No. 18-2574

IN THE

United States Court of Appeals for the Third Circuit

SHARONELL FULTON, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, ET AL.,
Defendants-Appellees,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. 2:18-CV-02075-PBT (HON. PETRESE B. TUCKER, U.S.D.J.)

BRIEF OF *AMICUS CURIAE* JEWISH COALITION FOR RELIGIOUS LIBERTY SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

WILLIAM J. HAUN
Counsel of Record
SHEARMAN & STERLING LLP
401 9th Street NW #800
Washington, D.C. 20004
(202) 508-8056
william.haun@shearman.com

Date: September 4, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* hereby certifies that it has no parent corporation and that no publicly held corporations own 10% or more of its stock.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Jewish Coalition for Religious Liberty is an association of American Jews concerned with the current state of religious liberty jurisprudence. It aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith communities. Over several years, its founders have worked on *amicus* briefs in the Supreme Court of the United States and lower federal courts, submitted op-eds to prominent news outlets, and established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership, including resolutions from the Rabbinical Council of America.[1]

[1] All parties have consented to this brief's filing. Further, no party or party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than *Amicus Curiae* and its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Amicus is participating in this case because of the ways in which it threatens to undermine the "'scrupulous policy of the Constitution in guarding against a political interference with religious affairs.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184 (2012) (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), reprinted in 20 Records of the American Catholic Historical Society 63 (1909)). In particular, this case presents violations of both "Religion Clauses" within the First Amendment: The City of Philadelphia (the "City") violated the Establishment Clause by using its foster-care program to direct a "proper" understanding of the Catholic religion to Catholic Social Services ("Catholic"). And, it violated the Free Exercise Clause by determining, based on its own perspective, whether the City's restraints burden Catholic's religious exercise.

While *Amicus* does not share Catholic's "religious [and] philosophical premises" at issue here, *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), *Amicus* is convinced that "the [City of Philadelphia's] treatment of [Catholic's] case violated the [City's] duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Should the Court fail to conclude the same, ***all*** religious adherents will be

detrimentally affected—and the impact will extend to matters beyond those present in this case. This presents an especially acute threat to Jews, as they are a religious minority with many practices that government actors historically have misunderstood or misapplied. Indeed, the repeated errors in identifying First Amendment or statutory violations when a Jew's religious liberty is at stake give *Amicus* particular insight into the constitutional issues raised by this case, as well as the hazards of getting them wrong.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE IS VIOLATED WHEN GOVERNMENT ACTORS DIRECT A "PROPER" UNDERSTANDING OF RELIGIOUS DOCTRINE.

Although the district court neglected to apply any Establishment Clause analysis except the "endorsement" test rooted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court has recently disregarded *Lemon* and confirmed that the Establishment Clause "must be interpreted by reference to historical practices and understandings." *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal quotations omitted); *see also Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from the denial of certiorari) ("After *Town of Greece*," it "misstates the law" to apply the "endorsement" test without reference to historical practices and understandings); *New Doe Child #1 et al. v. United States of America, et al.*, No. 16-4440, Doc ID. 4698645, at 4 (8th Cir. Aug. 28, 2018) (finding that *Town of Greece* set "an unequivocal directive" that "historical

practices and understandings" "***must***" be applied when interpreting the Establishment Clause) (emphasis in original). Applying that original understanding, "the men who wrote the Religion Clauses of the First Amendment [understood] the 'establishment' of religion connoted," among other things, "active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970); *see also Hosanna-Tabor*, 565 U.S. at 184 (quoting remarks of James Madison to explain that the Establishment Clause "addressed the fear that" state power would be used to "establish a religion" and thereby "compel others to conform") (internal quotation marks and citation omitted).[2] Unfortunately here, the City's "involvement in [Catholic's] religious activity" is of the kind that the Establishment Clause was designed to prohibit.

a. IF UPHELD, THE CITY'S ACTIONS AGAINST CATHOLIC WOULD SET A CHILLING ESTABLISHMENT CLAUSE PRECEDENT.

One of the historical practices that gave rise to the Establishment Clause was government entities abusing "the power of the state . . . to narrow the acceptable range of clerical opinion within the Church [of England]." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I:*

[2] Even if—notwithstanding the Supreme Court's command in *Town of Greece*—the district court was somehow correct to ignore historical practices and apply only *Lemon* and the endorsement test, modern Establishment Clause doctrine still prohibits "the people's religions" being "subjected to the pressures of government for change," *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962). Nevertheless, that is exactly what the City did here.

Establishment of Religion, 44 WM. & MARY L. REV. 2105, 2133 (2003); *see also id.* at 2131 ("[T]he key element of establishment" was state "control" of religious groups) (hereinafter "McConnell"). Importantly for Catholic's case here, the "narrow[ing]" of "acceptable" views within the Church of England did not only occur on internal church matters—the state also used its power to limit acceptable ways in which the Church of England could provide public services and participate in the public square. As Professor McConnell put it:

> All churches must face the question of what they stand for and how big a tent they should erect to balance the dangers of sectarian narrowness against those of broad-minded emptiness. As a result of the English establishment, however, these ecclesiastical questions were subjected to the control of political authorities rather than left to the internal deliberations of clergy and laity in the Church.

Id. at 2133.

Here, the City similarly sought to "narrow the acceptable range of clerical opinion within the Church." *See id.* DHS Commissioner Figueora told Catholic that future participation in foster-care services required Catholic to jettison its religious beliefs about marriage and family. In particular, she told Catholic that future participation in foster care would only occur if Catholic followed "the teaching of Pope Francis" about marriage and family—as interpreted by her—and

not the teaching of the Archbishop of Philadelphia ("Archbishop Chaput"). Appx.0324, 0584.[3]

The City then compounded this condition by telling Catholic how to balance "the dangers of sectarian narrowness against those of broad-minded emptiness" when it came to Catholic's religious beliefs on marriage and family. *See* McConnell at 2133. It told Catholic that further participation in foster-care services would require Catholic reconciling its religious views on marriage and family with the fact that "times have changed," "attitudes have changed," and it is "not 100 years ago." Appx.0325; Appx.0583-84; *see also* Appx.0151. Worse still, the City's condescension was not limited to the DHS Commissioner. In response to the same *Philadelphia Inquirer* article that inspired the DHS Commissioner to bring Catholic in for questioning about its religious beliefs, *see* Appx.0843-44, the Philadelphia City Council issued a resolution condemning "discrimination that occurs under the guise of religious freedom." Appx.0838-39.[4] Moreover, just as

[3] By itself, this statement requires Catholic's foster-care program to adopt the City's understanding of the Pope's authority in relation to Archbishop Chaput (as opposed to the Catholic Church's understanding). Such an imposition violates *Hosanna-Tabor*'s prohibition on the government usurping the right of religious organizations to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission," *see* 565 U.S. at 196.

[4] Despite the City Council's insulting resolution, there can be no doubt that caring for the orphan is a manifestation of Catholic's sincere religious exercise. Indeed, Catholic itself testified that its foster-care services are part of the Catholic

in *Masterpiece Cakeshop*, there is no record evidence of the City disavowing its derogatory treatment toward Catholic. *See* 138 S. Ct. at 1729-30.

The City's statements—and the City's exclusion of Catholic from its foster-care program within minutes of the DHS Commissioner making them[5]—represent the classic, "dominant purpose of the [religious] establishment" that the First Amendment sought to expel from American life: "not to advance religious truth, but to control and harness religion in service of the state." McConnell at 2208. To be sure, the City would likely claim that it has no interest in directing religious doctrine—to Catholics or to anyone else. But this is of no moment. Religious establishments at the founding were not about "[r]eligious motives and the advancement of religion." *Id.* at 2207. Rather, the goal of government-established religion was to subjugate "the doctrines, personnel, and practices of the Church" to "the authority of the state. . . ." *Id.* at 2208.

Church's religious ministry. Appx.0305; *see also* Appx.1032 (caring for foster children "continues the work of Jesus").

[5] The City admitted it shut down Catholic's foster-care intake because of Catholic's "religious decision." Appx.0178-79, 0549-50. Nevertheless, the district court rejected the conclusion that the City's statements "show that DHS has targeted [Catholic] on religious grounds" because it also shut down a non-Catholic, Christian foster-care system that holds similar religious beliefs on marriage and family to Catholic's. *See* Dkt. No. 52 at 37. Even if this reasoning followed (it does not—in fact, it is an acknowledgment that the decision was based on a particular kind of religious belief about marriage and family), it has nothing to do with whether the decision against Catholic violates the Establishment Clause. The district court erred in failing to address that issue.

As the Supreme Court said just last year, it is "odious to our Constitution" to exclude a religious organization from a public benefit program because of the organization's religious character. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). The City's exclusion here is equally "odious" because it conditioned Catholic's participation in a public benefit program on Catholic ***changing*** its religious character.[6] *See Engel*, 370 U.S. at

[6] Indeed, the fact that Catholic's involvement in foster care is, itself, a product of religious motivation demonstrates the incoherence of Intervenors' argument that the City would be "advanc[ing] religion" (and thus violating the Establishment Clause) by accommodating Catholic's religious beliefs on marriage and family. *See* Dkt. No. 28-1 at 12. To Catholic, caring for the orphan ***is*** "advancing religion." *See supra* n.4. This presents a problem for Intervenors' reasoning: If a government program "advances religion" it violates the Establishment Clause, but religion is why some are even involved in the government program. The Intervenors' apparent solution to this quandary is to permit the judiciary, under the guise of the Establishment Clause, to pick-and-choose what religious motivations government-program-participants may advance (Care for the orphan? Good! Care for the orphan consistent with Catholic's other religious views on family life? Bad!). This unprincipled, case-by-case governance of acceptable religious motivations morphs the Establishment Clause into "a sword to justify repression of religion [and] its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Rather than avoid an "entanglement" with religion—a condition the Intervenors say they oppose—Intervenors would ensure the government, through the judiciary, is entangled with adjudicating "proper" religious motivations. *Cf. Freedom from Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1053-54 (7th Cir. 2018) (Easterbrook, J., concurring) ("judges have picked through a performance to choose among elements with religious significance. Preventing that sort of entanglement between the judiciary and religious expression is a main goal of the First Amendment—yet we are at it again, playing the role of producer to decide which material, representing what religious traditions, may appear in a choral performance.") (citation omitted).

429-30 (the Establishment Clause confirms "that the people's religions must not be subjected to the pressures of government for change."). Refusing to even consider this Establishment Clause concern, as the district court refused, should alarm all religious adherents—even those, like *Amicus*, who do not share Catholic's religious views on these issues.

b. JEWS WOULD BE PARTICULARLY THREATENED BY THE DISTRICT COURT'S REVISIONIST APPROACH TO THE ESTABLISHMENT CLAUSE.

The district court's failure to even consider that the City's statements raise an Establishment Clause issue poses a particular risk to Jews. Judaism does not have a central authority; there is no body that can resolve Jewish disputes or settle doctrinal questions. Different groups within Judaism (Sephardic, Ashkenazi, and Yemenite, for example) thus maintain different traditions—no one of them can authoritatively determine which speaks for the "true Judaism." If the Establishment Clause were understood to permit a government actor to fill the space of a central religious authority by deciding, as a condition of fulfilling a religious mission through social services, the "proper" understanding of Judaism, Jews that wound up on the so-called "wrong side of history" would be unable to exercise their faith-driven need to do good without suffering government compulsion to violate other aspects of their faith. Such a result is untenable in a free society.

Unfortunately, Jews are all-too-familiar with the predicament faced by Catholic here—given the diversity of Jewish practices and their minority status in broader society, Jews have frequently faced the specter of government actors directing "proper" understandings of their faith. For example:

- Many Jews observe a ritual called Kapprot prior to the high-holidays every year. Some Jews interpret this ritual to require the ceremonial use and slaughter of chickens. Other Jews believe that it can be fulfilled by donating money to charity. Animal rights activists have brought lawsuits trying to prevent Jews from performing this ritual through slaughtering chickens. *United Poultry Concerns v. Chabad of Irvine*, No. CV 16-01810-AB (GJSX), 2017 WL 2903263, at *6 (C.D. Cal. May 12, 2017). Were a government agency to decide that its animal-treatment regulations require it to tell Jews that "times have changed," it's not "a 100 years ago," and Jews need to accordingly stop celebrating Kapparot with chicken sacrifice, the government would violate the Establishment Clause.

- The Conservative and Reform movements within Judaism have taken relaxed views relating to Sabbath observance. Orthodox Jews, by contrast, believe that they are forbidden from carrying items outdoors on the Sabbath in the absence of an eruv (a ceremonial string that surrounds a neighborhood). This issue has been litigated, including within this Court. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 152 (3d Cir. 2002). There, a panel of this Court held that the Borough had violated the Free Exercise Clause by denying local Jews' requests to erect an eruv while allowing similar secular requests. Had the Borough defended its position by telling Orthodox Jews that "times have changed," it's not "a 100 years ago," and their antiquated ideas about Sabbath observance do not justify public accommodation, the Borough would have put a thumb on the scale against Orthodox Jewish practice.

- Jewish law includes a prohibition on shaving one's face, but Jews differ in how that prohibition applies. Some Jewish people, for example, consider it permissible to shave with an electric razor as opposed to a blade. Still other Jews consider electric razors impermissible, and there are various positions in between these poles. *See, e.g.*, Rabbi Moshe Heinemann, *Electric Shavers*, KASHRUS KURRENTS (Spring 2012), https://www.star-

k.org/articles/kashrus-kurrents/563/electric-shavers/. This practice too has become the subject of litigation. In *Litzman v. New York City Police Dep't*, No. 12 CIV. 4681 HB, 2013 WL 6049066, at *1 (S.D.N.Y. Nov. 15, 2013), a Jewish police officer won the right to wear a beard while serving. By contrast, it would have been impermissible for a government official to tell this officer that since "it's not a 100 years ago," he should adopt the position that it is permissible to shave with an electric razor.

- As a final example—and a potent one given that it demonstrates how some issues within Judaism can raise the same kind of public controversy as those raised by the beliefs at issue in Catholic's case—there is a hotly-contested debate within Judaism regarding end-of-life issues. Some Jews believe "death" should be defined as "brain dead," while others define it as "breathing death." *See, e.g.*, Rabbi Jason Weiner, *Death vs. Brain Death in Judaism*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/defining-death-in-jewish-law/. Accordingly, different Jewish doctors may require different conscience protections depending upon how they understand Jewish law on when a person can be declared dead. Were those conscience protections up to whether a government agent thought one Jewish view or another was properly with "the times," the government would—without violating the First Amendment—be able to force an objecting Jewish doctor to, for example, take organs from a "brain dead" patient whom he considered still alive. Thankfully, as *Amicus* has demonstrated, that is not the case.

In sum, while "[t]he interest of society in the enforcement of [] discrimination statutes is undoubtedly important[,]" "so too is the interest of religious groups in choosing" how to "preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196. Our Constitution contains an Establishment Clause partly because of past government efforts to direct how religious groups should carry out public ministry. Preserving the Establishment Clause's prohibition on such efforts is important for everyone—but it is especially important for members of a minority religion that lack a central

interpretive authority (and are thus especially susceptible to the government trying to be one), like Judaism. Acknowledging the Establishment Clause violation raised by the City's actions here is therefore critical for the protection of minority faiths.

II. THE FREE EXERCISE CLAUSE REQUIRES THAT GOVERNMENT ACTORS CREDIT A RELIGIOUS CLAIMANT'S SINCERE DETERMINATIONS AS TO WHEN OR HOW A GOVERNMENT RESTRAINT CONSTITUTES A RELIGIOUS BURDEN.

Just last term the Supreme Court restated "that government has no role in deciding or even suggesting whether the religious ground for [an objector's] conscience-based objection is legitimate or illegitimate." *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *see also Emp't Div.. Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) ("[I]t is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [religious] creeds.") (internal quotation marks and citation omitted). Nevertheless here, the City did exactly that. To the DHS Commissioner, Catholic's beliefs are not actually burdened by the City's new foster-care requirements; Catholic simply misunderstands its own beliefs. If Catholic would just follow "the teachings of Pope Francis" and not Archbishop Chaput, DHS says, Catholic would realize that its religious beliefs are not burdened. Appx.0324, 0584.

Unfortunately, Jews are not strangers to such unconstitutional refrains. Indeed, Justice Alito shed light on an analogous example when he dissented from

the denial of certiorari just two years ago in *Ben-Levi v. Brown*, 136 S. Ct. 930 (2016) (Alito, J., dissenting from the denial of certiorari). There, both the U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the Eastern District of North Carolina determined that a prison did not discriminate against a Jewish prisoner when it denied Jews—and only Jews—the right to engage in prison bible study. The district court found the prison's denial was intended to protect "the purity of the doctrinal message and teaching" of Judaism, which, according to the prison, "requires a quorum or the presence of a qualified teacher for worship or religious study." *See id.* at 933 (internal quotation marks and citations omitted). As neither a quorum nor a qualified teacher would be present at Ben-Levi's proposed bible study, the prison decided that his religious exercise was not burdened by its refusal. *See id.* As Justice Alito succinctly put it: "In essence, respondent's argument—which was accepted by the courts below—is that Ben-Levi's religious exercise was not burdened because he misunderstands his own religion. If Ben-Levi truly understood Judaism, respondent implies, he would recognize that his proposed study group was not consistent with Jewish practice and that respondent's refusal to authorize the group was in line with the tenets of that faith." *Id.* (internal quotation marks and citations omitted).

Justice Alito was right—the lower courts got it wrong in *Ben-Levi*. The requirements imagined by the prison in *Ben-Levi* do not exist in Judaism. What

probably happened is that the lower courts confused the obligation to have ten men present for certain parts of a prayer service and communal Torah reading with an obligation to have ten men simply to study the bible. But in any event, the courts got it wrong. Whether the mistake was understandable or made in good faith is also beside the point. Rather, the mistake highlights why government actors should not act as theologians—and why the First Amendment, properly understood, ensures they do not even attempt it.[7]

Here, the City is not the only government entity that purported to tell Catholic what would constitute a burden on its religious beliefs; the district court did so too, twice. In its memorandum opinion, the district court said that Catholic's religious exercise is not really burdened by the City's requirement that Catholic certify approval of same-sex relationships because—the district court ***presumed***—Catholic's religious beliefs would not prevent it from certifying a couple containing a divorcee. *See* Dkt. No. 52 at 47-48. In another instance, the

[7] This mistake was not a unique occurrence. For example, during a Fifth Circuit oral argument, one of the panel judges thought turning "on a light switch every day" was a prime example of an activity unlikely to constitute a substantial burden on a person's religious exercise. *See* Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. April 7, 2015). But to an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of EXODUS 35:3. Certainly, this judge did not intend to demean Orthodox Jews or belittle central Jewish practices. He simply, and understandably, was unaware of how some Jews understand the Commandment to guard the Sabbath. This only reinforces the wisdom of the First Amendment's prohibitions.

district court refuted the impropriety of the City telling Catholic to follow its understanding of Pope Francis's "teachings," and not Archbishop Chaput, because DHS just said to follow "the head of the Catholic Church." *See* Day 3 Hearing Tr. 213:19-20. But Catholic believes that the Catechism of the Catholic Church places the Archbishop as the head of the diocesan church, of which Catholic is a part, and the Pope's authority is to "confirm" the bishop's, not usurp the bishop's. *See Catechism of the Catholic Church* §§ 894-95. More importantly for purposes of the First Amendment, as Catholic's counsel stated in response, "the government does not get to be the one who figures out what Pope Francis means. [] Archbishop Chaput has a different view of what Pope Francis means than the Philly Inquirer does," and the government has no lawful basis to pick among those interpretations. *See* Day 3 Hearing Tr. 213:22-25.

Just as in *Ben-Levi*, both the City's and the district court's attempts to divine a proper interpretation of Catholic's religious beliefs are dangerous, even if they were made in good faith. For this reason, as Justice Alito put it in *Ben-Levi*, the Free Exercise Clause and related federal statutes require that government burdens on religious exercise not be determined by whether ***the government*** considers its constraints a burden on a claimant's religion, but whether the claimant's "ability to exercise ***his*** religious beliefs, as ***he*** understands them" has been burdened. 136 S. Ct. at 934 (emphasis in original); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862-63

(2015) (the fact that "not all Muslims believe that men must grow beards" is irrelevant to whether the religious exercise of the Sunni Muslim claimant was burdened—"the guarantee of the Free Exercise Clause . . . is 'not limited to beliefs which are shared by all of the members of a religious sect.'") (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981)). Accordingly, the City cannot deny Catholic a religious accommodation simply because it thinks "the teachings of Pope Francis" confirm that Catholic misunderstands its religious beliefs on marriage and family. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (noting that the plaintiff's conscientious objection represents "a difficult and important question of religion and moral philosophy" to which the state has "no business" interfering); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring) ("All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. [Plaintiffs] are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case."); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 19 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial

of rehearing en banc) ("Judicially second-guessing the correctness or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs is exactly what the Supreme Court in *Hobby Lobby* told us not to do. And *Hobby Lobby* was not the first Supreme Court case to say as much.") (internal citations omitted). [8]

Finally, the City not only ignored Catholic's understanding of its own beliefs, the City acted out of unconstitutional animus toward those beliefs. The City's statements do not exist in a vacuum—they accompany an ongoing refusal to disavow them, a corresponding decision to investigate only religious foster-care centers, and a decision to terminate only Catholic's foster-care contract. Taken together, this is ample basis to conclude the City discriminated against Catholic because of its religious beliefs.[9] In fact, similar facts triggered the same conclusion in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1731 ("For the reasons just

[8] This consistent prohibition is for good reason; "free exercise is essential in preserving [a religious claimant's] own dignity and in striving for a self-definition shaped by [the claimant's] religious precepts." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). Dismissing Catholic's longstanding, deeply-rooted religious beliefs on marriage and family with a blithe turn of phrase is as demeaning to Catholic as it is burdensome.

[9] Indeed, three justices of the Supreme Court stated they would have granted Catholic's application for injunctive relief pending appeal; a standard that required Catholic to show, *inter alia*, an indisputably clear right to relief. *See Sharonell Fulton, et al. v. City of Philadelphia, et. al.*, No. 18-2574, Application 18A118 (Aug. 30, 2018) (noting that "Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application.").

described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.").

The district court's contrary conclusion—and in particular, its cursory presumption that the City's statements did not affect the decision to terminate Catholic's contract—can only find support in the short shrift embraced by the *Masterpiece Cakeshop* ***dissent***. *See id.* at 1751 (Ginsburg, J., dissenting) ("Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins."). But ***presuming*** animus was not involved does not make it so. The First Amendment gives the benefit of the doubt to Americans enforcing their constitutionally-guaranteed rights, not to government agents who made comments strongly indicative of animus.

CONCLUSION

To be sure, "in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). But that is all the more reason to guard against the government inserting itself into how a church should

approach its doctrine—which raises an Establishment Clause problem—and the government telling a religious claimant what he should consider a religious burden—which raises a Free Exercise Clause problem. Because the City of Philadelphia heeded none of this constitutional caution, and in light of the threat such overreach poses to Jews and all minority faiths, *Amicus* supports Catholic's respectful request that this Court reverse the district court and enter a preliminary injunction against the City.

Respectfully submitted,

/s/William J. Haun
WILLIAM J. HAUN
Counsel of Record
SHEARMAN & STERLING LLP
401 9th Street NW #800
Washington, D.C. 20004
(202) 508-8056
william.haun@shearman.com

STATEMENT OF RELATED CASES

I certify that I know of no other related cases pending in this court.

/s/William J. Haun
WILLIAM J. HAUN

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4) and Fed. R. App. P. 32(a)(7)(B) because it contains 4,627 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

I further certify that the text of the brief filed with the Court by electronic filing is identical to that filed in hard copy.

I further certify that, prior to being electronically filed, the brief was scanned by Symantec Endpoint Protection software, Version 14.0, and found to be free from computer viruses.

/s/William J. Haun
WILLIAM J. HAUN

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/William J. Haun
WILLIAM J. HAUN