No. 18A118

In the

Supreme Court of the United States

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

Applicants,

v.

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

Respondents.

Response in Opposition to Emergency Application for Injunction Pending Appellate Review or, in the Alternative, Petition for Writ of Certiorari and Injunction Pending Resolution

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DIRECTED TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Third Circuit:

Respondents City of Philadelphia, Department of Human Services for the City of Philadelphia, and Philadelphia Commission on Human Relations respectfully oppose the Emergency Application for Injunction Pending Appellate Review or, in the Alternative, Petition for Writ of Certiorari and Injunction Pending Resolution.

INTRODUCTION

Applicant Catholic Social Services (CSS) is one of 30 nonprofit agencies that provide services for foster parents and children in Philadelphia's public child welfare system through contracts with the City of Philadelphia's Department of Human Services (DHS). In the application, CSS asserts that its religious beliefs prevent it from adhering to non-discrimination provisions applicable to all of Philadelphia's contractors. CSS argues that the City's concerns about discrimination in fact reflect religious hostility and that an injunction should issue which would compel the City to sign a contract with CSS that does not include non-discrimination provisions required by the Philadelphia Home Rule Charter.

To argue that the City's actions were motivated by religious hostility rather than its generally applicable non-discrimination laws and policies, CSS focuses on only a narrow slice of its overall contractual relationship with the City. But in addition to the contract at issue here, CSS has many other contracts with the City, including other contracts with DHS to provide child welfare and foster care services.

CSS does not allege that its rights have been violated in relation to any of its other contracts with the City and none of those contracts are at issue here.

The dispute underlying this case began in mid-March 2018 when DHS first learned that CSS refused to certify same sex couples who wanted to be foster parents. At that time, DHS decided to suspend "intake" to CSS: this meant that there would not be new placements of foster children with CSS' in-home foster care program absent a reason (such as a kinship relationship) for an exception in an individual case. DHS made this decision because it was in the best interest of the children in DHS' care—DHS wanted to minimize possible disruption to their placements if CSS was not able to continue to contract with the City for these services and their foster families were unwilling to work with another agency.

Two months later, Applicants filed the underlying lawsuit. Three weeks after filing, they sought a temporary restraining order and preliminary injunction from the district court, claiming not only that the City had violated CSS' religious freedom, but also that DHS was putting children at immediate risk.

Following three days of hearings, the district court concluded that, contrary to Applicants' allegations, Respondents had not violated Applicants' rights or targeted CSS because of its religious beliefs. And the district court rejected Applicants' claims that the "emergencies" CSS manufactured regarding individual children in the City's custody warranted judicial intervention. Instead, the evidence established, and the District Court properly found, that DHS was acting to ensure that children's needs were being met. The district court also rejected Applicants'

legal arguments that the Free Exercise Clause and Free Speech Clause require the City to permit CSS to discriminate against prospective foster families headed by same-sex couples notwithstanding the fact that its contract with the City prohibits such conduct.

CSS appealed to the Third Circuit, again claiming "emergency" and moving for an injunction pending appeal. After briefing from both sides, the Third Circuit denied that motion.

Now Applicants assert yet another "emergency" and ask this Court to ignore the factual findings that contradict its assertions, all because CSS cannot impose its own terms on this single contract.

There is no emergency, and the Court should deny Applicants the extraordinary relief of an emergency, mandatory injunction while their appeal of the district court's denial of their motion for preliminary injunction proceeds before the Third Circuit. Applicants also have not demonstrated why this Court should take the extraordinary step of granting certiorari before the Court of Appeals has even had a chance to review Applicants' appeal. They present no reason to "deviat[e] from normal appellate practice" or why an immediate determination in this Court is required. Sup. Ct. R. 11.

At the outset, the Court should deny this Application because it does not meet the demanding standard of demonstrating an "indisputably clear" legal right to the relief which Applicants seek. *Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers). This contract places no obligation

whatsoever on CSS with respect to its private activities using its own resources, but merely sets conditions for the provision of government services paid for by City funds under a contract with DHS to provide family foster care services to foster parents and to children in the City's custody.

This Court has made clear that the government may place conditions on how government funds are spent, even when content based. *See Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991). Faced with longstanding First Amendment principles, CSS instead seeks its own constitutional right: a constitutional right to apply for a contract paid for by government funds, and then unilaterally rewrite the contract. This makes no sense as a matter of constitutional or contract law. There is no case from this Court nor any court that supports Applicants' extraordinary argument that a government contractor may opt out of government contract requirements and alter how the government chooses to provide government services if the contractor believes that providing those services in accordance with the contract requirements conflicts with its religious beliefs.

There is also no irreparable harm. No one is compelling CSS to apply for these City-funded contracts in the first place, and CSS can always simply choose not to participate. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("As a general matter, if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds.") Applicants' attempts to argue irreparable harm either seek to re-litigate disputed fact issues decided against them by the district court or are undone by CSS' admission that

despite repeated claims of imminent layoffs and closure, it has been able to avoid any layoffs.

This Court should reject the application and allow this case—as well as underlying contract negotiations between CSS and the City—to continue in normal course.

STATEMENT OF FACTS

I. DHS' Responsibility for, and Care of, 10,000 Children in Philadelphia.

Pennsylvania law requires that county[1] children-and-youth agencies such as DHS provide services to children who have been abused or neglected. Appx.275; 23 Pa. C.S. §§ 6361 et seq. These county agencies are further charged with the duty of addressing the well-being of these children consistent with the best interests of each child. Appx.531. Where children cannot remain in their own homes, county agencies must provide "temporary, substitute placement in a foster family home or residential child-care facility for a child in need of care." 23 Pa. C.S. § 6373(a)(4).

Philadelphia's DHS has protective custody of roughly 10,000 Philadelphia children. Appx.533. This number includes approximately 4,000 children who live with their legal parent(s) but receive in-home case management services. *Id.* The remaining 6,000 children are in "placement." Appx.275, 533. They have been removed from their homes and are in DHS' protective custody pursuant to a court order. Appx.275, 535. Many of these children are placed in homes with foster

[1] The city of Philadelphia is also the county of Philadelphia; the term "City" has been used throughout this litigation.

parents, which can include kinship care from relatives or close family friends, general foster care if the child has no special needs, or specialized behavioral health foster care if the child needs therapeutic intervention. Appx.273. Some of these children are in congregate care (also called group homes) in the community, institutional placements (located on a campus similar to a boarding school), or residential treatment facilities. Appx.286.

DHS provides foster care in part by contracting with Community Umbrella Agencies (CUAs) and foster care agencies, each of which must be licensed by Pennsylvania and is subject to state child welfare laws and regulations. Appx.270; 23 Pa. C.S. §§ 6344, 6351(2); 55 Pa. Code §§ 3680.1, 3700.1 et seq. The CUAs are charged with managing each DHS foster child's case within the City's ten geographical regions based on the location of the foster family with which that child is placed; they also provide case management services to those children still in their homes. Appx.270, 277-79. The CUAs ensure the child's safety through visitation, develop a case plan for permanency, provide child assessments, service referrals or interventions needed, and if necessary take the child to school and medical appointments. Appx.278-79.

In addition to the CUAs, DHS contracts with the thirty foster care agencies that work directly with foster care families and/or operate residential and congregate care facilities. Appx.277. Each of these foster care agencies is responsible for identifying and recruiting potential foster parents, for providing training to foster parents and kinship care parents, and for the initial and

continuing certification of those foster and kinship parents, according to standards set by Pennsylvania. Appx.279-80. Foster parents work with the agency with which they are certified, although they can change and be recertified by a different agency. City.Appx.28-29; *see also* Appx.281.

Each prospective foster parent has the choice of which agency they want to be certified by and work with. Appx.314-15. DHS expects each foster care agency it contracts with to complete the certification process, whatever its outcome, with each prospective foster parent that wishes to work with that agency. *See* Appx.315, 319-20, 322, 326-27; *see also* City.Appx.25-26.

II. DHS' Contracts with CSS.

DHS contracts with CSS for a range of foster care related services, including CSS acting as one of the City's CUAs, operating congregate care facilities, and providing the foster-parent-related services at issue in this case. Appx.414-15. The Scope of Services of the foster care services contract obligated CSS to recruit, screen, train, and provide certified resource care homes. City.Appx.52-54; 98-99, 101-02, 108. Because all City contracts are limited to one year, Phila. Home Rule Charter § 2-309, the City's FY 2018 contracts with CSS terminated at the end of June. City.Appx.39.

The contract obligates CSS to adhere to the City's long-standing non-discrimination policies and laws in performing the services required. In 1948, Philadelphia became one of the first cities in the United States to include in its Home Rule Charter a provision for an official human relations agency, the Philadelphia Commission on Human Relations (PCHR), to protect the civil rights of

residents. *See* Ordinance of the City of Philadelphia, March 12, 1948. In 1963, the City adopted its Fair Practices Ordinance (FPO), which was amended in 1982 to make discrimination on the basis of sexual orientation illegal in all areas. *See* 1982 Ordinances at 1476. Today the FPO prohibits discrimination on the basis of, *inter alia*, race, religion, sexual orientation, gender identity, and marital status. *See* Phila Code § 9-1100 et seq. And in 2010, the Philadelphia Home Rule Charter was amended by Philadelphia voters to require that City contracts contain a provision "that . . . the contractor will not discriminate . . . against any person because of race, color, religion, . . . [or] sexual orientation." Phila. Home Rule Charter § 8-200(d).

Consistent with the City's non-discrimination laws and policy, multiple provisions of the contract specifically prohibit an agency from discriminating on the basis of, *inter alia*, religion, marital status, and sexual orientation in its provision of services. City.Appx.91, 134-35. DHS has never authorized agencies to refuse prospective parents because of any of these characteristics. *See* Appx.662, 630.

For the coming year, the City has offered CSS two different foster care contracts: a "full" contract under which DHS would reopen intake and CSS would be required to recruit and certify prospective foster families in accordance with the City's non-discrimination provisions, or an interim contract which would provide funds for ongoing care of those children currently placed in CSS foster homes. 120-21, 481-83, City.Appx.161, 164. CSS' other contracts with the City, such as those for "congregate" care in group homes and case-management services as a CUA, are not affected by this lawsuit or CSS' opposition to same-sex marriage and the City is

renewing its contracts with CSS for these services. Appx.414-15, 693-95, 752. Those contracts encompass the vast majority of the foster care services CSS provides for the City, given that only 120 of the approximately 1,500 children served by CSS in 2018 were served through the family foster care contract at issue in this case. Appx.415, 467; City.Appx.192. The City will pay CSS over $18 million for its ongoing CUA and congregate care services in fiscal year 2019. Appx.490-92.

III. CSS' Refusal to Consider Same Sex Couples as Prospective Foster Parents.

On March 9, 2018, DHS learned from a Philadelphia Inquirer reporter that two of DHS' contractor foster care agencies—CSS and Bethany Christian Services ("Bethany")—had policies refusing services to same sex couples seeking to become foster parents. Appx.543, 594. This was the first DHS heard about CSS' outright refusal to work with same sex couples (despite legal and contractual non-discrimination requirements). City.Appx.18. Also, reports that Bethany had refused to serve a same sex couple quickly made clear that these policies had already resulted in discrimination against Philadelphia residents. City.Appx.3-8.

DHS Commissioner Cynthia Figueroa called both CSS and Bethany to determine the accuracy of the report and learned from both that they would in fact refuse to consider same sex couples for certification as foster parents for religious reasons. Appx.543-44, 694. Commissioner Figueroa also called other foster care agencies to inquire about their practices, focusing on religious agencies as she understood the issue to arise from religious belief, but also calling at least one agency not religiously affiliated. Appx.543-44, 594, 694. None had such a policy.

Appx.544-45. Since this was a serious issue that could result in CSS not being able to enter into the upcoming year's contract with the City for family foster care services, DHS and CSS promptly convened a meeting at the City's offices to discuss the matter. City.Appx.19, Appx.435. When CSS maintained its position at the meeting, Commissioner Figueroa, concerned about CSS' ability to perform its contractual obligations, and potential violations of laws such as the FPO, "decided that it was in the best interest [of children] to close intake." Appx.595-97. Under the Contract, the City is not required to make any placement referrals to CSS. City.Appx.108-11. As the district court found, Commissioner Figueroa made this decision and the Mayor was not involved. CityAppx.504. On March 15, 2018, DHS closed intake at both CSS and Bethany, although DHS has granted each request by CSS to place an individual child with it where that particular child's best interests so dictate. City.Appx.19-20; *see also* Appx.76.

Subsequently, Bethany clarified its position and reversed its policy, its intake was restored, and Bethany is signing a new full contract which will require, as will all the City's new contracts with its foster care agencies, service to all protected categories under the FPO. Appx.600, 603-04, City.Appx.161, 169 n.2. At the same time, Bethany maintains its religious opposition to same sex marriage.[2] The City

[2] *See* City.Appx.170 n.2 (citing Julia Terruso, *City resumes foster-care work with Bethany Christian Services after it agrees to work with same-sex couples* (June 28, 2018 12:46 PM), http://www.philly.com/philly/news/foster-care-lgbt-bethany-christian-services-same-sex-philly-lawsuit-catholic-social-services-20180628.html).

has offered the same contract to CSS, but CSS has refused to sign it, and its intake remains closed. Appx.468, 486.

IV. DHS' Intake Closures Are in the Best Interest of the Children.

DHS closes intake whenever a foster care agency may cease providing services, regardless of the reason, to minimize the number of placements that might need to be changed or transferred if the relationship ends. Appx.596-97. As of the hearing date, DHS also had intake closures for other foster care agencies. Appx.598-99. Despite this, the overall placement rates of children in the City have not changed. Appx.673-74. The district court credited Commissioner Figueroa's testimony on intake closures, concluding that "closure of CSS' intake of new referrals has had little or no effect on the operation of Philadelphia's foster care system." Appx.11, *see also* Appx.673-74. This makes sense given that the City works with 30 agencies, foster care is temporary, placement decisions are complex, and they are made on a case-by-case basis. As Commissioner Figueroa explained, "[kids are] not widgets. It's not one for one." Appx.684. In other words, the existence of an open family does not mean that family would be an appropriate placement in the case of a specific, individual child.

V. The Impact of Intake Closures on CSS and Foster Parents.

Although the number of children placed in CSS family foster homes may decline from the intake closure, the concrete impact on CSS' family foster care services operation depends on ongoing negotiations by DHS and CSS of an interim contract (including cost reimbursement and possible bonuses for staff to stay), Appx.601-03, foster care placement with CSS by other Pennsylvania counties,

Appx.468, and CSS' ability to transfer employees to perform other services, Appx.90, 940. Over the course of its series of "emergency" filings, CSS repeatedly has maintained that closure and employee termination were imminent, only to later acknowledge no employees have in fact been laid off. *Compare* Appx.79 (stating on June 4 that "[i]f the City continues refusing to refer children to CSS, . . . CSS will probably have to close its foster program and immediately lay off the staff involved in this program"), *and* City.Appx.13 (stating that, as of July 16, "absent relief, Catholic will be forced to lay off staff within weeks"), *with* Appx.943 (stating on July 31 that CSS "has been able to stave off layoffs").

CSS' other foster care activities, such as group home operations and CUA services, have not been affected by this dispute. Appx.394-95, 481-83, 540. Nor has DHS removed any children already placed with CSS foster families as a result of the intake closure. *See* City.Appx.20. And none of the foster parents who testified on CSS' behalf ruled out working with another agency if CSS were to close its family foster care operations. Appx.64-65,246, 256, 261.

ARGUMENT

Applicants fail to satisfy the demanding standard for the extraordinary relief they seek—an original injunction from this Court. The application should be denied because Applicants cannot show they have an "indisputably clear" right to the injunction they seek and that an injunction is necessary or appropriate to preserve this Court's jurisdiction.

I. Standard of Review

"The only source of authority for this Court to issue an injunction is the All Writs Act," *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012), which provides that the Court "may issue all writs necessary or appropriate in aid of [its] . . . jurisdictio[n] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). An "extraordinary writ" under the All Writs Act "is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20(1). The "issuance of an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 131 S.Ct. 5, 6 (2010) (Roberts, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)); *see also Respect Maine PAC v. McKee*, 131 S. Ct. 445 (2010) (per curiam); *Turner Broadcasting*, 507 U. S. at 1303. This authority is to be used "sparingly and only in the most critical and exigent circumstances." *Wisconsin Right to Life, Inc., v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (*citing Ohio Citizens*, 479 U.S. at 1313 (*quoting Fishman v. Schaffer*, 429 U.S. 1325 (1976) (Marshall, J., in chambers)).

A writ of injunction "is appropriate only if (1) it is necessary or appropriate in aid of [the Court's] jurisdiction, and (2) the legal rights at issue are indisputably clear." *Turner Broadcasting*, 507 U. S. at 1303; *see also Ohio Citizens*, 479 U.S. at 1313-14.

II. An Injunction Is Not Necessary or Appropriate in Aid of This Court's Jurisdiction.

Applicants try to gloss over the requirement under the All Writs Act that an injunction be "necessary or appropriate" to aid the Court's jurisdiction. *See Clinton v. Goldsmith*, 526 U.S. 529, 538 (1999). This is because the extraordinary relief they seek is neither necessary nor appropriate. *See Wisconsin Right to Life*, 542 U.S. at 1306.

Applicants must show: 1) the writ will be in aid of this Court's appellate jurisdiction; 2) exceptional circumstances warrant the exercise of the Court's discretionary powers; and 3) adequate relief cannot be obtained in any other form or in any other court. Sup. Ct. R. 20(1); *see also Hohn v. United States,* 524 U.S. 236, 263 (1998). Applicants do not meet any of those requirements.

There is nothing in Applicants' petition that demonstrates that this Court's jurisdiction might "be defeated" or somehow impeded if Applicants do not receive the relief which they seek. *See F.T.C. v. Dean Foods, Inc.,* 384 U.S. 597, 603-04 (1966); *see also Wisconsin Right to Life,* 542 U.S. at 1306. To the contrary, if the Court denies Applicants" requested injunction, the case will merely proceed as it should in the Third Circuit, where Applicants' appeal of the district court's denial of a preliminary injunction is being briefed on an expedited schedule (at Applicants' request). *See, e.g., Hobby Lobby*, 568 U.S. at 1404 (denying injunction pending appeal and noting that "[e]ven without an injunction pending appeal" applicants may "continue their challenge" in the lower courts). If Applicants lose their current challenge in the Third Circuit, they can seek certiorari at that time. Or, if

Applicants lose after final judgment, they can seek certiorari then. *See id.* Or, if the City loses, the City will have the right to seek certiorari. Any of these possible paths to review would present this case on a fuller record. Meanwhile, the case will remain a live dispute due to the ongoing court proceedings and ongoing contract negotiations between CSS and the City.

Applicants instead allege irreparable harm again and baldly assert that they face "critical" or "exigent" circumstances. App. at 37-39. As the City has explained, these are no more than allegations that were rejected by the district court, which heard, saw, and evaluated evidence and live testimony. While CSS apparently does not agree with the resulting factual findings, this Court is not the place to re-litigate them, and certainly not in the context of an All Writs Act motion. Indeed, this Court should be especially skeptical given that the Third Circuit already reviewed Applicants' allegations and claims of "emergency" and denied an injunction pending appeal. *See Wisconsin Right to Life*, 542 U.S. at 1306.

Even if the emergency circumstances Applicants allege were present (they are not), this would still be insufficient to support an injunction. Applicants need to show more than that they will face irreparable harm if they are forced to choose between complying with non-discrimination provisions in their work pursuant to a contract with the City or agreeing to a more limited contract. And CSS' claims of financial distress in this particular aspect of its operations can also be addressed by alternate means, in the short term by contract negotiations with the City and in the longer term, if CSS is successful, by claims for money damages. The use of the All

Writs Act is "unjustifiable" where a party has an alternate remedy. *See Clinton,* 526 U.S. at 537.

A. Applicants' request fails to demonstrate an "indisputably clear" right to relief.

1. There is no "indisputably clear" right to relief under the Free Exercise Clause.

a. There is no right to enter a government contract and then demand to change it to conform to religious beliefs.

There is no indisputably clear right under the Free Exercise Clause to conform a government contract to one's religious beliefs. Applicants make the extraordinary claim that the First Amendment gives them the right to enter into a government contract to perform government services—and receive over $19,000,000 in taxpayer dollars, Appx.11—and then demand that the contract and the government services required thereunder be altered to conform to their religious tenets. There are no cases from this Court or any other cases identified by Applicants or that Respondents could find that stand for such an extraordinary proposition. In fact, Applicants' claim is so all-encompassing it would require an ongoing right to such a contract, regardless of its terms of expiration.

This Court has made clear that the government's refusal to fund constitutionally protected activity does not constitute a burden on the exercise of that right. *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." (citing *Harris* v. *McRae*, 448 U.S. 297, 317 n.19 (1980)); *id.* ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not

infringe the right." (citing *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)).

In the only published case addressing a similar claim, *Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007), the U.S. Court of Appeals for the Sixth Circuit rejected the notion that there is a free exercise right to government contracts that conform to state contractors' religious beliefs. In that case, a state-contracted agency that provided residential care to youth in state custody was incorporating religious programming in its services. *Id.* at 406. Because this violated state policy, the state issued a moratorium against further placements, and Teen Ranch sued the state, claiming that the moratorium on placements "violate[d] the Free Exercise Clause because it conditions receipt of a government benefit on Teen Ranch's surrender of its religious beliefs and practices and burdens the free exercise of Plaintiff's religious beliefs. . . ." *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 837 (W.D. Mich. 2005) (Bell, C.J.), *aff'd as supplemented sub nom. Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007). The Sixth Circuit affirmed the district court's rejection of this claim after concluding that the Free Exercise Clause's protection against government encroachment on religious beliefs and practices does not mean the government is required to fund religious activity. *Teen Ranch, Inc.*, 479 F.3d at 410; *Teen Ranch*, 389 F. Supp. 2d at 838-39.

Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 U.S. 2012 (2017), is distinguishable and does not support Applicants' novel free exercise claim. In *Trinity Lutheran*, the Court established that the government could not disqualify

religious organizations from a grant program for which they otherwise qualified solely because of their religious identity. *Id.* at 2021. In this case, the district court found that the City suspended referrals to CSS not because it is Catholic or professes particular religious beliefs but, rather, because it refuses to comply with a provision of its contract—the City's non-discrimination requirement. Appx.12-14, 39-43. Applicants' claim to the contrary entirely fails to grapple (or even mention) the fact that the City continues to pay CSS tens of millions of dollars for congregate care and case management services and would happily resume family foster care referrals to CSS if CSS signed the same fiscal-2019 contract the City has offered to every other agency in Philadelphia. Appx.120-21, 490-92; City.Appx.161.

The consequences of the legal ruling Applicants seek are staggering. If a government-contracted agency's religious beliefs give it the right to offer government services only to those who meet its religious criteria, that would apply equally to an agency whose religious beliefs prevent it from accepting women who work outside the home or members of different faiths. It would apply equally to an agency whose religious beliefs prevent it from providing medical treatment to children who are sick or injured. The freedom of religion entitles faith-based organizations to participate in government programs on the same terms as other contractors; it does not entitle faith-based government contractors to alter the government services provided to conform to their religious beliefs, or to opt out on religious grounds of some of the contract provisions.

Like the contract that expired at the end of June, the full contract that the City is offering CSS and all its other foster care agencies for the 2019 fiscal year contains clear terms that agencies must evaluate all prospective foster parents[3] and prohibits discrimination against them based on characteristics unrelated to the ability to care for a child including race, sex, religion, marital status, and sexual orientation. City.Appx.134-35, 161. And the City's contracts require its agencies not to discriminate based on religious beliefs. City.Appx.106-07, 134-35.

Despite agreeing to these terms last year, CSS announced it would refuse to accept prospective foster families who do not meet CSS' religious criteria regardless of their qualifications under the applicable state criteria and the needs of the children in DHS' care.

In addition, as a result of the evidentiary hearing, the City learned that CSS also rejects unmarried opposite-sex couples and—until very recently—imposed a religiosity test on foster parent applicants. Appx.421, 472-73. In apparent recognition that such a practice violates the contract, CSS after the hearing quickly disclaimed that test, City.Appx.175-76, but up to that point had required all foster parent applicants to obtain a "pastoral letter" to prove that they were active adherents and members of a congregation in their chosen religion. Appx.421. A

[3] To be clear, the non-discrimination provisions only require that an agency evaluate a prospective foster parent according to the state requirements. *Contra* Appl. at 23. An agency need not certify a same-sex couple if that couple does not meet the state criteria, *see* City.Appx.26, as opposed to the agency's extra-legal requirements. Appx.421; 172-73. It does not require the agency to "parrot" the City's views, *see* Appl. at 2.

significant number of the foster care agencies DHS has contracts with are faith-based. *See* Appx.594-95. The City has services it must provide to the children in its care, and the City cannot fulfill its responsibilities unless all contractors comply with their contracts. What faith-based contractors do on their own time with their own resources is their own business, and the City's contracts do not affect their activities outside of the government services provided under those contracts.

But the City does have, and must have, very broad leeway in specifying how its own funds are spent. The City cannot run its foster care system if faith-based providers can unilaterally opt out of provisions of their contracts and instead apply their own religious criteria to their provision of City foster care services.

b. The City's non-discrimination contract requirements are neutral policies of general application furthering important governmental interests.

The City's contract requirements that agencies accept all qualified families and refrain from discrimination based on sexual orientation and other characteristics are neutral and generally applicable policies and, thus, any free exercise challenge to them is subject to rational basis review. *See Emp't Div. v. Smith*, 494 U.S. 872 (1990). Even if the non-discrimination requirements at issue here governed CSS' own conduct, rather than as they do its performance of government services as a condition of receiving government funds, it would still withstand free exercise scrutiny as a neutral and generally applicable regulation. This Court has made clear that non-discrimination policies, including those covering sexual orientation and "all comers" policies, are well within the

government's authority to enact. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 696 (2010); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1727 (2018). And as the district court concluded based on the evidence presented at the preliminary injunction hearing, the City's all comers and non-discrimination requirements further a number of legitimate government interests, including the City's interest in achieving a broad and diverse pool of families for children, and ensuring that government-contracted services are accessible to all Philadelphians who qualify.[4] Appx.34-35.

c. CSS' contention that the City targeted CSS because of its religious beliefs was rejected as a factual matter by the district court after a multiday evidentiary hearing.

Citing *Masterpiece Cakeshop*, Applicants argue that the City's suspension of referrals to CSS was based on "impermissible hostility" to Catholic doctrine on same-sex relationships. They cite a variety of statements and actions by City

[4] Applicants argue that agencies can supposedly "have 'different requirements,'" Appl. at 24-25, and therefore *Martinez* is inapplicable. But Applicants' only support for this claim is a general statement on the City's website that an agency may have "slightly different requirements, specialties, and training programs" and a hearsay statement in a third-party document that says merely that "individual agencies will vary their policies." Appl. at 8 n.28 (citing Appx.126, 647-50), 25 n.115 (citing Appx.126). Neither supports CSS' bold claim that these statements override explicit non-discrimination requirements.

Council,[5] the Philadelphia Commission on Human Relations (PCHR),[6] the Mayor,[7] and the DHS Commissioner[8] as supposed evidence of hostility, ignoring CSS' own

[5] Applicants cite a resolution by Philadelphia's City Council because it included the statement that "the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom." Appx.159. But that resolution neither singled out CSS nor targeted it—rather, after citing the City's general non-discrimination contract provision, it authorized a Council committee to investigate *DHS*' policies. Appx.159-60. Nor did City Council have any independent power to direct DHS' actions.

[6] Applicants claim in passing that letters from the PCHR seeking information about CSS' policies toward same-sex foster couples are "extra-jurisdictional." Appl. at 23. But the Philadelphia Home Rule Charter gives the PCHR the power to initiate its own investigations, Phila. Home Rule Charter § 4-701, and the PCHR has taken no action against CSS even though CSS has not even answered the basic questions posed in the PCHR letter. Appx.164. Certainly this mere inquiry cannot be evidence of hostility and CSS cites no authority in support of such a contention.

[7] Applicants claim that because Mayor Kenney has colorfully tweeted in the past about his disagreements with the Archbishop of Philadelphia about some of the Archdiocese's policies, the Mayor must have initiated the PCHR's letters and DHS' action. Appl. at 23. Unsurprisingly, the record directly contradicts this claim and the district court properly rejected it. Appx.12-14, 36-37; *see also* Appx.699-700 (DHS Commissioner stated she did not know the Mayor's views when she met with CSS and closed intake, and did not discuss the intake closure with the Mayor's Office.).

[8] Applicants claim that DHS Commissioner Figueroa was hostile because she (1) asked CSS to meet with her *at DHS' offices* and discussed CSS' policy toward same sex couples at that meeting. Appl. at 23. When CSS reiterated that policy, Commissioner Figueroa suggested that "it would be great if we listened to the teachings and the words of our current Pope Francis." Appx.697. Applicants do not explain how this comment evidences hostility to the Catholic faith. And when CSS brought up its long history of providing foster care, seemingly to suggest that the City had no business insisting on non-discrimination policies, the Commissioner responded that "times have changed" and it was "not 100 years ago." Appx.696. Applicants' implication—that it is somehow religious hostility to note that discriminatory practices in government services that were once constitutional are no longer permissible—cannot be squared with even *Masterpiece Cakeshop* itself. *See* 138 S. Ct. at 1727 (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, n.5 (1968) (per curiam)).

announced refusal to follow the contract, and without addressing the fact that despite the Catholic Church's views on same-sex couples are well known, the City to this day continues to contract with CSS except where CSS refuses to abide by the contracts' terms.

Moreover, after hearing the testimony and considering the evidence presented, the district court specifically found that the decision to suspend referrals to CSS was made by DHS and not influenced by the Mayor, Appx.38-41; that Applicants "dr[e]w too broad a conclusion" from the Commissioner's comment, Appx.41, and that "there is insufficient evidence to support the conclusion that DHS has explicitly targeted CSS for religious reasons." Appx.43; *accord* Appx.39; *see also* Appx.17 (noting that City maintains numerous other contracts with CSS to provide different forms of child welfare services and has a strong desire to keep CSS as a foster care agency).[9]

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[9] Applicants claim the FPO does not apply to CSS' policy because foster care is not a public accommodation. Appl. at 31. But the district court properly found that the relevant action—the evaluation of prospective foster parents—is a public accommodation because Philadelphia law considers any service to the public a public accommodation. Appx.10, 24-25. And the fact that Commissioner Figueroa testified that DHS could consider race or disability in making a *placement* determination merely reflects the complicated reality of child welfare. Of course whether an individual's mental disability poses a health and safety threat must be considered. Thus, the federal government does not consider this discriminatory even though HHS considers foster parents protected under Title II of the Americans with Disabilities Act. *See* U.S. Dep't of Health & Human Servs. & U.S. Dep't of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities* at 5 (August 2015), *available at* https://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf. In addition, while the Multiethnic Placement Act of 1994, Pub. L. 103-82 (1994), generally prohibits consideration of race and national origin in placement decisions, HHS has noted that agencies may sometimes consider them as one factor in a placement decision. U.S. Dep't of Health & Human Servs., *Ensuring the Best*

Applicants also assert there has been selective enforcement against CSS based on its religious beliefs, claiming that under Third Circuit precedent, DHS grants secular but not religious exemptions. Certainly, *Blackhawk* and *City of Newark* support the proposition that where the government grants secular exemptions to a neutral law or policy but refuses to grant similar religious exemptions, its conduct is constitutionally suspect. *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.); *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). But the neutral law or policy here is the City's non-discrimination requirement and there is no such exemption to that requirement here. CSS claims that agencies may "refer" prospective families to other agencies for reasons such as expertise in caring for medical needs or ability to find foster placements for pregnant youth and argues this demonstrates selective enforcement. But the district court properly found that such "referrals"[10] are not exemptions from the non-discrimination requirement

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Interest of Children at 17, available at https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/specialtopics/adoption/mepatraingppt.pdf (last visited July 23, 2018). Consideration of race and disability to serve the best interests of a child has nothing to do with what CSS seeks here—permission to refuse even to consider whether gay and lesbian couples meet certification criteria solely because of their sexual orientation.

[10] CSS repeatedly uses the term "referral" for its position that it can send away prospective foster care parents to other agencies. DHS has never permitted agencies to "refer," *i.e.* send away, prospective foster care parents. Appx.315, 319-20, 322, 326-27. Applicants claim that referrals "happen all the time," Appl. at 29-30, but what the cited testimony described was not what CSS seeks to do here. Mr. Amato spoke of referring a parent who was *already* certified and *already* had a foster child to another agency because doing so was necessary to address the *child's* medical needs. Appx.429-430. Such an action does not run afoul of the City's non-

because they only involve information sharing and leave the final choice of agency with the applicants, and because there was no evidence that DHS permits any agency to refuse to provide its services to prospective foster parents. *See* Appx.43. What CSS seeks is not a *referral*, but an exemption permitting it to *refuse* service on the basis of the couple's membership in a protected category. DHS has never permitted this and, therefore, *Blackhawk* and *Newark* are inapplicable.

2. There is no "indisputably clear" right to relief under the Free Speech Clause.

Applicants contend that the City is compelling CSS to engage in speech by barring it from discriminating against same-sex couples in its government-contracted work. They assert that providing certifications of same-sex couples would constitute compelled speech that conflicts with their religious beliefs about marriage. This argument fails because when a private agency provides public services pursuant to a government contract, its services under the contract are not private speech but rather "instances in which the government uses private speakers to transmit information concerning the government's own program." *Teen Ranch*, 389 F. Supp. 2d at 840. In *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 214-15 (2013), this Court expressly distinguished between "conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside

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discrimination policy because it is based on the needs of the foster child, not the categorical rejection of an entire population of prospective foster parents.

the contours of the program itself." Here, the requirement that contract agencies offer home studies and issue certifications on a nondiscriminatory basis goes to the heart of the services under the contract with the City and does not regulate the speech of foster care agencies outside of the performance of the contracted services. As the court found, the City has "not conditioned CSS's Services Contract on CSS changing its activities, views, opinions outside the context of the Services Contract." Appx.56.

Applicants claim that certifications and home studies constitute private speech, claiming that those activities are not expressly funded under the contract because CSS' compensation is based on the number of children in its care rather than on the number of home studies performed. However, regardless of the payment formula, the court found that certification clearly was part of the contracted services. Moreover, CSS' suspension of its pastoral letter requirement for prospective foster parents in light of the contract's prohibition on religious discrimination demonstrates CSS' recognition that certification of prospective foster parents is part of its contract. City.Appx.175.

Applicants' citation to this Court's opinion in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)—which recognized the free speech rights of government contractors—offers no support for their claim, and in fact supports the City in this case. In *Umbehr*, the Court applied the *Pickering* standard for public employee speech to the speech of government contractors. As this Court explained in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), speech in the course of a government

employee's official duties is not First Amendment-protected speech. The First Amendment "does not invest government employees with the right to perform their jobs however they see fit." *Id.* at 420. For the same reason, the Free Speech Clause, like the Free Exercise Clause, does not give an organization the right to enter into a government contract to perform a government service and then provide that service however it sees fit, regardless of the terms of the contract.

B. Applicants offer no basis to disregard the district court's factual findings concerning irreparable harm, the balancing of the equities, and the public interest.

The district court found that the Applicants failed to demonstrate irreparable harm absent injunctive relief. Applicants essentially repeat the same arguments to this Court. They first claim that children will be harmed if CSS closes, which they assert it will do if unable to continue excluding families based on religious objections. But the district court noted that experience in other states showed that services to children continue when religiously affiliated government-contracted child placing agencies close their doors due to religious objections. In those cases, the court noted, the agencies transferred their caseloads—in some cases, along with their staff—to others in their regions. Appx.20-21.

Applicants then assert that as a result of the suspension of referrals, children have experienced delays and difficulties in receiving placements that are in their best interests. Again, the district court found that while the parties disagree about what occurred in the case of a particular child identified as Doe Foster Child #1, further issues are unlikely to occur because DHS and CSS are "fully aware that

exemptions from the intake closure have been and continue to be granted consistent with the best interests of individual children." Appx.15.

Applicants also claim that children currently in group homes could be placed with CSS families whose homes are now empty as a result of the City's suspension of referrals. But the district court found, based on the testimony presented, that the suspension of referrals to CSS did not result in a rise in children placed in congregate care[11] or staying in the DHS childcare room, or otherwise have an impact on the operation of the child welfare system in Philadelphia. Appx.15-16.

The district court also rejected Applicants' claim that CSS itself would be irreparably harmed absent the requested injunction. Despite repeated claims that it was about to imminently close and lay off employees, CSS has not done so, by its own admission transferring two employees to other parts of its operations. Appx.90. Because the contract at issue in this case is but one portion of CSS' work for DHS, CSS will continue providing child welfare and foster care services as a CUA, through its congregate care facilities, and through foster care contracts with other Pennsylvania counties.[12] Only one portion of CSS' foster care services has been

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[11] Given the unique needs of each child, the availability of an open foster home does not necessarily equate to one fewer child in congregate care. Appx.16 (quoting Commissioner Figueroa's testimony that "assuming that 'availability [at any one foster agency] [will] reduce the [use of] congregate care is an over [simplification] of the complication of our work'").

[12] Although CSS tries to discount these other contracts by analogizing to *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938), *see* Appl. at 19, the relevant point is that they demonstrate the lack of immediate and irreparable harm to CSS, not that such contracts would absolve the City of liability if its actions were ultimately found to be unlawful.

impacted and, as the district court noted, CSS can mitigate this impact by agreeing to an interim contract with the City. Any harm in the form of lost revenue under the contract can be quantified and compensated, should CSS prevail, through money damages. Appx.63-64.

The district court also rejected the foster parent Applicants' claim that transferring to another agency if CSS closes this part of its operations constitutes irreparable harm, noting that when other agencies have closed, their families have successfully transferred. Appx.64-65. As the district court also noted, none of the foster parent Applicants' testified that they would not work with another agency if they could not work with CSS as foster parents if CSS closes this part of its operations. Appx.64-65; *see also* Appx.246, 256, 261.

After concluding that Applicants failed to demonstrate irreparable harm, the district court found that the balance of the equities tilted in favor of the City. Appx.67. The court rejected Applicants' assertion that no one would be harmed if CSS is permitted to discriminate against same-sex couples, finding that the City's interests in its non-discrimination requirement are manifold. *Id.* Among those interests, the court pointed to the City's interests in ensuring a broad and diverse pool of foster parents for children in need of foster parents, and ensuring that government-contracted services are accessible to all Philadelphians who are qualified. *Id.*

If the City were required to permit discrimination against same-sex couples by government-contracted family foster care agencies, it would seriously undermine

the City's interest in ensuring the broadest possible pool of families by sending the message to same-sex couples that coming forward to foster comes with the risk of facing the humiliation of discrimination. This Court has noted the stigma that comes with discrimination. *Masterpiece Cakeshop*, 138 S.Ct. at 1727, *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) ("Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color."). And it has never countenanced a system where some members of the public—such as opposite sex couples—can choose from any service provider but other members of the public—such as same sex couples—have fewer options. *Obergefell v. Hodges*, 135 S.Ct. 2548 (2015); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968). Moreover, while Applicants claim that CSS would be only one out of 30 agencies refusing service for same-sex couples, there is no way to predict how many others, if allowed to privilege their religious beliefs over the City nondiscrimination provisions, might exclude applicants who for do not conform to that agency's religious beliefs.

III. There is no justification for a writ of certiorari before judgment.

Applicants' alternative request for a writ of certiorari before judgment and injunction pending resolution is likewise unwarranted. As an initial matter, Applicants' request for an injunction in this alternative context would be subject to the same standard described above and would fail for all the same reasons already articulated.

Moreover, this case does not meet the criteria for granting a writ of certiorari before judgment. *See* Sup. Ct. R. 11 (a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). In fact, it is doubtful that it meets the criteria for a writ of certiorari at all.

There is no decision from any circuit court of appeals, state court of last resort, or this Court that conflicts with the district court's decision denying the requested preliminary injunction. And there is no other reason the legal questions at issue in this case, which relate to Philadelphia government contracts, are of such "imperative public performance" that they need to be immediately settled by this Court outside of normal appellate practice.

CONCLUSION

For all the foregoing reasons, this Court should deny the Emergency Application for Injunction Pending Appellate Review or, in the Alternative, Petition for Writ of Certiorari and Injunction Pending Resolution.

Respectfully submitted,

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Dated: August 13, 2018