**No. 18A118**

# In the Supreme Court of the United States

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

*Applicants,*

v.

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

*Respondents*.

## REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR INJUNCTION PENDING APPELLATE REVIEW OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND INJUNCTION PENDING RESOLUTION

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On one side of this dispute stand real children, real families, and real homes. On the other stand as-yet-imaginary scenarios and political calculations. Of course, the government need not justify its policies to all those it harms. But when it tries to control religious entities and their speech, and where the balance of harms is so lopsided, courts should intervene. No child should have to spend a single night without a home because the government played politics.

That is especially so here because the law is all on one side of the ledger. As a matter of law, the City's actions must survive strict scrutiny under the First Amendment, and to date the City has not come close to carrying that burden. Moreover, Applicants ask only that the Court preserve the *status quo ante*, and the time to act is short. Without an injunction, homes will continue sitting empty, foster parents will lose vital support, and Catholic will lose staff and close its program—all before Applicants have had the chance to litigate their appeal.

Applicants have shown that they were targeted by the City for their religious beliefs, and that the "policies" the City cites for doing so are neither neutral nor generally applicable but are instead riddled with secular exceptions. The City admits that it requires Catholic to either engage in certain speech (namely, certify same-sex couples) or be excluded from foster care. Nor does it deny the harm to individual foster parents like Applicant Mrs. Paul, or to the children who normally would be living in the 35 loving homes excluded from fostering because of their affiliation with Catholic.

The City offers essentially two arguments in response. First, it claims that if the First Amendment applies to government contractors, there will be no end to the

dangers that religious contractors pose to the people of Philadelphia. Despite the overheated rhetoric, the City does not even try to argue strict scrutiny. And the reason for that failure is obvious: Catholic has been helping children in Philadelphia for more than a century and the City cannot identify a single person who even claims to have been harmed by Catholic's religious practices. The City's imagined parade of horribles cannot obscure its very real failure to even make a strict scrutiny argument.

Second, the City says it can do what it wants under its contract. The City does not deny that it investigated only religious agencies and never looked into the practices of secular agencies. Nor does it deny that it summoned Catholic to DHS headquarters, told Catholic's leadership that they should follow the "teachings of Pope Francis," criticized what it deemed discrimination under the "guise" of religion, and unilaterally decided to close Catholic's foster care program without receiving a single complaint against the agency. It does not deny that it has cut off referrals to foster parents like Mrs. Paul, solely because of their religious association. But the City says all this and more is fine because it is using a contract to restrict Catholic's rights.

The City strains mightily to pretend that Catholic's certification of foster parents is something the City contracted for—precisely because the City knows that "what faith-based contractors do on their own time with their own resources is their own business." Opp.20. But the City testified that it has "nothing to do" with home studies, Appx.644-647, and even now admits that "certifications and home studies" are "not expressly funded under the contract." Opp.26. The City's assertions that home studies "go[ ] to the heart" of the foster contract are nothing more than a transparent attempt

to duck this Court's precedent prohibiting unconstitutional conditions on contracts, including conditions that would compel speech. The City has made clear that not only must Catholic perform home studies for same-sex couples; Catholic may not decline to endorse the relationship of a same-sex couple based on Catholic's religious beliefs. That condition is tantamount to the denial of a license and a prior restraint on Catholic's First Amendment activity because *only City contractors may provide foster care services in Philadelphia*. Appx.419-20.

The City's new and strained contract arguments cannot trump the First Amendment, and they cannot obscure the real harms that would be inflicted by depriving Applicants of protection during their appeal.

## ARGUMENT

### I. An injunction should be granted under the All Writs Act.

#### A. Applicants' right to relief is indisputably clear.

The City of Philadelphia is forcing Catholic to choose between giving up a centuries-old religious ministry or providing written endorsements of same-sex relationships. But the First Amendment stands against such attempts to prescribe what shall be orthodox and punish citizens who cannot in good conscience comply.

##### 1. The City's actions violate the Free Exercise Clause.

The City has violated the Free Exercise Clause in four separate ways: it engaged in religious targeting (App.22-26); its policies are not neutral (App.27-29); its policies are not generally applicable (App.29-31); and it provides individualized, discretionary

exemptions, but denied one here (App.26-27).[1] Each of these constitutes an independent violation of the Free Exercise clause. See *Masterpiece Cakeshop Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (religious targeting); *Employment Div., Dep't of Human Res. of Oregon* v. *Smith*, 494 U.S. 872, 884 (1990) (individualized exemptions); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993) (neutrality and general applicability); see also *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (neutrality, general applicability, and individualized exemptions). The City fails to rebut any of the four.

***Targeting.*** The City engaged in religious targeting. App.22-26. It attempts to distinguish *Masterpiece* by minimizing its role. Opp.21-23. But the City's words and actions speak for themselves. The City does not deny—indeed, it embraces—the fact that its investigation "focus[ed] on religious agencies." Opp.9. Nor does it deny that:

- The DHS commissioner told Catholic to follow the City's view of "the teachings of Pope Francis";
- The Commissioner told Catholic it was "not 100 years ago";
- City Council passed a resolution criticizing "discrimination that occurs under the guise of religious freedom";[2]
- The Human Relations Commission opened an extra-jurisdictional inquiry at the behest of the mayor;[3]
- The mayor publicly denigrated the Archdiocese;[4]

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[1] "App." refers to page numbers in the Application, while "Appx." refers to page numbers in the appendix attached to the Application.

[2] The City claims that the City Council resolution is not targeting because it did not single out Catholic. Opp.22 n.5. But the resolution states it was motivated by the policies of "At least two of these providers," *i.e.*, Catholic and Bethany. Appx.158.

[3] The City claims the PCHR can launch its own investigation, Opp.22 n.6, but the cited provision extends only to discrimination on the basis of "race, color, religion or national origin." Phila. Home Rule Charter § 4-701.

[4] The City labors to distance itself from its own Mayor, but does not deny his "colorful[ ]" statements, nor that Figueroa spoke with him before meeting Catholic

- The City is revising its contracts to explicitly prohibit religious practices.

See App.10-13, 22-26. The City points to the District Court's determination that there was no targeting, but this conclusion was based, *inter alia*, on the District Court's erroneous *legal* conclusions (1) that "*Masterpiece Cakeshop*, however, has little bearing on this case," (2) that penalizing two groups rather than one negated targeting, and (3) that the FPO was an "all comers policy" under *Martinez*.[5]

Nor does the City even dispute that it has the power to make discretionary exemptions, but denied one to Catholic. App.26-27. This concession alone triggers strict scrutiny. See *Blackhawk,* 381 F.3d at 207, 209-10.

The City does, however, contend that its rules are neutral and generally applicable. Indeed, the City pretends that agencies were and are required to accept "all qualified families" and take "all comers." Opp.20-21. But that is flatly contradicted by the City's own statement that agencies are allowed to have "different requirements" and the unrebutted testimony that "referrals are made * * * all the time." Appx.237. *Any* exception undermines an "all comers" policy, because the point of such a policy is that it applies across the board. The record contradicts the City's

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and told Catholic that the issue had the attention of the "highest levels of City government." App.10; Appx.698. The City says the record "directly contradicts" the Mayor's role, but PCHR stated that it "initiated this investigation at the request of the Mayor." Appx.116.

[5] Appx.37, 41-43; see also App.24-25 (addressing these errors). The City blurs the line between legal conclusions and factfinding, but even that does not help, since "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (internal quotation omitted).

new made-for-litigation characterizations.

Instead of addressing its admitted practices, the City responds by moving the goalposts, arguing that such referrals are permissible because they do not undermine the purpose of the FPO. Opp.24-25. But as we have shown, the City has never before considered foster care a public accommodation under the FPO.[6] The City cites no contrary evidence because it has none, merely asserting that home studies are a public accommodation. Opp.23 n.9. This *ipse dixit* cannot be squared with the City's admission that it wants Catholic not just to offer home studies, but to *certify* same-sex couples. Opp.19 n.3. Certifications, which rely upon discretionary criteria prohibited by the FPO, are not a public accommodation. App.31-32 (quoting 55 Pa. Code § 3700.64). The City then *admits* that it takes prohibited categories like race and disability into account, but relies upon the *non sequitur* that "the federal government does not consider this discriminatory." *Id.*[7]

These undisputed facts confirm that the City does precisely what the Free Exercise Clause forbids: it engages in actions which undermine its interest, but then "devalues" religious reasons for action "by 'judging them to be of lesser import than nonreligious reasons.'" *Blackhawk*, 381 F.3d at 209 (quoting *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002)).[8] And none of this can justify

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[6] App.29-32; Appx.399-00, 624-26, 628-29, 634-35, 637.

[7] Unlike the FPO, the federal guidance that the City cites specifically discusses the application of federal law to foster care. See *id.* (citing guidance documents).

[8] The City continues to root its objection to Catholic's religious exercise in ever-varying City policies, this time citing the City's Charter. Opp.7-8. The City did not identify the Charter as the source of its concerns in the May 7 letter, nor did it raise

the City's decision to penalize the individual Appellants merely for working with Catholic—an action the City completely fails to defend. App.27-29.

For these reasons, the City's actions are subject to strict scrutiny under the Free Exercise Clause. The City does not even try to carry its burden to satisfy strict scrutiny, and the District Court did not apply strict scrutiny. See Appx.43. Yet this Court's precedents show that such analysis is warranted here for multiple reasons. At this early stage of the proceedings, while Appellants await the outcome of their appeal, an injunction is warranted to allow the lower courts the time and opportunity to engage in the proper analysis and to safeguard this Court's jurisdiction so that Catholic's program is not shut down before it can litigate its claims.

Finally, the City invokes all manner of disastrous consequences that would follow if it had to abide by the Free Exercise Clause, Opp.18, "but [the City] has made no effort to substantiate this prediction." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).[9] The real problem is the City's "apparent belief" that no religious accommodations can be countenanced, "no matter how significantly it impinges on the religious liberties of [Applicants]." *Id.* Catholic has been providing foster care consistent with its religious beliefs for over a century, and the horribles have not paraded.[10]

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this argument before the District Court. And no matter what basis the City cites for its policies, their lack of general applicability remains unchanged.

[9] The Court was right to distrust the government's Chicken Little predictions in *Hobby Lobby*—none of them have come to pass in the four years since that decision.

[10] The City claims this Court "has never countenanced a system where some members of the public—such as opposite sex couples—can choose from any service

**2. The City violated the Free Speech Clause.**

The City is trying to do something the First Amendment forbids: "recast[ing]" its contract so as to subsume the compelled speech into "the definition of a particular program" in order to evade First Amendment review. *Agency for Int'l Dev.* v. *AOSI*, 570 U.S. 205, 215 (2013). The City claims that Catholic's home studies "go[ ] to the heart of the services" it provides and are therefore government speech. Opp.26. But the record—and the City's own admissions—make clear that the opposite is true.

For example, the City does not dispute that "certifications and home studies" 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." Opp.26.[11] The contract itself puts the discussion of certifications under the heading "required licensure and qualifications." City.Appx.104.[12] Nor does the contract require Catholic to perform a certain number of home studies, or to perform home

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provider but other members of the public—such as same sex couples—have fewer options." Opp.30. This is directly contrary to *Masterpiece*, where seven Justices of this Court acknowledged that religious groups can follow their beliefs when providing services such as marriage solemnization—which like foster care serves both governmental purposes as well as religious purposes—and this is a situation gay couples "could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece*, 138 S. Ct. at 1727.

[11] The record shows that Catholic's compensation is unrelated to the number of studies it provides. Appx.602.

[12] Pennsylvania law makes clear that foster care home studies and certifications are state-law-mandated prerequisites to foster care. See 55 Pa. Code § 3700.2. Dictating this licensing requirement (particularly without providing any compensation regarding this requirement) would be like a client trying to tell a public accounting firm that contracted to control the certification requirements for the firm's auditors, simply because such certifications are a prerequisite to the accountant's ability to perform the client's audit.

studies in any specific manner; Catholic provides the studies under state law so its families are licensed. Indeed, the City conceded that it has "nothing to do" with home studies and that agencies *can* have different requirements for certifying foster parents.[13] The contract even states that Catholic is an independent contractor, *not* a City agent. Appx.136. And as the City admits, those sorts of private actions are beyond its control: "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." Opp.20.[14]

Thus, by seeking to "leverage funding to regulate speech outside the contours" of the program the City actually contracts for and directly "subsidize[s]," the City contravenes the First Amendment. *AOSI*, 570 U.S. at 214–15; see also *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2379 (2018) ("*NIFLA*") (Kennedy, J., concurring) ("[I]t is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.") (citation omitted); *Pac. Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 16 (1986) (forcing a public utilities company to include speech it disagreed with in its customer mailings constituted compelled speech).

The City argues that Catholic can simply "choose not to participate" in foster care

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[13] Appx.644-650. Nor has the City pointed to a single instance in which it has treated home studies as its own; instead, home studies have always been private speech outside the scope of the City's contract.

[14] The City makes much of Catholic's request for a clergy letter. But Catholic never conceded the letter was somehow part of the contract; it merely agreed to make a change since the clergy letter, which could be from clergy of any faith, was not mandated by Catholic's religious mission. Appx.475; City.Appx.175.

contracts with the City as an adequate remedy. Opp.4. But Catholic cannot provide foster care services to Philadelphia children *at all* without a City contract. Catholic historically provided foster care services as part of its religious ministry before this was a government program, but the City does not dispute that it has now arrogated monopoly power over foster care. See App.5-6. Thus, getting a foster care contract is like getting a license. Telling Catholic its only remedy is to discontinue this religious ministry to Philadelphia's foster children is cold comfort. Opp.28; Appx.419-20. Catholic is thus unlike the libraries in *United States* v. *American Library Ass'n, Inc.,* 539 U.S. 194, 212, (2003) (plurality opinion) who were "free to [offer unfiltered access] without federal assistance." *Id*. Indeed, this is an even easier case than *AOSI*, where the organizations could forego government funding and "take a different tack with respect to prostitution." 570 U.S. 205 (Scalia, J., dissenting).

Failing to justify its conduct, the City turns to hyperbole, claiming that relief for Catholic here would somehow be so "all-encompassing" that "it would require an ongoing right to such a contract, regardless of its terms of expiration." Opp.16. Philadelphia's obligation to obey the Constitution does not mean it lacks all ability to contract; it simply means that Philadelphia must obey its constitutional obligations when doing so. Thus, as Catholic (and the caselaw) have made clear all along, "despite a government employer's general authority to terminate, or not-renew, an at-will government contract," the First Amendment places limitations on that discretion, including retaliatory government action or impermissible conditions compelling speech. *Bd. of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 685-686 (1996); *O'Hare*

*Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996) (same). Here the City has *admitted* that its adverse contract actions were based solely Catholic's "religious decision." Appx.120-21, 661-62.[15] The First Amendment provides clear constraints against "unfettered power to reduce a group's First Amendment rights" particularly where, as here, the City is essentially "imposing a licensing requirement" and using it to compel speech. *NIFLA*, 138 S. Ct. at 2375. The City can hardly complain about its freedom to contract when it has made itself the only game in town.

**B. Applicants face irreparable harm that cannot be avoided.**

Absent relief, Applicants' First Amendment rights will continue to be irreparably harmed, and this Court will lose its ability to provide full and complete relief at a later date. See *Lucas* v. *Townsend*, 486 U.S. 1301 (1988) (Kennedy, J.) (enjoining referendum pending appeal of denial of Voting Rights Act challenge); *American Trucking Ass'n* v. *Gray*, 483 U.S. 1306 (1987) (Blackmun, J.) (granting injunction pending final decision). Indeed, the City's actions are already causing irreparable harm to both Catholic and the individual Applicants.

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[15] By contrast, the federal government—hardly a pushover when it comes to contracts—has recognized that providing accommodations for religious contractors does not undermine its interests in enforcing the law and preventing discrimination. See Office of the Att'y Gen'l, *Mem. for all Exec. Depts. and Agencies: Fed'l Laws Protections for Rel. Liberty* (Oct. 3, 2017), https://www.justice.gov/opa/press-release/file/1001891/download ("government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization's hiring exemptions or attributes of its religious character."); Dep't of Labor, DIR 2018-03 (Aug. 10, 2018), https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf (staff "must permit faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for Federal contracts").

With intake closed, Catholic's foster program is withering away as children graduate from foster care, are adopted, or reunite with their birth families. Worse still, 35 foster homes are today sitting empty because of the City's actions. Appx.77. Foster parents like Applicant Mrs. Paul are unable to engage in religious exercise because the City will not place a child in their care, simply because they work with Catholic. App.29; Appx.241-242, 252-254, 258.

As Applicants have made clear from the beginning, Catholic will be forced to close its foster program in "a matter of months" if it does not receive judicial relief. Appx.85-86. It will be extremely difficult, if not impossible, for Catholic to rebuild. Appx.455-458.[16] Foster families will face a "very harmful" loss. Appx.257. The City tries to undermine the urgency of the situation by suggesting an interim contract, Opp.29, but that contract was designed to "wind down" Catholic's operations "in an orderly fashion." Appx.85-86; Appx. 815. Irreparable harm, imposed "in an orderly fashion," remains irreparable.[17] Similarly, it is no answer to say that Catholic engages in other charitable work throughout Philadelphia (though of course it does); this does not change the fact that the City is imposing irreparable harm on *this* program, on the

[16] The City says Catholic can provide foster care services elsewhere. Opp.28. If the First Amendment does not allow a municipality to ban nude dancing from its jurisdiction, it is hard to see how a total ban on Catholic foster care in Philadelphia can be permissible. See *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) ("'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'") (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1938)).

[17] The City also claims no urgency because Applicants did not immediately sue. But they initially tried to resolve the dispute without litigation. See, *e.g.,* Appx.116-122.

foster parents who work with it, and on the children who could be served by it.

The City also claims that this Court need not get involved because the Third Circuit has expedited Catholic's appeal. An expedited appeal will still take several months to complete,[18] and during that time Catholic faces the potential loss of foster parents and staff members by attrition due to uncertainty over their future. App.18-20; Appx.940. The City criticizes Catholic for working diligently to stave off layoffs. Opp.12. Under any other circumstances those actions would be commended, and they have come at the cost of unwanted transfers, stress on other programs, and downsizing its foster care program. Appx.940. The fact is that Catholic will likely lose many of its staff members and might even be forced to close completely before its appeal to the Third Circuit is complete.[19]

Finally, the City claims that Catholic's closure has had no effect on the foster care system because aggregate placement numbers have not changed. Opp.11. The City cannot deny that it put out an "urgent call" for 300 more foster families, and that it needs to placements in *increase*—not remain static—so it can move 250 children out of congregate care and into loving homes. Appx.148-155, 681-82. Catholic has 35

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[18] Even under this expedited schedule, briefing will not be complete until October, at which point the Third Circuit will have at least four weeks to review the briefs before argument (unless the panel unanimously agrees to a shorter period). See Third Cir. I.O.P. 1.1. After argument, the Court will then have to deliberate and draft an opinion, meaning that even an expedited appeal will take months.

[19] Shockingly, the City maintains that Catholic's harm is not irreparable because Catholic "can always simply choose not to participate" in foster care. Opp.4. This is a gross misreading of *AOSI*, and the suggestion that a harm is not irreparable because Catholic can simply give up its religious exercise reflects the City's utter failure to understand its obligations under the First Amendment.

vacancies due to the intake closure.[20] The City claims that this straightforward math "is an overexaggeration [sic] of the complication of our work." Appx.685. Catholic strongly agrees that children are not "widgets." Opp.11. But whether the number of children who could be placed with Catholic is 35 or even just 5, the City is harming real children and real foster families, not widgets.

In comparison to the serious harms suffered by Catholic and its foster families, the City invokes only broad and generalized interests in a diverse pool of foster parents. Opp.29. The City acknowledges that Catholic's views on same-sex marriage "are well known," Opp.23, and the City's interest in anti-discrimination appears to go back to 1982, Opp.8, yet it took until 2018 for the City to act. But more importantly, Catholic's actions have done nothing to prevent same-sex couples from accessing foster care services. Appx.609-10; 775-77. Nor is there any evidence that shutting down a religious foster care agency increases diversity in the foster care context: the City admitted that regardless of Catholic's fate, the same number of foster care agencies will be available to serve same-sex couples. Appx.608-09.

Without an injunction, Applicants continue to suffer irreparable harms and face the complete loss of their religious ministry before having the chance to litigate their appeal and seek this Court's review; with an injunction, the *status quo ante* is restored, and this costs the City *nothing*.

## II. Certiorari before judgment is appropriate.

The City would have this Court believe that there is "nothing to see here." But

[20] Appx.455.

even a brief review of key Supreme Court precedents contradicted or misinterpreted shows just how necessary this Court's intervention is.

This is a case in which the First Amendment has been twisted beyond recognition: When the District Court concluded that Catholic had lost its First Amendment rights by entering into a government contract, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2107) and *AOSI* fell by the wayside. When the District Court rejected the argument that the City's actions constituted impermissible religious targeting, *Masterpiece* was ignored. When it concluded that Catholic's home studies were, if anything, government speech, the court misapplied *NIFLA* and *Janus* v. *AFSCME*, 138 S. Ct. 2448 (2018). And when it found that Catholic's home studies were the equivalent of an "all-comers policy," *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661 (2010) was stretched to the point of breaking.

This Court's guidance is desperately needed, and the City's arguments do nothing to change that fact. The City does not contest the fact that this is just one of many foster care agencies that either are or have faced shutdowns by local or state officials over their religious beliefs (several of which were financially unable to pursue their case on appeal). Nor does it even respond to Applicant's arguments that this issue is of national importance, has already been deemed certworthy by this Court for all the reasons stated in *Masterpiece*, and has enormous real-world consequences for vulnerable children and families across the country.

## CONCLUSION

For the foregoing reasons, Applicants request a temporary injunction pending appellate review of their motion for a preliminary injunction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Mark L. Rienzi, a member of the Supreme Court Bar, hereby certifies that one copy of the attached reply was served via electronic mail and first-class United States Postal Service mail on August 14, 2018 on:

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Date: August 14, 2018

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