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


NICHOLAS M. CENTRELLA
CONRAD O'BRIEN PC
1500 Market Street
Suite 3900
Philadelphia, PA 19102
(215) 864-8098

MARK L. RIENZI
*Counsel of Record*
LORI H. WINDHAM
NICHOLAS R. REAVES
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., NW, Suite 700
Washington, DC 20036
mrienzi@becketlaw.org
(202) 955-0095

*Counsel for Petitioners*

## 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.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED....................................... i
PARTIES TO THE PROCEEDINGS ......................... ii
CORPORATE DISCLOSURE STATEMENT.......... iii
RELATED PROCEEDINGS .................................... iv
TABLE OF CONTENTS ......................................... v
TABLE OF AUTHORITIES....................................... x
PETITION FOR WRIT OF CERTIORARI ............... 1
OPINIONS BELOW ................................................. 3
JURISDICTION ...................................................... 4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ................................. 4
STATEMENT OF THE CASE ................................. 4
I. The foster care crisis and Catholic Social Services ........................................................ 4
A. CSS's long history serving at-risk children ...................................................... 5
B. Philadelphia's foster care system ............. 6
C. CSS's religious exercise...............................
II. Philadelphia targets CSS ............................... 8
III. Philadelphia's four post-hoc justifications.... 11
A. The first post-hoc justification: the Fair Practices Orginance................................. 11
B. The second post-hoc justification: Provision 3.21 .......................................... 12

C. The third post-hoc justification: new contract provision ........ 14

D. The fourth post-hoc justification: the City charter ........ 14

IV. The proceedings to date ........ 15

A. The district court's opinion and CSS's emergency stay motion ........ 15

B. The Third Circuit's opinion ........ 16

C. Current status of CSS's program ........ 17

REASONS FOR GRANTING THE PETITION ........ 18

I. The Third Circuit's decision deepens a circuit split over the requirements for proving a free exercise violation ........ 19

A. The Third and Ninth Circuits require free exercise plaintiffs to show that the government discriminates according to religious views ........ 20

B. The Second, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits consider evidence of non-religious exceptions and the history of the challenged policy ........ 22

C. The Third Circuit's approach directly conflicts with this Court's decisions in Smith, Lukumi, and Masterpiece ........ 29

II. *Smith* should be revisited ........ 31

III. The Third Circuit's decision upholds unconstitutional conditions on free speech and religious exercise, departing from this Court's decisions ........ 34

IV. This case raises exceptionally important questions ........ 38

CONCLUSION ........ 40

APPENDIX

Precedential Opinion, *Sharonell Fulton* v. *City of Philadelphia*, No. 18-2574 (3d Cir. Apr. 22, 2019) ........ 1a

Memorandum, *Sharonell Fulton* v. *City of Philadelphia*, No. 18-2075 (E.D. Pa. July 13, 2018) ........ 52a

Order, *Sharonell Fulton* v. *City of Philadelphia*, No. 18-2075 (E.D. Pa. July 13, 2018) ........ 133a

U.S. Constitution Amendment I ........ 135a

Declaration of James Amato, *Sharonell Fulton* v. *City of Philadelphia*, No. 18-2075 (E.D. Pa. June 4, 2018) ........ 136a

City of Philadelphia, Council of the City of Philadelphia, Resolution No. 180252 ........ 146a

Letter from Thomas Earle and Rue Landau, City of Philadelphia, Commission on Human Relations to Reverend John J. McIntyre, Board President of Catholic Social Services (Mar. 16, 2018) ........ 149a

Letter from Mark Rienzi, President, The Becket Fund for Religious Liberty, to Mr. Thomas Earle and Ms. Rue Landau, Philadelphia Commission on Human Relations (Apr. 18, 2018) ........ 153a

Letter from Valerie Robinson, Chair, Corporate and Tax Group, Law Department, City of Philadelphia, to Mark Rienzi, President, The Becket Fund for Religious Liberty (May 7, 2018) .......... 165a

David O'Reilly, *Chaput edict draws mixed reviews; Kenney calls it 'not Christian'*, Philadelphia Inquirer (July 6, 2016) .......... 173a

Patrick Kerksta, *Jim Kenney's Long War with the Archdiocese*, Philadelphia Magazine (July 9, 2016) .......... 177a

Pennsylvania Mentor, *Mother/Baby Host Home*, (June 4, 2018) .......... 183a

Julia Terruso, *Two foster agencies in Philly won't place kids with LGBTQ people*, Philadelphia Inquirer (Mar. 13, 2018) .......... 185a

Letter from Thomas Earle and Rue Landau, City of Philadelphia, Commission on Human Relations to Mark Rienzi, President, The Becket Fund for Religious Liberty (May 7, 2018) .......... 191a

Services, *Become a foster parent*, City of Philadelphia, (June 14, 2018) .......... 194a

Excerpts from Conformed Standard Amendment Agreement Between the City of Philadelphia, Department of Human Services and Catholic Social Services, Contract No. 16-20030-04 (Sept. 20, 2017) .......... 199a

Excerpts from Preliminary Injunction Hearing Transcript, *Sharonell Fulton* v. *City of Philadelphia*, No. 18-2075 (E.D. Pa. June 18, 2018)............................................211a

Excerpts from Preliminary Injunction Hearing Transcript, *Sharonell Fulton* v. *City of Philadelphia*, No. 18-2075 (E.D. Pa. June 19, 2018)........................................... 246a

Excerpts from Preliminary Injunction Hearing Transcript, *Sharonell Fulton* v. *City of Philadelphia*, No. 18-2075 (E.D. Pa. June 21, 2018)............................................281a

## TABLE OF AUTHORITIES

**Page(s)**

*Agency for Int'l Dev.* v. *AOSI*,
570 U.S. 205 (2013) .......................................... 35, 36

*American Legion* v. *American Humanist Ass'n*,
139 S. Ct. 2067 (2019) .......................................... 33

*Associated Gen. Contractors* v. *City of Jacksonville*,
508 U.S. 656 (1993) .......................................... 35

*Axson-Flynn* v. *Johnson*,
356 F.3d 1277 (10th Cir. 2004) .......................................... 24

*Cantwell* v. *Connecticut*,
310 U.S. 296 (1940) .......................................... 34-35

*Central Rabbinical Cong. of U.S. & Canada* v. *New York City Dep't of Health & Mental Hygiene*,
763 F.3d 183 (2d Cir. 2014) .......................................... 25-26

*CHILD, Inc.* v. *Min De Parle*,
212 F.3d 1084 (8th Cir. 2000) .......................................... 26

*Christian Legal Society* v. *Martinez*,
561 U.S. 661 (2010) .......................................... 15

*Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*,
508 U.S. 520 (1993) .......................................... *passim*

*Cutter* v. *Wilkinson*,
544 U.S. 709 (2005) .............................................. 32

*Department of Texas, Veterans of Foreign Wars of the U.S.* v. *Texas Lottery Comm'n*,
760 F.3d 427 (5th Cir. 2014) ........................... 36-37

*Employment Div.* v. *Smith*,
494 U.S. 872 (1990) ......................................*passim*

*Follett* v. *McCormick*,
321 U.S. 573 (1944) .............................................. 35

*Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*,
546 U.S. 418 (2006) .............................................. 32

*Grove City Coll.* v. *Bell*,
465 U.S. 555 (1984) .............................................. 37

*Kennedy* v. *Bremerton Sch. Dist.*,
139 S. Ct. 634 (2019) ....................................... 31-32

*Knox* v. *SEIU*,
567 U.S. 298 (2012) .............................................. 34

*Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*,
138 S. Ct. 1719 (2018) ..................................*passim*

*McDaniel* v. *Paty*,
435 U.S. 618 (1978) .............................................. 35

*Midrash Sephardi, Inc.* v. *Town of Surfside*,
366 F.3d 1214 (11th Cir. 2004) ............................ 24

*Murdock* v. *Pennsylvania*,
319 U.S. 105 (1943) .............................................. 35

*National Inst. of Family & Life Advocates* v. *Becerra*,
138 S. Ct. 2361 (2018) .......................................... 34

*Obergefell* v. *Hodges*,
135 S. Ct. 2584 (2015) ................................ 3, 38, 40

*Regan* v. *Taxation With Representation of Wash.*,
461 U.S. 540 (1983) .............................................. 37

*Rust* v. *Sullivan*,
500 U.S. 173 (1991) .........................................37-38

*Sherbert* v. *Verner*,
374 U.S. 398 (1963) .............................................. 35

*Shrum* v. *City of Coweta*,
449 F.3d 1132 (10th Cir. 2006) ............................ 27

*St. John's United Church of Christ* v. *City of Chicago*,
502 F.3d 616 (7th Cir. 2007) ................................ 26

*Stormans, Inc.* v. *Wiesman*,
136 S. Ct. 2433 (2016) .................................... 21, 22

*Stormans, Inc.* v. *Wiesman*,
794 F.3d 1064 (9th Cir. 2015) .................. 19, 21, 22

*Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017) .................................. 31, 35

*Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994) ............................................ 34

*United States* v. *American Library Ass'n*, 539 U.S. 194 (2003) ............................................ 37

*Ward* v. *Polite*, 667 F.3d 727 (6th Cir. 2012) .................... 23-24, 26

**Statutes**

55 Pa. Code § 3700.64.......................................... 7, 11

55 Pa. Code § 3700.69.......................................... 7, 11

28 U.S.C. 1254(1)....................................................... 4

Philadelphia Code § 9-1102....................................... 12

Philadelphia Code § 9-1106....................................... 11

**Other Authorities**

*Adoption Statistics,* Adoption Network Law Center ........................................................ 39

Emily Birnbaum and Maya Lora, *Opioid Crisis Sending Thousands of Children into Foster Care*, The Hill (June 20, 2018) ...................................................... 4

Patrick Kerksta, *Jim Kenney's Long War with the Archdiocese*, Philadelphia Magazine (July 9, 2016) ........................................ 9

Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1 (2016) .................................................. 32-33

Pat Loeb, *Backlog of 1,400 Adoption Cases Keeps Hopeful Philly Parents, Children Waiting,* Radio.com (February 19, 2019) ............................................. 17

Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990) ............................. 32

David O'Reilly, *Chaput Edict Draws Mixed Reviews; Kenney Calls it 'Not Christian'*, Philadelphia Inquirer (July 6, 2016) .......................................................... 9

Philadelphia Commission on Human Relations Regulation 2.3 ........................................ 9

Philadelphia Home Rule Charter § 8-200 ................ 14

Julia Terruso, *Philly Puts out 'Urgent' Call—300 Families Needed for Fostering*, Philadelphia Inquirer (March 18, 2018) .................................................... 4

U.S. Const. Amend. I .................................................. 4

## 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." *Stormans, 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" religion[66]; 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 outsized 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.

Respectfully submitted.

NICHOLAS M. CENTRELLA
CONRAD O'BRIEN PC
1500 Market Street
Suite 3900
Philadelphia, PA 19102
(215) 864-8098

MARK. L. RIENZI
*Counsel of Record*
LORI H. WINDHAM
NICHOLAS R. REAVES
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire
Ave., NW, Suite 700
Washington, DC 20036
mrienzi@becketlaw.org
(202) 955-0095

*Counsel for Petitioners*

JULY 2019