No. 19-123

# 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*

## REPLY BRIEF FOR PETITIONERS


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## INTRODUCTION

This petition involves both deep circuit splits and urgent issues of national importance. In opposition, Philadelphia offers pro forma arguments, claiming imaginary factual disputes and simply ignoring the precedents that make up the splits on both free exercise and free speech. Apparently unsure whether its previous four post-hoc justifications suffice, Philadelphia offers the Court two new alleged policies in its ongoing attempt to exclude CSS from foster care while avoiding judicial scrutiny.

Philadelphia's evasive maneuvers cannot conceal the "deep and wide" split over what makes a law religiously neutral and generally applicable, as courts and legal scholars acknowledge. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 11, 15 (2016) (Laycock). This split also underscores the need, as four Justices have recognized, to revisit its source: *Employment Div.* v. *Smith*, 494 U.S. 872 (1990). The key facts are undisputed. Philadelphia's shifting rationales demonstrate that its actions are not neutral attempts at good governance, but ploys to penalize disfavored religious practices—and to hide behind *Smith* while doing it.

The Court has known for years that this issue would arise. See *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting). Without this Court's intervention, the decision below will jeopardize the "long history of cooperation and interdependency between governments and charitable or religious organizations." *Bowen* v. *Kendrick*, 487 U.S. 589, 609 (1988). Religious groups, governments, parents, and children hoping for a stable home need to know

whether the law protects their ability to serve those most in need.

## ARGUMENT

### I. The circuit split is deep and the result of *Smith*.

#### A. The decision below deepens a 6-2 split.

The petition sets forth a 6-2 split over the requirements to prove a Free Exercise violation. Pet.19-29. The Third Circuit, after reciting various Free Exercise cases, distilled them to a new standard: plaintiffs must prove that someone else was permitted to engage in identical conduct for non-religious reasons. Other circuits permit a variety of ways to prove a law was not neutral or generally applicable. Pet.19.

Respondents deny the split, but tellingly never explain (despite nearly 18,000 words of briefing), how the Third Circuit's decision is consistent with the decisions of the Second (*Central Rabbinical Congress*), Sixth (*Ward*), Seventh (*St. John's*), Eighth (*CHILD*), Tenth (*Axson-Flynn, Shrum*), or Eleventh (*Midrash*) Circuits. Instead, Respondents admit the Third Circuit's decision "is also consistent with" *Stormans*, a case on the other side of the split, in which three Justices of an eight-Justice court would have granted certiorari. Phila. BIO 18-19; see also *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433 (2016) (Alito, J., dissenting from denial of certiorari).

Philadelphia's lack of a neutral, generally applicable law is clear and would have been dispositive in six circuits. Philadelphia attempted to prohibit CSS's religious exercise by hopping among the following policies: that (1) all agencies must assess all applicants,

(2) its fair practices ordinance (FPO) prohibits discrimination against protected classes, (3) it created a new non-discrimination provision for 2019 contracts, and (4) its City Charter required its actions. But (1) and (2) not only do not apply, they are riddled with exceptions; (3) was the result of religious targeting; and (4) by its terms never applied. Pet.11-15.

Now, in case those rationalizations are not enough, Philadelphia introduces two more: (5) a brand-new "Waiver/Exemption Committee" created during this appeal and made up of its lawyers and (6) "an updated and more detailed nondiscrimination provision" in 2020 contracts. Phila. BIO 15, 21. This is not application of a neutral law of general applicability. It is whack-a-mole.

Philadelphia also attempts to claim that the circuit split is really a factual disagreement. Not so. Philadelphia's policies are riddled with exemptions, Philadelphia officials' statements indicate religious targeting, and Philadelphia cycles through multiple policies. None of these facts are disputed: the exceptions are written into the contracts; the officials' statements are admitted; and the policy shifts are embraced as a feature, not a bug. In other circuits, any one of these facts would merit strict scrutiny. Pet.22-28.

1. The Sixth, Tenth, and Eleventh Circuits would have applied strict scrutiny here. The Sixth and Tenth Circuits hold that policies allowing for individualized exemptions are, by definition, not generally applicable. Pet.23-25 (citing *Ward* and *Axson-Flynn*). No one disputes that Philadelphia uses a system of individualized exemptions: the exemptions are in the contract. Pet.App.167a. Philadelphia asserts that all agencies

must assess all applicants, Phila. BIO 1, but the underlying contract provision only applies "unless an exception is granted by the Commissioner" in her "sole discretion." Pet.App.167a.

Philadelphia has doubled down on its existing system of individualized exemptions by creating a "Waiver/Exemption Committee" to consider other types of contract exemptions. Phila. BIO 15. Had the Sixth or Tenth Circuits heard this case, this alone would have mandated strict scrutiny. Pet.23-24.

The Sixth, Tenth, and Eleventh Circuits also apply strict scrutiny where categorical exemptions for secular conduct are present. Philadelphia makes such exemptions from its FPO. Pet.11; Phila. BIO 24. Indeed, Philadelphia acknowledges that agencies may "consider mental health, ethnicity, and family relationships" of prospective foster parents—all protected statuses under the FPO. *Ibid.* Philadelphia claims that such exceptions are permissible when they "reflect[] a neutral judgment"—a term Philadelphia struggles to define and that seems *designed* to prohibit only religious accommodations. Phila. BIO 1, 24. Philadelphia also claims these exceptions are justified in order to "signal to children in the foster-care system that the City respects their rights." *Ibid.* But excluding CSS to signal that its religious beliefs are out of step with the City's beliefs, or to signal support for opposing beliefs, is hardly neutral.

In the Sixth, Tenth, and Eleventh Circuits, this practice would face strict scrutiny. Pet.23-25. Yet the Third Circuit decided that CSS would have to demonstrate not just some secular exceptions, but that 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." Pet.App.32a. This was not, as Respondents would have it, a stray remark, but—as the Third Circuit said—"The question in our case." Pet.App.32a.

2. The Second, Sixth, Seventh, Eighth, and Tenth Circuits look to a policy's history in determining whether it is neutral. Pet.25. Throughout this litigation, Philadelphia has flailed about among post-hoc justifications to reach its desired result. See supra 2-3; Pet.11-15. This is a shell game. Philadelphia cannot settle on a consistent policy, but settles on one unwavering outcome: CSS's religious conduct must be prohibited.

Respondents assert that Plaintiffs simply lacked evidence the policies were non-neutral. Yet Respondents do not dispute the facts underlying the claim. They do not dispute their four policy shifts; instead they add two more. They spend pages attempting to rehabilitate statements of the City Council and Commissioner Figueroa, but do not dispute what was said. See Phila. BIO 6-8, 11; Intervenors BIO 10-11, 13; see also Pet.App.32a-34a.[1] The dispute in this case is not over the facts, but over which rule of law governs those facts.

According to the Third Circuit, even facts showing religious targeting are insufficient so long as the court can also identify some ostensibly neutral purpose for

[1] They simply ignore the actions of the Human Relations Commission, and urge the Court to look at anything other than the mayor's tweets. See *ibid.*

the government action. Pet.App.37a-38a. In contrast, the Tenth Circuit holds that non-neutral actions may arise "not out of hostility or prejudice, but for secular reasons." Pet.26-27. The Sixth Circuit holds that a policy created in response to a religious exemption request (not to mention six such policies) is not neutral. Pet.25-27. And the Second Circuit holds that where "purposeful and exclusive regulation exists—where the object of the law is itself the regulation of religious conduct—the law is subject to heightened scrutiny[.]" *Central Rabbinical Cong.* v. *New York City Dep't of Health*, 763 F.3d 183, 196 (2014). The Seventh and Eighth Circuits likewise look to a new policy's history when determining neutrality. Pet.26. Respondents never address any of these cases.

* * *

The Third and Ninth Circuits allow policies exempting secular conduct, but not religious conduct, unless a plaintiff proves that the differential treatment was motivated by plaintiffs' religion. Compare *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015) (upholding law which "applies to *all* objections to delivery that do not fall within an exemption, regardless of the motivation behind those objections") with *Fulton*, Pet.App.26a ("[A] challenger under the Free Exercise Clause must show that it was treated differently because of its religion."). They also do not credit evidence that a law was targeted at a religious practice so long as the law has an ostensibly neutral goal. Pet.20-22. In contrast, six other circuits hold that laws must face strict scrutiny if they either create exemptions or have a history indicating non-neutrality. Pet.23-27. Scholars too have highlighted the split and

urged the Court to determine "how much analogous secular conduct can be left unregulated before a law ceases to be generally applicable." Laycock at 11, 15. That question is squarely presented here.

### B. This case is an excellent vehicle to revisit *Smith*.

This deep split exists for a reason: *Smith*. Courts, invoking *Smith*, may "defer to the political branches on questions of formal neutrality and the scope of exemptions," be "myopic and deferential in considering claims that analogous secular behavior has gone unregulated," and may not be "vigorous about checking for bad motive or religious gerrymander." Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 42, 54 (1990). "Everything" under *Smith* "seems to depend on judicial willingness to enforce the exceptions and police the neutrality requirement." *Id.* at 54. Unsurprisingly, *Smith* has spawned fractured decisions filled with "after-the-fact maneuvering" to avoid the Free Exercise Clause. See*, e.g.*, *Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch & Alito, JJ., concurring). Absent review, such maneuvering may upend the "long, unbroken history of faith-based providers caring for children." Members of Cong. Amicus Br. 4-10.

Respondents' remaining arguments against *Smith* are a sideshow. See Phila. BIO 26-27. As we discuss below, there is no "public function" exception to the First Amendment. Nor does the Establishment Clause prohibit accommodation. Here, unlike in *Larkin* or *Teen Ranch*, no one must go through CSS; it is one of 29 agencies in an open-ended system of true private

choice. Moreover, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen*, 487 U.S. at 609. Further, the suggestion that CSS should just exercise religion by serving some other group in some other way makes no sense. Governments cannot point to other forms of religious exercise in hopes of avoiding a Free Exercise violation. See *Holt* v. *Hobbs*, 135 S. Ct. 853, 862 (2015).

All parties know—and until Philadelphia's BIO, agreed—that this case turns on how and whether *Smith* applies. Below, Philadelphia argued that ruling for CSS would "upend *Smith*." Resp. C.A. Br. 28. The Third Circuit agreed, claiming that ruling for CSS "runs directly counter to the premise of *Smith*" and would render *Smith* a "dead letter." Pet. App.37a-38a. But now, to avoid *Smith*'s reconsideration, Respondents claim "*Smith* is not outcome determinative." Phila. BIO 26-27; see also Intervenors BIO 24. This is contrary to the arguments below and the Third Circuit's reasoning.

This Court should grant certiorari to revisit Smith. If *Smith* gives Philadelphia's made-to-prohibit-CSS policies a free pass, then the only "dead letter" is the Free Exercise Clause.

## II. The Third Circuit's opinion runs afoul of this Court's unconstitutional conditions cases.

The Third Circuit allowed Philadelphia to exclude agencies that will not speak a government message in home studies. This splits with the Fifth Circuit's en banc decision in *Department of Texas, Veterans of Foreign Wars* v. *Texas Lottery Comm'n*, 760 F.3d 427 (2014) (prohibiting the government from requiring a

license, and then conditioning that license on the content of the applicant's speech). Respondents do not dispute this split. Instead, Philadelphia erroneously claims that "CSS does not allege a circuit split on this question." Phila. BIO 29. Not so. See Pet.38 ("The Third Circuit's decision * * * splits with the Fifth Circuit.").

Further, the Third Circuit's decision departs from this Court's decision in *Agency for Int'l Dev.* v. *AOSI*, which held that the government may not condition participation in a government program on speech outside that program. 570 U.S. 205, 218-221 (2013). Here, Philadelphia admits that it has "nothing to do" with home studies. Pet.App.302a-303a.

Respondents also claim that this case is somehow different from other First Amendment cases because it involves a "public function." Phila. BIO 29. But neither Respondent shows their work. They never define "public function" nor cite to any persuasive authority explaining why that distinction is relevant here. This argument is particularly odd as CSS has engaged in this work longer than Philadelphia. And the City's own contract states that CSS "shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City." C.A. J.A. 1103.

But *even if* foster care were a public function (it is not), there is nothing talismanic about this. Education, public health, sanitation, and solemnization of marriages could all fall into Respondents' nebulous category, yet the First Amendment still applies. See, *e.g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017); *Espinoza* v. *Montana Dep't of Revenue,* 435 P.3d 603 (Mont. 2018); *Board of Cty.*

*Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996); *Obergefell*, 135 S. Ct. at 2594, 2602, 2607.

Philadelphia frets over "mayhem in government contracting" if CSS prevails. Phila. BIO 30. But as this Court has observed, there is a "long" (mayhem-free) "history of cooperation and interdependency between governments and charitable or religious organizations," based in accommodation. *Bowen*, 487 U.S. at 609.[2]

## III. This case presents an ideal vehicle for addressing the questions presented and resolving issues of national importance.

1. Respondents' attempts to manufacture factual obstacles to certiorari are unsuccessful. There is no factual dispute over the core issue before this Court: whether Philadelphia may shut out a Catholic foster care agency because it disagrees with the agency's sincere religious beliefs about marriage. There is no dispute that Philadelphia's actions would prevent CSS from engaging in its sincere, century-old religious exercise: providing foster care for Philadelphia's most vulnerable children. Nor is there any dispute that CSS's beliefs about marriage are the impetus for this hostility. Nor is there any dispute about whether any same-sex couples had ever even asked CSS for a home study.

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[2] *Contra* Respondents, CSS does not seek an "indefinite" contract, but merely the ability to participate without First Amendment violations. AOSI sought—and received—the same kind of remedy. See *AOSI*, 570 U.S. at 211-212. So did Trinity Lutheran. *Trinity Lutheran*, 137 S. Ct. at 2022.

Philadelphia points to other services CSS provides and suggests that CSS's foster care closure is speculative. Phila. BIO 22-23. Both arguments fail. There is no question that without the ability to contract with Philadelphia, CSS would soon be forced to close its foster care program; Respondents' only quibble is *how* soon. Pet.17-18. Nor is there any question that CSS would then be unable to serve Philadelphia children in this way. Pet.6.

Respondents' other objections fare no better. They object that the record is "stale" because the ongoing exclusion of CSS began under an annual contract that has expired. Intervenor BIO 21. This Court has reviewed government grant programs and rejected the argument that litigation-driven changes to those programs preclude review. See *AOSI*, 570 U.S. at 211-212, 219 (considering renewable grant program and rejecting claim that "the affiliate guidelines, established while this litigation was pending, save the program."). And Philadelphia limits *all* contracts to one-year terms absent express legislative authorization. Phila. City Charter § 2-309. By this logic, it is impossible to challenge any Philadelphia contract, as the dispute would always be "stale."

Philadelphia claims that the record below is insufficient. Far from it. The District Court held a three-day evidentiary hearing resulting in a 742-page transcript, and the Third Circuit received a 1,200-page record. This Court frequently hears First Amendment cases on preliminary injunction records, as in *NIFLA*, *Holt*, *Hobby Lobby*, and *AOSI*. Finally, Philadelphia claims that review would not be outcome-determinative because the Third Circuit "squarely held" Petitioners lost on the non-"likelihood of success" factors.

See Phila. BIO n.5. But the Third Circuit said the exact opposite, explaining that likelihood of success prong "alone defeats the request for a preliminary injunction." Pet.App.50a. And the Third Circuit's weighing of the other factors depended upon its finding of no countervailing constitutional violation. *Ibid.*

2. The Third Circuit's decision threatens all manner of religious groups, including hospitals, homeless shelters, and many others who partner with the government to serve vulnerable populations. These religious groups, and the government agencies who work with them, need guidance from this Court. The decision below goes further than those before, denying a *church* the ability to remain faithful to its sincere beliefs while serving those in need.

Even in the specific context of adoption and foster care, our country has already seen nearly a decade of closures of faith-based adoption programs. Pet.39. Without relief, CSS will be forced to close its program. Philadelphia does not dispute this fact, nor that it needs more foster parents. Nor does it, or can it, contest the history of religious agency shutdowns during a period of great need.

As the Court explained last Term, the Religion Clauses "aim to foster a society in which people of all beliefs can live together harmoniously." *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). The Third Circuit instead embraced a view of the Free Exercise Clause that mandates the closing of a century-old religious ministry to foster children. That divisive approach should not stand.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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