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

REPLY BRIEF FOR PETITIONERS

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Catholic Social Services stands to be excluded from foster care, not because it broke any law, but because Philadelphia disagrees with its religious practices regarding marriage. Philadelphia's shifting policies are riddled with exemptions and its leaders were anything but neutral. Philadelphia's latest justifications are more of the same: made-for-CSS rules in a system that Philadelphia now concedes is "subjective and individualized."

Unable to shoehorn its treatment of CSS into *Smith*, Philadelphia asks for a made-for-CSS constitutional standard, too. Respondents ask the Court to create a new, untested standard, even more deferential to the government than *Smith*, whenever the government is "manag[ing]" its "agents" wielding "delegated" government power. That rule has no basis in free exercise precedent or the facts of this case. CSS is not Philadelphia's agent, Philadelphia hasn't delegated it any power over home studies, and Philadelphia doesn't "manage" home studies. Nor has any court, anywhere, adopted Respondents' proposed new constitutional rule. Nor can Respondents explain how their arguments comport with *Espinoza*, *Our Lady*, or the discussion of religious liberty in *Bostock*.

Philadelphia wants things both ways: It creates exemptions when the City wants to discriminate based on disability or race, but claims its rules are ironclad for CSS. It wants the Court's review to be constrained, except when it wants the Court to embrace a new legal theory Respondents never argued below. It declares CSS independent for tort liability purposes, but wants it to be Philadelphia's agent for constitutional ones. It has "nothing to do" with home studies, until it claims

"managerial authority" over them. It wants the Court to retain *Smith*, except when it wants the Court to rewrite it.

Respondents' attempt to create a brave new free exercise world is yet another reason to revisit *Smith* and to employ a constitutional standard that follows the text, history, and tradition of the Free Exercise Clause. That would respect our long history of protecting religious dissenters and confirm that the Religion Clauses, properly construed, can help "foster a society in which people of all beliefs can live together harmoniously." *American Legion* v. *American Humanist Ass'n*, 139 S.Ct. 2067, 2074 (2019).

I. Philadelphia violated the First Amendment.

Smith has long been understood as the constitutional floor, the minimum level of protection accorded any First Amendment right. Laycock Br.20-24. But *Smith* applies to only a limited class of free exercise claims. Pet'rs.Br.23-25. Philadelphia's attempts to exclude the Catholic Church from foster care fall outside of *Smith*'s narrow rule for general laws with an "incidental effect" on religious exercise. *Employment Div.* v. *Smith*, 494 U.S. 872, 878 (1990); see Pet'rs.Br.19-23. The effect on CSS is not "incidental"—it is the point. And even after six attempts, Pet'rs.Br.12-15, Philadelphia still can't identify a generally applicable rule.

A. Philadelphia's actions are not neutral.

Philadelphia departed from neutrality at every turn. Pet'rs.Br.10-11. The City Council condemned "discrimination that occurs under the guise of religious freedom" and demanded that CSS "have their contract with the City terminated with all deliberate

speed." Pet.App.147a. The Mayor spoke with Commissioner Figueroa, who launched an investigation of religious agencies. Pet'rs.Br.10.

Respondents claim that the City Council "does not oversee" contracts, the Mayor didn't have "any influence," and Commissioner Figueroa was just doing what "made sense," Phila.Br.39-41. This ignores reality. Philadelphia proposes an "especially clear showing" standard for proving non-neutrality. Phila.Br.23. But it's not apparent what that novel standard would accomplish here, since Figueroa's statements and the City Council's resolution were crystal clear. Philadelphia was not investigating discrimination generally; it says it "made sense" to target religiously-motivated actions. Phila.Br.41; Interv'rs.Br.31. This alone violates the First Amendment.

Nor can Philadelphia justify telling an arm of the Catholic Church how to interpret Catholic doctrine, then penalizing it minutes later for failure to conform. "[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion. State interference in that sphere would obviously violate the free exercise of religion." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S.Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 186 (2012)).

Having failed to rehabilitate its past actions, Philadelphia urges this Court to ignore them and look only at the FY2020 contract. Phila.Br.3, 14-15. But that contract was changed "to address CSS's objection that the prior language was unclear." Phila.Br.40. A contract specifically written to address CSS's religious exercise is nothing like the across-the-board criminal

prohibition in *Smith*. That alone triggers strict scrutiny. U.S.Br.15-17, 20-26.

History matters, too. The Court looks to the "discriminatory *reasons* that [Philadelphia officials] adopted their peculiar rules in the first place." *Ramos* v. *Louisiana*, 140 S.Ct. 1390, 1401 (2020). Philadelphia is changing its position mid-litigation to refine its targeting. Because the current contract "flowed directly from" Philadelphia's "failure to follow the dictates of federal law, it cannot be defended as a neutral policy decision." *Espinoza* v. *Montana Dep't of Revenue*, 140 S.Ct. 2246, 2262 (2020). Unlike *Abbott,* Philadelphia is not enacting statewide law through a legislature whose motives can be difficult to determine. See *Abbott* v. *Perez*, 138 S.Ct. 2305, 2324 (2018). Here, the same officials who ordered the 2018 referral freeze are rewriting contracts to preserve it. Such bureaucratic ad hocery is the antithesis of neutral law. Philadelphia's egregious actions warrant forward-looking relief so that CSS and its foster families can resume helping children. See *Agency for Int'l Dev.* v. *AOSI*, 570 U.S. 205, 211 (2013) (affirming preliminary injunction against grant requirement).

B. Philadelphia's policies are not generally applicable.

Philadelphia's policies are not generally applicable because the City (1) uses individualized exemptions and (2) makes other exceptions from its nondiscrimination policies. Pet'rs.Br.25-30. Its actions must face strict scrutiny.

1. Philadelphia now concedes it uses a "subjective and individualized" system. Phila.Br.20, 23, 38. *Smith* applies only to general laws; it is inapplicable "where

the State has in place a system of individual exemptions." *Smith*, 494 U.S. at 884. Philadelphia previously trumpeted a "Waiver/Exemption Committee," but now makes an about-face, claiming that the Waiver Committee "has no authority" to grant waivers. Phila.Br.36. But both its name and Philadelphia's BIO confirm the opposite: the Committee can "participate in resolving religious objections of the kind made by CSS." Phila.BIO.21. *Smith* requires strict scrutiny in such "subjective and individualized" circumstances.

Philadelphia's contract, in Section 3.21, also lets the Commissioner make exceptions "in his/her sole discretion." J.A.582. Philadelphia asks this Court to overlook this provision, claiming it allows "'exception[s]' only from the obligation set forth in Section 3.21 itself." Phila.Br.36. But even Philadelphia's new, made-for-CSS Section 3.21 permits discretionary "exception[s]" from the requirement "not [to] reject a child or family" based upon "their actual or perceived race, ethnicity, color, sex, [or] sexual orientation." S.A.16; S.A.27-39 (no changes for FY2020). Philadelphia insists it *can* grant such exemptions but refuses to do so for CSS. Pet'rs.Br.25-27; Pet.App.168a. This alone triggers strict scrutiny.

Despairing of the facts, Respondents ask the Court to change the law: *Smith* and *Lukumi* should be reduced to intentional discrimination, and government should be rewarded with even "greater leeway" when it burdens religion through "subjective and individualized" decisions. Phila.Br.12, 36-38; Interv'rs.Br.37-38. But the point of *Smith*'s individualized exemption language, like a prior restraint or content discrimination in the speech context, is to apply strict scrutiny in the

high-risk circumstance where religious exercise is penalized through "individualized governmental assessment of the reasons for the relevant conduct" rather than "an across-the-board criminal prohibition." *Smith*, 494 U.S. at 884; see also U.S.Br.14-16. Even *Smith*'s defenders understand that its rule should not apply in such circumstances. See Hamburger Br.14-18.

2. Philadelphia also permits numerous exceptions from its nondiscrimination requirements. Pet'rs.Br.27-30; U.S.Br.23-26.

Respondents rely heavily on a supposed factfinding that Philadelphia "would not permit any foster agency * * * to turn away potential foster parents." Phila.Br.6, 10, 29; Interv'rs.Br.9, 31, 34-35. This conclusion, like others Respondents invoke, is at best a mixed conclusion of fact and law. See Pet.App.71a-131a ("Conclusions of Law"). And even if it were a factfinding, in First Amendment cases this Court has "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 567-568 (1995). The record here proves Philadelphia makes multiple exceptions. Pet'rs.Br.25-30.

For example, state law governing home studies requires agencies to consider factors supposedly forbidden by Philadelphia's contract, including marital status, familial status, and disability. Pet'rs.Br.12-13. Philadelphia admits this. Phila.Br.31. Respondents defend those exemptions as relating to the care and nurturing of children, a phrase which appears in state law—not in the Fair Practices Ordinance or relevant

contract provision. Phila.Br.31; Interv'rs.Br.35. Philadelphia is therefore making a value judgment, rooted in its own beliefs about marriage and nurture of children, to allow exceptions for other agencies, but not for CSS. See J.A.210-213 (discussing CSS's beliefs).

Philadelphia specifically defines itself as a public accommodation in the FPO. Phila. Code § 9-1102(w). Yet Philadelphia defends its own use of race in foster care. Phila.Br.32-35. Its various hypothetical justifications for this action have no basis in the FPO. Commissioner Figueroa admitted DHS had never "done anything to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work." J.A.306; see also J.A.150-51. Thus, the FPO has "every appearance of a prohibition that" Philadelphia "is prepared to impose upon" CSS "but not upon itself." *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 545 (1993). That is the antithesis of a generally applicable law.

Philadelphia's real problem is that it has never had a nondiscrimination rule suited to the complex and sensitive inquiries inherent in the foster care process. Providing foster care is not like buying a train ticket or a sandwich. Race, age, religion, disability and other characteristics are considered—and can be dispositive. Philadelphia never had a general rule that took these circumstances into account, and after six tries, still doesn't have one today. Philadelphia's actions "fall well below the minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543.

C. Philadelphia cannot rewrite CSS's religious beliefs.

Philadelphia also tries to rewrite CSS's religious beliefs, arguing that CSS is "simply mistaken" about the nature of certifications, and that certifying same-sex couples isn't actually "contrary to its stated religious beliefs" after all. Phila.Br.43-45. CSS testified the exact opposite: that "certifying a home of the same-sex couple would be in violation of" the Church's teachings on marriage. JA.210-213. No one has challenged the sincerity of that objection. Nor is there a meaningful factual dispute about what CSS must do: state law *requires* that CSS "shall consider" "[e]xisting family relationships" and must also consider applicants' ability "to work in partnership with an [agency]." 55 Pa. Code § 3700.64. This "assessment" is required for CSS to "approve" applicants. 55 Pa. Code § 3700.61. The City's theologians may call that approval a permissible non-"endorsement," Phila.Br.43-46, but the Archdiocese disagrees. J.A.210-213.

It is not for the City to say CSS's religious belief that it cannot complete certifications is "mistaken or insubstantial." *Burwell* v. *Hobby Lobby Stores*, 573 U.S. 682, 725 (2014); see also *Little Sisters of the Poor* v. *Pennsylvania*, 140 S.Ct. 2367, 2383 (2020) (rejecting attempt to "'tell the plaintiffs that their beliefs are flawed'"). Where Philadelphia objects to something that CSS can change without violating its religious beliefs, CSS is willing to change. Phila.Br.10 (pastoral letter requirement). But CSS cannot violate its religious beliefs about marriage. Nor are CSS's beliefs idiosyncratic. Cf. *Holt* v. *Hobbs*, 574 U.S. 352, 362 (2015). Catholic agencies across the country have shut

their doors rather than betray their faith. Pet'rs.Br.32; USCCB Br.2.

Respondents would also tell CSS how to exercise its faith. Phila.Br.6. They argue, in effect, that the Church and its foster families should simply find another vocation. But government can't forbid one religious exercise with the excuse that another (real or theoretical) option is available. See *Holt*, 574 U.S. at 361-362. Nor does Philadelphia explain how CSS could "provide assistance" to foster children if they must be placed with another agency, and there is no evidence this or their other suggestions are feasible. Indeed, the individual plaintiffs would be "devastated" if CSS were no longer their foster agency, and those families can't even hypothetically engage in Philadelphia's alternatives. J.A.68; see also Phila.Br.51 (acknowledging CSS families must find a new agency).

II. Respondents' novel government contract theory has no basis in fact or law and would have untenable consequences.

Since *Smith* is inapplicable to "subjective and individualized" determinations, Respondents try to change *Smith*. They introduce brand-new arguments in this Court, seeking an untested standard of near-absolute government control over contractors. But their "managerial authority" test has no basis in the text, history, or tradition of the Free Exercise Clause—nor in the facts of this case. What's worse, Respondents get the consequences precisely backwards: Governments have long accommodated religious exercise without ill effect. Respondents' test would transform every government contractor or delegee into an arm of the state, with disastrous consequences.

A. Respondents' theory is wrong on the facts.

Philadelphia argues that it should get special deference when exercising "managerial authority" over its "agents" wielding "delegated" authority. Phila.Br.11-12. This argument stumbles out of the gate because the contract is extraordinarily clear that CSS is *not* Philadelphia's agent:

> Provider is an independent contractor and shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City.

J.A.634, S.A.17. Yet Philadelphia premises its "managerial authority" argument on "agents" doing "jobs" for the City. Phila.Br.11-12. Philadelphia wants to hold CSS at arms' length to avoid liability, but treat CSS like an employee for First Amendment purposes.

Nor does Philadelphia exercise "managerial" authority over home study certifications. Those are governed by state law, not Philadelphia's contract. Pet'rs.Br.7-8. Respondents act as if home studies are what CSS is contracted to do. Interv'rs.Br.27. Instead, CSS agrees to support and oversee foster families *after* a child is placed. That support includes meeting with the child's care team to develop goals and track progress, J.A.517, 560, 527; providing "ongoing support and coaching" to foster parents, J.A.512, 522; conducting quarterly inspections to ensure children are receiving proper food, clothing, shelter, and transportation, J.A.520-522; and committing to be available to help their foster families, twenty-four hours a day, J.A.532. Having screened and certified foster families is a predicate that permits CSS to perform those duties *after*

Philadelphia places a child in a home. The contract nowhere grants Philadelphia managerial authority over home studies: As Figueroa admitted, when agencies gather information for a home study, they "don't provide it to" Philadelphia; "they have to go through the state process." J.A.321. Philadelphia has "nothing to do with that process." J.A.322.

Nor did Philadelphia "delegate[ ]" any authority over home studies to CSS. The language Respondents tout, Phila.Br.5-6, is not in the contract, but in a *state* law covering the relationship between the *state* and private foster agencies. See Phila.Br.5-6, 24-25 (citing 55 Pa. Code § 3700.61). Philadelphia made no such delegation and instead, by law, "shall not authorize any placement" until it makes its own independent determination of the family's qualifications. Phila. Code § 21-1801; see also J.A.84-85, 98 (confirming Philadelphia does so). Philadelphia is reserving authority to make its own decision about families. It cannot transform the state's delegation into the City's constitutional free pass.

Private and religious entities frequently partner with the government to provide social services. CSS is akin to a private school serving children under state contracts, *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982); a nursing home serving patients funded by public assistance, *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); a religious hospital serving the poor through Medicaid, *Bowen* v. *Kendrick*, 487 U.S. 589, 613-614 (1988); or a rabbi solemnizing a marriage pursuant to authority conferred by state law, 23 Pa. Stat. and Cons. Stat. § 1503. Such entities do not forfeit their constitutional rights.

B. Respondents' theory is wrong on the law.

Respondents' "managerial authority" rule has no basis in the text, history, or precedent of the Free Exercise Clause. Respondents appear to divine their "managerial authority" rule from the penumbras of state action, respondeat superior, and agency. But they never show their math, breezing past well-developed bodies of law to declare that CSS, a private actor and non-agent, is identical to a government employee acting within the scope of her employment.

1. First, Philadelphia argues that it must exclude CSS from foster care or else face "liability" for CSS's actions, because CSS is a "*potential* 'state actor[ ].'" Phila.Br.25 (emphasis added). Note the hedge: Philadelphia wants a novel constitutional rule based on state action, but it won't conduct the analysis or commit to the consequences. Contracts and funding do not create state actors. In *Rendell-Baker*, for example, the private school was a private actor even though it received 99% of its funding from the government to perform the "public function" of educating "maladjusted high school students" referred to it by government agencies under "public contracts." 457 U.S. at 836, 841-842. And this Court has rejected the idea that "[m]ere approval of or acquiescence in the initiatives of a private party" can render the government "responsible for those initiatives." *Blum*, 457 U.S. at 1004-1005.

Respondents likewise speak loosely of "government function," "public functions," and "public services," Phila.Br.1, 15; Interv'rs.Br.25-26. They use these terms to suggest state action or agency, but never connect the dots. This Court has rejected such attempts to transform private action into state action: "it is not

enough that the function serves the public good or the public interest in some way"; instead, "the government must have traditionally *and* exclusively performed the function." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S.Ct. 1921, 1928-1929 (2019). Foster care and the selection of foster parents has never been an exclusive state prerogative. See Pet'rs.Br.3-9; USCCB.Br.8-20. That is still true under Pennsylvania law today. See 55 Pa. Code § 3700.4 (discussing "[a] public or private agency"). Yet Respondents want a new rule that government is acting as a manager—and constitutional protections are diminished—whenever a private party performs some vaguely defined "public" function.

Respondents rely primarily on cases standing for the unremarkable proposition that government can manage its employees. In *Engquist* v. *Oregon Department of Agriculture*, the Court distinguished the "'close relationship between the employer and employee'" from "'arm's-length' government decisions.'" 553 U.S. 591, 604 (2008). It applied a higher constitutional standard to the latter, particularly when the government deploys its "power to regulate or license, as lawmaker." *Id.* at 598, 604. Cf. *NASA* v. *Nelson*, 562 U.S. 134, 148 (2011) (distinguishing "regulate or license" cases); *Garcetti* v. *Ceballos*, 547 U.S. 410, 424 (2006) (rejecting notion that government can shield actions via "excessively broad job descriptions").

Here, Philadelphia is acting as sovereign, regulating the foster care system and licensing dozens of private agencies via arms-length contracts. Those private agencies can only serve children in Philadelphia's foster system by contracting with Philadelphia. Pet'r.Br.5. But the agencies are not "employee[s] or

agent[s]" of Philadelphia. S.A.17. Moreover, Philadelphia relies on the FPO, a public accommodations law which the City claims is "binding of its own force." Phila.Br.35-36. That's sovereign, not managerial, authority.

Respondents demand a level of deference that exceeds what the government enjoys in national security and prison management. Even in the context of terrorism, this Court does not defer to the "Government's reading of the First Amendment," but considers carefully its "findings" and "empirical conclusions" under strict scrutiny. *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 29, 34-35 (2010). And in prison management, where "government exerts a degree of control unparalleled in civilian society," *Cutter* v. *Wilkinson*, 544 U.S. 709, 720, 722-723 (2005), the Court rejected "a degree of deference that is tantamount to unquestioning acceptance." *Holt*, 574 U.S. at 364. Instead, appropriate deference meant "courts should not blind themselves" to the setting, and that governments may withdraw accommodations "if the claimant abuses the exemption" to undermine compelling interests, or is insincerely "using religious activity to cloak illicit conduct." *Id*. at 369. While *Holt* was decided under RLUIPA, it applies to every prison system nationwide. There is no evidence that this stringent standard has made prison management unworkable.

2. Respondents rely heavily on *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668 (1996), which applied the *Pickering* test to a government contractor. There, the Court analogized the government's power over an "exclusive" service provider for the entire jurisdiction to "the public services [the county] performs

through its employees." *Id.* at 671, 676. Here, Philadelphia works with dozens of agencies and specifies that they are not its employees or agents. Pet'rs.Br.7. The condition Philadelphia requires here—asking a church to violate its religious beliefs on marriage as a condition of foster care—is a far cry from the condition in *Umbehr*, *i.e.*, that a county's exclusive trash hauler refrain from criticizing the relevant government officials. Moreover, since *Umbehr*, the Court has declined to extend *Pickering* "to compelled speech" of even government employees, particularly speech on "controversial subjects such as * * * sexual orientation," which "occupies the highest rung of the hierarchy of First Amendment values." *Janus* v. *AFSCME,* 138 S.Ct. 2448, 2473, 2476 (2018) (citation omitted).

Respondents also analogize to *Bowen* and *Lyng*. But *Bowen* merely demonstrates actual management of internal operations, where the question was whether "state agencies 'shall utilize' Social Security numbers." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986). Five Justices agreed the outcome would have been different had the government "affirmatively compel[led]" the religious objectors to perform an action or face consequences. *Id.* at 703; *id.* at 715-716 (Blackmun, J., concurring in part); *id.* at 726-733 (O'Connor, J., dissenting in part); *id.* at 733 (White, J., dissenting). *Lyng* was about "publicly owned land" and distinguished cases where "individuals [are] coerced by the Government's action into violating their religious beliefs." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Here, CSS is not trying to control Philadelphia's internal actions or its property; Philadelphia is attempting to coerce CSS.

Respondents ignore the more analogous cases. They don't mention *Rosenberger*. There, the religious student publication was required to "become a 'Contracted Independent Organization'" to receive funding, and its contract stated it "should not be misinterpreted as meaning that those organizations are part of or controlled by the University." *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 823, 824 (1995). Like Philadelphia, UVA claimed that a ruling for petitioners "would become a judicial juggernaut, constitutionalizing the ubiquitous content-based decisions" of government entities. *Id.* at 833. The Court rejected that argument, giving the government no special deference where the contract makes clear that the student groups "are not the University's agents." *Id.* at 835.

Indeed, in funding cases, the Court has repeatedly declined to carve out an exception to the Free Exercise Clause. *Espinoza* rejected the argument "that some lesser degree of scrutiny applies to discrimination against religious uses of government aid." 140 S.Ct. at 2257. *Trinity Lutheran* held that government cannot exclude religious organizations from grant programs, observing that governments may not discriminate against "some or all religious beliefs." *Trinity Lutheran Church of Columbia* v. *Comer*, 137 S.Ct. 2012, 2021 (2017). And it analogized the church's injury there to the improper exclusion of a government contractor. *Id.* at 2022. Respondents' rule would allow governments to assert "managerial authority" wherever funding or an allegedly "public function" like education, health, or the care of children is involved. The Court should reject this end run around the protections granted in *Espinoza* and *Trinity Lutheran*.

C. Respondents are wrong on the consequences.

1. Respondents claim "government 'could not function'" if contractors have normal free exercise rights. Phila.Br.11; cf. Interv'rs.Br.20-21. To the contrary, religious exercise protections for contractors "have proliferated without unduly burdening the government," and Respondents provide "no evidence of excessive or abusive litigation under such provisions." *Umbehr*, 518 U.S. at 683, 684.

State and federal law have long protected religious government employees and contractors. The federal government recognizes that both RFRA and Title VII's religious exemption apply to religious contractors.[1] Federal statutes require governments using federal funds—including Philadelphia—to protect the religious freedom of social service providers. See 42 U.S.C. 604a(c). And many states have specific protections for child welfare providers like CSS. Tex.Pet.Br.3. Even government employees receive protections under state and federal RFRAs, Title VII, and the Government Employee Rights Act, 42 U.S.C. 2000e-16. See, *e.g.*, *Deveaux* v. *City of Philadelphia*, 75 Pa. D. & C.4th 315 (Com. Pl. 2005) (applying Pennsylvania RFRA to Philadelphia employees); *Myrick* v. *Warren*, Case No. 16-EEOC-0001 (Mar. 8, 2017) (GERA permits magistrate to recuse from wedding); *Potter* v. *D.C.*, 558 F.3d 542, 545 (D.C. Cir. 2009)

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[1] Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002); Application of the Religious Freedom Restoration Act to the Award of a Grant, 31 Op. O.L.C. 162 (2007); 82 Fed. Reg. 49,670, 49,671 (Oct. 26, 2017).

(beard accommodation for Muslim firefighters); *Tagore* v. *United States*, 735 F.3d 324, 330 (5th Cir. 2013) (kirpan accommodation for Sikh employee). These protections have existed for years without creating the dire consequences Respondents predict.

So, too, have recusal provisions. CSS makes the modest request to recuse from performing a specific task to which it conscientiously objects. Government employees are regularly permitted such recusals from discrete tasks, and allowing them comports with the best of our traditions. We excuse corrections employees from being present at an execution, 18 U.S.C. 3597(b); prosecutors from prosecuting capital cases, *ibid.*; military chaplains from performing ceremonies for another faith, Air Force Instruction 52-101, § 2.1; and Sabbatarians from Saturday shifts, 5 U.S.C. 5550a. If even government employees, acting within the scope of their employment, are protected under existing law, then the sky will not fall merely because the Court continues offering ordinary First Amendment protection to a private, non-employee, non-agent ministry.

2. By contrast, the consequences of Respondents' new "managerial authority" rule would be severe—eliminating First Amendment protection for anyone who contracts with the government or receives "delegated" authority, even if the contracted or "delegated" function were historically private, as here.

Were this the law, then government could use this deference to target and disfavor unpopular religious groups in a wide variety of contexts, including inmate reentry programs, refugee services, homeless shelters, and education. That "would give government officials

at all levels a deadly weapon with which to coerce religious * * * institutions into abandoning a variety of religious practices that the broader community might find objectionable." Colleges Br.21. Indeed, governments could impose all manner of restrictions on anyone they contract with: requiring employee health plans to include contraception and abortion coverage, requiring religious schools to forfeit their Title VII and Title IX exemptions, prohibiting contractors from hiring former felons, requiring pharmaceutical companies to provide lethal injection drugs, or compelling Medicaid providers to allow assisted suicides on premises.

Nor would the consequences of Respondents' rule be limited to contractors. For example, Pennsylvania has delegated to religious leaders the power to solemnize a state-licensed marriage. See 23 Pa. Stat. and Cons. Stat. §§ 1301, 1503. According to Respondents, Pennsylvania (or even Philadelphia) could mandate that all clergy solemnizing *any* civil marriages must solemnize *all* marriages. In Respondents' view, that mandate would be neutral, and would enjoy extra deference since the state would be using "managerial authority." But the First Amendment protects "a member of the clergy who objects to gay marriage" from "be[ing] compelled to perform the ceremony" in violation of "his or her right to the free exercise of religion." *Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1727 (2018). Respondents' theory, if adopted, would negate this protection.

III. Respondents have no answer to CSS's compelled speech claim.

Philadelphia says it is not compelling speech, but its argument amounts to nothing more than "declaring" CSS's "speech itself to be the public accommodation," *Hurley*, 515 U.S. at 573. Respondents point to *Rumsfeld* v. *FAIR*, but the policy there did not "require[ ] them to say anything." 547 U.S. 47, 60 (2006). Respondents also rely on *Rust* v. *Sullivan*, but that case turned on the notion that a provider remained free to engage in abortion advocacy "separate and independent" from the government program. 500 U.S. 173, 196 (1991). Here, home studies are separate; the City admits it has "nothing to do" with them. J.A.322. And *Rust* is limited by *AOSI*, which says government cannot limit a funding recipient to "express[ing] *its* beliefs" only "at the price of evident hypocrisy." *AOSI*, 570 U.S. at 219 (distinguishing *Rust*). Philadelphia's actions are "actually coercive," since CSS can only engage in foster care if it speaks a message contrary to its religious beliefs. *Id.* at 214. This is doubly true since Philadelphia relies not only on the carrot of a contract, but also the stick of the FPO.

Philadelphia now claims CSS could provide certifications with express disclaimers. Phila.Br.45-46. This Court has already rejected that supposed solution. *AOSI*, 570 U.S. at 219 ("evident hypocrisy"). Nor can this argument be squared with Respondents' own claim that accommodating CSS would send "the wrong message." J.A.428, 281; Interv'rs.Br.47-48. Philadelphia's supposed solution is to make CSS trumpet that message.

IV. Philadelphia fails strict scrutiny.

Philadelphia's interests are not compelling. It cannot have any compelling interest in avoiding dignitary harms, since its proposed disclaimer would impose (at minimum) the same harm. Phila.Br.45-46. Nor can its interests be compelling when it is willing to make exceptions from its rules, easily (and correctly) overriding its other concerns to place children in loving homes. U.S.Br.15-16; Pet'rs.Br.14-15, 23-24.

Even under intermediate scrutiny, "Such '[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'" *NIFLA* v. *Becerra*, 138 S.Ct. 2361, 2376 (2018). Deputy Commissioner Ali's concession was spot-on, and dispositive: Philadelphia's interest here is "no stronger or no weaker than enforcing any other policy." J.A.148.

CSS's religious exercise doesn't prevent any same-sex couples from fostering. Twenty-nine other agencies can provide the certification, and Respondents (and their amici) have failed to find a single same-sex couple who even approached CSS. Strict scrutiny can be satisfied only with evidence of an "actual problem" in need of solving. *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). Even intermediate scrutiny is fatal because Philadelphia excluded CSS and its already-certified foster families, leaving homes empty when the City admittedly needed more families—"hardly a narrowly tailored solution." *McCullen* v. *Coakley*, 573 U.S. 464, 493 (2014). Respondents have no compelling interest in turning foster-care into a zero-sum game from which either the Catholic Church or same-sex couples must be excluded.

Respondents' last refuge is to callously equate traditional religious beliefs about marriage with invidious race discrimination. Phila.Br.26; Interv'rs.Br.21, 45. But race discrimination has a unique history. Comparing *Loving* and *Obergefell* illustrates the difference: *Loving* said, "There is patently no legitimate overriding purpose independent of invidious racial discrimination." *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967). By contrast, *Obergefell* spoke of "decent and honorable religious or philosophical premises" that should not be "disparaged." *Obergefell* v. *Hodges*, 576 U.S. 644, 672 (2015). This Court has since warned against such "undue disrespect to sincere religious beliefs." *Masterpiece*, 138 S.Ct. at 1732.

Nor is Respondents' solution the least restrictive means. The means chosen—excluding CSS and refusing to place children with its already-certified families—are the *most* religion-restrictive. Cf. *Espinoza*, 140 S.Ct. at 2261 ("categorical ban"). Respondents have no answer for the 250 children they admitted need to be moved out of institutions—but who won't be placed in the empty homes CSS can provide today. Pet'rs.Br.12; J.A.352-353 (Figueroa confirming 250).

Less restrictive alternatives abound. Philadelphia spent decades working with CSS with no demonstrated harm to its claimed interests. Pet'rs.Br.5. Most states have not gone to Philadelphia's extreme and excluded religious foster care providers; ten have even created specific legal protections for them. Tex.Pet.Br.3. Some of those laws require the approach suggested by CSS: agencies must identify concerns and refer at the outset, minimizing any delay or inconvenience for potential foster parents. See, *e.g.*, Mich. Comp. Laws Ann. § 722.124e; Tex. Hum. Res. Code

Ann. § 45.005. States accommodating religious agencies like CSS have not experienced a decline in LGBTQ fostering, but instead have seen that accommodating religious providers creates win-win outcomes. Tex.Br.24-29; Nebraska Br.10-19. Philadelphia thus "has available to it a variety of approaches that appear capable of serving its interests." *McCullen*, 573 U.S. at 493-494 (considering policies of other states); *Holt*, 574 U.S. at 368-369 (same). It cannot survive scrutiny here.

V. *Smith* should be revisited and replaced.

Philadelphia offers virtually no defense of the *Smith* standard; the Intervenors offer none at all. That is no surprise, as *Smith's* problems are legion and its merits few. Pet'rs.Br.37-49; see also Robertson Ctr. Br.4-30; Tex.Br.4-21; Laycock Br.24-35; Meese Br.26-33; Hamburger Br.17-18; COLPA Br.4-8. Respondents invest far more energy asking the Court to modify *Smith* to grant "greater leeway" to government, Phila.Br.12, than defending *Smith* itself.

Philadelphia denies that the First Amendment "protects an affirmative freedom from government interference." Phila.Br.49. This is a remarkable argument, particularly since the Court just reaffirmed the "independence of religious institutions." *Our Lady*, 140 S.Ct. at 2060. Philadelphia then "briefly" tries to counter the historical evidence against *Smith*, resting on Justice Scalia's *Boerne* concurrence to argue that *Smith* is consistent with early laws allowing "peace" and "public safety" concerns to limit religious exercise. Phila.Br.48-49. But Philadelphia's view has proven deeply problematic in the years since *Smith* and *Boerne*, as government continues to expand its reach far beyond what would have been understood as

"peace" and "public safety" in the founding era. See Pet'rs.Br.37-47; Meese Br.13-14, 25-29. Nor does Philadelphia explain how historical evidence comports with its proposed "managerial authority" expansion of *Smith*. Philadelphia relies on "the Constitution's supposed original meaning only when it suits them—to retain the part of [*Smith*] that they like." *Janus,* 138 S.Ct. at 2470. The Court should reject this "halfway originalism." *Ibid.*

Nor is it plausible to defend *Smith* as "deeply embedded" because RFRA, *Lukumi*, and *Boerne* came after. Phila.Br.50. RFRA and *Lukumi* would remain even if *Smith* were overruled; *Boerne*'s Section 5 framework would too. And Congressional efforts to forestall *Smith*'s impact are hardly an argument for retaining *Smith*. Indeed, if this logic held, the Court should never have decided *Barnette*, since Congress acted to limit *Gobitis* before *Barnette* was decided. See Jeffrey Sutton, Barnette*, Frankfurter, and Judicial Review*, 96 Marq. L. Rev. 133, 146 (2012). As with *Gobitis*, *Smith*'s negative effects have proliferated despite legislative amelioration. See *id.* at 143, 148-50; Meese Br.31-32; Bruderhof Br.8-22. This is why the Court "cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." *Citizens United* v. *FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring).

Philadelphia repeats *Smith*'s speculation that the compelling interest test courts "anarchy." Phila.Br.50-51. Thirty years of history prove otherwise. Pet'rs.Br.38-40; Tex.Br.24-32.

Finally, Philadelphia claims reliance interests. Phila.Br.51. But twenty-one state statutes (including Pennsylvania's), the federal government, and eleven

state courts partially displaced *Smith*. Robertson Ctr. Br.30-31. RFRA applies to federal law, including such sensitive areas as narcotics and prison administration. By no measure is this "reliance." Further, *Smith* is supposed to be about *incidental* burdens on religious liberty. Philadelphia's claim that governments are routinely *relying* on it proves *Smith*'s deficiencies.

In short, Philadelphia all but concedes *Smith*'s comprehensive failure and openly asks for an even less-protective Free Exercise Clause. *Smith* is now invoked to banish the Catholic Church from foster care. Whatever *Smith*'s intentions, that surely was not one of them. A Free Exercise Clause permitting that result can hardly be said to "lie[ ] at the heart of our pluralistic society." *Bostock* v. *Clayton County*, 140 S.Ct. 1731, 1754 (2020). *Smith* should be overruled and replaced with a standard that relies on the text, history and tradition of the Free Exercise Clause.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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