NO. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, et al.,

Petitioners,

v.

CITY OF PHILADELPHIA, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* NEW HOPE FAMILY SERVICES, INC. AND CATHOLIC CHARITIES WEST MICHIGAN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

New Hope Family Services, Inc. is a nonprofit Christian ministry in New York that has placed more than 1,000 children in loving adoptive homes since 1965. Embracing Scripture's call to care for orphans and widows, New Hope serves as a pregnancy resource center and adoption provider—connecting birthmothers with couples looking to adopt. New Hope does not receive a single dollar of public funds; private donors fund its entire ministry.

New Hope's main concern is finding permanent homes for children that best serve children's needs. As a Christian agency, New Hope believes placement with a married mother and father is in children's best interests. So New Hope respectfully refers unmarried and same-sex couples to one of the many other New York adoption providers. In turn, these couples have respected New Hope's beliefs.

Despite zero complaints, New York's Office of Child and Family Services demanded New Hope place children with unmarried and same-sex couples or shut down its adoption ministry. New Hope sued to stay open. But citing *Employment Division* v. *Smith*, the district court dismissed its complaint. New Hope's appeal of that decision is pending before the Second Circuit.[2] This Court's decision here could determine whether New Hope's ministry survives.

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[1] No party other than Amici and their counsel authored any part of this brief or gave money to fund its preparation or submission. Counsel for City Respondents filed their blanket consent with the Court. Counsel for all other parties gave written consent.

[2] ADF represents New Hope in the district court, Case No. 5:18-cv-1419 (N.D.N.Y.), and on appeal, Record No. 19-1715.

Catholic Charities West Michigan is a nonprofit religious organization affiliated with the Roman Catholic Diocese of Grand Rapids. As one of Michigan's oldest and largest providers, Catholic Charities oversees up to 300 children in foster care every day. In the past decade, it has placed close to 4,500 children in adoptive or foster homes.

Because of its Catholic faith and its beliefs about marriage and the family, Catholic Charities cannot recommend or facilitate placements with same-sex couples. While it routinely serves people in same-sex relationships through its other ministries, Catholic Charities respectfully refers these prospective foster and adoptive parents to other agencies in the area.

For decades, the State has contracted with Catholic Charities to provide foster-care and adoption services for children in state custody. Under these contracts, Catholic Charities receives state funding case-by-case when it accepts children referred by the State. These funds cover only some of Catholic Charities' expenses; private donations cover the rest.

In 2015, Michigan enacted conscience protections for faith-based providers. But in 2018, a new attorney general brokered a settlement in which the State agreed to force faith-based providers to recommend same-sex couples or else the State would cancel their contracts. Faced with that ultimatum, Catholic Charities sued in federal court.[3] If the State cancels its contracts, Catholic Charities will be forced to close its foster-care and public-adoption ministries, and children in need of loving homes will pay the price.

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[3] ADF represents Catholic Charities; the lawsuit remains pending in the district court. Case No. 2:19-cv-11661 (E.D. Mich.).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

There is a national shortage of loving homes for our most needy children: those who have been neglected or abused and are now in state custody. Yet government officials are driving away faith-based adoption providers because those officials dislike the providers' religious beliefs about marriage. Purging these providers does not help a single child find a forever home. To the contrary, a diverse array of providers recruits more families, and faith-based agencies do some of the best work finding homes for hard-to-place children and those in large sibling groups. Ignoring this, officials have persuaded courts to overlook these realities—and the free-exercise rights of religious providers—by hiding behind *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

Amici agree that this Court should overrule or narrow *Smith*. But unless the Court takes the additional step of reaffirming the strict-scrutiny principles in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), rogue courts will continue to misapply strict scrutiny to allow government officials to infringe free-exercise rights.

The Court should reaffirm that compelling state interests must be truly compelling to justify interfering with religious exercise. And they must be particularized to the state interests that an individual case actually implicates. At a minimum, the Court should reaffirm that when courts assess whether a law burdening religious exercise is generally applicable, courts must consider all analogous secular conduct. And compelled endorsement of certain relationships qualifies as compelled speech.

ARGUMENT

I. If the Court overrules *Smith*, it also should rein in courts that misapply strict scrutiny by defining state interests too broadly.

This Court granted review to reconsider *Employment Division* v. *Smith*. Pet. for Writ of Cert. at i, 18. *Smith* is a "regrettable departure from a doctrine that at least purported to value and protect religious liberty." James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412 (1992) (Ryan). And Petitioners are right that the Court that decided *Smith* "could not have envisioned" it would be used "to shut down a century-old ministry" over a dispute about issues of faith. Pet. for Writ of Cert. at 31–32.

The Court should overrule *Smith* and restore constitutional norms to free-exercise doctrine: courts should strike down laws that substantially burden religious exercise absent narrow tailoring to some compelling state interest that is actually advanced by applying the law in the manner in question. See *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (stating the pre-*Smith* test in these terms).

But overruling or narrowing *Smith* might not be enough to keep ministries like CSS, New Hope, and Catholic Charities open when officials conspire to close them—and when courts reach for reasons to oblige. Several courts already have tipped their hands, reading state interests as broadly as necessary to override First-Amendment rights. If the Court revisits *Smith* and revives strict scrutiny but fails to bring these courts in line, the result will not be a nationwide victory for religious liberty.

A. For decades, some courts have watered down strict scrutiny by invoking state interests that either are not compelling or do not apply to the facts at hand.

When constitutional rights are at stake, "[s]trict scrutiny must not be strict in theory but feeble in fact." *Fisher* v. *Univ. of Tex. at Austin*, 570 U.S. 297, 314 (2013). Otherwise, "judicial review [ceases] to be meaningful." *Ibid.* Unfortunately, some courts have drifted so far astray in their First-Amendment analyses that, until this Court corrects course, "strict" scrutiny in this context will remain anything but.

1. Following the Burger Court's lead, some courts have manipulated the test to reach desired outcomes.

Specifically, the Court should remedy two common problems: (1) some courts label far too many interests as "compelling," and (2) some courts define those interests at levels of generality that are far too high.

1. This Court has not always given clear guidance for deciding which state interests are compelling. Many of the Court's cases "suggest[ ] there is no bright-line standard for resolving what a compelling state interest looks like—no definitive criterion, no operational definition." Matthew D. Bunker, et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 364 (2011) (Bunker). For years, the test seemed "largely intuitive, a kind of 'know it when I see it' approach." Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 937 (1988) (Gottlieb) (quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

Some of that uncertainty has stemmed from a shift in the Court's caselaw. In the test's earliest days, the Court "was extremely reluctant to find government interests sufficiently compelling to satisfy strict scrutiny." Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law,* 21 LOY. L.A. L. REV. 449, 475 (1988) (Galloway). "[A]voiding major military disasters" and "protecting the nation from communist subversion" made the cut. *Ibid.* "But the list was short." *Ibid.*

The Burger Court, though, proved "surprisingly willing to characterize government interests as compelling." *Ibid.* "Government purposes which are admittedly legitimate and even substantial but seem far less urgent than avoiding major military catastrophes" suddenly qualified. *Ibid.* (providing examples). "Increasingly, the Justices add[ed] new interests to the list in a casual, off-hand manner suggesting . . . almost any significant government interest is sufficiently compelling to satisfy strict scrutiny." *Ibid.*

Worse, the Court mostly "failed to explain the basis for finding and deferring to [the] compelling governmental interests" that the Court identified. Gottlieb 937 (collecting cases in preceding discussion). "When no criteria for what constitutes a 'compelling interest' are provided, future courts are left with little guidance and ample room for their own improvisation." Bunker 378. The result in some jurisdictions has been "serious debasement of the compelling interest test, severely eroding the strictness of strict scrutiny." Galloway 476.

As the test itself began to break down, its ability to restrain results-based judging crumbled too. An ad hoc approach to "deciding what is a compelling interest[] inherently requires value choices by the [courts]." Erwin Chemerinsky, *Progressive and Conservative Constitutionalism As the United States Enters the 21st Century*, 67 L. & CONTEMP. PROBS. 53, 60 (2004). And hiding those value choices behind "such easy phrases as compelling state interest[s]," enables all but the most "unimaginative" judges to reach their desired results. *Ill. State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring) (cleaned up).

2. "Aside from [elevating] interests that seem less than compelling, courts also frequently describe compelling interests at a level of abstraction that tends to overstate the interest actually present in the case at hand." Bunker 369. "[I]t will frequently be crucial" to a case's outcome "how the government's interest is defined." Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1323 (2007). So by "fram[ing] broad compelling interests that are only marginally related to the actual interest in the case," courts stack the deck in favor of a certain outcome. Bunker 369.

Government should have to "do more than point to a vital public objective brooding overhead." *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 466 (2015) (Scalia, J., dissenting). Instead, it should have to make the "difficult" showing that a law "substantially advances the claimed objective." *Ibid.* Otherwise, "the compelling interest inquiry can be manipulated, depending on the level of generality at which the interests are framed." Bunker 371.

2. In free-exercise cases, some courts still cover for free-exercise violations by stretching state interests too far.

"Both techniques discussed above—lowering the bar for which interests are truly compelling, and disguising the real interest in the case by stating it at a high level of abstraction—pose dangers for robust First Amendment protection[s] . . . ." *Id.* at 372. "Strict scrutiny is not only not fatal, it isn't even strict when such techniques become commonplace." *Ibid.* And merely overturning *Smith* won't change that.

The free exercise of religion shares "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Ibid.*

In the "years preceding *Smith*," though, some courts refused to give free-exercise claims the priority they deserved. Ryan 1412. "[D]espite the apparent protection afforded claimants by the language of the compelling interest test," far too often courts sided "with the government when applying that test." *Ibid.* In these instances, courts "accepted less than compelling government interests and were reluctant to consider some significant state intrusions as burdens on religious practices." *Id.* at 1417. "The language of the compelling interest test, in other words, proved to be an easily surmountable obstacle" for courts that were "intent on rejecting free exercise claims . . . ." *Ibid.*

In the years after *Smith*, "RFRA, RLUIPA, and similar state standards" have provided a "more administrable rule." Opening Br. at 39. And most courts "have proven adept at resolving [these] claims," offering "greater protection for religious exercise." *Ibid.* Especially in federal courts, empirical data suggests "strict scrutiny" in these free-exercise cases "at least appears to be strict." Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 303 (2017) (Wolanek & Liu). In general, most courts have been "'up to the task' of determining when laws should trump free exercise rights." Opening Br. at 38 (quoting *O Centro*, 546 U.S. at 436).

But "important religious freedom cases [still] fall through the cracks." *Id.* at 40. And the victories some claimants have achieved "might not be durable." Wolanek & Liu 275. For one thing, "courts almost never say that an interest could never be compelling." *Id.* at 305. And "when courts invalidate interests only as applied, they concede that," in the right case, the interest would be "strong enough to overcome religious objections." *Ibid.* For another, some courts still find "compelling" interests too easily, elevating those that "represent something more like a desire to further policy goals." *Id.* at 306.[4] This "should terrify religious claimants who had otherwise planned to take refuge behind state RFRAs." *Id.* at 307.

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[4] See, *e.g.*, Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1049 (2012) (discussing a Michigan case in which the court rejected a RLUIPA claim based on "an extremely broad definition of 'compelling governmental interest'").

Relatedly, while federal courts have not seen the influx of "clash[es] between gay rights and religious liberty" that some predicted, these battles often are playing out in state court. Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 356 & n.5 (2018) (collecting cases). And these courts have proven willing to read state interests broadly to reject free-exercise claims. See, *e.g.*, *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203, 1234 (Wash. 2019), *cert. pending* (No. 19-333) (assuming state constitution's free-exercise provision "provides Stutzman with the strongest possible protections, subjecting the [state's public-accommodations law] to strict scrutiny," but holding that "her state constitutional challenge must still fail"); *Minton* v. *Dignity Health*, 252 Cal. Rptr. 3d 616, 625 (Cal. Ct. App. 2019), *cert. pending* (No. 19-1135) (holding that "any burden" California's public-accommodations law placed on a religious hospital's "exercise of religion [was] justified by California's compelling interest in ensuring full and equal access to medical treatment").[5]

For these courts, stretching state interests to reject free-exercise claims is nothing new. See, *e.g.*, *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 10 Cal. Rptr. 3d 283, 313–15 (Cal. 2004) (rejecting free-exercise claim under state constitution based on "compelling state interest" in eradicating "subtle forms of gender discrimination").

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[5] In *Dignity Health*, ADF represents amici Catholic Medical Association and the National Catholic Bioethics Center in support of the petitioner's petition for a writ of certiorari. In *Arlene's Flowers*, ADF represents the petitioner.

As the Washington Supreme Court recognized, "numerous other courts have heard religious free exercise challenges to [anti-discrimination] laws and upheld them under strict scrutiny." *Arlene's Flowers*, 441 P.3d at 1234 (collecting cases). Indeed, that court was "not aware of *any* case invalidating an antidiscrimination law under a free exercise strict scrutiny analysis." *Id.* at 1235 (emphasis added). It should not be this way.

B. *Sherbert* and *Yoder* announced a much stricter compelling-state-interest test for free-exercise cases.

Thomas Jefferson's Bill for the Establishment of Religious Freedom in Virginia is "among the most seminal" of the nation's "revolutionary-era documents and understandings of religious liberty." Vincent Martin Bonventre, *The Fall of Free Exercise: From 'No Law' to Compelling Interests to Any Law Otherwise Valid*, 70 ALB. L. REV. 1399, 1401 (2007). The Bill, which eventually became law, "recognized government's justified interference with religious liberty only within the narrowest confines." *Ibid.*

"Jefferson's formulation" is "central" to this Court's "understanding [of] the First Amendment's protection of religious liberty." *Id.* at 1402 (citing *Reynolds* v. *United States*, 98 U.S. 145, 162–64 (1878); *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 13 (1947)). And the Bill codified the founding-era belief that it was "enough for the rightful purposes of civil government for its officers to interfere when [religious] principles break out into *overt acts against peace and good order*." *Id.* at 1401–02 (emphasis added) (quoting SAUL K. PADOVER, JEFFERSON 81 (1980)).

In Virginia, then, "[o]nly 'overt acts,' and only when they disturbed the 'peace and good order,' would allow abridgement of the guaranteed freedom of religion." *Id.* at 1402. And "state constitutions enacted at the time of the Revolution" were equally strict. *Ibid.* "Public disturbances, threats to safety, and other such conduct inconsistent with peaceful society were alone identified" as acceptable limits on free exercise. *Ibid.*

Sherbert echoes these founding-era documents. There, the Court held the state could not pressure a Seventh-day Adventist "to abandon [her] religious convictions" by denying her unemployment benefits based on her unwillingness to work on Saturdays. *Sherbert*, 374 U.S. at 410. Surveying earlier cases, the Court noted that it had rejected free-exercise challenges to "regulation of certain *overt acts* prompted by religious beliefs or principles." *Id.* at 403 (emphasis added). But the "conduct or actions so regulated [had] invariably posed some *substantial threat* to *public safety, peace or order*." *Ibid.* (emphasis added). Sherbert's "conscientious objection to Saturday work" posed no such threat. *Ibid.*

In determining "whether some compelling state interest" justified "the substantial infringement" on the plaintiff's free exercise, the Court rightly declared that "no showing merely of a rational relationship to some colorable state interest would suffice." *Id.* at 406. Instead, "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" *Ibid.* (quoting *Thomas*, 323 U.S. at 530) (cleaned up). And "[n]o such abuse or danger [had] been advanced." *Id.* at 407.

"*Sherbert* was the first clear, succinct, and complete statement of what constitutional lawyers have come to mean by the phrase strict scrutiny." Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 380 (2006) (cleaned up). So from the beginning, the Court was clear: only "paramount interest[s]" would qualify as "compelling," and "only the gravest abuses" would justify government interference with the free exercise of religion. *Sherbert*, 374 U.S. at 406.

This Court in *Yoder* went further. The Court began by reaffirming "that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. In *Yoder*, the state had a "high" and even "paramount responsibility" for the "education of its citizens." *Id.* at 213. Still, though, the Court rejected the state's "sweeping claim" that "its interest in its system of compulsory education [was] so compelling that even the established religious practices of the Amish must give way." *Id.* at 221. Despite the claim's "validity in the generality of cases," the Court had to "searchingly examine" the state's asserted interests "and the impediment to those objectives that would flow from recognizing the claimed Amish exemption." *Ibid.*

Thus, it was not enough for the state to identify even compelling interests if they applied only at a high level of generality. Instead, "it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." *Id.* at 236. Since the state failed to do that, the plaintiffs' free-exercise claims prevailed.

Much more recently, this Court observed that the "compelling interest test" enunciated in *Sherbert* and *Yoder* requires courts to "look[ ] beyond broadly formulated interests" and "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. Under that test, the "invocation" of "general interests, standing alone, is not enough." *Id.* at 438.

Taken together, *Sherbert* and *Yoder* provide the tools to stop government discrimination against faith-based adoption and foster-care providers while ending results-based manipulation of the compelling-state-interest test: only "paramount interest[s]" of the "highest order" involving some "substantial threat to public safety, peace or order" qualify as "compelling." *Sherbert*, 374 U.S. at 403, 406; *Yoder*, 406 U.S. at 215. And the government must show with "particularity" how an exception for individual plaintiffs would thwart those interests. *Yoder*, 406 U.S. at 236. The City of Philadelphia's excuses for kicking Catholic Social Services to the curb do not come close to satisfying those standards.

C. No compelling state interest justifies forcing CSS, New Hope, and Catholic Charities to violate their religious beliefs as the price for serving children.

The City could not make that showing here, nor could the State of New York in New Hope's case, nor the State of Michigan in Catholic Charities'. In all three, the only relevant *compelling* state interest is the government's need to find as many stable homes as possible for the children in its care. That interest is hurt—not helped—by forcing these agencies to shut down their ministries.

Catholic Social Services has been recruiting and working with foster-care families to care for children in the Philadelphia area for more than a century—dating to at least 1917. Pet. for Writ of Cert. at 6. As the district court acknowledged, CSS's foster-care work "has benefited Philadelphia's children in immeasurable ways." Pet.App.52a. "On an average day, Catholic Social Services serves more than 120 children in foster care, and it supervises around 100 different foster homes." Pet.App.137a. "Of the select agencies in the City who [have] obtained additional competitive contracts to serve foster children and families, the City ranked CSS as the second highest of all agencies." Pet.App.137a–38a. Nothing in the record suggests that CSS has ever placed or cared for a child in a manner that was inconsistent with the child's best interests.

Catholic Charities West Michigan's situation is similar. As one of Michigan's oldest and largest providers, it has close to 300 employees overseeing up to 300 children in foster care every day. Decl. of Chris Slater at 4, *Catholic Charities W. Mich.* v. *Mich. Dep't of Health & Human Servs.*, No. 2:19-cv-11661 (E.D. Mich. June 26, 2019), ECF No. 11-1. Catholic Charities "serves approximately 450 foster children annually," and it has more than 100 licensed foster homes. *Ibid.* "Because of its distinctly religious nature and beliefs, Catholic Charities is particularly successful at recruiting foster families and adoptive parents that the State and secular providers do not, and could not, recruit." *Id.* at 4–5. In the past decade, it has placed close to 4,500 children in adoptive or foster homes. *Id.* at 4.

New Hope Family Services' combined-pregnancy-resource-center-adoption-provider approach sets it apart from other agencies. J.A., Vol. I, at JA18–21, *New Hope Family Servs., Inc.* v. *Poole*, No. 19-1715 (2d Cir. Aug. 15, 2019), ECF No. 63-1. Since its founding, New Hope has placed more than 1,000 children in loving adoptive homes. *Id.* at JA9–10. State officials have never argued "that New Hope is not acting in the best interests of the children when placing [them] for adoption." J.A., Vol. II, at JA281, *New Hope*, No. 19-1715, ECF No. 64. And the district court in *New Hope* commended the "fruitful relationship" New Hope and New York shared for many years, "a relationship that has benefitted New York's children in immeasurable ways." *Ibid.*

In all three cases, then, the alleged problem has nothing to do with finding the best homes for children. Instead, the government mainly asserts a compelling interest in serving certain adults. The problem with that argument is two-fold: first, it fails to identify a truly compelling interest as defined in *Sherbert* and *Yoder*; and second, it fails to state the interest in terms particularized to the facts of each case. Under a properly calibrated compelling-state-interest test, the government's arguments fall far short.

For example, the court below rejected CSS's state-RFRA arguments, holding that "the City's actions appear to survive strict scrutiny." Pet.App.49a. The interest the court identified, though, was not child-focused. Instead, the court found the City has a compelling interest in "eradicating discrimination," Pet.App.47a (cleaned up), ignoring that CSS "serves all children in need, regardless of religion, race, sex, or sexual orientation," Opening Br. at 5.

To be sure, this Court has held that a state has a "compelling interest in eradicating discrimination against its female citizens." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984). But that decision must be read through the lens of *O Centro*, which clarified that the compelling-state-interest test "contemplate[s] an inquiry more focused than [a] categorical approach." 546 U.S. at 430. Instead, the state must satisfy the test "through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430–31 (cleaned up). The City cannot make that showing here.

The Court also qualified its holding in *Roberts*, explaining that "*invidious* discrimination in the distribution of *publicly available goods, services, and other advantages* cause[s] unique evils that government has a compelling interest to prevent." 468 U.S. at 628 (emphasis added). CSS's child-placement policy is not "invidious." *Ibid.* It is based on CSS's religious beliefs about the best family structures for children. And adoption and foster-care services—with their inherently subjective judgments—are not analogous to the "distribution of publicly available goods, services, and other advantages." *Ibid.* But the Third Circuit considered none of that, instead using the phrase "eradicating discrimination" as a shortcut to reach its desired result. *Cf.* Bunker 369 (noting that "courts sometimes appear to offer phrases like 'protecting children' as a talisman against deep thought").

The Third Circuit also failed—even refused—to state the City's interest in terms particularized to this case. It made no difference that shutting down CSS's ministry would "not increase the number of foster agencies willing to work with same-sex couples." Pet.App.48a. Nor did it matter whether allowing CSS to stay open would discourage same-sex couples from becoming foster parents (it would not). Pet.App.49a. Nor that "no same-sex couples [had] ever—so far as the record reflect[ed]—approached [CSS] seeking to become foster parents." *Ibid.* The lack of actual harm was "not surprising." *Ibid.* And CSS's arguments "miss[ed] the mark" and were "beside the point." Pet.App.48a–49a. The "*mere existence* of CSS's discriminatory policy [was] enough to offend the City's compelling interest in anti-discrimination." Pet.App.49a (emphasis added). That analysis barely even qualifies as "scrutiny," much less "strict."

The closest the court came to stating the City's interests in more particularized terms came in a single, revealing line: "The government's interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do." Pet.App.48a–49a. In other words, the only "state interest" the City is pursuing is its desire to eliminate agencies who hold religious beliefs like CSS's. No wonder the City's actions—prompted by the *Philadelphia Inquirer*—felt more like a search-and-destroy mission. If *that* is a "compelling" interest, agencies like CSS (and New Hope and Catholic Charities) don't stand a chance.

The district court's analysis in New Hope's case proves the same point. That court was equally quick to dismiss New Hope's claim that the state had violated its First Amendment rights by forcing it to place children with same-sex and unmarried couples or else shut down. After applying *Smith* and the Third Circuit's decision in this case to dismiss New Hope's free-exercise claims, the court held in cursory fashion that "the state's compelling interest in prohibiting the discrimination at issue here far exceeds any harm to New Hope's expressive association." *New Hope Family Servs., Inc.* v. *Poole*, 387 F. Supp. 3d 194, 219–20 (N.D.N.Y. 2019).

The court offered no analysis to support that claim. *Ibid.* Nor did the court care that New Hope refers same-sex and unmarried couples to other providers and, as a result, has "never denied an unmarried couple or same-sex couple's application." *Id.* at 204. Nor did the court consider the lack of evidence that New Hope's referral policy had ever prevented any unmarried or same-sex couples from adopting or receiving adoption services—which explains the lack of any complaints from these couples "about how New Hope handled their inquiry." J.A., Vol. I, at JA32, *New Hope*, No. 19-1715, ECF No. 63-1. Again, all that mattered was the state's interest "in minimizing—to zero—"agencies with religious beliefs like New Hope's. Pet.App.49a. That "interest" means eliminating faith-based providers' freedom to hold certain religious beliefs while continuing to exercise their religion by serving children—a clear violation of the Free Exercise Clause.

This case and New Hope's both prove a simple truth: requiring courts to apply strict scrutiny to all free-exercise claims will not meaningfully protect providers like CSS, New Hope, and Catholic Charities if courts remain free to treat that analysis as "strict in theory but feeble in fact." *Fisher*, 570 U.S. at 314. An analysis that accepts every government reason for forcing people to violate their religious beliefs is just as bad as a regime where religious claimants always lose under *Smith*.

The results would be different if courts defined compelling state interests more narrowly and in terms of the particular harms to those interests actually implicated—if they performed scrutiny that is truly strict. This Court can ensure that here by reaffirming the standards the Court enunciated in *Sherbert*, *Yoder*, and *O Centro*. Or the Court could go further by giving lower courts more guidance "to explicate more fully what kinds of governmental interests are truly compelling." Bunker 378–79. One group of scholars suggests a "rubric [that] could include these considerations: (1) the gravity of the harm contemplated, (2) the concreteness of the harm contemplated, and (3) the probability of the occurrence of that harm." *Id.* at 379.

This Court once held that "any attempt to restrict [First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas*, 323 U.S. at 530. That is still true, and this Court should say so.

II. If the Court does not overrule *Smith*, it should tell courts to stop reading *Smith*'s general-applicability test too narrowly.

A. *Smith*, *Lukumi*, and *Masterpiece* make clear that the proper scope of the inquiry includes *all analogous* secular conduct.

Even under *Smith*, Philadelphia's exception-riddled "anti-discrimination" regime should lose. In *Smith*, this Court noted that its cases *at least* mean "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." 494 U.S. at 884 (cleaned up). That system is not "generally applicable." *Ibid.*

In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, the Court clarified that laws are "generally applicable" only if they "prohibit nonreligious conduct that endangers [state] interests in a *similar* or greater degree than" regulated religious conduct. 508 U.S. 520, 543 (1993) (emphasis added). So exceptions for "hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia" rendered a ban on animal sacrifices not-generally-applicable. *Id.* at 537, 543–46. So, too, did the ordinance's failure to regulate restaurants "[d]espite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants." *Id.* at 544–45.

Killing animals and disposing of garbage are not exactly the same. But they both "cause[] substantial health risks," which the city "addresse[d] only when [resulting] from religious exercise." *Id.* at 545. "This precise evil is what the requirement of general applicability is designed to prevent." *Id.* at 545–46.

More recently in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, this Court placed great weight on Colorado's "disparate consideration of Phillips' case compared to the cases of [three] other bakers." 138 S. Ct. 1719, 1732 (2018). Those bakers had refused "to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text." *Id.* at 1730. Yet Colorado's Civil Rights Division found they had acted lawfully. *Ibid.*

The conduct was not exactly the same—Colorado argued Phillips discriminated based on sexual orientation; the other bakers discriminated based on religion and viewpoint. *Ibid.* But that made no difference to this Court. The lower court distinguished the other bakers because they had balked at "the offensive nature of the requested message." *Id.* at 1731. But distinguishing "based on the government's own assessment of offensiveness" is wrong. *Ibid.* It is *not* "the role of the State or its officials to prescribe what shall be offensive." *Ibid.*

As Professors Laycock and Collis have summarized, "[t]he constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22–23 (2016). "The secular conduct may be quite similar to the prohibited religious conduct, as in killing animals for religious and secular reasons." *Id.* at 11. "Or the conduct itself may be substantially different," as in "disposal of restaurant garbage." *Ibid.* "[I]t is still analogous if it harms or undermines the same or similar government interests." *Ibid.*

B. The court below and the district court in New Hope's case examined only the *exact same* secular conduct, allowing them to distinguish various secular exceptions.

As Petitioners show, the City's policies "are riddled with exemptions." Opening Br. at 23. The City "*requires* private agencies to consider marital status, familial status, and disability, and they may decline to certify a foster family on that basis." *Id.* at 28. The City also allows referrals "for reasons related to a child's disability or a parent's race, such as for Native American children and parents." *Ibid.* And the City itself "considers disability and even race when making foster care placements." *Ibid.*

According to the court below, though, the question was whether the City "treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs." Pet.App.32a. Stating it that way, the court brushed aside CSS's arguments, finding "differences between CSS's behavior and the City's consideration of race or disability when placing a foster child." Pet.App.36a. "Most significantly, unlike CSS, [the City] never refuses to work with individuals because of their membership in a protected class. Instead it seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Ibid.*

The court's reasoning is not entirely clear, but it appears to believe the City's policies are generally applicable because the City tolerates discrimination case-by-case only, and because the City approves of the motives behind that discrimination. Both are distinctions without a difference.

As to the case-by-case distinction, that proves only that adoption and foster care lend themselves to "individualized governmental assessment of the reasons for the relevant conduct." *Smith*, 494 U.S. at 884. Thus, the City cannot allow some exceptions while refusing "to extend that system to cases of religious hardship without compelling reason." *Ibid.* (cleaned up). And if the City's interest is in "eradicating discrimination" and "minimizing—to zero—the number" of providers that consider protected characteristics, Pet.App.47a–49a, allowing *every provider* to discriminate, even case-by-case, "endangers [those] interests in a similar or greater degree than" allowing a single religious provider to have a referral policy for same-sex couples, *Lukumi*, 508 U.S. at 543. This is especially true considering that "no same-sex couples have ever—so far as the record reflects—approached [CSS] seeking to become foster parents." Pet.App.49a. Compared to the "mere existence" of CSS's policy, *ibid.*, the actual discrimination the City allows proves the City's policies are not generally applicable.

The second asserted distinction fares no better. The City says it discriminates based on a prospective foster parent's race and disability "to find the best fit for each child." Pet.App.36a. To the City, that makes its discrimination okay. *Ibid.* But CSS's religiously motivated decision not to place foster children with same-sex couples is *not okay* even though CSS, too, is "seek[ing] to find the best fit for each child," a fact no one disputes. *Ibid.* The City "cannot have it both ways." *Masterpiece*, 138 S. Ct. at 1737 (Gorsuch, J., concurring). "This precise evil is what the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545–46.

In New Hope's case, the district court followed the same blueprint. New York statutes and regulations form a highly tailored regime with a host of exceptions that allow—and sometimes require—discrimination throughout the adoption process:

Recruitment. One regulation requires agencies to focus recruitment on communities with "ethnic, racial, religious or cultural characteristics similar to those of the children . . . composing the largest number" of children waiting to be adopted. N.Y. COMP. CODES R. & REGS. tit. 18, § 421.10(a).

Adoption studies. Another regulation requires agencies to give "first priority" in the adoption-study process to "Indians seeking to adopt Indian children." N.Y. COMP. CODES R. & REGS. tit. 18, § 421.13(a)(1).

Placement. A statute instructs providers to place children with people and agencies who share the child's religious faith. N.Y. SOC. SERV. LAW § 373(1), (2) (2018). A regulation "requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as that of the child." N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(c) (citing N.Y. SOC. SERV. LAW § 373(3)). And "where practicable" and "consistent with the best interests of the child," New York law requires following the birthmother's "religious wishes." N.Y. SOC. SERV. LAW § 373(7) (2018).

Other regulations instruct agencies to make placement decisions based on adoptive parents' "age," "[r]ace, color or national origin," N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(d)(1), (2), when any of these otherwise protected characteristics "relate to the specific needs of an individual child," *ibid.*

New York law even discriminates based on certain aspects of a prospective adoptive parent's *marital status*, preventing certain married persons from adopting individually if they are living apart from their spouse. N.Y. DOM. REL. LAW § 110 (2009).

Despite these exceptions, the district court found the challenged anti-discrimination provision to be generally applicable based on "significant differences" between state-sanctioned forms of discrimination and New Hope's policy. *New Hope*, 387 F. Supp. 3d at 215. "Most significantly, unlike New Hope's practice, the cited provisions do not permit authorized agencies to refuse to work with individuals because of their membership in a protected class. Instead, the cited provisions are *clearly intended to find the best fit for each child*, 'taking the whole of that child's life and circumstances into account.'" *Ibid.* (emphasis added) (quoting the Third Circuit's decision below).

Like Philadelphia, New York no doubt believes its approved forms of discrimination are "intended to find the best fit for each child." *Ibid.* But New Hope equally believes—informed by its faith—that its referral policy allows it to place children in the "ideal and healthiest family structure." J.A. Vol. I, at JA17–18, *New Hope*, No. 19-1715, ECF No. 63-1. Even "in pursuit of legitimate interests," the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Thus, courts cannot ignore analogous, unregulated secular conduct (like non-invidious placement decisions based, in part, on protected characteristics) just because the state likes its discrimination better.

III. Given the equal importance of CSS's Free Exercise and Free Speech claims, the Court should also hold that forcing CSS to recommend certain couples forces CSS to speak.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977). In the court below, Respondents argued they are not requiring CSS to speak because their contract "simply asks CSS . . . to certify as foster parents any applicants who are qualified under the governing state law criteria." Br. of Appellees at 53, *Fulton* v. *City of Philadelphia*, 320 F. Supp. 3d 661 (E.D. Pa. 2018) (No. 18-2075). Amici have seen that argument before. And this Court should reject it.

A. Religious providers speak their beliefs when they counsel parents and place children in adoptive and foster homes.

CSS's experience in Philadelphia, New Hope's experience in New York, and Catholic Charities' experience in Michigan all confirm the same thing: speech is an inherent and integral part of providing adoption and foster-care services. And for agencies to best serve their clients—parents and children alike—they must be allowed to choose what they say.

In Philadelphia, "[p]rospective foster parents must undergo a thorough evaluation and receive a written agency opinion assessing their home and family life." Opening Br. at 6. Pennsylvania law requires agencies like CSS to perform home studies that are "deeply personal," culminating in CSS's "decision to approve, disapprove or provisionally approve the foster family." *Id.* at 7–8 (quoting 55 Pa. Code § 3700.69).

"Home study certifications signify an agency's approval of a family, and CSS understands the home studies as an endorsement of the relationships of those living in the home." *Id.* at 8. "Accordingly, CSS cannot certify relationships during a home study that are inconsistent with its Catholic beliefs," meaning that CSS "cannot provide foster care certifications for unmarried couples, regardless of sexual orientation, nor for same-sex married couples." *Id.* at 9.

New Hope's experience in New York is similar. During the home-study process, providers "use their engagement and assessment skills" to make multiple subjective assessments about prospective parents, including about family history and relationships, traditions and "religion/spirituality," marriage and dating history, and the "[i]mpact of life experiences on current functioning." *Household Composition and Relationships Form*, OCFS Forms of Adoption, at 4, perma.cc/BL34-8F79.

"At the completion of the applicant's home study," agencies "must complete a *Final Assessment and Determination*." *Foster/Adoptive Home Certification or Approval Process*, OCFS Administrative Directive, at 7 (Apr. 16, 2018), perma.cc/GNW8-CAZ5. If the agency "discontinue[s] a home study" or "denies certification or approval," it "must advise the applicant in writing of the reasons for [its] decision." *Id*. at 12. If an agency approves an applicant, it must "prepare a written summary of [its] findings" to be used "for making placement decisions about children," and the agency also must "provide a dated written notice of approval to [the] applicant." N.Y. COMP. CODES R. & REGS. tit. 18, § 421.15(e)(1), (6).

As a Christian agency, New Hope conveys to its clients "a system of values about life, marriage, family and sexuality." *Id.* at JA53. New Hope believes and conveys that the "biblical model for the family as set out in the Bible—one man married to one woman for life for their mutual benefit and the benefit of their children—is the ideal and healthiest family structure." *Id.* at JA17–18. Based on these beliefs, New Hope cannot recommend unmarried or same-sex couples as adoptive parents. *Id.* at JA32, JA40, JA53.

Similarly, Catholic Charities "evaluates candidate foster and adoptive parents, and [it] must provide *written assessments* and *recommendations* to the State about whether particular candidate parents should be approved, and whether it is in the best interests of particular children to be placed in particular homes." Br. in Supp. of Mot. for Prelim. Inj. at 20, *Catholic Charities*, No. 2:19-cv-11661 (E.D. Mich. June 26, 2019), ECF No. 11.

In practice then, Michigan's recently adopted policies would "force Catholic Charities to affirm, in official submissions to the State, that placements with same-sex couples *will* be in the best interests of children, when in fact Catholic Charities' religious beliefs about human nature, marriage, and family teach it that those placements *will not* be in the best interests of children." *Ibid.* Like New Hope, Catholic Charities does not wish to speak a message it does not believe, especially when finding the best homes for children is at stake.

B. The Human Rights Campaign agrees that providers speak; it even writes the script.

The Human Rights Campaign describes itself as "the largest national lesbian, gay, bisexual, transgender and queer civil rights organization." *HRC Story / Our Values*, Human Rights Campaign, perma.cc/WEV9-T3JD. In its own words, HRC's "job" is to "hurry up history." *Ibid.* As Petitioners note in their brief, "[t]hree foster care and adoption agencies in Philadelphia" have obtained HRC's "Seal of Approval." Opening Br. at 7. And the City itself recently boasted a "perfect score on the Human Rights Campaign's Municipal Equality Index for the eighth year in a row." Lauren Cox, *2019: LGBT Affairs Year in Review*, Phila. Office of LGBT Affairs (Dec. 22, 2019), perma.cc/W9TH-GXQ9.

"HRC's All Children—All Families project promotes LGBTQ cultural competency among child welfare agencies . . . ." *Promising Practices for Serving Transgender & Non-Binary Foster and Adoptive Parents*, All Children All Families, at 4 (2017), perma.cc/K5VS-N6CB (*Promising Practices*). The project includes "[t]ools to support child welfare agencies implementing" HRC's "best practices." *Ibid.*

These "tools" offer a window into the future for religious agencies who choose to sacrifice their religious beliefs so they can keep serving children. Specifically, they reveal how far HRC believes agencies need to conform their speech to move "beyond non-discrimination and tak[e] concrete action to send the explicit message 'You are welcome here'" to LGBTQ couples and families. *Benchmarks of LGBTQ Inclusion*, All Children All Families, at 2, perma.cc/3XUD-TRQ8.

For example, HRC's "Benchmarks of LGBTQ Inclusion" instruct that all "agency-controlled forms and internal documents use LGBTQ-inclusive language." *Ibid.* (providing examples). "If needed changes are identified," HRC offers "model language." *All Children – All Families: Inclusive Agency Forms*, perma.cc/KDY2-9ATT. Agencies also are told to "consistently communicate[ ] [their] commitment to LGBTQ inclusion externally," including in "common areas" and on websites, social media, and printed materials. *Benchmarks of LGBTQ Inclusion* at 2.

HRC even has a sample "LGBTQ Affirming" list of home-study questions. *Sample LGBTQ Affirming Homestudy Questions & Rationale*, All Children All Families, at 1, perma.cc/WSA6-ADVZ. Questions include the following:

- "When did you first realize you were LGBTQ, and when did you begin telling others? What were your early coming out experiences like?"
- "How comfortable are you with your identity as a LGBTQ person?"
- "Have you ever had to negotiate homo/bi/transphobia or heterosexism or cissexism in [your] relationships?"
- "How have homo/bi/transphobia and/or heterosexism or cissexism affected your life and how have you dealt with this?"
- "What pronouns should I use when referring to you?"
- "How do you identify your gender?"

Id. at 2–5, 10.

Other tools include "a checklist for creating gender-inclusive events; affirming questions on gender identity; resources to share with transgender and non-binary parents and a glossary of terms." *Promising Practices* 4.

"Forcing free and independent individuals to endorse ideas they find objectionable is *always* demeaning . . . ." *Janus* v. *Am. Fed'n of State, Cty. & Mun. Emps., Council 31,* 138 S. Ct. 2448, 2464 (2018) (emphasis added). Religious providers like CSS, New Hope, and Catholic Charities shouldn't need a "glossary of terms" to serve children. But if governments have free rein to pursue an interest "in minimizing—to zero—the number of establishments" that fail to reflect their "conception of equality," Pet.App.49a, Pet.App.169a, then these providers will have no choice but to conform or shut down.

* * *

In our Constitution, First Amendment liberties have been given a priority that affords them a "sanctity and a sanction not permitting dubious intrusions." *Thomas*, 323 U.S. at 530. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Ibid.* The City has not made that showing here. Nor can it.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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