearings, and Defendants' Proposed Findings Of Facts And Conclusions Of Law (Doc. 45), and Plaintiffs' Proposed Findings Of Fact And Conclusions Of Law (Doc. 46), **IT IS HEREBY ORDERED**

¹ On June 18, 2018, the Court accepted the Intervenor's Opposition Brief as an amicus brief. The Court's decision was memorialized by an order dated June 19, 2018 (Doc. 33).

AND DECREED that Plaintiffs' Injunction Motion is **DENIED**.²

IT IS FURTHER ORDERED that Defendants City of Philadelphia, Department of Human Services for the City of Philadelphia, and Philadelphia Commission on Human Relations shall file an answer or otherwise respond to Plaintiffs' Complaint (Doc. 1) no later than **twenty-one (21) days** from the date of this Order.

BY THE COURT:

/s/ _____
Hon. Petrese B. Tucker, U.S.D.J.

² This Order accompanies the Court's Memorandum Opinion dated July 13, 2018.

U.S. Constitution Amendment I provides:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA**

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

Plaintiffs,

v.

CITY OF PHILADELPHIA,
DEPARTMENT OF HUMAN
SERVICES FOR THE CITY
OF PHILADELPHIA, and
PHILADELPHIA
COMMISSION ON HUMAN
RELATIONS,

Defendants.

Civil Action No.
18-cv-2075

Assigned to the
Honorable
Judge Tucker

DECLARATION OF JAMES AMATO

1. My name is James Amato. I am over the age of 21 years old and capable of making this declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or been convicted of a crime of dishonesty. I have personal knowledge of all the contents of this declaration.

2. The City of Philadelphia is facing a crisis because of the acute shortage of qualified families available to care for the thousands of vulnerable children who have been removed from abusive or neglectful homes and placed in foster care. The City relies on private foster agencies to help fill this shortage. In March of this year, the City sent out an

“urgent” call that 300 additional families are needed for fostering.

3. Catholic Social Services exists to help fill this need. For over 100 years, the Archdiocese of Philadelphia has worked to provide loving foster homes for needy children. This continues today through the work of Catholic Social Services (CSS), a non-profit religious corporation under the auspices of the Archdiocese. CSS has contracted with the City on an annual basis for over 50 years. On an average day, Catholic Social Services serves more than 120 children in foster care, and it supervises around 100 different foster homes.

4. Through its contract with the City, CSS placed these children in loving foster homes—many of whom have worked exclusively with CSS for decades. CSS also provides ongoing support to its foster families. In all this time, the City has never suspended referrals to Catholic Social Services as long as CSS had homes available, nor has it sought to either construe the contract to require CSS to do home studies for same-sex couples or to enforce such a construction against Catholic Social Services. A true and correct copy of this contract is included as Attachment A.

5. There are 28 state-licensed agencies who partner with the City to provide additional services to foster children. Of those agencies, eight obtained additional competitive contracts with the City to also serve as a Community Umbrella Agency (CUA), an entity that works to try to help at-risk children stay in their homes where such an option would be possible and safe for the child. If that option is not available, the CUA refers the child to be placed in foster care. Of the select agencies in the City who obtained additional

competitive contracts to serve foster children and families, the City ranked CSS as the second highest of all agencies.

6. Foster care services involve placing children with foster families who have already undergone extensive interviews and home studies by social workers at the agency. The agency makes a determination whether a particular foster family would be an appropriate family to care for foster children. After these interviews, home studies, and evaluations, an agency may provide a written certification endorsing a specific foster family to care for foster children, including thorough analysis and a written endorsement of any relationships of the foster parents. No same-sex couple has ever requested CSS to provide such a written certification for foster care services.

7. State law does not prohibit foster agencies from declining to perform a home study, nor from referring families to another licensed agency to perform a home study. And in fact, foster care agencies have referred families to other agencies regularly for a number of secular reasons including 1) geographic constraints, such as proximity of an agency to the child's biological home or current school, 2) the expertise of an agency for particular medical needs, 3) the expertise of an agency to address particular behavioral issues, 4) agencies focused on finding foster placements for pregnant youth, and 5) the expertise of an agency focused on homes under the City's "kin care" program. Some agencies also specialize in finding families who want to foster LGBT youth, including an agency located in suburbs near Philadelphia. Other agencies specialize in placing Native American children with

families of Native American lineage.

8. Because of its religious mission, CSS would also refer a family to one of over two dozen nearby agencies if providing a written certification for that family would violate CSS's religious beliefs. In fact, four such agencies are located within two miles of CSS's downtown office. Catholic Social Services has provided foster services consistent with its religious beliefs, without complaint, as long as it has been operating.

9. On March 15, in response to a newspaper article discussing Catholic Social Services' religious beliefs, the City abruptly cut off foster care referrals to CSS, and has threatened to make it impossible for CSS to continue contracting with the City to provide these services as of June 30, 2018. Only two religious foster care agencies have been subject to contract suspensions by the City, even though a number of other religious groups operate foster care agencies.

10. Also on March 15, the Philadelphia City Council passed a resolution alleging that some foster service providers prohibit the placement of children with LGBTQ people based on religious principles and calling for an investigation. A true and correct copy of this resolution is included as Attachment B. Catholic Social Services has provided foster services consistent with its religious beliefs, without complaint, as long as it has been operating.

11. On March 16, the Commission on Human Relations (Commission) sent a letter to Catholic Social Services, to which CSS later responded. A true and correct copy of the Commission's letter is included as Attachment C; a true and correct copy of Catholic Social Services' response is included as Attachment D.

On March 27, the Operations Director at the City's Department of Human Services (DHS), sent an email to other foster agencies in Philadelphia forbidding them from referring any additional foster intakes to Catholic Social Services. A true and correct copy of this email is included as Attachment E.

12. On May 7, the Commission and the City's Law Department responded to Catholic Social Services' April 18th letter (Attachment D), defending the City's actions and stating that CSS would face subpoenas and further adverse actions under the contract in 10 days. True and correct copies of these letters are included as Attachments F and G, respectively.

13. If the City persists in these actions, the consequences will be severe. Currently, CSS has about 26 available spots for foster children in need of a home, and this number is projected to increase to about 35 spots by the end of June 2018. Additionally, about a dozen foster homes currently sit completely empty because CSS cannot receive any referrals, and therefore cannot place any children with these loving parents. The number of foster parents, like Mrs. Paul, who are willing and anxious to care for foster children but are unable to do so at all because of the City's actions, will increase to about 20 by the end of June. This number is expected to accelerate quickly if the City's actions continue, as CSS on average would receive about 9 additional referrals from the City every month prior to the current referral freeze.

14. If the City makes renewal of the contract impossible on June 30, then many current placements will be in jeopardy. Children who are already at a vulnerable point in their lives stand to have those lives disrupted again, since their foster parents are certified

and supported by CSS and cannot automatically receive foster placements and support from another agency.

15. The City's current actions are resulting in placements being made that are not in the best interest of children. A court has already had to order the City to place a child with the former foster mother of that child—a mother working with CSS. And right now, an urgent situation is ongoing where the City is refusing to place a special needs child, referred to as Doe Foster Child #1, with his former foster mother named Doe Foster Mother #1, even though no other permanent home for the child is currently available and the child is languishing in temporary respite homes. Included as Attachment H is a true and correct copy of the email a social worker at Catholic Social Services sent seeking to resolve this situation. My understanding is that under normal circumstances, Doe Foster Child #1 would have been placed with his former foster mother almost immediately after he was removed from the other home due to an emergency, and no court order or court determination would have been necessary since she was the only permanent home available. The CUA assigned to Doe Foster Child #1 has expressed the position that it would be in Doe Foster Child #1's best interest to return to Doe Foster Mother #1's care, as she is prepared to adopt Doe Foster Child #1. I am aware that the Child Advocate with the Philadelphia Defender Association assigned to Doe Foster Child #1's case has also expressed her opinion that the child should be returned to Doe Foster Mother #1's care. Yet DHS is still resisting this outcome. The reason DHS provided to Doe Foster Child #1's social worker for denying the placement was

the City's current dispute with Catholic Social Services.

16. I am aware of multiple additional children who have been referred elsewhere when CSS families should have been the preferred placement for those children as a result of the City's freeze on referrals to CSS.

17. If the City continues refusing to refer children to CSS, or if the City fulfills its threat to permanently end CSS's foster care service to Philadelphia children on June 30th, CSS will probably have to close its foster program and immediately lay off the staff involved in this program. Relying on its contract with the City, CSS has hired 15 staff members dedicated exclusively to its foster services program and has budgeted and raised funds designed to supplement the City's funding for foster care. Were CSS forced to close this program, CSS would also lose the network of foster families it has carefully cultivated over the years. Restarting this program later from scratch would be incredibly difficult, and likely impossible. Even if a new contract were not signed by June 30th, however, CSS could continue operating under the current contract if referrals resume. It is commonplace for CSS to continue operating under an old contract in agreement with the City until a new contract could be drafted and signed. True and accurate signature pages from prior contracts showing the date of ratification are included as Attachment I.

18. Attachment J is a true and correct copy of an article entitled *Chaput edict draws mixed reviews; Kenney calls it 'not Christian'*, visited on June 4, 2018, and available at http://www.philly.com/philly/news/20160707_Chaput_edict_draws_mixed_reviews_Kenney

calls it not Christian .html.

19. Attachment K is a true and correct copy of an article entitled *Jim Kenney's Long War with the Archdiocese*, visited on June 4, 2018, and available at <https://www.phillymag.com/citifed/2015/07/09/jim-kenney-catholic-archdiocese-charles-chaput/#Ipkpzv0aRJyCyIrL.99>.

20. Attachment L is a true and correct copy of an article entitled *Project Discovery by Crossroads*, last visited on June 4, 2018, and available at <http://crossroadsprograms.org/wp-content/uploads/2016/07/Project-Discovery-Brochure.pdf>.

21. Attachment M is a true and correct copy of an article titled *Crossroads Programs Inc: LGBTQ Focused Services*, last visited on June 4, 2018, and available at <https://www.mightycause.com/organization/Crossroads-Programs>.

22. Attachment N is a true and correct copy of an article titled *Local Organization Seeks Foster Parents for LGBTQ Youth*, list visited on June 4, 2018, and available at <https://www.phillymag.com/g-philly/2014/05/28/local-organization-seeks-foster-parents-lgbtq-youth/>.

23. Attachment O is a true and correct copy of an article titled *N.J. Youth Agency Looks to Match LGBT Adults, Teens*, last visited on June 4, 2018, and available at <http://www.epgn.com/news/regional/7396-25314381-nj-youth-agency-looks-to-match-lgbt-adults-teens>.

24. Attachment P is a true and correct copy of a website titled *Mother/Baby Host Home*, last visited on June 4, 2018, and available at <https://www.pa->

mentor.com/who-we-serve/children-and-families/motherbaby-host-home/.

25. Attachment Q is a true and correct copy of a website titled *Therapeutic Foster Care*, last visited on June 4, 2018, and available at <https://www.pam-mentor.com/who-we-serve/children-and-families/therapeutic-foster-care/>.

26. Attachment R is a true and correct copy of a document titled *Pennsylvania Indian Child Welfare Handbook*, last visited on June 4, 2018, and available at <http://www.pacwrc.pitt.edu/ICWA/Indian%20Child%20Welfare%20Handbook.pdf>.

27. Attachment S is a true and correct copy of a website titled *Welcome to Rainbow Adoptions*, last visited on June 4, 2018, and available at <http://www.cotraic.org/adopt.html>.

28. Attachment T is a true and correct copy of a document titled *Quarterly Indicators Report*.

29. Attachment U is a true and correct copy of an article titled *Philly halts foster placements with 2 faith-based agencies shutting out LGBT couples*, last visited on June 4, 2018, and available at <https://why.org/articles/philly-halts-foster-placements-2-faith-based-agencies-shutting-lgbt-couples/>.

30. Attachment V is a true and correct copy of testimony entitled *Education Interrupted: How We Are Failing Our Children in Residential Placements*, last visited on June 4, 2018, and available at <https://www.elc-pa.org/wp-content/uploads/018/05/ELC-Testimony-Before-City-Council-Residential-Placements-May-17-2018.pdf>.

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31. Attachment W is a true and correct copy of an article entitled *Two foster agencies in Philly won't place kids with LGBTQ people*, last visited on June 4, 2018, and available at <http://www.philly.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html>.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 4, 2018.

/s James Amato
James Amato

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City of Philadelphia
Council of the City of Philadelphia
Office of the Chief Clerk
Room 402, City Hall
Philadelphia
(Resolution No. 180252)

RESOLUTION

Authorizing the Committee on Public Health and Human Services to investigate Department of Human Services' policies on contracting with social services agencies that either discriminate against prospective LGBTQ foster parents or allow non-LGBTQ foster parents to discriminate.

WHEREAS, Currently, approximately 700 children in Philadelphia are residing in group home placements, and according to the Philadelphia School Notebook more than 8,000 children were in foster care at some point during 2016; and

WHEREAS, In March 2018 the Department of Human Services announced its first major recruitment of foster parents in more than a decade—putting out an urgent call for 300 parents which included specific appeals to the LGBTQ community—to help move children from group homes into family settings; and

WHEREAS, The Department of Human Services currently has contracts with several social service providers for foster care placement and adoption services which were collectively reimbursed by the City for \$3 million in 2017; and

WHEREAS, According to Section 14.1 of the City of Philadelphia Professional Services Contract, providers “shall not discriminate or permit discrimination

against any individual because of race, color, religion, ancestry or national origin, sex, gender identity, sexual orientation, age or disability”; and

WHEREAS, At least two of these providers have policies that prohibit the placement of children with LGBTQ people based on religious principles, although the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom; and

WHEREAS, The Fair Practices Ordinance is the City’s local anti-discrimination law, enacted in 1963 to prohibit discrimination in Philadelphia in employment, housing, and places of public accommodation in addition to covering over 16 protected categories such as race, religion, national origin, age, sex, disability, sexual orientation, and gender identity; and

WHEREAS, Any agency which violates City contract rules in addition to the Fair Practices Ordinance should have their contract with the City terminated with all deliberate speed; and

WHEREAS, The Department should also conduct a thorough review of its contracts with all of its 26 foster care agencies to ensure that providers are adhering to antidiscrimination policies as they pertain to the City’s protected classes, now, therefore, be it

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, That it hereby authorizes the Committee on Public Health and Human Services to investigate Department of Human Services’ policies on contracting with social services agencies that either discriminate against prospective LGBTQ foster parents and allow non-LGBTQ foster parents to discriminate against children.

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CERTIFICATION: This is a true and correct copy of the original Resolution, Adopted by the Council of the City of Philadelphia on the fifteenth of March, 2018.

Darrell L. Clarke
PRESIDENT OF THE COUNCIL

Michael A. Decker
CHIEF CLERK OF THE COUNCIL

Introduced by: Councilmembers Bass, Green, Gym
and Parker

Sponsored by: Councilmembers Bass, Green, Gym,
Parker, Reynolds Brown, Jones, Blackwell, Greenlee,
Squilla, Oh and Johnson

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CITY OF PHILADELPHIA
COMMISSION ON HUMAN RELATIONS
601 Walnut Street, Suite 300 South
Philadelphia, PA 19106
Telephone (215) 686-4670
Fax (215) 686-4684

THOMAS H. EARLE, ESQUIRE
Chairperson

RUE LANDAU, ESQUIRE
Executive Director

March 16, 2018
Reverend John J. McIntyre
Board President
Catholic Social Services
Auxiliary Bishop, Archdiocese of Philadelphia
222 North 17th Street, 3rd Floor
Philadelphia, PA 19103

We are writing in response to the March 13, 2018 Philadelphia Inquirer article, *Two Foster Agencies in Philly Won't Place Kids with LGBTQ People* that indicated Catholic Social Services (CSS) is denying services to same sex couples, and other individuals in the lesbian, gay, bisexual, transgender, and Queer (LGBTQ) community.

This nondiscrimination language is memorialized in Article XIV, Section 15.1 of the City's Professional Services Contract with your organization. Specifically, the contract states,

[t]his Contract is entered into under the terms of...the Fair Practices Ordinance (Chapter 9-1100 of the Code)...Provider [shall not] discriminate or permit discrimination against

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individuals in employment, housing and real property practices, and/or public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal denial, differentiation or preference in the treatment of a person on the basis of actual or perceived race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, disability, marital status, source of income, familial status...or engage in any other act or practice made unlawful under...Chapter 9-1100...

The contract also provides that “[i]n the event of any breach of this Section 15.1 (Non-Discrimination; Fair Practices), the City may, in addition to any other rights or remedies available under this Contract, at law or in equity, suspend or terminate this Contract forthwith.”

According to the aforementioned article, CSS administrator Ken Gavin said, “The Catholic Church does not endorse same-sex unions, based upon deeply held religious beliefs and principles. As such, CSS would not be able to consider foster care placement within the context of a same-sex union.”

Based on the information provided in the article, it appears that CSS may be in violation of Article XIV, Section 14.1. Accordingly, we are writing to ask that you provide written responses to the questions below. Please note that any reference to “foster parent” is inclusive of foster parent(s), kinship parent(s), and/or pre-adoptive foster parent(s).

- 1) What are your policies for selecting foster care

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families? Please provide a copy of these policies in writing if available;

- 2) Are LGBTQ individuals, whether married or single, eligible to become foster parents with CSS?
- 3) Does CSS ask individuals or couples who apply to be foster parents if any household member identifies as LGBTQ? List and describe all instances in which CSS rejected attempts by persons identifying as LGBTQ to serve as foster parents.
- 4) Does CSS have a policy that denies services to any individual based on their sexual orientation? If so, please provide any applicable policy;
- 5) Does CSS have a specific policy that denies services to people based on their gender identity? If so, please provide any applicable policy;
- 6) Does CSS provide foster care placement to LGBTQ youth?
- 7) Does CSS have a policy that prohibits the completion of Adoption or Permanent Legal Custodianship (PLC) family Profiles for LGBTQ individuals whether married or single?
- 8) Do you have authority as a local affiliate/branch of the larger organization to create or follow your own policies?
- 9) If CSS has policies that deny services to people based on their sexual orientation or gender identity, are you willing to revise your policies so that all people can have equal access to your

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services?

- 10) If CSS subcontracts any of the services it is obligated to provide under its contract with the City, please provide the name and location of each entity and/or individual.

Once the requested information is provided, PCHR would like to arrange a meeting to further discuss CSS's policies with regard to the placement of foster care children and the provision of associated services to foster care children and the families with whom they are placed. If it is determined that CSS is in violation of its contract with the City, we would also like to explore potential remedies to bring CSS into compliance with the non-discrimination provisions of its contract.

Please provide responses to these questions within 10 days.

Sincerely,

/s/ Rue Landau

Rue Landau, Esquire
Executive Director

/s/ Thomas H. Earle

Thomas H. Earle, Esquire
Chairperson

cc: Marcel S. Pratt, Acting City Solicitor
Cynthia Figueroa, DHS Commissioner

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Becket—Religious Liberty for All
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
202-955-0095/ @Becket Law
www.becketlaw.org

April 18, 2018

Mr. Thomas Earle and Ms. Rue Landau
Philadelphia Commission on Human Relations
601 Walnut Street
Suite 300 South
Philadelphia, PA 19016
Via Email

Dear Mr. Earle and Ms. Landau,

I am President of the Becket Fund for Religious Liberty, and I represent Catholic Social Services for the Archdiocese of Philadelphia in this matter. Becket is the nation's leading law firm dedicated to protecting religious freedom. Our lawyers have a remarkable track record, including five Supreme Court victories in the last six years. Those cases include rulings protecting a Muslim prison inmate who was forbidden to grow a beard, Massachusetts sidewalk counselors restricted in their free speech near abortion clinics, the Little Sisters of the Poor in their challenge to the contraceptive mandate, and a Lutheran church sued for allegedly violating anti-discrimination law.¹ These decisions were unanimous. Most recently, we succeeded in forcing the Trump administration to

¹ *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (9-0); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (9-0); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (9-0); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) (9-0); see also *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (5-4).

change its discriminatory disaster relief policy after litigation on behalf of churches and synagogues damaged by hurricanes.²

I am writing in response to your March 16, 2018 letter concerning the foster care services provided by Catholic Social Services to the City of Philadelphia ("the City"). Your letter comes on the heels of the City's decision to suspend referrals of future foster care intakes to Catholic Social Services, a decision that is both harmful to children and families and an illegal breach of contract. While my clients are somewhat puzzled by the Commission's involvement in the matter and reserve the right to challenge its jurisdiction, they welcome this opportunity to better understand the City's goals and resolve this issue amicably so that we can continue serving children in need.

The Shortage of Families

As I'm sure you know, the City is facing an acute need for more foster families to provide homes for at-risk children. Just last month, the City sent out an "urgent" call that 300 additional families are needed for fostering,³ and other organizations have recognized that the City faces a "crisis" because of "the lack of qualified foster parents and other placement options

² See Letter of Solicitor General to Clerk of the Supreme Court (Jan. 3, 2018), available at <https://s3.amazonaws.com/becketnewsite/17A649-Harvest-Family-Church-letter.pdf>.

³ Julia Terruso, *Philly puts out 'urgent' call—300 families needed for fostering*, Philadelphia Inquirer, March 18, 2018, <http://www.philly.com/philly/news/foster-parents-dhs-philly-child-welfare-adoptions-20180308.html>.

for the increasing number of children in care.”⁴ Approximately 13,000–15,000 PA children are currently in foster care and part of Pennsylvania’s child welfare system,⁵ and over 5,000 of those children are in Philadelphia’s foster care system alone.

That is why the City relies on private agencies to help fill this shortage. In Philadelphia, there are 28 agencies who partner with the city to provide foster services.⁶ Of those agencies, eight obtained additional competitive contracts with the City to also serve as a Community Umbrella Agency (CUA), an entity that works to try to help at-risk children stay in their homes where such an option would be possible and safe for the child. If that option is not available, the CUA refers the child to be placed in foster care. Agencies place children with foster families who have already undergone extensive interviews and home studies by social workers. The social workers make a

⁴ David R. Fair, Partners for Philadelphia Families Testimony to Philadelphia City Council, Turning Points for Children, (June 15, 2016), www.turningpointsforchildren.org/news/228-partners-for-philadelphia-families-testimony.

⁵ Pennsylvania State Resource Family Association, *Being A Foster Parent: The Facts*, <https://www.psrfa.org/being-a-foster-parent/the-facts/> (last accessed April 4, 2018); in 2017, there were over 25,000 youth statewide who were at some point in Pennsylvania’s out of home placement program. Pennsylvania Partnerships for Children, *2018 State of Child Welfare*, <http://www.papartnerships.org/socw2018> (last accessed April 4, 2018); Pennsylvania Partnerships for Children, *2018 State of Child Welfare Data Sheets*, http://www.papartnerships.org/reports/2018_socw/source_files/Pennsylvania%202018%20SOCW.pdf (last accessed April 4, 2018).

⁶ City of Philadelphia, Department of Human Services, *Foster Care Licensing Agencies (contracted by Philadelphia DHS)*, https://beta.phila.gov/media/20180402133414/DHS_Philadelphia_Foster_Care_Agencies_32818.pdf (last accessed April 4, 2018).

recommendation that a particular foster family would be an appropriate family to care for foster children.⁷ The culmination of these interviews, home studies, and recommendations includes agency certification that a foster family is approved to care for foster children.⁸ The City provides per diem payments only after an agency has accepted the referral of a child and is supervising that placement with an approved foster family.

A foster agency provides ongoing training and support and works with the assigned CUA case manager to coordinate services to the foster family, birth family and child in order to achieve a positive outcome. Foster parents are needed not only to care for children, but to provide mentoring to the birth family and support the relationship between the child and the birth family. This collaborative approach assesses the continued appropriateness of temporary placement and explores options for permanency through return to the birth family, placement with kin, or adoption.

A Dedication to Children

Catholic Social Services shares the City's goal of working to fill the shortage of safe homes for these vulnerable kids. Today, permanency is Catholic Social Services' number one priority, aimed at preventing children from languishing too long in uncertainty. Catholic Social Services, foster care department prioritizes permanency, and the statistics demonstrate its success—about 50 children per year

⁷ Pa. Code § 3700.64, <https://www.pacode.com/secure/data/055/chapter3700/s3700.64.html>.

⁸ Pa. Code §§ 3700.61, 3700.69, <https://www.pacode.com/secure/data/055/chapter3700/s3700.69.html>.

either return to their families or move to adoption with their foster families.⁹FN9 Catholic Social Services' Youth Division, including St. Gabriel's System and St.

Francis & St Vincent Homes, serves 1,544 youth in placement, and approximately 1,400 families per year across all of its child welfare and juvenile justice programs. As one of those programs, Catholic Social Services Foster Care currently cares for 127 children daily whom it has currently placed in foster arrangements through referrals from the City.

Catholic Social Services also provides important ancillary services to children and families. For example, Catholic Social Services, St. Gabriel's System, is certified as a Sanctuary Model of Trauma-Informed Care provider—a best practice standard now hailed nationwide. Catholic Social Services also provides educational programming via state-licensed schools at St. Gabriel's Hall, DeLaSalle Vocational School and St. Francis Homes. Last year, through Catholic Social Services programs, 132 graduates received high school diplomas.

Catholic Social Services' Religious Mission and Practices

Catholic Social Services exists to transform lives and bring about a just and compassionate society where every individual is valued, families are healthy and strong, and communities are united in their commitment to the good of all. Catholic Social Services

⁹ City of Philadelphia, Department of Human Services, *Resource Parent Handbook: A Guide for Foster and Kinship Caregivers*, 11 (Sept. 26, 2017), <https://beta.phila.gov/media/20170926145732/DHS-Resource-Handbook-FINAL-VERSION-small.pdf> (discussing the importance of permanency for children).

works towards a world touched by God's mercy: where poverty and need are alleviated and all people share justly in the blessings of creation. Catholic Social Services is dedicated to serving others in a spirit of humility and genuine concern for the well-being of its neighbors and affirms the God-given dignity and worth of every person.

The religious mission of Catholic Social Services is rooted historically in its foster work. In 1916, the Catholic Children's Bureau was established and staffed by Missionary Sisters of the Blessed Trinity, early Catholic pioneers in social work. Their work continues today through the dedicated efforts of the foster care program. This ongoing religious mission motivates the staff of Catholic Social Services to provide exemplary services to children and families in Philadelphia.

Catholic Social Services serves and places children regardless of their race, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, disability, source of income, familial status, genetic information, or sexual violence victim status. Catholic Social Services would never stop a family who wants to foster from having the opportunity to complete the application and home study process, either through Catholic Social Services or another agency. If Catholic Social Services is unable to perform in-depth home assessments and make recommendations to the state for any reason, including consistency with its religious mission, then Catholic Social Services will refer the potential foster parent to one of 28 nearby agencies who can better serve their needs. Four agencies are located within

just two miles of Catholic Social Services' downtown office.

No same-sex couples have been denied the ability to become foster parents because of Catholic Social Services, and no same-sex couples have filed complaints against Catholic Social Services regarding its provision of services.

The City's Unlawful Suspension of Catholic Social Services' Contract

As the Commission is aware, on March 15, 2018, the City announced that it was suspending referral of future foster care intakes to Catholic Social Services. Philadelphia Councilwoman Cindy Bass introduced a resolution March 15 authorizing "the Committee on Public Health and Human Services to investigate Department of Human Services' policies on contracting with social services agencies that either discriminate against prospective LGBTQ foster parents or allow non- LGBTQ foster parents to discriminate." On March 27, 2018, Staci Boyd, the Operations Director at the Department of Human Services, sent an email to other foster agencies in Philadelphia forbidding them from referring any additional foster intakes to Catholic Social Services.

The City's suspension of Catholic Social Services' contract is unjustified and unlawful for at least four reasons.

First, Catholic Social Services' foster services do not constitute a "public accommodation" under the City's Fair Practices Ordinance, and therefore it is not bound by that ordinance, nor subject to penalties or investigations pursuant to that ordinance, nor can it have violated the contract provision relating to that

ordinance. Catholic Social Services does not offer, sell, or make available its services to the public that entail supervision of a child placed with an approved foster family. Phila., Pa., Admin. Code § 9-1102(1)(w). These services are only available to at-risk children who have been removed by the state and are in need of a loving home, and Catholic Social Services serves any child who is referred to them. The City only pays Catholic Social Services a per diem for these supervisory services, and the City is not contracted to compensate Catholic Social Services for anything else related to the provision of foster care.

Furthermore, the Pennsylvania Supreme Court has declined to treat a Catholic religious entity as a public accommodation because of its private, religious character. *See Roman Catholic Archdiocese of Philadelphia v. Com., Pennsylvania Human Relations Comm'n*, 119 Pa. Cmwlth. 445 (1988).

Second, even if Catholic Social Services' foster services did constitute a public accommodation, no "unlawful public accommodation practice" has occurred. No individual or couple has alleged that Catholic Social Services has "den[ied] or interfere[d] with the public accommodations opportunities of an individual." Nor could they, because no allegation has been made that Catholic Social Services prevented anyone from receiving relevant city services, nor has Catholic Social Services prevented any child from being placed in a family. Courts have denied similar meritless public accommodation claims when there was not a clear allegation that an individual was actually denied services. *See, e.g., Abdul-Latif v. Cty. of Lancaster*, 990 F. Supp. 2d 517, 533 (E.D. Pa. 2014)

(dismissing public accommodation claim because plaintiff had not tried to access the services).

Third, the City's contract with Catholic Social Services states under the relevant nondiscrimination Paragraph 15.1 that the City may "suspend or terminate" its contract with Catholic Social Services only "[i]n the event of any breach of this Section 15.1." The City has not set forth any clear basis for breach of contract prior to engaging in suspending additional referrals. Nor has it provided the notice required under the contract prior to exercising its remedies. See Section 12.2. As such, the City is in breach of its contract with Catholic Social Services by failing to perform and for preventing Catholic Social Services from continuing to perform without any justification.

Many state and federal courts have held that a government entity breached its contract with a private party and was subject to damages or injunctive relief when it terminated its agreement or prevented performance of a contract without being clearly "justified under state law."¹⁰FN10 Here, if the City continues to suspend referrals and impede Catholic Social Services' ability to perform under its contract without clear justification, the City will likewise be subject to claims for injunctive relief or monetary damages.

This breach has real-world consequences. After the City informed Catholic Social Services that it would not receive any new referrals, Catholic Social Services

¹⁰ *N. Penna. Legal Servs., Inc. v. Lackawanna Cty.*, 513 F. Supp. 678 (M.D. Pa. 1981); *see also, e.g., Com., Dep't of Transp. v. Brozzetti*, 684 A.2d 658, 665 (Pa. Commw. Ct. 1996) (government breached contract when it failed to justify its termination for convenience).

received a request regarding a child who had just been taken into foster care. The agency wished to place that child with his siblings, who had been placed with a family through Catholic Social Services. Responding to an urgent need, Catholic Social Services placed the child with his siblings that afternoon, and informed DHS of the placement. That placement was made in accordance with best practices and law, which favor family placement of siblings wherever possible.¹¹ After that placement was made, DHS sent a message to its referral partners regarding Catholic Social Services and Bethany Christian Services, stating that “NO referrals are sent to these two providers effective immediately,” and demanding that all its partners affirm this directive in writing.

If a similar situation happens in the future, it appears that DHS is willing to violate its own best practices guidelines and ignore the best interests of children. Surely the City does not actually believe it would be better if Catholic Social Services had not been willing and able to place the child with his siblings.

Fourth, the City has been engaging in blatant unconstitutional targeting of organizations based on their religious beliefs. Despite receiving no complaints from families about the practices of Catholic Social Services, the City suspended continued foster referrals. The City cannot simply lump all religious organizations into a category of groups with beliefs the

¹¹ City of Philadelphia, Department of Human Services, *Resource Parent Handbook: A Guide for Foster and Kinship Caregivers*, 7 (Sept. 26, 2017) (“[I]t is DHS policy to keep siblings—brothers and sisters—together whenever possible in the same home unless there is a very strong reason for their separation.”).

City does not agree with and punitively banish them from public service as a result. Nor can it lawfully punish Catholic Social Services for operating according to its religious beliefs—particularly in a way that has worked well, without complaint, for decades.

Moving Forward

Because the City has not articulated any clear breach of contract justifying a suspension of foster referrals, and because I trust the City does not wish to continue violating Catholic Social Services' rights under federal, state, and City law, I am confident that the City will quickly resume normal services and operations with Catholic Social Services to avoid mounting claims for injunctive relief and monetary damages.

In the alternative, I assume that the City will immediately provide a clear legal basis for its allegations that Catholic Social Services is in breach of its contract. Such allegations would, of course, need to explain what the City would require of Catholic Social Services to come into compliance. For example, is the City requiring Catholic Social Services to promise that it will engage in detailed home assessments and make written endorsements and recommendations to the City that run contrary to Catholic Social Services' religious beliefs regarding marriage? We would need to understand exactly what tasks the City is demanding that Catholic Social Services do, and exactly what outcomes are expected, before we could evaluate the City's position.

I look forward to your response and a prompt resolution of this matter so that we can all continue our work of serving the City's most vulnerable

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children. These children need and deserve help, and Catholic Social Services remains eager to provide it.

Sincerely,

/s/ Mark Rienzi

Mark Rienzi

President

The Becket Fund for Religious Liberty

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CITY OF PHILADELPHIA
LAW DEPARTMENT
One Parkway
1515 Arch Street
Philadelphia, PA 19102-1595

May 7, 2018

Mark Rienzi
President
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036

Dear Mr. Rienzi:

The City of Philadelphia (the "City") is in receipt of your letter dated April 18, 2018 to the Philadelphia Commission on Human Relations (the "Commission"). Mr. Earle or Ms. Landau will respond directly to you regarding the questions you raise concerning the Commission's jurisdiction. We are writing to you separately to respond to the concerns you raise regarding the City's decision to suspend new referrals from DHS to Catholic Social Services' ("CSS") family foster care program.

While we are genuinely appreciative of the invaluable services that CSS provides on the City's behalf to the City's most vulnerable children and to

the resource families that care for those children, those services must be provided in a manner consistent with certain core City principles, including our non-discrimination rules. As CSS works on the City's behalf, we cannot allow discrimination against qualified couples who are ready to take on this important role, simply because of whom they choose to marry. We would not allow such discrimination against, for example, Catholic couples or "mixed-race" couples, and we cannot allow it with respect to same-sex couples, either.

You take issue in your letter with the City's ability to apply these non-discrimination rules in the context of CSS's current contract with the City. We disagree.

Nothing in CSS's existing contract obligates the City to continue to send any referrals to CSS. A review of CSS's contract For General, Kinship, and Teen Parent/Baby Resource Home Care Providers shows numerous duties on the part of CSS, but for DHS, its duty primarily is to provide CSS with support and compensation for the services that CSS performs, with no minimum guarantee or even a duty to provide *any* referrals. Without any duty to make referrals, DHS simply cannot be in breach of its contract for failure to continue making referrals.

Moreover, the City has the unilateral right under the contract to terminate or suspend the contract, regardless of any breach or lack thereof by CSS, "for

any reason, including, without limitation, the convenience of the City.” Professional Services Contract General Provisions ("General Provisions") ¶ 14.2. You correctly note in your letter that the City has not sent to CSS a notice of default or a notice to suspend or terminate. That is intentional, as we do not wish to make this an adversarial proceeding, and we remain hopeful that CSS will comply with its contractual obligations and will implement them in a non-discriminatory manner. Regardless, however, the City reserves the right to cancel or suspend this contract, at any time, for the City's convenience.

Of course, the City does not need to rely on its mere convenience. Section 3.21 of the General Provisions states:

Provider shall not reject a child or family for Services based upon the location or condition of the family's residence, their environmental or social condition, *or for any other reason* if the profiles of such child or family are consistent with Provider's Scope of Services or DHS's applicable standards as listed in the Provider Agreement, unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.

(“Services” are defined at General Provisions ¶ 1.72 as “the work to be performed under this contract,” which plainly includes the intake and

registration of new, prospective foster parents. *See, e.g.*, Scope of Service p.4 (“Resource caregivers are screened, trained, and certified by the Provider.”); *id.* at 6 (“Provider is responsible for offering training and related support to Resource Parents”). In your letter, you confirm that CSS has no intention of complying with this contractual obligation to provide Services to *all* qualified families, as you have clearly re-affirmed that CSS intends to reject families for Services based solely on the fact that they are same-sex couples. That is not a permissible reason for rejection under either the Scope of Services set forth in the contract or under DHS's applicable standards, and the Commissioner has no intention of granting an exception.

Indeed, as you know, the refusal to provide Services to same-sex couples constitutes a violation of a fundamental City policy to provide services to *all* qualified families. We cannot allow a provider, acting under a City contract, to inform a qualified family who wants to give of its time, resources, and home, in order to protect vulnerable children, that they must go elsewhere to make this contribution, solely because our contractual provider disapproves of their familial relationship. The City maintains an important policy that all resource families be treated equally, so long as they meet the agreed-upon eligibility requirements. We recognize that CSS's values and the City's values may diverge here, but CSS is contracting with the City, not free-

lancing, and the ultimate responsibility for managing this foster care program belongs to the City. We have to insist that all services provided as part of this program are provided in a manner that is consistent with our conception of equality.

Moreover, and independent of the foregoing, CSS's refusal to provide services to same-sex couples is a violation of law. CSS falls squarely within the definition of a "public accommodation" under the City's Fair Practices Ordinance, Phila. Code § 9-1102(1)(w), as CSS is, *inter alia*, a "provider . . . whose . . . services . . . are . . . made available to the public." You focus on CSS's admirable provision of services to *the children*, but the contract indisputably also requires CSS to provides services to *the foster families*, including certification, support, re-evaluation, and training to *any* family that meets state regulations and DHS standards and wishes to provide badly needed foster care.

Please be assured that we have not targeted your client on the basis of its religious beliefs. As we explained, our motivation arises from our concern that all families in this City be treated equally with respect to all opportunities and services that are available to them. We respect your sincere religious beliefs, but your freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded,

secular social services.

The Commonwealth has set eligibility standards for prospective foster parents. It is inappropriate (and arguably unconstitutional) for us to allow a provider to add its own requirements for foster parents that are rooted in religious doctrine, and which clash with the constitutional requirement that we treat all marriages/families equally. Nor can we allow you to refuse service to an otherwise eligible family by referring them to another agency.

Please also note that CSS's current contract expires on June 30, 2018, and the City is under no legal obligation to enter into a new contract for any period thereafter. We are hopeful that we can work out any differences before then, but please be advised that -- except where the best interests of a child demands otherwise -- the City does not plan to agree to any further referrals to CSS, and the City intends to assist with the transition of foster families to other agencies, absent assurances that CSS is prepared to adhere to its contractual obligations and, in implementing its City contract, to comply with all applicable laws, including those relating to non-discrimination. We believe our current contract with CSS is quite clear that this is our right, but please be advised that any further contracts with CSS will be explicit in this regard.

Family equality is both a legal requirement, and an important City policy and value that must be

embodied in our contractual relationships. If CSS cannot come into compliance, we are prepared to enter into an interim, contractual relationship with CSS in order for CSS to continue to supervise the foster children in its care properly with the least amount of disruption for them, while the transition to other agencies is completed. On a related note, contrary to the discussion in your letter regarding DHS's practice concerning siblings, because the best interests of the children in our care are paramount, we did recently grant an exception to the cessation of CSS referrals in that instance to ensure that siblings were placed together, and we expect that the best interests of the children will remain paramount throughout any transition.

In closing, we do not wish to see our valuable relationship with CSS regarding foster care services come to an end. We are hopeful that CSS will be prepared to commit to comply with the letter and spirit of CSS's contractual obligations and the Fair Practices Ordinance by committing to provide foster care services on a non-discriminatory basis to all families that meet the City's standards. Please let me know as soon as possible whether CSS is prepared to comply with these standards. Alternatively, please let me know with whom I should be in contact for purposes of promptly negotiating a transition plan.

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Thank you for your understanding and your client's work with children and families.

Sincerely,

/s Valerie Robinson

Valerie Robinson

Chair, Corporate and Tax
Group

cc: Rue Landau, Executive Director
Philadelphia Commission on Human
Relations

Cynthia Figueroa, Commissioner DHS
Marcel S. Pratt, City Solicitor

David O'Reilly, *Chaput edict draws mixed reviews; Kenney calls it 'not Christian'*, Philadelphia Inquirer (July 6, 2016), https://www.inquirer.com/philly/news/20160707_Chaput_edict_draws_mixed_reviews__Kenney_calls_it__not_Christian_.html.

Chaput edict draws mixed reviews; Kenney calls it 'not Christian'

Kenney's was among the sharper reactions Chaput's decree drew from around the region. Some were swift to denounce the archbishop as an "old white man" whose church was out of touch.

Others, though, hailed the archbishop for upholding traditional church teaching or deferred with a shrug to his authority.

The mayor, who was raised Catholic, has often been sharply critical of Chaput's conservative stances on matters of faith.

On Friday, Chaput posted on the archdiocesan website six pages of guidelines for clergy and other local church leaders on how to implement *Amoris Laetitia*, a major document on the family Pope Francis issued in April.

Some theologians have said *Amoris* calls on church leaders to be more welcoming of Catholics who are estranged from parish life because the church disapproves of their sexual relationships.

Chaput was emphatic that this does not mean Francis has reformulated the church's traditional ban on Communion for those Catholics who live in what the church views as sin—such as divorced Catholics who remarry outside the church, sexually active gays, and cohabiting unmarried couples.

In *Amoris*, Francis “states clearly that neither Church teaching nor the canonical discipline concerning marriage has changed,” Chaput remarked in his guidelines.

Holy Communion is a central element of the Catholic faith, which holds that the prayers a priest utters over bread and wine during Mass transform them physically into the body and blood of Jesus.

Barring a person from receiving Communion does not mean that he or she is excommunicated. But many of those barred have complained of feeling shunned, embarrassed, or marginalized.

Many laypeople and clergy had hoped Francis might ease the church’s position regarding Communion in *Amoris Laetitia*, but despite his call for clergy to listen compassionately to the pain of those who feel excluded, he did not make any explicit changes to the teaching.

Chaput’s guidelines may be the first of their kind issued by the bishop of any American diocese in response to *Amoris Laetitia*, Latin for “the joy of love.”

Chaput's position did not upset Lydia Carbone, a member of St. Patrick's parish in Center City.

“It's not for me to judge the church's teachings,” she said.

Unmarried after a divorce more than 16 years ago, she has led programs at her parish designed to help the newly divorced understand the church’s stance that they may not remarry in the faith unless their first marriage is declared invalid by a diocesan tribunal.

But she was pleased, she said, that Pope Francis “seems to be opening dialogue in the gray areas” around divorce and remarriage. “I’m hoping the church will be more open and welcoming.”

Others were fuming.

An article on the guidelines in Wednesday’s *Inquirer* generated more than 1,000 comments, most of them harshly critical of Chaput.

Across the street from the Cathedral of SS Peter and Paul, an 18 year-old Catholic questioned the wisdom of the guidelines Wednesday afternoon.

“It’s isolating people,” said Mia Trotz, a college student in Philadelphia selling water ice at Sister Cities Park.

But Carl Miller, 58 and gay, said he admired Chaput for his stance. “I believe the Catholic Church’s teachings are ultimate truth,” said Miller.

“I struggle with living it perfectly,” said Miller, who attends Mass weekly and receives Communion, “but I think the archbishop is right in restating what the Catholic teaching is.” He declined to name his hometown or parish.

A large part of the debate involves just what Francis meant to say about the inclusion in parish life of unmarried but cohabiting Catholics, those in same-sex relationships, and the estimated 4.5 million who are divorced and remarried without an annulment.

“It’s being read in different ways by different individuals and different bishops,” said John Grabowski, associate professor of moral theology at Catholic University of America.

Grabowski, an authority on *Amoris Laetitia*, noted that in one place Francis writes that priests have the duty to accompany those who divorce and remarry outside the church “in helping them to understand their situation according to the teaching of the Church and the guidelines of the bishop.”

But Grabowski noted that Francis also wrote in *Amoris* that “I would also point out that the Eucharist ‘is not a prize for the perfect, but a powerful medicine and nourishment for the weak.’”

And for those struggling to reconcile what appear to be Francis' positions, Grabowski pointed to yet more lines from the pope:

“I understand those who prefer a more rigorous pastoral care which leaves no room for confusion,” wrote Francis. “But I sincerely believe that Jesus wants a Church attentive to the goodness which the Holy Spirit sows in the midst of human weakness, a Mother who, while clearly expressing her objective teaching, always does what good she can, even if in the process, her shoes get soiled by the mud of the street.”

“I don’t want to say this is murky,” said Grabowski, “but it’s not crystal clear. So what happens is that people find support for differing positions. So it’s going to be up to different bishops to decide how this document should be implemented in their dioceses.”

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856-779-3841

Staff writer Robert Moran contributed to this article.

Patrick Kerksta, *Jim Kenney's Long War with the Archdiocese*, Philadelphia Magazine (July 9, 2016), <https://www.phillymag.com/citifed/2015/07/09/jim-kenney-catholic-archdiocese-charles-chaput/>.

Jim Kenney's Long War with the Archdiocese
The mayoral nominee is a disaffected Catholic
disgusted by local church leadership.

Democratic mayoral nominee Jim Kenney is a proud graduate of St. Joe's Prep and La Salle. He was born and raised in a Irish Catholic family. He is the single most devoted fan of the Neuman- Goretta women's basketball team in the world.

And yet, Kenney's relationship with the Catholic Church is fraught. Actually, the more accurate adjective is probably just "hostile." Kenney showed vividly just how little regard he has for local "cowardly men" in the Archdiocese of Philadelphia of orchestrating the firing. "If you're a church official and you feel that strongly that this woman and her partner are such a threat to society, stand up and say so," Kenney told the paper.

That might seem like extraordinarily blunt language coming from the likely next mayor of the city and aimed not so subtly at Archbishop Charles J. Chaput. But it's actually not all that different from Kenney's past public statements about the archdiocese. Like the time he urged Pope Francis to "kick some ass" in the archdiocese.

MetroPhilly @MetroPhilly Nov 14, 2014

Relics have been removed from St. Laurentius Church in Fishtown, but former parishioners' appeal is still pending.

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Jim Kenney @JimFKenney

@MetroPhilly The Arch don't care about people. It's about image and money. Pope Francis needs to kick some ass here! 10:06AM - Nov 14, 2014

Kenney began feuding with the archdioceses as far back as 1998 when Catholic leader mobilized to block a City Council bill granting benefits to partners of gay city employees that Kenney co-sponsored. More recently, he's sparred with archdiocesan leadership over the closing of parochial schools, publicly criticized their decision to ban an 11-year-old girl from playing CYP football and wished that Pope Francis will straighten out Chaput and company when he comes to town in September.

In a lot of respects of course, Kenney's fight with the archdiocese is just a microcosm of the broader debate playing out in the Catholic community, Church conservatives like Chaput, are digging in, even as the broader culture embraces marriage equality. Liberal catholics, like Kenney (and a lot of other Philadelphia catholics), desperately want the church to change with the times. Not just on gay marriage, but on the role of women and a host of other issues. The ascension of liberal Pope Francis has raised the stakes of the debate. And now the liberal Francis is coming to Philadelphia, where he'll be hosted by the very-conservative Chaput, all while Kenney (who can summon dozens of news cameras and microphones whenever he likes) looks on...

The World Meeting of Families doesn't look like it'll be boring. But let's not get ahead of ourselves.

Does this latest episode hurt Kenney at all? Might he have alienated true-blue city Catholics with

his criticism? It's certainly possible that it will, but it's also likely to further enhance Kenney's standing in progressive circles and among gay voters.

The harder question is this: should a mayor speak so bluntly on such charged issues? Or is it unbecoming of the office to weigh in so strongly so quickly? This is a controversy about a school outside city limits, after all. Mayor Nutter hasn't issued any press releases.

There's no simple answer to that one. Mayors do need to exercise more discretion than Council members. Mayors are emissaries for the whole city, and Philadelphia is a complicated place that's home to people with a lot of different beliefs.

But for Kenney, justice is justice, and a wrong is a wrong. He doesn't take a black-and-white approach to everything. But on certain matters - like gay equality, like gender equality- Kenney is a moral absolutist, and he's not going mince words or avoid fights, even if he does become mayor. Lauren Hitt, Kenney's communications director, told me a while back in a conversation about a completely different topic that he 'has an annoyingly strong moral compass.' Right now, Kenney's moral compass is the pointing in the polar opposite direction of the Archdiocese of Philadelphia. And in recent years, Kenney has been his most convincing - and his popular appeal has been strongest - when he has framed his policy preferences in stark moral terms.

We just put in a request with Kenney's campaign to talk to him about his faith and his relationship with the Catholic church, and if he's got time for an interview we'll bring you his answers in depth.

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But Kenney being Kenney, a lot of his feelings are already out there on Twitter. See below.

Jim Kenney @JimFKenney

The sisters who do the work for meager salaries, will be the only ones who save the Catholic Church #whatsistersmeantome 10:33 AM - Apr 23, 2012.

Jim Kenney @JimFKenney

9:44 AM - Jun 25, 2012

Miriamhill@Miriamhill

Replying to @myantkinney Jul 12,2012

@myantkinney so hard to know, b/c so few women in leadership positions

Jim Kenney @JimFKenney

@Miriamhill Monica, I agree. Same prob with the Catholic Church. Too male centered with no opportunity for dissent. 11 :01 AM - Jul 12, 2012

Jim Kenney @JimFKenney

On Action News tonight; why would the Archdiocese of Phila try to stop a young girl from playing CYO Football with the boys if she is able?

12:09 AM - Jan 7, 2013

Jim Kenney @JimFKenney

@SheinelleJones Every girl should be able to compete at any level she is capable. Why would the Archdiocese keep her from being her best?

8:06 AM - Jan 7, 2013

Jim Kenney @JimFKenney

fb.me/25XJ5EviX 3:13PM- Jan 9, 2013

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Jim Kenney @JimFKenney

Thank you to Archbishop Chaput for making the right decision and to Caroline for being so determined! fb.me/2ooBk5vib

4:03 PM - Mar 14, 2013

Jim Kenney @JimFKenney

Having been Jesuit-educated myself, I've always had confidence and trust in their commitment to fairness and... fb.me/115hpc9S5

1:35 PM - Jul 29, 2013

Brian P. Hickey @BrianPHickey Jul 29, 2013

Replying to @JimFKenney

@**JimFKenney** I'm not running back to church but I'm down with new Pope.

Jim Kenney @JimFKenney

@**BrianPHickey** Just taking a few steps in that direction. Moral authority was lost. Pope Frank might repair much of that. I pray!

9:11 PM - Jul 29, 2013

Jim Kenney @JimFKenney

Saddened by the closing of 49 Catholic schools. I feel for the students & teachers affected by this decision ow.ly/8Ivkr

Jim Kenney @JimFKenney

Archbishop Chaput: Philadelphians 'confused' by Pope Francis's words po.st/veMrff via @**po_st** I wasn't confused at all. 4:34 PM - Sep 26, 2013

(link to article and image Jim Kenney retweeted omitted)

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Jim Kenney @JimFKenney

Watching CNN. Pope Francis is awesome! Freaking awesome! Makes me want to turn back to my church. I worry about him though.

7:50 PM - Dec 24, 2013

Mike Jerrick @MikeFOX29 Mar 8, 2014

Lets do this! RT **@JimFKenney: @MikeFOX29**

How about a regional effort to Tweet @Pontifex to come to Philly in 2015 to bless us in person?

Jim Kenney@ JimFKenney

@MikeFOX29@Pontifex

Pope Francis is a social media guy. The Muckety Mucks are going to Rome but the Papa lists to the real people! 8:43 PM- Mar 8, 2014

Follow @pkerkstra and @CitifiedPHL on Twitter.

Pennsylvania Mentor, *Mother/Baby Host Home*, (June 4, 2018), <http://www.pa-mentor.com/who-we-serve/children-and-families/motherbaby-host-home>.

<p>Children & Families</p>	<p>Mother/Baby Host Home</p>
<p>Therapeutic Foster Care</p>	<p>It takes a village to raise a child, and at Pennsylvania MENTOR, we help build a community of support for the young mothers we serve. In this program, young mothers living in the homes of our foster parents, who we call Mentors, receive intensive case management services to help them be the best moms they can be. The teenage girls are in foster care when they are pregnant or have already given birth. The baby lives with their mother in the Mentor's home. As long as it remains in the best interest of the child, the mother maintains full custody Through our Mother Baby Host Home program, we help these young mothers learn how to support and care for their child.</p>
<p>CRR Host Home</p>	
<p>Mother/Baby-Host Home</p>	
<p>Behavioral Health</p>	
<p>Rehabilitation Services</p>	
<p>Case Management & Resource Coordination Service</p>	<p>Personalized Support</p>
	<p>Our dedicated program service coordinators visit the young mothers in their Mentors' homes. We make sure the young mothers are working with the support system we help them develop, a support system that includes:</p>

<p>Emergency After Hours Placement Response Ser- vice</p> <p>Family-Based Services</p> <p>Adults with Disabilities</p>	<ul style="list-style-type: none">• Parenting Classes• Independent living classes• Day care• Support groups• Access to health care, WIC, and transportation <p>Our experienced team is available to the young mothers 24/7, offering constant guidance and support. Our goal is to make sure these young women have everything they need to be the best moms possible.</p> <p>This program is available in Philadelphia, Bucks, Montgomery, Delaware, and Chester Counties. Please call 215-925- 3461 *5025 for more information.</p> <p>If you would like to help a young mother and her baby have the best start possible, go to www.makeadifferenceathome.com to learn more about becoming a Mentor!</p>
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Julia Terruso, *Two foster agencies in Philly won't place kids with LGBTQ people*, Philadelphia Inquirer (Mar. 13, 2018), <https://www.inquirer.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-arch-diocese-20180313.html>.

[Appx.0981]

Megan Paszko spent countless hours researching how to become a foster parent in Philadelphia. She compiled all the information organizations needed and mailed, emailed, faxed, and even hand-delivered applications.

Months passed before anyone responded, and then Bethany Christian Services got back to her and said there was an orientation for interested foster parents that week. Paszko and her wife drove to Elkins Park. They were the first people to arrive. They'd also be the first to leave.

"The trainer approached us, and she was really nice, but she told us, 'I just want to be upfront. This organization has **[Appx.0982]** never placed a child with a same-sex couple,'" Paszko said. "She told us she didn't want to waste two hours of our time."

In a follow-up call with administrators, the couple were told that Bethany does not work with LGBTQ people because of the church's views on homosexuality. They were offered names of other agencies to try.

"I just couldn't believe it," said Paszko, who lives with her wife in Brewerytown. "There are so many kids out there who need homes, you're really going to deny them a good one?"

At the same time that the city's Department of Human Services is urgently calling for more foster parents, two of its foster care agencies, Bethany and Catholic Social Services, operate under policies that turn away LGBTQ people who come knocking.

The organizations, which also offer adoption services, are likely violating city contract rules that forbid discrimination. Philadelphia's fair practices ordinance, which prohibits discrimination based on sexual orientation, is included in all city contracts, said Rue Landau, executive director of the Human Relations Commission.

"What a tragedy for the kids of Philadelphia," said Mary Catherine Roper, deputy legal director for the ACLU of Pennsylvania. "This agency is putting its own view on religion above the needs of its kids."

Roper said the position could also be unconstitutional: "A government doesn't get to use a contractor to implement religious programs and when you start saying, 'We're running this as a religious program such that we won't take you because you don't fit our religious view,' then the city is paying for a religious program, and that's a problem under the First Amendment."

[Appx.0983]

DHS said it was unaware, until contacted by the Inquirer and Daily News, of the policies held by the two organizations. Bethany Christian Services has had a contract with the city since 1996 and Catholic Social Services since 1997.

DHS spokeswoman Heather Keafer called both groups' stances "deeply concerning," given an ongoing

push to recruit more LGBTQ people to become foster parents. “We actively recruit individuals that represent the diversity of our city, including diversity of sexual orientation, genders, race, religions, and communities to provide quality foster care to Philadelphia’s most vulnerable children and youth,” Keafer said.

The city’s Law Department is reviewing the issue while DHS works with the Human Relations Commission to investigate policies at both organizations, Keafer said. The department is also reviewing policies of all 26 foster care agencies it works with. The city will continue to recruit LGBTQ parents, including at an event March 22 at the William Way LGBT Community Center hosted by the Office of LGBT Affairs.

Last year, Bethany Christian Services was reimbursed \$1.3 million for operating foster homes for 170 children, representing 1.5 percent of the department’s payments to foster care providers. Catholic Social Services was reimbursed \$1.7 million in the same year for 266 children, representing 1.9 percent of the amount paid.

Joe DiBenedetto, a spokesman for Bethany, said the organization places children with married couples made up of two parents of the opposite sex, or in some cases individuals. He said the organization does not believe it is in violation of any city ordinances. “This has been our practice throughout our nearly 75 years of operation and is based on our adherence to what we believe to be foundational Biblical principles,” he said.

Ken Gavin, a spokesman for the Archdiocese of Philadelphia, said Catholic Social Services wasn’t aware of any **[Appx.0984]** recent inquiries from same-

sex couples but confirmed that the organization would not work with interested LGBTQ people if approached.

“Catholic Social Services is, at its core, an institution founded on faith-based principles,” Gavin said. “The Catholic Church does not endorse same-sex unions, based upon deeply held religious beliefs and principles. As such, CSS would not be able to consider foster care placement within the context of a same-sex union.” Gavin said that arrangement is a “well-established and long-known one in our relationship with DHS.”

Both organizations work with LGBTQ youth. That can send a mixed message to children and teens in their care, said Currey Cook, an attorney who heads Lambda Legal’s Youth in Out-of-home Care Project.

“How do you pretend you can simultaneously say we serve all youth and do a good job serving all youth while at the same time you’re saying same-sex couples are not real parents, are not good parents?” Cook said. “LGBT youth who have faced so much isolation, stigma, prejudice in the system are left wondering, ‘What’s going to happen if I come out, and I’m being served by parents or an agency that basically says trans parents, LGBT people, aren’t good parents?’”

Cook said Pennsylvania could benefit from a more explicit nondiscrimination policy. Its state code prohibits discrimination against children based on sexual orientation but does not say anything specific about prospective foster or adoptive parents.

A nationwide tension

[Appx.0985]

Similar conflicts have sprouted up across the country in recent years as states have legalized same-sex marriage. Before laws started changing, religious-conflicted organizations could avoid working with LGBTQ people by requiring foster parents to be legally married, Cook said.

His organization sued the federal government and the Catholic Conference of Bishops last month after married lesbian professors were told they could not foster a refugee child through Catholic Charities of Fort Worth, Texas. A woman at the organization told them foster parents must “mirror the Holy Family,” according to the suit.

The ACLU sued the State of Michigan last year after two same-sex couples were turned down by Bethany Christian Services and Catholic Social Services there. Michigan is one of a growing number of states to pass laws explicitly allowing religious-based discrimination. Similar bills are percolating in Georgia, Oklahoma, and Kansas.

Pennsylvania has no such law but religious non-profits often discriminate quietly, said Leslie Cooper, an attorney with the ACLU’s national office, who is handling the Michigan case.

Lawyers for Bethany and Catholic Social Services have defended their clients’ stances in court documents by saying that requiring religious organizations to comply with nondiscrimination laws would force them to close, meaning fewer organizations to help kids in need.

Cooper said a religious organization could always change its affiliation, which occurred in Illinois after a foster care agency associated with the Catholic Church

broke off and rehired the same staff to operate independently.

“The premise that there would be no one to do this work is just false,” she said.

Both the archdiocese and Bethany say they always direct interested LGBTQ parents to other agencies.

Paszko and her wife are now working with Jewish Family and Children’s Service of Greater Philadelphia to become **[Appx.0986]** certified foster parents, but the journey has not been easy.

They stalled sending out requests for information to various agencies in July. Calls and emails went unanswered. An application Paszko hand-delivered was mailed back to her with no explanation. A home visit scheduled weeks ago was canceled unexpectedly. The couple took off from work to get background checks but upon arrival, learned the center no longer offered the screenings. They don’t attribute all these roadblocks to discrimination but to a system ill-equipped to catch interested parents.

“If you work and you actually have the financial means to help a kid, I feel like the system is not set up to help you do that,” Paszko said. “There have just been so many stops along the way where I’ve just said, ‘Ugh, this is not meant to be.’”

Interested in fostering? Call 215-683-5709 or email fosteringphilly@phila.gov. Learn more at beta.phila.gov/fosteringphilly.

Anyone who believes they were discriminated against may contact the PCHR at 215-686-4670 or pchr@phila.gov.

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CITY OF PHILADELPHIA
COMMISSION ON HUMAN RELATIONS
601 Walnut Street, Suite 300 South
Philadelphia, PA 19106
Telephone (215) 686-4670
Fax (215) 686-4684

THOMAS H. EARLE, ESQUIRE
Chairperson

RUE LANDAU, ESQUIRE
Executive Director

May 7, 2018

Mark Rienzi
President
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., NW, Suite 700
Washington, D.C. 20036

Via First Class Mail and Email

Dear Mr. Rienzi:

Thank you for your letter of April 18, 2018. The Department of Human Services ("DHS") will respond separately through the Law Department to the issues you raised concerning the contract between Catholic Social Services ("CSS") and DHS. We are writing to address your statements regarding the jurisdiction of Philadelphia Commission on Human Relations ("PCHR").

The purpose of the Philadelphia Fair Practices Ordinance ("FPO") is to assure that all persons are afforded equal opportunities for employment, housing, and the use of public accommodations such as CSS. Philadelphia Code § 9-1 101(l)(a) and (e).

PCHR initiated this investigation at the request of the Mayor and pursuant to its authority under the Home Rule Charter, the Fair Practices Ordinance, and its governing regulations in order to determine if CSS is engaged in discriminatory practices. *See* PCHR Regulation No. 2.1. Pennsylvania Courts have deferred to agencies like PCHR in determining the extent of their jurisdiction and permitted the due course of administrative actions. *See Chestnut Hill College*, 158 A.3d 251, 257-58 (Pa. Cmwlth. 2017), *alloc. den.*, 173 A.3d 262 (Pa. 2017).

CSS' provision of services to children in foster care and to their foster parents under that contract is a public accommodation under § 9-1102(w) of the FPO, and therefore within the jurisdiction of the PCHR. Your citation to *Roman Catholic Archdiocese of Philadelphia v. Pa. Human Rel. Comm'n.*, 548 A.2d 328 (Pa. Cmwlth; 1988) and assertion that CSS is "distinctly private" do not alter this conclusion.

First, unlike the PHRA, the FPO does not contain an exception for "distinctly private" entities.

Second, your April 18 letter, as well as CSS's own website, demonstrate that that the provision of services to children in foster care and to their foster parents is a public accommodation. Your letter states that CSS "serves and places children regardless of their race, color, sex, sexual orientation, gender identity, religion, national origin..." pursuant to its contract with the City. The very nature of this process requires CSS to identify, recruit, certify, select, and provide training, payment and services to the individuals and families who foster these children. *See* Professional Services Contract General Provisions Article V. Indeed, the CSS Philadelphia

website invites members of the public to contact CSS to become potential foster parents. See <https://cssphiladelphia.org/adoption/>.

Third, the Commonwealth Court's recent opinion in *Chestnut Hill College* makes plain that a discrimination claim alleged against a Catholic-affiliated entity does not involve a matter of purely ecclesiastical concern, and therefore, religiously affiliated institutions like Chestnut Hill College (and also CSS) fall within the jurisdiction of the investigating agency. 158 A.3d 251, 259-60 (Pa. Cmwlth. 2017); see also, *O'Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1106-09 (Pa. 2009) (finding Archdiocese was not exempt from parents' claims that their child had been unfairly disciplined by the school).

As we explained in our March 16, 2018 correspondence, any potential violation of the FPO falls under the jurisdiction of PCHR. Therefore, we reiterate the request for information set forth in that letter and ask that you respond within ten days of this letter to avoid the issuance of a subpoena.

Sincerely,

/s/ Rue Landau

Rue Landau, Esquire
Executive Director

/s/ Thomas H. Earle

Thomas H. Earle, Esquire
Chairperson

cc: Marcel S. Pratt, City Solicitor
Cynthia Figueroa, DHS Commissioner

Services, *Become a foster parent*, City of Philadelphia (June 14, 2018), <http://beta.phila.gov/services/birth-marriage-life-events/become-a-foster-parent/>.

Birth, marriage & life events

Become a	Become a foster parent
<p>foster parent</p> <p>Ask the DHS Commissioner's Action Response Officer (CARO)</p> <p>Get a birth certificate</p> <p>Get a copy of a divorce decree</p> <p>Get a death certificate</p> <p>Get a marriage license</p> <p>Request Medical Examiner records</p>	<p>Every child deserves to be loved, and to grow up in a safe and healthy environment. Foster care is temporary care for children who are unable to remain in their own homes. Most children enter foster care as a result of abuse or neglect.</p> <p>Over 5,000 children and youth are in foster care at any given time in this city. People who care for children in foster care are called resource parents because they help parent a child, and act as a resource and mentor to that child's family. Resource parents provide children with love and support while they are separated from their families.</p> <p>Overview</p> <p>The goal of foster care is to reunite children with their families. When this is not possible, as determined by the courts, many resource parents choose to adopt the children that are in their care.</p> <p>Resource parents as part of the team</p> <p>Resource parents are key members</p>

of the child's permanency planning team. This consists of the child's social worker, birth family, and other caring adults. As the person who lives with the youth 24 hours a day, seven days a week, resource parents bring important perspectives and information to the team meetings.

Successful resource parents

- Work with all members of the team.
- Share Information.
- Give and receive support.
- Ensure that the child feels safe and is free from threats of harm or danger.

Resource parents can help in the reunification process in many ways. They should:

- Be a role model and mentor for the parents of origin.
- Support the child's relationship with their parents.
- Share information with the parents, such as health care and educational progress.
- Provide emotional support for the child as they prepare to return home.
- Be available to both the child

and their parents after they return home.

- Include parents and other family members in important holidays, birthdays, or other special occasions (such as school plays).

Financial Assistance

Resource parents receive money for the cost of caring for the child. The amount changes depending on the level of care the child needs. All children receive medical coverage through Medicaid.

Who

Foster parents can be single, married, divorced, any gender or sexual orientation.

Requirements

To care for children in foster care, you must:

- Pass child abuse, criminal history, and FBI clearances.
- Be physically able to care for a child.
- Have space in your home for an additional child.
- Be at least 21 years of age.

How

Here's how to become a resource

parent

1. Choose a foster care agency.

DHS works with many state-licensed agencies to provide foster care. Browse the list of foster agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose. This agency will be a big support to you during your resource parent journey. Once you've found one you like, call them to find out how to begin the certification process. Each agency has slightly different requirements, specialties, and training programs.

2. Begin the certification process.

The certification process will take approximately 3-6 months to complete.

As part of the process you will have to:

- Fill out an application.
- Attend an orientation.
- Complete at least 6 hours of training.
- Get a medical examination that proves you are physically able to care for children and are free from contagious diseases.

-
- Pass child abuse, criminal history, and FBI clearances.
 - Have a social worker come to your home to help determine if it is safe for a child.

Relatives, family friends, trusted teachers, coaches, or others who have a close connection with the foster child may become kinship caregivers. Kinship caregivers are allowed to have foster children placed more quickly in their homes. This is often better for the child, as it limits disruption and prevents the need for placement in a foster care center

Kinship caregivers go through an initial review that includes clearances of their home. Once they have been cleared, the foster children connected to them can come live with them. Kinship caregivers still need to go through the rest of the process of becoming a foster parent, but they can do this while they serve as foster parents.

To get more information about becoming a resource parent, call (215) 683-5709 or email dhs.fosteringphilly@phila.gov.

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**EXCERPTS FROM
CONFORMED
STANDARD AMENDMENT AGREEMENT
BETWEEN THE CITY OF PHILADELPHIA
DEPARTMENT OF HUMAN SERVICES AND
CATHOLIC SOCIAL SERVICES
MADE SEPTEMBER 20, 2017
EFFECTIVE JULY 1, 2017
Contract Number 16-20030-04
Original Contract Number 16-20030**

* * *

[1032]

Statement of Purpose:

This Scope of Service is made and entered into between Catholic Social Services (the Provider) and the Philadelphia Department of Human Services (DHS), and sets forth the services for general, kinship, and teen parent/baby resource home care.

Throughout this document, the term “Resource Parent” refers to both kinship parents and non-relative foster parents.

When a child or youth is placed through a Community Umbrella Agency, CUA, the Provider offers ongoing support and coaching to Resource Parents through Provider Staff.¹ The Provider is required to work collaboratively with the CUA. Contracts between DHS and all CUAs set forth services for resource home care with case management responsibilities remaining with the CUA. When the child or youth is receiving

¹ Provider Staff is responsible for recruiting and certifying foster and kinship homes.

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case management services directly from DHS, the Provider must also deliver case management services to the Resource Parent, parent or other reunification resource, and the child or youth and collaborate with the assigned DHS Social Worker (DHS cases).

Department Overview:

The mission of the Department of Human Services (DHS) is to provide and promote safety, permanency, and well being for children and youth at risk of abuse, neglect and delinquency. DHS is organized in the following Divisions: Administration and Management, Child Welfare Operations Division, Community Based Prevention Services, Finance, Juvenile Justice Services, and Performance Management and Technology. DHS continues to implement the Improving Outcomes for Children (IOC) model. The vision for IOC is to:

- Maintain children and youth safely in their own homes and community.
- Timely reunification or other permanency.
- Reduce use of congregate care.
- Improve children, youth, and family functioning.

As it relates to Resource Home care, the IOC framework provides a single Case Manager to work with assigned families. The case management service is provided by Community Umbrella Agencies who are embedded in the communities they serve.

For children and youth for whom the Provider continues to provide case management services, the case management staff interact on a regular basis with schools, medical, dental, and behavioral health provid-

ers; various community resources; and all service providers indicated on an Individual Service Plan (ISP) or Family Service Plan (FSP). For youth funded and placed by a CUA, the Provider interacts with external resources as needed, collaborates and communicates with the CUA, and continues to support the resource caregivers.

Provider Organizational Overview:

Mission Statement: Catholic Social Services of the Archdiocese of Philadelphia continues the work of Jesus by affirming, assisting and advocating for individuals, families, and communities.

Vision and Values: Statement: Catholic Social Services Vision:

* * *

[1058]

1.59 Party; Parties. A “Party” means either the City or Provider; the “Parties” means the City and Provider.

1.60 PBC. “PBC” or “Performance Based Contract” means a contract model that incentivizes performance and ties Provider’s payment and contract renewal to performance outcomes.

1.61 Person. “Person” means any individual, sole proprietorship, association, company, firm, partnership, limited partnership, joint venture, corporation, limited liability company or other form of entity or association recognized by law.

1.62 Placement Amendment. “Placement Amendment” means that document which is a part of the FSP, and which identifies those Services that are

required for a child who is placed outside of his or her home.

1.63 Policy Transmittals and Guides. “Policy Transmittals and Guides” means those notifications to Providers of changes in Departmental policies or procedures in the of the [sic] Department that are issued on an interim or emergency basis.

1.64 Professional Services Contract. “Professional Services Contract” has the meaning set forth in Section 17-1401(15) of The Philadelphia Code, as it may be amended from time to time. As of June 2012, that definition was “[a] contract to which the City or a City Agency is a party that is not subject to the lowest competitive bidding requirements of Section 8-200 of the Charter because it involves the rendition of professional services, including any renewal of such a contract (other than a renewal term pursuant to an option to renew contained in an executed contract).”

1.65 Provider. “Provider” means the Person providing Services and Materials to the City as defined in the heading of the Provider Agreement.

1.66 Provider Agreement. The “Provider Agreement” means the instrument, part of the Contract Documents, which sets forth the terms, covenants and conditions specific to Provider’s engagement by the City to provide the Services and Materials under this Contract.

1.67 Provisional. “Provisional” means conditional, pending confirmation or validation.

1.68 Referring Agency. “Referring Agency” means the Department.

1.69 Responsible Official. The “Responsible Official” means the director, commissioner or other head of the Department.

1.70 Santiago Consent Decree. “Santiago Consent Decree” means the Third Amended Stipulation and Order, dated January 21, 1988, amending *Santiago, et al. v. City of Philadelphia et al.* (C.A. No. 74-2589, E.D. Pa.), a consent decree, and requiring the Department to maintain the population at the Philadelphia Juvenile Justice Services Center at a maximum of one hundred five (105) youth.

1.71 Scope of Services. “Scope of Services” means the document(s) incorporated by reference and/or the document(s) attached as an exhibit (or as exhibits) to the

* * *

[1070]

3.13 Routine Transportation Costs. With the exception of those costs associated with a runaway, the specific provisions for which are set forth at Section 3.29 (Absence of a Child), Provider shall be responsible for all routine transportation costs incurred by Provider in fulfilling the terms of this Contract.

3.14 Family Visit Food Costs. Provider shall be responsible for the costs of food for the child while the child is visiting his or her family.

3.15 Payment for Placement Services. Provider shall use payments under this Contract to purchase only those Services that are reimbursable under Applicable Law and the Contract Cost Principles, unless Provider has received prior written approval from the

Commissioner or the Commissioner's designee to purchase non-reimbursable Services. This requirement applies equally whether the Services are purchased directly by Provider or indirectly through Provider's Subcontractor, or Provider's referral to another agency.

3.16 EPSDT; Managed Care. Provider shall comply with the City's EPSDT initiative. Compliance shall include, without limitation, Provider's securing of all licenses and permits necessary for Provider to participate in the Medical Assistance program, HealthChoices or managed care organizations (where appropriate); Provider's timely submission of all forms and reports required by the Commonwealth Office of Medical Assistance, HealthChoices or managed care organizations; and Provider's timely pursuit of any and all appeals of the Commonwealth's denial or discontinuance of EPSDT funding to Provider, or denial, discontinuance or reduction of medical services by HealthChoices or managed care organizations.

Provider shall comply with the City's initiative to integrate behavioral health services with other health and social services provided to children and families. Compliance shall include) without limitation, the following:

(a) Provider shall use 1-888-545-2600, the central contact number of Community Behavioral Health (CBH), for the purpose of securing mental health and substance abuse services for children and their caregivers;

(b) Provider shall document fully in the case file the results of each referral to CBH; and

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(c) Upon request by DHS and/or CBH and with proper authorization, Provider shall release to CBH any documents and/or reports regarding behavioral health services provided to children and families. Provider must maintain centrally located documentation regarding whether a child/youth has received a full EPDST screening within sixty (60) days of entering placement, unless the child has had a screening and the results are available, and whether the subsequent treatment indicated has been initiated/scheduled within ninety (90) days upon entering placement. Youth transferring from one foster care agency to another and youth transferring from a facility licensed under Chapter 3800 regulations to a foster care agency may be exceptions.

[1071]

3.17 Service Requirements.

(a) Provider shall provide Services to the children and youth and their families in accordance with the FSP, any Placement Amendments, and Form Authorizations.

(b) Provider shall submit a Scope of Services which shall be consistent with Department's Program Standards and Applicable Law.

(c) Provider's Scope of Services shall be current, shall satisfy the City's requirements as to form and content, and shall be attached as an exhibit to the Provider Agreement.

3.18 Web-Based Central Referral Unit (CRU) System Participation.

(a) The Department utilizes a Web-Based CRU System for all its non-PBC providers. Upon its implementation, Provider shall report all its vacancies, by age and gender, by participating in the Department's Web-Based CRU System, and in any additional tracking system the Department may identify, and Provider shall update the system on a weekly basis, and/or more frequently for emergency shelter programs. Failure to comply with this provision may result in the Provider not receiving referrals from the Department's CRU. Provider has twenty-four (24) hours to accept or reject a referral.

(b) The Department shall monitor Provider's compliance with this provision and shall only make referrals based upon vacancies reported through this system. The Department, in its sole discretion, may periodically utilize additional resource tracking systems.

3.19 Dependent Placement Referrals. Provider shall accept youth with deferred or dual adjudications in its dependent facility. To the extent permitted by law, including applicable state regulations, Provider shall accept dependent youth in its delinquent facilities if such youth are otherwise eligible for admission into Provider's facility. Delinquent Providers agree that their Scope of Services shall not exclude dependent children from their program unless they are required by law to do so.

3.20 Referral Disputes. Provider shall submit a written quarterly report to the Commissioner's designee detailing the number and circumstances of each referral dispute registered in accordance with Section

5.2(b)(3) of these General Provisions. Excessive referral disputes, as determined by the Commissioner in his/her sole discretion, may cause the City to terminate this Contract.

3.21 Rejection of Referral. Provider shall not reject a child or family for Services based upon the location or condition of the family's residence, their environmental or social condition, or for any other reason if the profiles of such child or family are consistent with Provider's Scope of Services or DHS's applicable standards as listed in the Provider Agreement, unless an exception is [1072] granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.

3.22 Notice of Referral Acceptance or Rejection.

(a) Except for Performance Based Contract Providers, Provider shall notify the Commissioner within twenty-four (24) hours of its decision to accept or reject placement referrals; provided, however, Provider's rejection of a placement referral must be in accordance with the process set forth in Section 5.2(b)(3) of the General Provisions. Provider shall provide the Commissioner with a written statement of the basis for each rejected referral within twenty-four (24) hours of the rejection unless an exception is granted by Commissioner or Commissioner's designee.

(b) Within seventy-two (72) hours of accepting a case that has been designated as a Kinship Care placement, Provider must visit the placement and complete an assessment of the kinship caregiver's home to ensure that it is in compliance with State regulations regarding foster homes.

3.23 Documentation of Referrals. Providers must maintain centrally located documentation regarding each referral that the Provider receives from DHS. Provider must maintain the following information: the date of receipt of referral; the requesting DHS division (CWO or JJS); the name, age and race of the child; presenting primary problem; and whether the child was accepted or rejected for admission to the program and if applicable, the reason for rejection.

3.24 Vacation, Holiday Placement. Provider shall ensure that each child in an Out-of-Home Placement has uninterrupted Services and placement in the event Provider's office closes for vacation or holidays.

3.25 Adequate Clothing. It shall be Provider's responsibility to purchase a seasonally adequate and complete wardrobe for each child in placement in its program and for any child who is being discharged from its program.

3.26 Return of Medical Assistance Card. At the time of discharge or within seventy-two (72) hours of an unplanned discharge, Provider shall return the Medical Assistance card of any child who has been removed or discharged from Provider's placement to the City; otherwise, Provider shall be liable for any charges incurred after discharge. Provider agrees that, upon its return of the child's Medical Assistance card to the City, Provider will cooperate fully with the Department for the purpose of re-enrolling the child with a primary care physician.

3.27 Service Reports.

(a) Progress Reports. Provider shall submit to the City, on a quarterly basis, a written progress report for each child for whom Services are provided. The report

shall be consistent with the ISP, shall present an evaluation of **[1073]** the child's current status, and shall include a statement of Provider's treatment goals. If the City purchases residential treatment Services under the Contract, Provider shall submit a diagnostic study and treatment plan to the City within thirty (30) days after the child's initial placement.

(b) Placement Objectives; Adjustment Reports. When the Services purchased under the Contract include residential Services, Provider shall, within ninety (90) days after the child's initial placement, submit a report to the City which evaluates the child's adjustment to placement and the child's prognosis. Within one hundred eighty (180) days after the initial placement, Provider shall submit a report to the City which examines whether a less restrictive placement is appropriate for the child. The City generally expects that Provider will move children to a less restrictive placement, and that children have the capacity to make use of a less intensive Service within one hundred eighty (180) days after their initial placement in a residential facility. With the exception of those children committed to the Juvenile Justice System as the result of the commission of delinquent acts, when Provider recommends that a child receive more than one hundred eighty (180) days of residential services, Provider shall present written justification for the recommendation to the Department, and shall participate in a case review within one hundred eighty (180) days after the child's placement. Provider shall allow visits by authorized City employees, upon oral or written request, for discussion or review of information pertinent to the child, or for interviews with the child and the child's natural family. If the child is placed in foster family residential treatment, and is supervised by

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Provider, Provider shall arrange for all contacts by the City with the child and foster family through the staff of Provider. The use of conference calls between the City, the natural family, and the residential treatment facility or the foster family will be regularly scheduled by Provider when distance prevents regular contact.

With regard to children with special medical needs, Provider shall provide all training necessary to the individual(s) with whom the child will reside in order to accommodate those needs. Individuals to be trained may include, without limitation, the child's legal guardian(s) or the child's biological, kinship, foster or adoptive parent(s).

(c) Notice of Child's Location. Providers shall promptly notify the City of the exact placement location and address of each child placed in accordance with the terms of the Contract. A child shall not be moved from one location to another even within a Provider's own system without PRJOR written notice to the Department and applicable approval of court, except in emergency situations that place the child in imminent risk of harm. In non-emergency situations, Provider must furnish the City, in writing, with information regarding any proposed move of a child including, but not limited to, the exact new address of the child as soon as that address is known, plans for education, and plans for transfer of

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Appx.0090-0095

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 18, 2018**

[Appx.0090]

[Lori Windham] accommodation. That's something they have never been understood to be, that's something that the city has not even attempted to establish that they are.

Number two, the city is also asking this court to rule that actions by private religious charities are really city actions. That's contrary to both law and to the plain terms written into the city's contract. Thus the city's defenses fall apart, and what is left is a government targeting, retaliating and burdening religious exercise in violation of the law. without urgent action by this court, catholic will soon be unable to continue its decades-long religious exercise of serving foster children consistently with its faith. Without urgent action from this court, foster parents like Ms. Fulton and Ms. Simms-Busch will lose the critical support services that they rely on to serve their foster children. Without urgent action from this court, loving foster homes like Mrs. Paul's will continue to sit empty during a foster care crisis.

The plaintiffs meet the criteria for emergency and injunctive relief. First, the plaintiffs have demonstrated a reasonable probability of success on the merits. Unless the court has a particular claim that it would like me to turn to first, I will address each one in turn.

[App.0091]

First, plaintiffs are likely to prevail on their claim under the Pennsylvania Religious Freedom Protection

Act or respite. Under respite, a plaintiff needs to show that they are engaged in religious exercise and that religious exercise is substantially burdened. Once a plaintiff has made that showing, and plaintiffs have here, then the burden shifts to the defendants to show that they have a compelling interest in their actions, and that they have used the least restrictive means available to further that interest.

We have explained these claims at length in the briefing, and so I want to touch briefly on the city's counter arguments. First, the city claims that the plaintiffs are not engaged in religious exercise here. I think the best proof that they are is their long history. The archdiocese of Philadelphia has been providing services for at-risk children for over a century. Catholic social services has been involved in this particular form of service to children, foster care service and placements, for a half century.

The declaration of Bishop McIntyre details the importance of this fundamental religious exercise to Catholic social services and to its Catholic faith. This court also recognized in the case of Chosen 300 Ministries in the city of Philadelphia that acts of **[Appx.0092]** charity are often central to Christian worship. In that case, this court ruled in favor of a religious ministry dedicated to feeding the homeless, and not just feeding the homeless generally, but doing it in a very particular way, feeding them downtown on the parkway at the place where they are. Catholic Social Services has a fundamental religious exercise of serving foster children in a matter consistent with Catholic faith. The same is also true for the individual foster families, and you will hear a little bit more about that from them today.

Second, there are four different statutory criteria for what constitutes a substantial burden under respite. The plaintiffs have met all four of those. It's only necessary to meet one in order to prove a substantial burden, but all four are met here.

The city's response is twofold. First, the city says that no substantial burden exists because Catholic entered into a contract with the city and therefore cannot have a substantial burden. This argument rests on the fallacy that Catholic is a public accommodation under the terms of the contract. And I want to point the court to contract provision 15.1. This is the nondiscrimination provision. That is at ECF document 13-5 at page 18. The city says, and in **[Appx.0093]** performing -- or the contract says, and in performing this contract, providers shall not discriminate or permit discrimination against any individual because of race, color, religion or national origin, period.

Then there's a second sentence, nor shall the provider discriminate or permit discrimination against individuals in employment, housing and real property practices and/or public accommodation practices. It then goes on to define both discrimination and apply it to a number of additional protected classes, including sexual orientation. And so by plain terms of the contract, it only prohibits actions that the city would term discrimination against sexual orientation if they occur in the context of a public accommodation. Written certifications for home studies are not a public accommodation.

First, Catholic Social Services is not a place of public accommodation within the meaning of the city's ordinance. It is a private religious entity. And in a prior case the Pennsylvania Commonwealth Court

determined that a religious school run by the Archdiocese of Philadelphia was not a public accommodation under state law.

The same is true here, Catholic Social Services is not a public accommodation like a hotel or a **[Appx.0094]** restaurant or a train station. Second, written certifications for home studies are not a good or service that is generally made available to the public. They are not something you can walk in the door, pay your money and say, Hey, I have paid the price, give me that thing. They are governed by state law, and state law is clear that a number of subjective and discretionary criteria go into making that determination. I am going to be looking at 55 Pennsylvania Code, Section 3700.64. These are state regulations governing the certifications for the home study process.

The factors that foster care agencies must consider include stable, mental and emotional adjustment, including in some cases a psychological evaluation. Supportive community ties, existing family relationships, attitudes and expectations, ability of the applicant to work in partnership with an FSCA, a foster care agency. And so the determinations involved in home studies and in the written certifications are by nature discretionary determinations governed by detailed state regulations. They are not public accommodations that are made available to the general public. You don't have to go through an evaluation of supportive community ties in order to rent a hotel room. You don't **[Appx.0095]** have to prove you have stable, mental and emotional adjustment in order to buy a bus ticket. They don't ask you about your existing family relationships and attitudes and expectations towards children when you

go to buy a train ticket. This is not a public accommodation within the meaning of the contract.

And so the city's defense on this point falls apart. Catholic Social Services is substantially burdened within the meaning of state law. The individual foster families are substantially burdened as well. And the city must prove that it has a compelling government interest in what has been done here, and that it has used the least restrictive means available to further that interest.

First, it's important to note that when there is a compelling government interest, the question is not, is this interest compelling in the broad sense. The question is, is the interest compelling in this particular case.

In the 9-0 Supreme Court decision of *Church of Lukumi Babalu Aye v. City of Hialeah*, the Supreme Court said that public health was not a compelling government interest because the city had failed to pursue it evenhandedly. In the 9-0 Supreme Court decision of *Holt v. Hobbs*, the Supreme Court said

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Appx.0117-0119

**Excerpt from *Fulton v. City of Philadelphia*
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[Appx.0117]

Ms. Barclay: Good Afternoon, Your Honor. Stephanie Barclay for the Plaintiffs, and we would like to call Ms. Toni Simms-Busch to the stand.

(Witness sworn.)

The Witness: Toni Simms-Busch, T-O-N-I, last name Simms, S-I-M-M-S-B-U-S-C-H.

Ms. Barclay: would you like me at the podium?

The Court: Yes, please.

DIRECT EXAMINATION

By Ms. Barclay:

Q. Good Afternoon.

A. Good Afternoon.

Q. Please state your name for the record.

A. Toni Simms-Busch.

Q. Can you describe your current relationship with Catholic Social Services?

A. I am a foster mother.

Q. In what city do you live?

A. Philadelphia, Pennsylvania.

Q. How long have you lived there?

A. Philadelphia, Pennsylvania? My entire life, 38 year.

Q. Can you describe your educational background?

A. Yes. I have a Bachelor's degree from Chatham **[Appx.0118]** College in Forensic Psychology and I started a Master's program at Argosy University for Counseling Forensic Psychology.

Q. How did you do academically in these programs?

A. I did very well.

Q. Can you describe a little bit about your relevant work experience?

A. Yes. When I graduated in 2002, I worked as a youth counselor with a partial care program for children 3 to 5 and 6 to 9. I then worked in a residential treatment facility for adolescent male and females in New Jersey. I then worked at PSI Family Services as a foster care agency worker. After that I was a child advocate social worker for nearly four years with the Defender Association of Philadelphia.

Q. Were you a foster care social worker in Philadelphia?

A. Yes.

Q. And were you a child advocate social worker in Philadelphia?

A. Yes.

Q. You mentioned that you worked at an in-staff and group homes. How long did you work in that position?

A. A little over two years.

Q. When you were a foster care social worker, how [Appx.0119] long did you work in that position?

A. A little over two years.

Q. And when you were a child advocate social worker, how many years were you in that position?

A. Approximately four years.

Q. I would like to talk to you a little bit about your observations as a foster worker in Philadelphia. During your work, did you ever observe in your experience there to be a shortage of foster homes for children?

A. Yes.

Q. What sort of things did you observe that led you to think that?

A. As a foster care worker, as a child advocate social worker, my professional experience was that children were constantly being relocated due to placement issues. Several children had to be placed – several teenage children had to be placed in shelters due to a lack of available foster homes. Children had to be placed in respite for temporary hold until permanent foster homes could be located, and children sometimes -- I had a few cases where children would have to stay at the DHS building until a placement would be found.

Q. What sort of impact did you experience that to

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Appx.0126-0129

**Excerpt from *Fulton v. City of Philadelphia*
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[Appx.0126]

By Ms. Barclay:

Q. As a foster care worker, did you ever refer prospective foster families to other agencies?

A. [Witness Toni Simms-Busch] Yes. There were instances where I needed to refer them out to other agencies for various reasons. Perhaps there was a language barrier, perhaps there was a difficult medical case or behavioral health case that my agency could not support.

Q. I want to take each of those with you in turn. In the context of a language issue, walk me through what a referral would look like and why that would arise?

A. Right. So if I had a client or a family who was of another language and for some reason I could not accommodate them or my agency could not accommodate them, I would contact a specialized agency and make that referral for that family to be serviced.

Q. What was the name of one of the agencies with language specialty you referred families to?

A. Concilio.

Q. Did you ever refer families for geographic reasons?

A. Yes. We had to refer families for geographical reasons. Perhaps a child was in a specific school district and we wanted to keep them in that school district, or even for safety reasons. If a parent was in **[Appx.0127]** a certain neighborhood and we wanted

to refer them out, the families would refer them out to a different agency in another neighborhood.

Q. Did you ever refer families for behavioral health specialty reasons?

A. Yes. Yes, we had to do that as well. Again, if our agency was not able to cope with that child or the family was unable to cope with it and needed specialized – and that child needed specialized services, we would refer out to a different agency.

Q. Were you aware of referrals also being made for specialized medical needs of a child?

A. Yes, medical would be the same.

Q. Did DHS ever penalize or sanction you for engaging in these referrals?

A. No.

Q. Did you think that you were doing anything out of the ordinary when you made these sorts of referrals?

A. No. Referrals are made all the time.

Q. When a new prospective foster family approaches an agency and comes to them through the intake process, is that a DHS referral to the agency?

A. No, that's an independent referral, like a self referral, it's not an DHS referral.

Q. So that's a separate pipeline for obtaining **[Appx.0128]** families?

A. Yes. DHS did not refer me to be a foster parent, I self referred myself.

Q. Do you have any experience with how foster care placement works for Native American children in Pennsylvania?

A. Yes. I have had personal experience with that, so prior to me becoming a foster parent with Catholic Social Services, I have Native American Heritage, I was thinking about adopting or fostering a Native

American child and because I cannot certify myself as a Native American, I was unable to do that.

Q. And was your experience that you could have gone to any agency to try and foster a Native American child?

A. No, I cannot. I cannot.

Q. So what would happen if you went to an agency, any agency in Philadelphia, for example, trying to foster a Native American child?

A. I would not be able to do that because I cannot certify myself as a Native American.

Q. What would the agency do for you?

A. Refer me to – you know, I was not denied to become a foster parent, but I cannot be a foster parent of a Native American child.

Q. If you went to an agency that specialized in **[Appx.0129]** placing Native American children, again, what would that agency do for you?

A. Refer me out.

Q. As a foster parent, did you ever work with gay – or excuse me. As a foster worker, did you ever work with gay foster parents?

A. Yes.

Q. What was your experience with that family?

A. I had a specific family, a male foster parent. He had three young boys. I thought he was an excellent foster parent. Took very well – you know, took very good care of those boys.

Q. I want to talk to you a little bit about your interactions with other foster agencies during your child advocacy work. When you worked as a child advocate social worker, did you personally interact with other foster agencies in Philadelphia?

A. Yes. Yes, I have.

Q. Which agencies did you interact with?

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A. Pretty much all of them.

Q. From your interactions, what did you personally observe about the quality of care that these agencies were providing?

Ms. Cortes: Your Honor, I would object to relevance.

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Appx.0131-0132

**Excerpt from *Fulton v. City of Philadelphia*
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[Appx.0131]

aware of instances where city attorneys would not speak with you about a child's case?

A. [Witness Toni Simms-Busch] No.

Q. [Stephanie Barclay] That was not something you observed to be a common practice?

A. No, I had very good relationships with the DHS attorneys.

Q. Were people you interacted with generally aware of the religious nature of Catholic Social Services?

A. Yes.

Ms. Cortes: Objection, Speculation as well, Your Honor.

The Court: Overruled.

By Ms. Barclay:

Q. How long – let's talk about your time as a foster parent. How long have you been a foster parent?

A. For approximately two-and-a-half years.

Q. Can you tell us about what influenced your decision to become a foster parent?

A. My work as a professional and also my personal inability to have children. And also my belief that – I believe that God placed it in my heart as a calling.

Q. What influenced your decision to choose Catholic Social Services?

A. My professional work with them and also my **[Appx.0132]** Catholic beliefs. I knew that we would share the same foundational beliefs.

Q. Can you describe some of the support you have received from Catholic Social Services and how that has been important for you?

A. Again, I know that I can call anyone on my team at any hour of the day and sometimes at night, or text them and I know that they are going to be there. I know if I my call worker, he is is going to come as soon as he can. He will spend anywhere between a half an hour to a couple of hours if he needs to or if he wants to, just playing with my boys or being there for me as a support.

Q. Are you currently caring for foster children?

A. I have to young boys. I have a tow year old who has been with me for 16 months and I have a – he will be five months old on the 21st of this month and he has been with me since he was three days old. They are siblings.

Q. Are you interested in fostering additional children in the future?

A. I would, yes. I would be very open.

Q. Would you be open to fostering siblings of your boys?

A. Yes.

Q. Are there things that you have experienced

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Appx.0142-0146

**Excerpt from *Fulton v. City of Philadelphia*
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[Appx.0142]

Q. [Stephanie Barclay] How long have you lived in Philadelphia?

A. [Witness Cecilia Paul] My whole life.

Q. Can you tell us just a little bit about your educational background?

A. I had 16 years of Catholic education, graduated from Villanova University with a BSN.

Q. And did you have any work experience that is relevant?

A. Yes. After getting my degree, I went to Children's Hospital of Philadelphia, worked there for two years. Then had my own family and stayed in the home. Missed nursing very, very much because it's an avocation and then heard about fostering in Catholic Social Services.

Q. Let's talk about your time as a foster parent. How long have you been a foster parent?

A. I have been a foster parent for 46 years.

Q. How many children approximately have you fostered?

A. I have fostered 133 children.

Q. Did you ever adopt any of these children?

A. I have adopted six.

Q. Have you ever been recognized for your care by the city?

A. Yes. Three years ago in May I received a – **[Appx.0143]** whatever, a Certificate stating that they recognized me as a loving, caring foster parent.

Ms. Barclay: and may I have permission to approach the witness, Your Honor?

The Court: Yes.

By Ms. Barclay:

Q. Ms. Paul, I have handed you what has been marked as plaintiff's Exhibit 1. Do you recognize this document?

A. Yes, I do.

Q. What is this document?

A. I didn't hear what you said.

Q. What is this document?

A. It's a document, a Certificate of Appreciation from the city of Philadelphia issued by DHS, the Commissioner at the time was Vanessa Harley who presented it to me on May 26, 2015.

Q. What does the award say that it was for?

A. Excuse me?

Q. What does the award say that –

A. The award says, for answering the call of our most vulnerable children, for helping to right the wrongs, for being a shoulder to cry on, and most importantly for providing Philadelphia's foster children with love, compassion and respect they deserve. You **[Appx.0144]** make the difference in the lives of children and youth.

Ms. Barclay: Your Honor, may I have permission to enter this Exhibit 1 for the Plaintiffs into the record?

The Court: Yes.

By Ms. Barclay:

Q. Ms. Paul, what influenced your decision to become a foster parent?

A. Having the Catholic background, I chose Catholic Social Services for the caring that they give children, for the commitment they give children, and the beliefs that I believe in and they do too.

Q. What influenced your decision to become a foster parent, generally?

A. Because I feel that I have been given a gift from God to help children and care for them and love them along with my own children who also accept them and love them.

Q. In addition to your -- you mentioned earlier that you had a pediatric nursing background. Was that relevant at all?

A. Certainly, because I had a lot of training with children, especially at Children's Hospital, and wanted to keep that going. Even though I couldn't do it on a professional level as a nurse in a hospital, I could do **[Appx.0145]** it in my home.

Q. Can you tell us about the type of support you received from Catholic Social Services?

A. The kind of support I received from them is excellent. They are always there from -- for me no matter what kind of question I might have, they are always there to answer and care -- you know, come out. If I need their help face-to-face or on the phone, they are there.

Q. Are you currently receiving normal referrals for foster children?

A. No.

Q. When did the last foster child leave your home?

A. In early April.

Q. So you have not received any normal foster care referrals since April?

A. No referrals, no.

Q. Have you ever gone without foster care referrals for this long?

A. Not usually, no.

Q. How have you felt not being able to care for foster children?

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A. I feel very lost, very lost because I can't use the talent that was given to me to help with these children who are out there, mainly infants that I get **[Appx.0146]** who are drug addicted, who come into my home and need a lot of care, which I am more than happy to give, and my family also is involved in giving, and not able to do it leaves me very upset.

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Appx.0148

**Excerpt from *Fulton v. City of Philadelphia*
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June 18, 2018**

[Appx.0148]

Q. [Stephanie Barclay] Ms. Fulton, what is your current relationship to Catholic Social Services?

A. [Witness Sharonell Fulton] I am currently a foster parent with Catholic Social Services.

Q. And what city do you currently live?

A. Philadelphia.

Q. And how long have you lived there?

A. Most of my life.

Q. How long have you been a foster parent?

A. For 26 years.

Q. And how many children have you fostered over the years?

A. 40.

Q. How did your religious beliefs if at all motivate your desire to become a foster parent?

A. Well, I started thinking about it in the early '90's and I kept seeing the commercial. So because I am Catholic, I went to church and I prayed about it and I believe that it was my faith that led me to it.

Q. What led you to choose Catholic Social Services as the agency that you work with?

A. Well, because I went to church, I go to a Catholic church and I have for 55 years, so I decided that I would start there because they share the values. I share the same values.

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Appx.0174-0175

**Excerpt from *Fulton v. City of Philadelphia*
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June 18, 2018**

[Appx.0174]

A. [Witness Kimberly Ali] Yes.

Q. [Schaundra Oliver] Will you please inform the court as to that?

Ms. Barclay: Objection, Your Honor, as to speculation.

The court: Well, overruled. You just said inform, you didn't say reasons why.

Ms. Oliver: Thank you, Your Honor.

By Ms. Oliver:

Q. Will you please provide the court with reasons as to why some foster parents change agencies?

Ms. Barclay: Objection, Your Honor, for speaking about informing and that is hearsay of third parties.

By Ms. Oliver:

Q. To your knowledge as the deputy --

The court: overruled.

Ms. Oliver: Thank you.

The witness: Can you repeat the question?

By Ms. Oliver:

Q. Why do some foster parents change agencies?

A. To my knowledge and in my expertise, the reason why foster parents change agencies is sometimes there may be dissatisfaction with a particular foster care agency. Other times they may have a young person in **[Appx.0175]** their home who is in need of specialized services, such as specialized behavioral health, because they have a behavioral health need that exceeds the expertise of particular foster care agencies. In either situation, we try to

obtain or we do obtain at the Department a reason why the foster parent wants to transfer. If it is dissatisfaction for our foster care agency, then we try to resolve those differences between the foster parent as well as the agency. If it is because a young person needs a higher level of care, we ask the foster parent if they are willing to continue to care for the young person. If they are willing to care for the young person, then as opposed to allowing the young person to disrupt from the foster home in which we would have to remove the child from the foster home, we transfer that entire foster home to a different provider agency.

Q. So in other words, is it your testimony that if a foster parent changes agencies, that does not necessitate the disruption in that child's placement?

A. Absolutely. The first thing we ask foster parents who have children in their home is whether or not they will be willing to continue to foster that child or youth because we want to minimize and avoid disruptions.

Q. And if we can go back for just a moment because

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Appx.0197-0213

**Excerpt from *Fulton v. City of Philadelphia*
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[Appx.0197]

Q. [Stephanie Barclay] Would you have remembered if a complaint was filed against the agency?

Ms. Oliver: Objection, Your Honor; asked and answered.

The Court: She is not sure.

The Witness [Kimberly Ali]: I'm not sure. I don't know how –

Ms. Barclay: I am not sure if she's not sure she would never have known about the complaints because it would not have come to her attention, or she just at this time can't think of any.

The Court: She said she is not sure. So she – that's her answer. She is not sure.

Ms. Barclay: Your Honor, may I have permission to just confirm what that answer means?

The Court: I would think that's basic English. She is not sure.

Ms. Barclay: Okay.

By Ms. Barclay:

Q. You are not aware of any families that were prevented from becoming foster parents because of Catholic Social Services?

Ms. Oliver: Objection.

The Court: Overruled.

The Witness: I would not know that.

[Appx.0198]

By Ms. Barclay:

Q. So you are not aware of any personally?

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A. I don't – I don't know.

Q. You are familiar with DHS's operations, policies, and procedures, including the practices that are the subject of this action?

A. Yes.

Q. The DHS foster care contract says that, quote, the provider shall not reject a child or family for services based upon the location or condition of the family's residence, their environmental or social condition, or for any other reason if the profiles of such child or family are consistent with the provider's scope of services or DHS's applicable standards as listed in the provider agreement, unless the exception is granted by the commissioner or the commissioner's designee in his sole discretion. My question is: this paragraph is dealing with a rejection of referrals, correct?

A. Yes.

Q. And this is referring to a rejection of a referral from DHS, correct?

A. Yes.

Q. Non-relative family members generally approach Foster agencies about becoming foster parents.

[Appx.0199]

A. It depends.

Q. One of the ways that non-relative family members can become a foster agency – or can become foster parents is by approaching a foster agency, correct?

A. Yes. That's one of the ways.

Q. And if they come through that way, agencies will decide to evaluate those families as part of their normal intake process.

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A. As part of their normal – can you define what intake process is?

Q. Let me ask you the question a different way. If an agency is evaluating a family that came to them on their own, that type of foster family is not one that was referred to the agency by DHS, is it?

A. Not necessarily.

Q. And Kin Care is a situation where DHS would refer an entire family, correct?

A. Yes.

Q. And you testified earlier that DHS, when it makes referrals, will identify the needs of the family as well as the needs of the child to try to find the ability to meet those needs, correct?

A. The needs of the child. So we determine the needs of the child and whether or not the foster parent or the kinship caregiver is able to meet those needs.

A. It depends.

Q. One of the ways that non-relative family members can become a foster agency – or can become foster parents is by approaching a foster agency, correct?

A. Yes. That's one of the ways.

Q. And if they come through that way, agencies will decide to evaluate those families as part of their normal intake process.

A. As part of their normal – can you define what intake process is?

Q. Let me ask you the question a different way. If an agency is evaluating a family that came to them on their own, that type of foster family is not one that was referred to the agency by DHS, is it?

A. Not necessarily.

Q. And kin care is a situation where DHS would refer an entire family, correct?

A. Yes.

Q. And you testified earlier that DHS, when it makes referrals, will identify the needs of the family as well as the needs of the child to try to find the ability to meet those needs, correct?

A. The needs of the child. So we determine the needs of the child and whether or not the foster parent or the kinship caregiver is able to meet those needs. **[Appx.0200]** So we lead with the needs of the particular child.

Q. Let's assume that there was a family that was primarily Spanish-speaking. DHS would consider that in akin care referral as far as referring to an agency that was able to communicate with the family and the child, correct?

A. It would depend.

Q. So you would refer a Spanish-speaking family to another agency that didn't communicate with them?

A. If the particular agency has Spanish-speaking staff, then we would make that referral to that particular agency.

Q. And that would be a consideration?

A. That would be a consideration.

Q. This paragraph also refers to a provider's scope of services. Providers are required to comply with state law, correct?

A. Which document are you referring to?

Q. If you want to turn to -- this is ECF 13-4 of the document you have in front of you at pages 14 to 15.

Ms. Oliver: Could counsel please state again which document you are referring to.

Ms. Barclay: This is the contract.

Ms. Oliver: And the specific page and section?

[Appx.0201]

Ms. Barclay: it is ECF 13-4, and it's pages 14 and 15.

By Ms. Barclay:

Q. Ms. Ali, would it be helpful if I –

A. Can you just make sure I have the correct – yes, please.

Q. Ms. Ali, this paragraph says that providers shall not reject a child or family for services based upon the location or condition of the family's residence, their environmental or social condition or for any other reason if the profile of such child or family is consistent with provider's scope of services. My question to you earlier is that a provider's scope of services includes complying with applicable state laws, correct?

A. Yes.

The Court: Do you understand the question?

The Witness: Yes.

By Ms. Barclay:

Q. This provision does not prevent agencies from referring families to an agency that would be a better fit for the family, does it?

A. The agency is not –

Ms. Oliver: Objection.

[Appx.0202]

The Court: Overruled. Answer the question.

The Witness: Repeat the question, please.

By Ms. Barclay:

Q. This provision that we just read does not prevent agencies from referring families to another agency that would be a better fit for the family, does it?

A. So provider agencies would not refer a family to – or a child to another agency, as I testified earlier, that the central referral unit is a unit in the Department of Human Services that makes referrals when you are going outside of a particular agency.

Q. I understand that. I am not asking you about a DHS referral of a child. If a prospective foster parent approaches an agency about being considered for the home study certification process, this contract provision does not prevent that agency from sending that family or allowing them to know about another agency that would be a better fit for the family, does that provision?

Ms. Oliver: Objection, Your Honor. I renew my objection with regard to the contract –

The Court: I think that's an unfair [Appx.0203] question because it's asking for a negative. So I am going to sustain the objection.

Ms. Barclay: let me see if I can word That a little differently, Your Honor.

By Ms. Barclay:

Q. Sometimes families might come to an agency not As a DHS referral but on their own. We discussed that earlier, right?

A. Yes.

Q. And if that family comes to an agency, this contract provision does not say anything about whether or not the agency could give the family information about another agency better able to meet their needs.

Ms. Oliver: Objection, Your Honor. Questions with regard to the contract are conclusions of law.

The Court: sustained.

By Ms. Barclay:

Q. Do you enforce this contract provision in an evenhanded manner?

The Court: What contract provision?

Ms. Barclay: This contract, Your Honor.

Ms. Oliver: Objection, Your Honor. It's an improper question for this witness. She does not enforce the contract.

[Appx.0204]

Ms. Barclay: Your Honor, this witness has testified that she is familiar with DHS's operations, policies, and procedures, including the practices that are the subject of this action. And under the free exercise clause, one of the very important legal questions is not just what a contract provision or policy says in a vacuum but how the relevant officials enforce that policy and if they enforce it in an even manner. So it's very relevant to the questions at issue in this case.

Ms. Oliver: Your Honor, I submit that she is not the relevant official. It's not an appropriate question for this witness.

The Court: Well, she is an appropriate witness as far as the policy. But I don't know whether or not there is an issue of equal application. I mean, as far as she is concerned, she is the appropriate person.

By Ms. Barclay:

Q. DHS would not prevent an agency from letting a prospective foster family know about another agency that might better meet their needs?

A. DHS will have a problem with that. If a potential foster parent seeks out, as you indicated, on their own and contact a provider – a foster care **[Appx.0205]** provider agency wanting to become a foster parent, we would expect the foster care provider to train and certify that foster parent.

Q. No matter what?

A. If it's in – if it's aligned with the 3700 Regulations.

Q. The 3700 Regulations meaning?

A. The foster care regulations. So we expect for the foster care provider agency – as a foster care provider agency, we expect you to recruit, to train, and to certify potential foster parents.

Q. And your position is that it would violate those regulations if an agency let prospective foster parents know that a different agency would be a better fit for them.

A. Because it's the foster parents' choice. So if in the foster parent sought out a particular provider agency, that is the foster care provider agency that the foster parent wants to work with. So we would expect the foster care provider agency to train and certify them.

Q. And it would be a violation of DHS policy if that agency referred them to a different agency for any reason?

The Court: Well, that's a kind of a **[Appx.0206]** broad question.

By Ms. Barclay:

Q. It would be a violation of DHS policy if they referred that family to another agency that they thought would be a better fit for that family?

A. If that referral – define your referral. What are you talking – define your referral.

Q. If that agency told the family that another agency would be a better fit for them, and so – sent that family to a different agency, it's your position that this would violate DHS policy?

A. Yes.

Q. So the contract's provision also allows the commissioner to make exceptions in his or her sole discretion, correct?

Ms. Oliver: Objection. Question is regarding the contract, Your Honor.

Ms. Barclay: I can move on, Your Honor.

The Court: Yes, please.

By Ms. Barclay:

Q. Are you aware of DHS making exceptions to this Policy in the past?

A. No, I am not.

Ms. Oliver: objection to what policy.

Ms. Barclay: the contract provision that **[Appx.0207]** we have been discussing.

The Court: Well, I think you need to be more specific.

By Ms. Barclay:

Q. You testified earlier that if an agency referred a family to a different agency because they thought it would be a better fit, that would be a violation of DHS policy. And I am asking, has DHS made exceptions to that policy, that you are aware of, in the past?

Ms. Oliver: Objection. I believe that counsel is mischaracterizing her testimony.

The Court: Overruled.

Can you answer the question?

The Witness: can she ask it again?

By Ms. Barclay:

Q. You testified that if a family approached an agency and the agency referred them to a different agency as being a better fit for that family, that would be a violation of DHS policy. And I am asking, are you aware of times in the past where DHS made an exception to that policy?

A. I am not aware.

Q. Only certain agencies are allowed to care for a foster child with certain behavioral health issues, correct?

[Appx.0208]

A. It's not true.

Q. Behavior issues are ones that require additional expertise provided by certain agencies, correct?

A. Depending on the level of behavioral health needs of the young person.

Q. But you have previously said under oath that behavioral issues require additional expertise that can better be provided sometimes by another agency.

A. I actually said specialized behavioral health, which is different from the broader behavioral health. young people who come into placement because of the trauma that they suffer more often than not have some behavioral health needs, which would be separate and apart from specialized behavioral health, which is oftentimes a diagnosis, prescription medication, the foster parent has to maintain medication logs. So that is different from just behavioral health.

Q. Okay. So specialized behavioral health is an issue that requires additional expertise by an agency?

A. Yes.

Q. Such agencies have to offer parents specialized training, right?

A. Yes.

Q. They also have to meet additional requirements with regard to staff?

A. Yes.

Q. These agencies have an add-on contract with the city that lets them provide those specialized behavioral health services for those children, correct?

[Appx.0209]

A. Yes.

Q. For instance, one agency that has those behavioral health add-on contracts is Devereux?

A. Yes.

Q. Some foster parents might only be interested in fostering a child with those sort of specialized

behavioral issues. If such a parent showed up at a agency without that specialty in that contract, then that agency would need to refer that family to an agency with a contract like devero, right?

A. If the foster parent is requesting that.

Q. Right.

A. Yes.

Q. If the foster parent is requesting to foster a child with specialized behavioral health issues.

A. So what we would ask the foster care provider agency to do is explain to the potential foster parent about the type of young people that they provide foster care for, and if the foster parent does not want to foster with that particular agency, then it would be their choice to foster for another agency.

[Appx.0210]

Q. And so if they only wanted to foster young people with that specialized behavioral health issue, they would need to be referred to an agency with that specialty?

A. Yes.

Q. Have you granted a formal exception for these types of referrals?

The Court: Formal exception, that is assuming that an exception is necessary or required.

Ms. Barclay: I am not assuming that an exception is required. I am asking if an exception has ever been granted. That you are aware of.

The Court: Well, under the circumstances that you have outlined, you are assuming that one is required.

By Ms. Barclay:

Q. Is an exception required from the DHS policy we were discussing earlier?

The Court: If?

By Ms. Barclay:

Q. To refer a family to a different agency with the specialized behavioral health specialty.

A. I guess the difficulty that I am having is that this speaks to foster parents who are – who – individuals who are already foster parents and not a [Appx.0211] potential.

Q. No, my hypothetical is assuming prospective foster parents who are only interested in fostering youth with specialized behavioral health issues. So it does not require a formal exception in order for an agency to refer them to a different agency if they could provide that behavioral health expertise, does it?

A. No.

Q. Only certain agencies are allowed to care for foster children with certain specialized medical issues, right?

A. Depends, again. And it depends on the level of medical need. For example, a medical one in which a young person may have asthma, for example, could be cared for by a general foster care foster parent.

Q. So – but there are some medical needs that can only be provided for by an agency with that specialty, correct?

A. Yes.

Q. And these agencies also have to receive an additional license through the state office of medical assistance?

A. Yes.

Q. They then receive an additional line item, add-on on the foster care contract, to provide these [Appx.0212] special medical services, right?

A. I am not completely familiar with the line item.

Q. Jewish family children services is one agency that has this medical expertise that they provide for families, correct?

A. Yes.

Q. Some foster parents – prospective foster parents might only want to foster a child with particular medical issues, right?

A. Yes.

Q. If such a parent showed up in an agency that didn't have this special contract, they would need to be referred to an agency like Jewish family that does have that expertise, correct?

A. We would ask the foster care provider agency to explain the children that they service, some of which will be medical level one, and let the foster parent decide whether or not they want to transfer – potential foster parent, whether or not they want to provide foster care for medical agency.

Q. But if they only wanted to foster youth with this specialized medical issue, there are some agencies that they cannot receive that service from, correct?

A. Correct.

Q. And so if they wanted to be foster parents, they [Appx.0213] would need to be referred to a different agency, like Jewish family children, that has that specialty?

A. Yes.

The Court: The biggest problem is I think you are disagreeing what is a referral.

The Witness: yes.

The Court: I mean, what is it you are trying to do – and I think it's inappropriate – is to get this witness to use the same words that you are using and mean the same thing. She clearly is not on the same wavelength as you when talking about referral. And I think that's where the confusion lies.

By Ms. Barclay:

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Q. So there are two different ways that I am aware of that the word "referral" can be used. It can mean referral from DHS to agencies, right, from your central referral unit?

A. Yes.

Q. And so for ease of reference, what I have been talking about is that sometimes agencies can provide additional information to families about other agencies that would serve their needs and give them the choice to go to that agency?

A. And I am invisible to that process.

Q. And so what I am explaining is that – what I

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Appx.0284-0289

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 19, 2018**

[Appx.0284]

for use to Catholic?

A. [Witness Kimberly Ali] According to our attorneys, it was fair practice.

Q. [Stephanie Barclay] The fair practice ordinance, meaning what?

A. I don't know all the details.

Q. Do you think foster-care is a public accommodation?

A. I can't answer that question.

Ms. Oliver: Objection.

The Court: She said she can't answer it.

By Ms. Barclay:

Q. Yesterday I think I understood your testimony to be, and correct me if I'm not getting this right, that I think I understood your testimony to be that if a qualified foster family wanted to receive a home study from a particular agency, then that agency would have to provide the home study?

A. I'm sorry. Repeat it again.

Q. Yesterday I understood your testimony to be that under DHS policy if a qualified foster family wanted to receive a home study from a foster agency, then that particular foster agency would have to provide it. They could not turn that family away?

A. Unless it was the family's choice, yes.

Q. So presumably this is an important policy for **[Appx.0285]** DHS?

A. Yes.

Q. And this is a policy that you have a compelling interest in enforcing, correct?

The Court: What do you mean by "compelling"?

By Ms. Barclay:

Q. This is a policy that you have a strong interest in enforcing, correct?

A. I would say interest in enforcing.

Q. You have an interest in enforcing this policy.

A. Yes.

Q. Not a strong interest?

A. I have an interest in enforcing all policy. whether it's strong or weak, I cannot say that.

Q. Okay. So you have an interest that is no stronger or no weaker than enforcing any other policy?

A. Yes.

Q. And when did you first put this particular policy in writing?

A. What particular policy?

Ms. Oliver: objection.

Ms. Barclay: I am not sure what the

Objection is, Your Honor.

The Court: I was going to ready to ask you what policy.

[Appx.0286]

Ms. Barclay: the policy I just described to her from yesterday's testimony that she agreed to, which is that if a qualified foster family wanted to receive a home study from a particular agency and that was the family's choice, then that agency would need to provide that home study.

By Ms. Barclay:

Q. I am trying to understand, Ms. Ali, when did you first put that policy in writing?

Ms. Oliver: Objection, Your Honor. Assuming facts not in evidence.

Ms. Barclay: I am just basing on her own testimony, Your Honor, that is in evidence.

The Court: When you say "in writing," I don't know that it's been placed in writing.

By Ms. Barclay:

Q. Okay. Have you ever put this policy in writing?

A. It is my understanding of the contract, so me personally, no, I don't put contracts in writing or policies in writing. Those are done by a separate department.

Q. Great. So your understanding is that this policy – the place where it is written down exclusively comes from the foster-care contract?

The Court: exclusively? She didn't say **[Appx.0287]** that.

Ms. Barclay: I am just confirming if that is true.

The Witness: I was going to say the same thing, as exclusively.

The Court: yes.

By Ms. Barclay:

Q. Is there another spot you're aware, other than the contract, where this policy is written down?

A. I am not sure.

Q. So you are not aware, right, at this time of another spot where it is written down?

Ms. Oliver: Objection, asked and answered. The witness is not sure.

The Court: Overruled. She can answer.

The Witness: I said I am not sure.

By Ms. Barclay:

Q. Thank you. And I am just trying to clarify at this time you are not aware of anywhere else where this policy is written down. That's just a yes or no question.

The Court: She is not sure.

Ms. Barclay: Okay.

By Ms. Barclay:

Q. How have you communicated this particular policy **[Appx.0288]** to foster agencies?

A. I have not. It's in the contract.

Q. Okay. So the contract is the main way in which you communicate this with the agencies?

A. Yes.

Q. And how do you communicate to foster agencies, if at all, whether or not they are required to comply with public accommodation requirements?

A. I have not.

Q. Okay. You have been doing this work for 18 years?

A. Yes.

Q. Have you ever had conversations with anyone about DHS's own obligations for providing a public accommodation regarding foster-care services under the Fair Practices Ordinance?

Ms. Oliver: Objection.

The Court: Overruled.

The Witness: Repeat it, please.

By Ms. Barclay:

Q. Have you ever had conversations with anyone about DHS's own obligations providing a public accommodation with respect to foster-care services under the Fair Practices Ordinance?

A. Other than in this situation? **[Appx.0289]**

Q. Yes, other than in this situation.

A. No.

Q. And in this situation, have you had conversations about your own requirements and DHS's own obligations to provide public accommodation services with respect to foster-care?

A. No.

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Q. Have you – so you have never trained staff about that issue either?

A. No.

Q. Thank you. You state in your declaration that a situation in which a foster agency shut down – or excuse me. You described in your declaration a situation in which a foster agency shut down and the children needed to be transferred, correct?

A. Yes.

Q. You stated that, quote, the goal is to keep children in the same home and not disrupt the children and their care, end quote. Correct?

A. Yes.

Q. And that was the goal because moving children from one home to another can be traumatic?

A. Absolutely.

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Appx.0302-0329

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 19, 2018**

[Appx.0302]

A. [Witness James Amato] Good afternoon.

Q. [Stephanie Barclay] What is your current relationship to Catholic Social Services?

A. I serve as a secretary for Catholic Human Services, oversee Catholic Social Services and Nutritional Development Services.

Q. In what city do you currently live?

A. Philadelphia.

Q. How long have you lived there?

A. My life, my whole life.

Q. Can you tell me a little bit about your work experience in the child welfare arena?

A. Yes. I have been involved in child welfare since 1976 when I graduated from Temple with a degree in Social work. Worked for a couple of years in residential care for children at an agency affiliated with the Archdiocese, and then went on to get a Master's Degree in social work and worked at Children's Aid Society and foster-care agency for a couple of years. And then moved into progressive management, running a home for children run by Catholic Social Services, and then into senior management.

Q. How long total have you been working in child welfare?

A. 42 years.

[Appx.0303]

Q. Can you describe a little bit more about your role at Catholic Social Services?

A. My role involves two things basically. One, I am the Executive Vice-President of all 13 of our nonprofit corporations, and I manage the operations, the daily operations of the Catholic Human Services.

Q. And can you tell us a little bit about the way in which Catholic Social Services as a nonprofit organization is organized?

A. Catholic Social Services is organized into several different divisions. Youth services is a prominent division. Developmental program serving those with intellectual disabilities. Housing and homeless and family based services. And we also have Catholic housing and community services, which addresses the needs of seniors.

Q. Does senior leadership report to you?

A. Yes.

Q. And do you have a hand in both governance and operations?

A. I do.

Q. I believe Catholic Social Services has two programs relevant to foster children. Can you tell us a little bit about both of those.

A. The most long-standing program is Catholic **[Appx.0304]** Social Services foster-care department, which has been – has its roots in 1917 as the Catholic Children’s Bureau and then grew into Catholic Social Services Foster-Care Department, today serving about 120 some children and 100 foster homes. And we also have our residential services for adjudicated delinquent youth, run by Saint Gabriel's system and dependent adolescent, teens, boys and girls, run by St. Francis and St. Vincent's homes.

Q. Does Catholic Social Services also have a CUA?

A. We also have a CUA that handles most of northeast Philadelphia.

Q. I want to talk to you a little bit about the religious ministry of Catholic Social Services. Can you tell us some of the ways in which, on a daily or weekly basis, Catholic Social Services is operating in a religious fashion?

A. Yes. All of our meetings begin with – and many times end with prayer. Our facilities all have chapels. They are well used by staff. And that our Catholic identity is very apparent in our religious artifacts on the walls and those kinds of things.

Q. And how frequently is prayer involved in what you do?

A. Daily, several times daily.

[Appx.0305]

Q. How has your religious mission been made apparent to those you interact with, including the city?

A. Well, as far as the city goes, every year we submit a program description that I believe is part of the contract, and that clearly identifies our Catholic identity, our history and our mission, so that's very clear. Also we do a lot in orientation training with staff that underlines the importance of that to who we are and why we do what we do.

Q. How many at-risk children were served across all Catholic Social Services programs last year?

A. Over 1500.

Q. Is providing foster-care services a religious ministry for Catholic Social Services?

A. The Church's care for orphans – which is an outdated word – and at-risk children is centuries old. In Philadelphia it dates back to 1797, when we responded to the needs of children whose families – parents had died due to yellow fever. So intrinsic to who we are and what we do is the care of at-risk

children and who are many times the poorest children in our communities.

Q. And so just to confirm, is foster-care services a religious ministry of Catholic Social Services?

A. It absolutely is, yes.

Q. You mentioned some of the roots of your program [Appx.0306] was the epidemic of yellow fever. Did that ultimately formalize in a specific program in the early 1900's?

A. Yes. The first response was that, and then that grew into the orphanage movement in the mid-19th century. And that followed by the establishment of the Catholic Children's Bureau in 1917, which was dedicated to foster-care.

Q. So that 1917 Catholic Children's Bureau was providing foster-care to children?

A. Yes.

Q. Was there any government involvement with this program in 1917?

A. To my understanding, no.

Q. How did it work? How did you find children and care for them? Can you walk us through that a little bit?

A. Well, the religious sisters who ran Catholic Children's Bureau had a deep network of relationships around the city with parishes and community groups. And when it became known that a child was at risk, they would do a home evaluation. If the child needed to be removed – in those times, many times the parents would agree to that, because they are called voluntary placement. The child would be removed, placed in a foster home and we would track them and the child's [Appx.0307] progress in that home.

Q. I think you said were these networks known through Catholic parishes?

A. Catholic parishes were a great source of referrals for that program.

Q. So when did Catholic partnership with government begin to provide these services?

A. Well, I came into the work in 1976, and I can tell you then, it was well established. So my guess is that this happened in the late '40's, early '50's, that the contracts became involved with government.

Q. And at that point when the government became involved, is it your understanding that the government took over all aspects of it or were there things that Catholic Social Services was still doing at the beginning of that partnership?

Mr. Field: Your Honor, I object, the witness said he was not around when the government became involved.

The Court: To the extent he knows the history, I am going to overrule the objection.

The Witness: So repeat the question, please.

By Ms. Barclay:

Q. Sure. So when this government partnership began, what is your understanding as far as the role that Catholic Social Services would play with regard to **[Appx.0308]** removing and placing children and the role that the government played.

A. Catholic Social Services, to my understanding at those times, had tremendous oversight of the intake function. So that once a child became known to be at risk and was evaluated as such, we would place the child and simply advise the city that there was a voluntary placement and they would then move forward and support that.

Q. By the time you joined Catholic Social Services in the '70's, how had the roles changed as far as what the government was in charge of?

A. Well, things changed for the better and they changed swiftly. And they're now – in my time from the mid-'70's on, all the intake was handled through the Department of Human Services, and that was done after a child protective services investigation, the child was seen as needing to be placed.

Q. Now at this time is Catholic Social Services authorized to provide foster-care services without a government contract?

A. You really can't do it without a government contract.

Q. So you would be breaking the law if you tried to provide foster-care services without a contract?

[Appx.0309]

A. Yes.

Q. Does Catholic Social Services make money from this government contract in providing these services?

A. Absolutely not. And just to give you an idea in – last year we subsidized these services to the tune of \$3.8 million.

Q. Where do those subsidies come from?

A. They come from endowments, donations and general archdiocesan support.

Q. Yesterday the attorneys for DHS referred to Catholic Social Services as a business. Is that how you think of your work?

A. I really don't know of any business that would start or be able to finish with a \$3.8 million subsidy. I never thought of it as a business.

Q. So before yesterday, have you ever heard that?

A. Never.

Q. How would you describe the work that Catholic Social Services is doing?

A. A religious ministry based on a nonprofit Corporation – corporations that have a deep

commitment to the poor and the vulnerable in our community.

Q. I want to talk to you a little bit more about some of the logistics of foster-care. When Catholic Social Services performs a home study, what does that **[Appx.0310]** process entail?

A. It entails an assessment of the relationships that exist in that foster home, the suitability of the physical plan of the foster home to be safe for a child, and then obviously getting clearances too for everybody in the home. If all of those things are up to par, then we – then the home is certified as a foster home and the home study is complete.

Q. Does Catholic Social Services request a pastoral reference as part of that process?

A. It requests a reference from clergy for all interested people who apply to be foster parents.

Q. So is it correct that they ask for a pastoral reference?

A. Yes, they request a pastoral reference.

Q. With regard to the relationships that you said that you would analyze, does this process culminate in anything relevant to those relationships as far as writing that you would provide?

A. The process culminates after the evaluation is done and a certified home study, which would enable the family to actually begin receiving children in their home.

Q. Does that home study include any written endorsements of those relationships?

[Appx.0311]

A. It is – the home study is a written evaluation, yes.

Q. And an endorsement?

A. And an endorsement, yes.

Q. Are you aware of any policy or law that says that an agency must certify any qualified prospective foster family that wants to be certified by that agency?

A. No, I am not aware of that law.

Ms. Barclay: Permission to approach the witness, Your Honor.

The Court: yes.

By Ms. Barclay:

Q. Mr. Amato, I am approaching you with what has been labeled and it's Exhibit Number 4. Mr. Amato, I have approached you with what is described as Pennsylvania State Resource – Family Association Resource Parent Manual. Are you familiar with this document?

A. I have heard of it, yes.

Q. And at the top of page 7, it says that: note, these are minimum requirements and individual agencies will vary with their policies. Is that consistent with your understanding that agencies can have their own additional requirements or considerations for why they would certify a foster parent?

[Appx.0312]

A. Yes, it is.

Q. What are the religious beliefs of Catholic Social Services with respect to marriage?

A. That a marriage is a sacred bond between a man and a woman.

Q. Across all programs what does that mean for LGBTQ individuals who might want or need services from Catholic?

A. We regularly serve proudly people of all faiths, all backgrounds, without regard to sexual identity, so that today we are serving folks from the LGBTQ community.

Q. What about the same-sex couples who approached Catholic about receiving a home study service to become foster parents? Has that situation ever arisen?

A. Well, that situation has not arisen, and – to my knowledge since the time that I’ve been in Catholic Social Services.

Q. And hypothetically speaking, if Catholic were forced to provide a written certification endorsing a same-sex marriage, would that violate the religious exercise of Catholic Social Services?

A. Yes, it would.

Q. I want to talk to you a little bit about some of the strengths and hallmarks of Catholic Social Services [Appx.0313] foster-care program. What would you describe as some of the strengths and unique aspects of your program?

A. I think the key strength is the accumulated knowledge after doing it for 100 years. The staff, our turnover is very, very low. The staff has excellent relationships with the foster parents and I think that leads to – we keep our case loads low so that we can continue to provide adequate support, and I think that kind of results in some of the things that we heard yesterday.

Q. It is your understanding that your case loads are deliberately lower than many other agencies?

A. Absolutely, particularly now with the new standards that come with the CUA.

Q. How long has your longest staff member been there?

A. Over 35 years. Q. How do you think the continuity with your staff impacts the children that you serve?

A. What I have heard and witnessed is our foster parents can call at any time and get access to our social workers. But if they can't, we have Bob Montoro running it who has been there for many years. We have Christy Reed, the Supervisor, who has been there for many years. And we have an Eileen Mullen who is a case [Appx.0314] worker who has done most of these home study, who has been there about 35 years, and she is readily available and accessible and I find that foster parents see that as a great source of support and hope.

Q. From your personal experience have you ever observed there to be a surplus – or which have you observed, a surplus or a shortage of foster families for foster children?

A. Absolutely there is a shortage of foster families for children, particularly adolescent children.

Q. What led you to arrive at this conclusion?

A. Reading, going to meetings with the senior management from DHS, seeing some of the children that we have served in group care that have the profile that could be matched with a foster family but there's simply not sufficient families for the adolescent children.

Q. What physically happens – what else physically happens to children when there are not enough foster homes for children?

A. I think the most sad thing that happens is that a child would have to wait and sit in the child care room at the city while agencies are appropriately pressed to find a foster home for them. That would be one item that we all are trying to avoid. Number two would be the potential placement of a young kid in a [Appx.0315] congregate care shelter, which now best

practice says is not the best way to go. So those would be just two of the things that would come to mind.

Ms. Barclay: Permission to approach the witness, Your Honor?

The Court: Yes.

By Ms. Barclay:

Q. Mr. Amato, I am approaching you with what has been marked as plaintiff's Exhibit Number 5.

Mr. Field: Your Honor, may we have a moment to review this exhibit? We have not seen this document before.

The Court: Okay. I am going to take a brief recess. I have another matter I have to handle. I will be about ten minutes.

The Clerk: All rise.

(Brief recess.)

The Court: Okay. You may be seated.

Ms. Barclay: May we resume?

Mr. Field: Your Honor, I would ask an offer of proof on this exhibit, is it p-5?

The Court: Yes. Ms. Barclay, can you identify it first for the record.

Ms. Barclay: This is the certificate granted **[Appx.0316]** to Philadelphia DHS to operate Philadelphia county children and youth services and discusses some of the issues that DHS was facing with regard to being able to have enough homes to place children. And it is relevant to another document that we will be discussing that Catholic Social Services provided to DHS to try and assist with this problem.
The Court: okay.

Mr. Field: Your Honor, I apologize. DHS is a large organization with a long history. This is a document from 2016. I am not clear on the relevance of the entirety of DHS's history of the care with children.

This litigation, which I understand to be about this alleged religious burden and the harms that flow therefrom. I respectfully submit we will be here a long time if we are going into the entirety of DHS's care – even recent years.

Ms. Barclay: Your Honor, there's only one paragraph that I will just briefly read and then –

The Court: I am going to overrule the objection.

By Ms. Barclay:

Q. Mr. Amato, if you can turn with me to the page that is tabbed, and I am just going to read to you. It says: children are staying at DHS overnight in the childcare room and at the CUA without adequate and timely placement. The reported number of children **[Appx.0317]** staying overnight at DHS and CUA combined during calendar year 2015 was 84. This number is probably higher as some CUA's did not maintain records of which children stayed overnight and when they stayed overnight. This is an unacceptable practice and at the State's request DHS has submitted a plan to alleviate this concerning issue. Now, before we recessed, you were discussing the issue of when children stay overnight at the childcare room. And around this time was there anything that Catholic Social Services did to try and assist DHS with this issue?

A. Acting commissioner Jessica Shapiro at that time approached me, knowing our history in providing emergency shelter for children, and asked me for a proposal to resume that shelter.

Ms. Barclay: Your Honor, permission to approach the witness.

The Court: Yes.

By Ms. Barclay:

Q. Mr. Amato, I am approaching you with what has been marked as plaintiff's Exhibit Number 6.

A. Yes.

Q. What is this document, Mr. Amato?

A. This is the cover letter that accompanied the **[Appx.0318]** budget proposal and a brief description of what we could offer to meet that emergent need.

Q. Just describe again for us, what was the need that this shelter was meant to address?

A. An immediate resource - an immediate group care resource for up to 12 children who were in - there was not an immediate foster family available.

Q. And so was this shelter option seeking to make it so that less children would end up staying overnight in that childcare room?

A. Yes.

Q. Are you aware of instances where a foster agency will choose not to perform a home study for a prospective couple for various reasons?

A. Yes. There's a couple of reasons that I am aware of. One would be the geographical location of the foster parent, so that it would be better for them to have the home to be done to an agency closer to them. Another would be a special medical situation, where we would refer a foster parent because we don't have a special medical service, nor do we have a license for that. Another would be behavioral - a specialized behavioral health home, because again, we don't provide specialized behavioral health. It used to be called treatment foster-care. There are also some agencies **[Appx.0319]** that specialize in foster homes for teen pregnant girls and teen mother/babies. Further there are agencies who specialize, and one is in suburban Philadelphia, in home studies for LGBTQ individuals and couples. And finally there are agencies

who specialize in providing foster homes for Native American children so they are placed with Native American families.

Q. Are there also agencies who have specialty in, for example, outreach to the Latin American community?

A. Yes. And the two that come immediately to mind are Concilio and APM, which have a deep-rooted history in the Latino community. Almost all staff – I would assume, I think all, are bilingual and have – both have quality foster – and recognized foster-care programs.

Ms. Barclay: Permission to approach the witness, Your Honor.

The Court: Yes.

By Ms. Barclay:

Q. Mr. Amato, I am approaching you with what has been marked as plaintiff's Exhibit Number 7. This is a document from Concilio's website. It says that: the purpose of this agency is to provide social, educational, cultural prevention and intervention services and programs to underserved young people and families in the Philadelphia region and to serve as a **[Appx.0320]** community voice for the diverse Latino community on issues affecting children, youth and family. This is consistent with your understanding that this is an agency that has targeted outreach to the Latino community.

Mr. Field: Objection, Your Honor, on the basis of hearsay and relevance.

The Court: Sustained, as to relevance.

Mr. Field: I ask that the reading would be stricken from the record.

The Court: It will be stricken.

By Ms. Barclay:

Q. Is it your understanding that there are any agencies who specialize in servicing kin care populations?

A. I think the most renowned agency for that is Second Chance.

Q. And are you aware – any time has there been a time where they exclusively served kin care populations?

A. When they first became –

Mr. Field: Objection.

The Witness: When they first became known to Philadelphia, my understanding is –

The Court: Overruled.

The Witness: – they were rooted in **[Appx.0321]** Allegheny County with an expertise in the kin care families, particularly minority kin care families.

By Ms. Barclay:

Q. Thank you. Have you ever understood it to be a problem for an agency to decline to perform a home study and instead connect a family with a different agency that the agency believed would be a better fit for them?

A. Never saw it as a problem. In fact, it's best practice and widely known in social work is information referral to get a family or an individual connected with the agency that can best serve them.

Q. So you just used the term "information referral," and I just want to clarify. That's not the same thing as when DHS makes a referral to an agency, right?

A. No, that's –

Mr. Field: Objection, leading.

The Court: Overruled. You may answer.

The Witness: That's information referral directly to a client inquiring about a service that he or she might be interested in.

By Ms. Barclay:

Q. How does that differ from the DHS referral to an **[Appx.0322]** agency?

A. A DHS referral is for a particular hard service, foster-care, group home, that kind of thing. The other one is more of a query about where will I be best served.

Q. I want to talk to you now about this particular litigation, Mr. Amato. When did you first learn that the city had concerns about Catholic Social Services' religious beliefs?

The Court: I don't know that that is properly phrased.

Ms. Barclay: I can rephrase it, Your Honor.

The Court: Okay.

By Ms. Barclay:

Q. When did you first learn that the city had concerns about Catholic Social Services' religious beliefs with respect to written certifications that can provide to same-sex couples?

Mr. Field: Objection, Your Honor.

The Court: Again, you are putting in there "religious beliefs." I don't think that that is the issue. The issue is whether or not they were going to be certified.

Ms. Barclay: I can rephrase it again, Your Honor.

The Court: Yes.

[Appx.0323]

Ms. Barclay: If you can wait one moment.

By Ms. Barclay:

Q. Okay. When did you first learn about the city's concern with the hypothetical situation where Catholic Social Services would be unable to provide written certification for same-sex couples?

A. In mid March following an event, a promotion that the city held, DHS held, for 300 more foster families, I got a call on my cell phone, I think it was a Friday afternoon, from Commissioner Figueroa and First Deputy Shapiro inquiring as to Catholic Social Services' position on providing home studies to same-sex individuals or couples.

Q. And what was Commissioner Figueroa asking you?

A. She was asking me whether we do that.

Q. Whether we do what?

A. Whether we would complete a home study on a same-sex couple or individual.

Q. What was your response?

A. My answer was no, that we would not do that, that it's against the teachings of the Church.

Q. Did they say anything to you then in response?

A. They said to me that you are discriminating. I said that I am following the teachings of the Catholic Church.

[Appx.0324]

Q. And this was a phone call in mid March?

A. It was a phone call in mid March, yes.

Q. Did you have a followup in-person conversation?

A. There was a meeting the next week with DHS senior management, Catholic Social Services senior management, and archdiocesan legal counsel.

Q. What were the things that DHS senior management communicated to you at that meeting?

A. Their great concerns about us not completing home studies for same-sex individuals and couples, the fact that this had the highest attention, the attention at the highest levels of government in the city, and that –

Mr. Field: Your Honor, hearsay.

The Court: Overruled.

Ms. Barclay: This is an admissible party admission.

The Witness: and an indication that Catholic Social Services should be following the teachings of Pope Francis rather than the Archdiocese – rather than the Archbishop or the Archdiocese.

By Ms. Barclay:

Q. Did the city say anything about times changing?

A. Yes, where they indicated when I –

Mr. Field: Objection. Leading, Your Honor.

[Appx.0325]

The Court: Overruled.

The Witness: When I indicated that the mission commitment expressed in over 100 years of services, I was advised that times have changed, attitudes have changed, science has changed. It's time for – the implicit message was it's time for the Catholic Church – Catholic Social Services to change.

By Ms. Barclay:

Q. And just to confirm, I apologize you were interrupted before. What did they say about the top city officials?

A. Without naming names, they indicated that it had the attention of top levels of government, which I would assume would be Mayor Kenney and City Council.

Mr. Field: Objection, calls for speculation.

The Court: Sustained.

Ms. Barclay: That's fine, Your Honor.

By Ms. Barclay:

Q. The substance of that meeting, was that inquiring about anything else relevant to Catholic Social Services?

A. No. It was strictly around the matter that we just discussed.

Q. Did they ask about – did they tell you in that meeting that there would be a referral freeze? **[Appx.0326]** Surprisingly, no. And it was kind of odd to get a call five minutes later when we were walking back to the Archdiocese from Deputy Commissioner Ali, telling us that we forgot to mention something, your referrals would be frozen.

Q. So that was ten minutes after the in-person meeting?

A. Correct, yes.

Q. So I will go back to that. You mentioned there was some discussion of the Pope from DHS at that meeting. Do you remember exactly what they said about the Pope?

The Court: Who said?

By Ms. Barclay:

Q. It was Commissioner Figueroa, correct?

A. It was.

Q. What did Commissioner Figueroa say about the Pope?

A. That we should be listening more to Pope Francis than the Archbishop and the Archdiocese's position on this.

Q. So moving forward again to when you received that follow-up phone call about the referral freeze, who was on the phone 10 minutes later for that follow-up phone call?

[Appx.0327]

A. Deputy Commissioner Ali.

Q. Just Commissioner Ali?

A. Yes.

Q. And did she explain why there was going to be a referral freeze?

A. No. It was pretty short and to the point, and it was based on the meeting. We forget to mention that, so we are mentioning it to you now.

Q. Did they indicate that there would be any sort of exception for the best interests of children to this referral freeze at this time?

A. No. It was absolute, no referrals and no talk of any exceptions.

Q. So is your – what is your understanding as far as the sole reason for this referral freeze?

A. That Catholic Social Services in its statements had said they would not go forward with the home studies, completing home studies for same-sex individuals and couples.

Q. Before this lawsuit have you ever heard to – services providing a home study described as a public accommodation?

A. Never heard of that before.

Q. Had you ever heard of foster-care generally being described as a public accommodation?

[Appx.0328]

A. No.

Q. When was the first time you heard of foster-care being described in that way?

A. When I went to that meeting with the Commissioner. She was quoting that from the contract.

Q. What did the Commissioner say about public accommodations in that meeting?

A. Basically a public accommodation is anything that gets public funding. So if you get public funding, you have to follow through with that expectation.

Q. It was their position that you were not complying with the public accommodation requirements?

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A. That was their position.

Q. And was their position that you needed to do home study for anyone that applied?

A. Yes.

Q. Commissioner Figueroa's declaration claims that you told her CSS, quote, "could not comply with its contract," end quote. She uses that phrasing twice. Did you say that to her?

A. Not to my knowledge or recollection.

Q. What did you say?

A. I said that Catholic Social Services, due to its religious teachings, would not move forward with a home Study for a same-sex couple, but would immediately refer **[Appx.0329]** that couple to one of the other 28 or so agencies who would complete such a home study.

* * *

Appx.0344-0346

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 19, 2018**

[Appx.0344]

The Court: I don't think we have to go any further.

Ms. Barclay: This is the end of my line of questioning on that.

By Ms. Barclay:

Q. Mr. Amato, I would like to speak to you about the viability of the Catholic Social Services Foster Program moving forward. Do you regularly or do your staff regularly report foster-care vacancies to DHS?

A. [Witness James Amato] Yes.

Q. And is that a contract requirement, as far as you are aware?

A. I think it's a performance expectation. I don't think it's a contract requirement.

Q. Before the referral freeze, on average how many vacancies would Catholic Social Services have at any given period of time across all of their programs?

A. Four or five.

Q. How many vacancies do you anticipate that you will have by the end of June?

A. 35.

Q. If you continue to not receive referrals, when will you have to start laying off employees?

A. In mid July we will begin a very sad process of staff reduction.

[Appx.0345]

Q. And that's if you do not continue to receive referrals?

A. Correct.

Q. And on average, how many referrals will Catholic Social Services receive a month from DHS for foster children?

A. Nine.

Q. Is it your experience that after a contract expired with DHS that foster agencies are able to continue operating under the prior contract?

A. Can you repeat that question, please.

Q. Let's talk, for example, if there was no referral freeze going on and this contract with Catholic Social Services has a term ending June 30th. In a typical sense, does that mean that right at June 30th you have to enter into another contract, or is it typical for an agency to operate under an existing contract?

A. It's typical --

Mr. Field: Objection. Speculation, Your Honor.

The Court: Overruled.

By Ms. Barclay:

Q. You can answer the question.

A. It's typical that we operate under an existing **[Appx.0346]** contract. Many of our -- many years of contract with the City are not conformed until well into the Fall.

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Appx.0388-0391

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 19, 2018**

[Appx.0388]

[By Ms. Barclay]

Q. It says: “please also note that CSS’s current new contract expires on June 30th, 2018, and the city is under no legal obligation to enter into a new contract for any period thereafter. We are hopeful that we can work out any differences before then, but please be advised that except for in the best interest of the child demands otherwise, the city does not plan to agree to any further referrals to CSS, and the city intends to assist with the transition of foster families to other agencies absent assurances that CSS is prepared to adhere to contractual obligations, and an implication of city contract to comply with all applicable laws, including those relating to nondiscrimination. We believe our current contract with CSS is quite clear that this is our right, but please be advised that any further contract with CSS will be explicit in this regard.”

What was your understanding about the meaning of this communication from the city?

A. [Witness James Amato] Quite frankly, they were on a short rope and that referrals—they carry us over until the program basically dried up in a matter of months, and we would have no foster-care program.

Q. This last sentence: “we believe our current contract with CSS is quite clear that is our right, but **[Appx.0389]** please be advised that any further contract with CSS will be explicit in this regard.” Did this

give an indication that potentially future full contracts, as the city characterizes them, would have different contract terms than you have seen in the past?

A. Yes.

Q. And would you need to review contract terms of a new full contract to ensure that you could continue to provide foster-care services consistent with your religious beliefs, as you have done for the last 50 years?

A. Yes.

Q. Is it your position, Mr. Amato, that the product of a final home study includes a written endorsement of any relevant relationships of the foster parent?

A. It is.

Q. That's your sincere belief, correct?

A. It is.

Q. And the sincere belief of Catholic Social Services?

A. Yes.

Q. Now, is it your understanding that evaluation of the relationships of the parents is required by state law for a home study?

[Appx.0390]

A. Yes.

Q. I just want to direct your attention to the 3700 regulations dot 64. You are familiar with the requirement under (a)(3)(b)(1) that an agency evaluate, quote: "existing family relationships added to and expectations regarding the applicant's own children and parent-child relationships, especially that they might affect a foster child." Correct?

A. Yes.

Q. And you also understood that under this state law, Catholic Social Services is entitled and indeed required to evaluate the ability of the applicant to work in partnership with Catholic Social Services, correct?

A. Yes.

Q. And it was your understanding that this state law requirement meant that you, to perform an adequate home study, needed to evaluate the relationships of any foster parent living in the same home, correct?

A. Yes.

Ms. Barclay: just one moment, your honor.

Thank you, Mr. Amato. No further questions.

The Court: Any other questions?

Mr. Field: Just two brief questions, Your Honor.

[Appx.0391]

RECROSS-EXAMINATION

By Mr. Field:

Q. Jim, a minute ago, in talking to your counsel you said that a product of the home study includes a written endorsement of relationships of the parents; is that correct?

A. Yes

Q. Is that a written endorsement of any relationships that exist in that household that is subject to the home study?

Ms. Barclay: Objection, Your Honor, asked and answered on his direct.

The Court: Overruled.

The Witness: Yes.

By Mr. Field:

Q. And your counsel just read you a portion of the 3700 regulations. Are you familiar with those?

A. Yes.

Q. And I believe the quote she read you in her words was ability of applicant to work in partnership with Catholic Social Services. Is it correct to say the

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rights – say the ability of the applicant to work in partnership with an agency?

* * *

Appx.0433-0436

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 19, 2018**

[Appx.0433]

The Witness [Cynthia Figueroa]: I was on the phone with Jessica and James Amato and he indicated that they would not, based on the religious position, certify same sex homes, or do homes for adoption.

By Mr. Field:

Q. What did you learn from Bethany?

A. They had a similar statement. They indicated that they actually had same-sex homes that were certified, but their statement said that they were—they were unclear about their ability to serve same-sex couples.

Q. And did you—you said you contacted other foster-care agencies as well?

A. I did. I called a number of faith-based institutions that same day, and asked them what their position was.

Q. What did you learn from any of them?

Mr. Rienzi: Objection, hearsay.

Mr. Field: She is not offering for the --

The Court: Sustained.

By Mr. Field:

Q. Did any of the other agencies tell you that they would not certify same-sex couples?

Mr. Rienzi: Objection, hearsay.

The Court: Sustained.

[Appx.0434]

By Mr. Field:

Q. Are you aware of any other agencies that—in foster-care for the city that will not certify same-sex couples?

A. No.

Q. So what did you do after your conversation with Jim Amato that you just referenced?

A. So after my conversation with Jim Amato, I was immediately concerned because it would put the city in a position of discriminating against one particular community. I knew that that actually had to be explored further, and I made the determination that we would have to meet with them to discuss these matters further, and we would have to do an analysis, too, of how many children are we talking about, what is the impact on the kids that we served.

I ultimately decided that it was in the best interest to close intake, so that I could look more deeply into this issue.

Q. Best interest of the home?

A. The best interest of the children.

Q. And why, in your view, was it in the best interest of the children to close intake at that time?

A. So I make determinations around closure regarding best interest, even if they are administrative **[Appx.0435]** or programmatic, in order to make sure that any additional children that we're putting there were not going to either be put in harm's way, or cause any sort of disruption. In this particular circumstance, adding additional children to the caseload could be problematic.

Q. And what -- just so we are clear on what we are talking about, what does "close intake" mean to you?

A. So "close intake" is that we would not provide any—we would not send in the way of a referral any

new children to be placed in a catholic social services foster-care home.

Q. Is that any new children in all circumstances, or are there exceptions that DHS observes those circumstances?

Mr. Rienzi: Objection, leading.

The Court: Overruled.

You can answer.

The Witness: So exceptions as it related, yes, always since it is in the culture of the agency to look at kin, so, absolutely, the placement of siblings, the ability to also look to see the history of the child, if they had a recent placement with that provider.

The Court: Okay. Perhaps this would be an appropriate time to recess until Thursday at 9:30.

[Appx.0436]

Mr. Field: Thank you, Your Honor.

(All rise.)

* * *

Appx.0489-0502

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 21, 2018**

[Appx.0489]

[By Mr. Field:]

Q. And has DHS offered Catholic Social Services an alternative?

A. [Witness Cynthia Figueroa] Yes, we have.

Q. And what is that alternative?

A. We offered a limited contract to ensure that they could continue to search the children who are currently placed in foster care without sending in additional referrals. It was good to hear Mr. Amato state that they would consider entering into a limited contract.

Mr. Rienzi: Objection, move to strike the narrative.

The Court: Overruled.

By Mr. Field:

Q. Have you been in situations in the past in which providers are closing or for some other reason unable to continue long-term providing services?

A. Yes. Unfortunately in my tenure I have had to experience that a few times.

Q. And in those experiences, what have you done to work with providers to ensure the best interest of the children?

A. So in a number of experiences we have actually negotiated a contract in -- understanding that they were going to have to close, but understanding also that we **[Appx.0490]** needed the staffing and we needed the ability to assure quality services and the safety of children. And so we negotiated the staffing levels and the contracted amounts. In one particular

case we had an individual, and I know this gets very much into jargon around our contracts, but we pay a lot of the placement services in what we call a per diem. So that's like a set amount of money per child per day. And then we have the ability to do what is called a cost reimbursement contract. In one instance when we knew we were closing the program, we knew it was not financially viable or in the best interest of the kids from a programmatic standpoint, they were not going to be able to keep staff, so we changed it from a per diem contract to a cost reimbursement, and we guaranteed them the ability to have a set amount of staff. In one other instance we actually offered stay bonuses for staff to make sure that we had the exact staffing pattern we needed until closure.

Q. And do you have any reason to think you would not engage in negotiations of this sort with Catholic Social Services?

Mr. Rienzi: Objection, speculation.

The Witness: No.

By Mr. Field:

[Appx.0491]

Q. Would you engage in negotiations of this sort with the Catholic Social Services?

Mr. Rienzi: Objection, speculation.

The Court: Overruled.

The Witness: Yes, that's within my purview as the commissioner, and I would negotiate those terms.

By Mr. Field:

Q. Real briefly, you mentioned when you were first contacted by a reporter two agencies, Catholic Social Services and Bethany, I believe?

A. That is correct.

Q. What does Bethany do for DHS?

A. Foster care services.

Q. So it's a similar contract?

A. Yes.

Q. And did you close intake with regard to Bethany?

A. Yes, I did.

Q. Does it remain closed?

A. As of today it remains closed, yes.

Q. And is it your expectation that Bethany will sign a full contract for the coming year?

The Witness: Yes.

Mr. Rienzi: Objection, speculation.

The Court: Overruled.

[Appx.0492]

The Witness: yes. It's my expectation. In communication it has been indicated that we will likely enter into a full contract with Bethany.

By Mr. Field:

Q. And is it your understanding of the coming fiscal year contract that it includes a clause that providers not discriminate in the recruitment and certification of foster parents?

Mr. Rienzi: Objection, speculation, hearsay and best evidence rule. The document speaks for itself.

The Court: Overruled.

The Witness: Yes.

Mr. Field: May I have a moment, Your Honor?

The Court: Yes.

Mr. Field: Thank you.

(Brief pause in the proceeding.)

Mr. Field: that's all I have at the moment, Your Honor.

The Court: Okay. Cross-Examine.

Mr. Field: Thank you.

The Witness: Thank You.

Mr. Rienzi: Your Honor, can I take a very short recess so that I can confer with my **[Appx.0493]** co-counsel and look at my notes so I can do this as briefly as possible.

The Court: I will give you two minutes.

Mr. Rienzi: that's all I need. Thank you, Your Honor.

(Brief pause in the proceeding.)

CROSS-EXAMINATION

By Mr. Rienzi:

Q. Good morning, Commissioner Figueroa.

A. Good morning.

Q. You have had a long career doing a variety of different kinds of social justice work?

A. That is correct.

Q. I believe you said yesterday you went to a Jesuit college?

A. I did.

Q. And then you started your career in the Jesuit volunteer corps?

A. Yes, that's correct.

Q. What inspired you to do that?

A. Mostly my parents and a history -- long tradition. We have believed faith and social justice are good tenets to ensure that those with less have the same opportunities that we have been given.

Q. And those experiences probably gave you a good **[Appx.0494]** understanding of what Catholic non-profit service groups are like?

A. Absolutely.

Q. You know that Catholic loses money doing foster care?

A. No, I am not aware of that.

Q. Do you know that Catholic is a religious organization?

A. I do know that.

Q. And as DHS commissioner would you say that Catholic has a strong commitment to service?

A. Yes.

Q. And for Catholic that commitment to service is part of how they practice their religious beliefs?

A. I would not provide that expectation.

Q. Do you think there's a different reason?

A. There could be.

Q. You have no opinion either way as to whether they do it for religious reasons?

A. I don't know that it is for me to say.

Q. I'm asking, do you have an opinion?

A. No.

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

[Appx.0495]

By Mr. Rienzi:

Q. You have been DHS commissioner since when?

A. My tenure began in September of 2016.

Q. Do you have that job for a particular term of years?

A. No.

Q. You are an at-will employee?

A. I'm an exempt employee with the City of Philadelphia.

Q. How many foster agencies are there in the city right now?

A. There are 30 agencies in the City of Philadelphia.

Q. Does that include Catholic when you say that?

A. It does.

Q. And Bethany?

A. Yes.

Q. So of those, how many provide home studies for same-sex couples?

A. To my knowledge, all of them should.

Q. How many do?

A. All of them. Except for Catholic Social Services.

Q. So it is your testimony that 28 today provide home studies for same-sex couples?

[Appx.0496]

A. Well, actually Bethany does because they have certified a number of same-sex couples, so I would just say Catholic.

Q. So today 29 agencies will do home studies for same-sex couples?

A. From my knowledge.

Q. If Catholic closes their program, how many foster agencies in the city will provide home studies to same-sex couples?

A. The same --

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

The witness: the same number, I presume.

By Mr. Rienzi:

Q. And if Catholic is allowed to resume its past practice, how many agencies in the city will provide home studies for same-sex couples?

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

The Witness: 29.

By Mr. Rienzi:

Q. So no matter happens in this case it is your testimony there will be 29 agencies in the city that **[Appx.0497]** provide home studies for same-sex couples, correct?

Mr. Field: Objection, calls for speculation.

The Court: Overruled.

The Witness: Yes.

By Mr. Rienzi:

Q. To your knowledge, DHS has received no complaints against Catholic for operating according to its religious beliefs, correct?

A. That is correct.

Q. To your knowledge, you have received no complaints against Catholic for providing foster care services according to its religious beliefs, correct?

A. None that I am—none that I can recall.

Q. To your knowledge, you have received no complaints against Catholic for failing to perform a home study for someone who wanted it, correct?

A. I can't answer that unequivocally.

Q. But you are not aware of any as you sit here today?

A. I am not aware of any, no.

Q. To your knowledge, not a single prospective LGBT foster parent was unable to become a foster parent because of Catholic's religious exercise, correct?

A. I can't answer that.

[Appx.0498]

Q. You don't know either way?

A. I can't answer that.

Q. Are you aware of any who are unable to become a foster parent because of Catholic?

A. I can't answer that.

Q. You cannot answer because you are not aware of any, correct?

A. I can't answer that because I don't know if anybody was turned away.

Q. So far as DHS is aware, the number of foster parents turned away by Catholic who wanted a home study for an LGBT couple is zero, correct?

A. I can't answer that.

Mr. Field: She just said she is unaware if anybody was turned away, Your Honor.

The Court: She answered several times.

By Mr. Rienzi:

Q. You said you are responsible for about 1500 employees?

A. That is correct.

Q. To your knowledge, not one of them has told you about any couple rejected by Catholic because of its religious exercise?

A. Not that I can recall.

Q. On your foster care website you tell prospective **[Appx.0499]** parents to look for an agency that would be a good fit for them, correct?

A. I don't have it in front of me, so. . . .

Mr. Rienzi: Permission to approach, your honor.

The Court: Yes.

By Mr. Rienzi:

Q. I am handing you a document labeled plaintiff's exhibit 14. Do you recognize that document?

A. I do.

Q. What is that?

A. It's the Philadelphia website. It's the Philly.gov website.

Q. And you are an employee of the City of Philadelphia?

A. I am.

Q. And DHS is part of the City of Philadelphia government?

A. That is correct.

Q. I would like you to look at the bottom of the second page, please.

A. Second or third?

Q. Bottom of the second says: choose a foster care agency. Do you see that?

A. Yes.

[Appx.0500]

Q. And that says: DHS works with many state licensed agencies to provide foster care. Browse the list of foster agencies to find the best fit for you. You want to feel confident and comfortable with the agency you choose. This agency will be a big support to you during your resource parent journey. Once you have found one that you like, call them to find out how to begin the certification process. Did I read that correctly so far?

A. You did, yes.

Q. Is all of that true to the best of your knowledge?

A. Absolutely.

Q. Okay. Why do you want foster parents to find an agency that they will feel confident and comfortable with?

A. Because it's the choice of the family to determine who they want to be served by.

Q. And why would you like them to be confident and comfortable?

A. Because it is their decision.

Q. I am not asking whose decision it is. I'm asking why would you—here it says you would like them to feel confident and comfortable. Why?

A. Because they are deciding to become a foster **[Appx.0501]** parent, so they have to feel comfortable and confident in their decision.

Q. You would like them to have a good fit with the agency?

A. I'd like them to be comfortable with their decision.

Q. You would like them to have a good fit with the agency?

A. I would like them to be comfortable with their decision.

Q. Would you like them to have a good fit with the agency?

Mr. Field: Asked and answered, Your Honor.

Mr. Rienzi: Your Honor, she has not answered.

The Court: Overruled. She can answer.

By Mr. Rienzi:

Q. Would you like them to have a good fit with the agency?

A. Yes.

Q. Agencies are allowed to have different requirements for certifying families, correct?

A. No.

Q. Would you read for me the last sentence of that **[Appx.0502]** paragraph we were just looking at, please?

A. Oh, different requirements, specialties and training.

Q. It says: each agency has slightly different requirements, specialties and training programs, correct?

A. Correct.

Q. Agencies are allowed to have different requirements, correct?

A. They may only have special requirements as it relates to medical and specialized behavioral health.

Q. It doesn't say that on your website, does it?

A. This is meant to provide general information and does not go into individual regs of all of the specializations.

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Q. Is there someplace else that tells agencies that those are the only different requirements they are allowed to have?

A. Not that I can recall right now.

Q. I believe you testified yesterday and some this morning that you are familiar with DHS's contracts?

A. I am.

Q. And you are familiar with the contract under which Catholic provides foster care services?

A. I am.

* * *

Appx.0512-0519

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 21, 2018**

[Appx.0512]

ability to comply with the entirety of their contract.

Q. [Mark Rienzi] And for my next question, I want you to leave that discussion aside because I am not asking about that discussion. I am asking you about your job as the person in charge of DHS, and I am asking about your job particularly as somebody who has testified that it is your responsibility to ensure that your agency complies with state, federal and city law.

A. [Witness Cynthia Figueroa] That is correct.

Q. Is it your opinion that DHS is governed by the Fair Practices Ordinance when doing foster care work?

A. Could you restate your question.

Q. Is it your opinion that DHS, the agency you run, is covered by the Fair Practices Ordinance when doing foster care work?

Mr. Field: Objection to the extent it calls for a legal conclusion or information learned from counsel.

The Court: Overruled. If you can answer.

The Witness: I don't feel I have legal training to answer that question.

By Mr. Rienzi:

Q. Have you ever trained your staff on compliance with the Fair Practices Ordinance?

[Appx.0513]

A. As a commissioner?

Q. Yes.

A. No, I have not.

Q. In your prior term at DHS have you ever trained your staff on compliance with the Fair Practices Ordinance?

A. As a deputy commissioner, no.

Q. In any context at DHS have you ever trained staff on that issue?

Mr. Field: You mean -- Your Honor, can we just find out whether he means her personally or her department?

The Court: Her personally.

By Mr. Rienzi:

Q. I will start with you personally.

A. I'm sorry. I am confused. Can you start over again.

Q. Sure. And I will back up. I apologize. What I am trying to get a sense of is whether while you are at DHS you all are acting like you are covered by the Fair Practices Ordinance. So my question is -- I will start with now as commissioner. As commissioner, have you done anything to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work?

[Appx.0514]

A. Not to my recollection.

Q. And in all of your time at DHS, now over the couple of different stints that you have had, do you recall any discussions with anybody about whether DHS was covered by the Fair Practices Ordinance when doing foster care work?

A. I answered that it was with our legal counsel.

Q. Yes. I want you to leave aside that discussion. Other than that, are you aware of any other discussion about whether DHS is covered by the Fair Practices Ordinance when doing foster care work?

A. I have not had a reason to.

Q. DHS sometimes considers race when making a foster care placement?

A. No.

Q. DHS never considers a request from a parent to foster a child of a particular race when placing children?

A. That would be the parent's choice and perspective to give that request.

Q. And when DHS is meeting that parent's choice, it does consider race when making foster child placements?

A. We can't always offer the ability to provide the consideration that has been presented by the parent.

Q. Understood, but sometimes you do, correct?

[Appx.0515]

A. No, I can't answer that.

Q. You can't answer it or you don't do it? I will break it apart. Are you saying that DHS never considers the race of a child when making a placement?

A. I am saying that we consider the request of the resource parent and that the other factor that we have to consider is the best interest of the child. Whether the behavior is -- coincides with the environment in the household, whether or not there can be no other child in the home, whether or not the child is medically fragile. So there are a lot of considerations and they are all driven by safety.

Q. I am trying to get you to focus on race.

A. Right. And I am telling you the priority of the department -- Q. I understand that. I am asking --

A. -- is children's safety.

Q. I understand that. But I am asking you a question about whether the department ever considers race when making a placement.

The Court: When you say “consider,” do you mean that's one of the factors or one of many factors?

By Mr. Rienzi:

[Appx.0516]

Q. Yes, just consider it as one of the factors. So you consider race when making placements sometimes?

A. There's no formalized way for us to do that.

Q. Do you do it?

A. I don't know that I can answer that.

Q. You don't know whether your department ever considers race in making a foster child placement? Is that your testimony?

Mr. Field: Asked and answered, Your Honor.

Mr. Rienzi: Your Honor, with all due respect, it's not actually been answered. I am trying to get to the answer.

The Court: Overruled.

The Witness: Can you repeat it.

By Mr. Rienzi:

Q. Sure. Is it your testimony that the Department of Human Services never considers race when making a child placement?

A. I'm sorry. It sounds like you're using a double negative. Can you ask it more directly.

Q. Sure. Does the Department of Human Services ever consider race when making a foster care placement?

A. I think what I have answered before, as one of the many factors that, yes.

[Appx.0517]

Q. So yes, it does, but there are other factors also considered?

A. That's correct.

Q. Have you ever had any discussions with anybody as to whether you are violating Fair Practices Ordinance to consider race in a public accommodation?

A. It has not come to my attention.

Mr. Field: Assumes facts not in the record, Your Honor.

By Mr. Rienzi:

Q. Does DHS sometimes consider disability when making child placements in foster care?

A. Absolutely.

Q. Have you ever considered whether you are violating the Fair Practices Ordinance if foster care is a public accommodation?

A. We actually have specialized providers --

Mr. Field: Objection.

The Witness: -- that only work with the population you have addressed.

The Court: Overruled.

By Mr. Rienzi:

Q. And that would be a violation of the Fair Practices Ordinance if foster care were a public accommodation, wouldn't it?

[Appx.0518]

Mr. Field: Objection, calls for a legal conclusion, Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. You know that sometimes foster agencies themselves consider race when making foster care placements?

A. I can't answer that. I don't know.

Q. You don't know whether any agencies consider race when making placements?

A. I have never had that discussion --

Mr. Field: Assumes facts not in the record regarding placements, Your Honor.

Mr. Rienzi: It's a question about whether it happens.

Mr. Field: The witness has not testified as to whether foster care agencies provide placements.

The Court: She answered.

By Mr. Rienzi:

Q. Who at DHS would know that?

The Court: who?

By Mr. Rienzi:

Q. Who in DHS would know whether foster agencies consider race in making placements?

The Court: What does that have to do **[Appx.0519]** with this case?

Mr. Rienzi: Plenty, Your Honor. The claim is that foster care is a public accommodation subject to the Fair Practices Ordinance. The commissioner has just told me that the department sometimes considers race when making placements.

The Court: As one of many other factors.

Mr. Rienzi: Which would be a violation of the Fair Practices ordinance if they actually believed it.

The Court: That is your opinion.

Mr. Rienzi: Correct. And it's actually also the Fair Practices Ordinance, Your Honor. I am simply trying to get a sense of how they run their foster care program and whether they allow other considerations that are not consistent with this apparently new view that foster care is a public accommodation. So I am trying to find out how the department handles other things that if their story were actually correct would be violations of the Fair Practices Ordinance.

The Court: Well, that is not -- the fact that you consider a public accommodation and what is required

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by the Fair Practices Act is not what this case is based on, the issue of race.

* * *

Appx.0522-0525

**Excerpt from *Fulton v. City of Philadelphia*
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[Appx.0522]

Think they have obligations under the Fair Practices Ordinance when doing foster care work?

A. [Witness Cynthia Figueroa] We always remind individuals to meet the standards in their contracts.

Q. [Mark Rienzi] I am saying other than the contract, have you ever told agencies to do that?

A. Based on the nature of the contract discussions, then I would say yes because they all sign their contracts as I did.

Q. I am just asking you, other than the contract, do you ever tell them they must follow the Fair Practices Ordinance?

A. Not that I recall.

Q. You are not aware of any trainings that your agency has done to tell people that?

A. Not that I am aware of.

Q. So in all of your time at DHS the first time you ever heard anybody say foster care was a public accommodation under the Fair Practices Ordinance was in this particular dispute, correct?

A. Again, that was in conversation with my counsel.

Q. And I am asking you since I know you also observed nonprivileged conversations between your counsel and Catholic. So I am not asking you to tell me anything about what your lawyer told you. Prior to **[Appx.0523]** March of 2018, you had never taken the position that foster care work was a public accommodation under the Fair Practices Ordinance, correct?

Mr. Field: objection to the characterization of taking a position, your honor.

The Court: Sustained.

By Mr. Rienzi:

Q. You are not aware of DHS ever telling anyone that foster care was a public accommodation prior to 2018, correct?

A. We never needed to prior.

Q. That's not my question. My question is whether you are aware of anyone at DHS ever taking that position prior to 2018?

Mr. Field: objection to the scope of this, your honor. She has only been the commissioner since the fall of 2016.

The Court: My understanding is it's in the contract.

Mr. Rienzi: I understand that that is their claim, your Honor, and I'm simply saying if you are running a large system, I am curious to know whether they said it to anybody else. The Court: when you say "said it to anybody else," I mean the fact that it's laid out in the **[Appx.0524]** contract --

Mr. Rienzi: Your Honor, the words "Fair Practices Ordinance" appear in the contract. We have a serious dispute with the City as to whether that makes foster care a public accommodation.

The Court: I can appreciate that. All I am saying is, the fact that it is in the contract, I don't know that it's necessary that it has to be said any other way.

Mr. Rienzi: Your Honor, I think that's a perfectly fair position to take, and maybe Ms. Figueroa is going to say that. But my question is just whether she is aware of anyplace else that they have taken the position that foster care is a public accommodation. She has been there for many years. If the answer is no, then that's fine. I believe the answer was --

By Mr. Rienzi:

Q. Was your answer previously it has not come up before? Was that your answer?

Mr. Field: Again, Your Honor, I just object because he referred again to this characterization of taking the position, which is a legal conclusion.

By Mr. Rienzi:

Q. You have worked at DHS for a total—

[Appx.0525]

A. Well, in my current capacity?

Q. Total.

A. Almost four years.

Q. Prior to 2018 you had never heard anybody at DHS say that foster care work was a public accommodation, correct?

A. I believe I answered this.

Q. I am asking for a yes or no answer. Prior to 2018, you had never heard anybody call foster care a public accommodation, correct?

Mr. Field: I object to the extent it calls for a privileged communication, Your Honor.

The Court: Overruled. You may answer.

The Witness: I believe I answered that prior to this incident it had not arose.

By Mr. Rienzi:

Q. So no, you had never heard that?

A. No.

Q. Okay. Thank you. I believe you testified on Tuesday that you had heard and agreed with Ms. Ali's testimony, is that correct?

A. That is correct.

Q. And you know that Ms. Ali stated a -- what she said was a rule that if a qualified prospective foster

Appx.0532-0533

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
June 21, 2018**

[Appx.0532]

A. [Witness Cynthia Figueroa] I don't know what else that -- right now off the top of my head in the 74-page document that might be found besides page 2. Can you repeat the statement you are asking me to confirm?

Q. [Mark Rienzi] The "How do I become a foster parent" section does not say that you have a right to get a home study from whatever agency you want, does it?

A. In this guide, it does not.

Q. Okay. It says: DHS does not license or approve foster parents. Who does?

A. The Pennsylvania Department of Human Services.

Q. So Pennsylvania DHS is the one who licenses and approves foster parents?

A. That's correct.

Q. Do agencies play a role in that?

A. Based on the information that they provide is how a parent becomes licensed and approved.

Q. Who do they provide that information to?

A. You are getting into the real technical operational part, so I would have to rely on my deputy commissioner to answer that.

Q. They don't provide it to you, do they?

A. No. They have to go through the state process. Yep.

Q. And you have nothing to do with that process, do **[Appx.0533]** you?

A. No.

Q. Your office does not review home studies?

A. I can't answer that.

Q. I'm sorry. You said you can't answer that?

A. I don't know.

Q. When agencies do home studies, they are not acting on behalf of the city, are they?

Mr. Field: Objection, calls for a legal conclusion.

The Court: Overruled.

The Witness: The city pays for the contract for them to deliver the service. The licensing component is held by the state. They can't do the work unless they have a contract with the City of Philadelphia.

By Mr. Rienzi:

Q. When agencies do home studies, they are not acting on behalf of the city, are they?

The Court: She answered that question.

When you say on behalf of, it's necessary for them to get a license, but they can't --

Mr. Rienzi: I am simply trying to figure out if this is the city's work that the agencies are doing or if it's somebody else's work.

* * *

Appx.0582-0588

**Excerpt from *Fulton v. City of Philadelphia*
Preliminary Injunction Hearing Transcript
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[Appx.0582]

Inquirer reporter. Do you remember that?

A. [Witness Cynthia Figueroa] I do.

Q. [Mark Rienzi] When you did that investigation, you only contacted faith-based foster care agencies, correct?

A. That's correct.

Q. You did not contact any nonreligious foster care agencies, correct?

A. Actually, I did speak with one other nonfaith based foster care agency.

Q. Which one was that?

A. Northeast Treatment Center.

Q. Why did you contact Northeast Treatment Center?

A. I have a good relationship with the ceo and wanted to ask about their practices.

Q. Did you talk about Catholic's practices?

A. No.

Q. As to all of the other nonreligious foster care agencies in the city, you did not call them to ask them their policy about LGBT couple applicants, correct?

A. No.

Q. Have you ever called nonreligious agencies to ask them whether they perform home studies for everyone who asked them?

A. Aside from Northeast Treatment Center, no.

Q. Have you ever called nonreligious agencies to **[Appx.0583]** tell them they must important perform home studies for everyone who asks them?

A. No.

Q. Have you ever called nonreligious agencies to ask if they ever refer home studies to another agency?

A. No.

Q. You had a meeting with James Amato in or around March 15th, correct?

A. That's correct.

Q. Where did that meeting take place?

A. In Deputy Commissioner Ali's conference room.

Q. That's a government office?

A. It is.

Q. And who attended for the city at that meeting?

A. It was myself, Deputy Commissioner Ali, our attorney was present, and Jim Black, James Amato, as well as counsel for the Archdiocese attended.

Q. Did you take notes?

A. I don't recall.

Q. Do you recall if anyone else did?

A. I believe our legal counsel did.

Q. At that meeting you told Catholic that times have changed, didn't you?

A. I did.

Q. And you told them that it's not 100 years ago **[Appx.0584]** anymore, didn't you?

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

Q. You explained to them that it was not 100 years ago anymore, correct?

Mr. Field: Asked and answered.

The witness: I indicated, yes, things have changed since 100 years ago.

By Mr. Rienzi:

Q. You told Catholic that they should listen to Pope Francis, did you not?

A. I said it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church.

Q. You told Catholic that they should not listen to Archbishop Chaput on this issue, correct?

A. I don't believe those were my words.

Q. So on one hand you said it would be great if we would listen to Pope Francis, correct?

A. Um-hum.

Q. Was there anyone on the other side you were saying they should listen to Pope Francis instead of?

[Appx.0585]

A. I stated the first part of that, that, you know, it would be great if we listened to the teachings and the words of our current Pope Francis.

Q. And you said that they should not listen to the Archdiocese on this issue, correct?

A. I answered this. I don't recall what I said specifically.

Q. Okay. So you know you said we should listen to Pope Francis, but you don't recall saying anything about who would be listening to Pope Francis --

Mr. Field: Asked and answered.

The witness: I don't recall saying the Archbishop.

By Mr. Rienzi:

Q. Do you recall saying the Archdiocese?

The court: Overruled.

The witness: No.

By Mr. Rienzi:

Q. Do you recall saying anyone else in distinction with Pope Francis?

A. No.

Q. You told them that the home study issue was getting attention at the highest levels of city government, didn't you?

A. I did.

[Appx.0586]

Q. Okay. And you were referring in part to the Mayor when you said that, correct?

A. And my chain of command, yes.

Q. So when you said that, you were referring to yourself as the highest levels of city government?

A. Certainly the managing director's office. So in the city charter I report in to the managing director's office and subsequently the Mayor.

Q. You had discussed this issue with the Mayor before your meeting with Catholic, correct?

A. Briefly.

Q. What did you say?

A. I said that I am working to address the issues. There is a number of children, and that we will brief him once we have made decisions about moving forward.

Q. What did the Mayor say?

Mr. Field: objection, assumes facts not in the record.

The court: Sustained.

By Mr. Rienzi:

Q. Did the Mayor answer you?

Mr. Field: Objection, assumes facts not in record.

Mr. Rienzi: It's simply a question, Your Honor. She said what she told the Mayor. I am asking **[Appx.0587]** what the Mayor said back.

Mr. Field: Objection, hearsay.

The court: Sustained.

Mr. Rienzi: The city is a defendant, Your Honor. The Mayor is the Mayor of the city. It's an admission, Your Honor.

The court: Sustained.

Mr. Field: Objection as well to the extent there was counsel present.

By Mr. Rienzi:

Q. Did you know the Mayor's views by the time you sat down to meet with Catholic?

A. No.

Mr. Field: Objection, calls for speculation.

The court: She has answered.

By Mr. Rienzi:

Q. Did you discuss cutting off intake with the Mayor's office?

A. No.

Q. The Mayor is your boss?

A. He is the head of the city. My direct boss is Eva Gladstein.

Q. Who is Eva Gladstein's boss?

A. Mike Diberadinis.

[Appx.0588]

Q. Who is his boss?

A. The Mayor.

Q. Who appointed you?

A. The Mayor.

Q. Do you consider yourself part of the Mayor's administration?

A. I do.

Q. You know the Mayor's views about the Archdiocese?

A. I do now.

Q. When did you learn the Mayor's views about the Archdiocese?

A. Through this litigation.

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Q. You know that he does not like the Archdiocese very much, correct?

A. I understand what has been presented, yes.

Q. Do you doubt the truthfulness of what has been presented?

The court: In regard to --

Mr. Rienzi: The Mayor's views on the Archdiocese.

The witness: I'm sorry. Can you repeat what you are asking me.

By Mr. Rienzi:

Q. When you said you know what has been presented.

* * *

Appx.0616-0619
Excerpt from *Fulton v. City of Philadelphia*
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[Appx.0616]

[By Mr. Rienzi:]

that's a letter from the law department, who are your lawyers in this case, correct?

A. [Witness Cynthia Figueroa] Yes. This is the letter prior to sending the award letter. So this is dated in regards to the line of questions you are asking me.

Q. I would like to turn to page 2 of that document, please. In the third full paragraph from the top, the last sentence of that paragraph reads: we believe our current contract with CSS is quite clear that this is all right.

A. Did you say second or third paragraph?

Q. Third paragraph from the top, second page, third paragraph from the top. The paragraph begins "please also note."

A. Sorry, that's page 3.

Q. I apologize. Sorry about that.

A. Go ahead. Sorry.

Q. The last sentence of the third paragraph reads: we believe our current contract with CSS is quite clear that this is all right, but please be advised that any further contracts with CSS will be explicit in this regard. Do you see that?

A. I do.

Q. And any future contract that you enter into with CSS you have told CSS you plan to have a more explicit **[Appx.0617]** discrimination policy in that contract, correct?

A. The clarity regarding the policy will be made available to all contracted providers, not just CSS.

Q. And when you said Bethany is going to enter into a new contract, that new contract is not the same as their old contract, is it?

A. It is the same contract with explicit language defining the expectations.

Q. So it's the same, but with different language on the key issue, correct?

Mr. Field: Objection to the reference "key issue," Your Honor.

The Court: Sustained.

By Mr. Rienzi:

Q. It's the same with different language that is being changed in order to more directly address the question of home studies for same-sex foster couples, correct?

A. Can you repeat that?

Q. Sure. I am trying to figure out the contract that you were saying before that DHS would give Catholic is the same full contract they had before or is a changed contract on the nondiscrimination issue?

A. I don't have the contract in front of me, but just to repeat what was shared with Catholic Social **[Appx.0618]** Services, it would be explicit in regard, in terms to what is required.

Q. The current contract is not explicit, correct?

A. I believe right, it means providing further clarity.

Q. In the past you have frequently let agencies continue for months after the expiration of a contract, is that correct?

A. When there is a renewal expected and it's been cleared by both the provider and the city that the

expectation is to move forward in compliance with that contract, yes.

Q. And in those situations sometimes you operate for months under the old contract?

A. That is correct.

Mr. Field: That calls for a legal conclusion, Your Honor.

The Court: Overruled.

By Mr. Rienzi:

Q. You talked earlier about possibly changing contract terms to shift from per diem to cost reimbursement. Do you recall that testimony?

A. That was an example what we did with a provider that was closing, yes.

Q. In that circumstance you are not doing any new **[Appx.0619]** referrals, is that correct?

A. That's correct.

Mr. Rienzi: My last question and I want to make one proffer, one last document, Your Honor.

By Mr. Rienzi:

Q. My last question, though, is, I believe we talked before about whether you spoke with the mayor. And I just want to be clear. Have you had any conversations with anyone in the mayor's office about whether this conflict with the Archdiocese is politically useful?

Mr. Field: Objection to the scope of the question, Your Honor.

The Court: Yes, sustained.

Mr. Rienzi: Your Honor, my one proffer. There is one additional Mayor Kenney tweet that I just want to make the proffer on. I understand that it will almost certainly be covered by your prior ruling. May I just make the offer out loud?

The Court: Yes.

313a

Mr. Rienzi: It's a April 9, 2015 tweet by Mayor Kenney at Jim F. Kenney. It says: love this, hashtag Philadelphia Council, invite all affected by RFRA laws to City of Brotherly Love, ranked the number one hashtag LGBT friendly by HRC.

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