App. No. ___-_____

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.

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

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Dated: July 31, 2018

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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To the Honorable Samuel Alito, Associate Justice of the United States Supreme Court for the Third Circuit:

The City of Philadelphia has imposed an intake freeze on Catholic Social Services' (Catholic's) foster care program over a purely hypothetical disagreement. Yet the harm to Applicants and the children they serve is anything but hypothetical. As the District Court found, Catholic's work "has benefitted Philadelphia's children in immeasurable ways."[1] The City also admitted in its testimony that many of the 250 Philadelphia children currently living in group homes *could* be moved to loving foster families. But Philadelphia has chosen to let those children languish rather than place them with parents who work with Catholic.

Without intervention, the City's intake freeze will force Catholic's foster care program to close before the Third Circuit can rule on Catholic's preliminary injunction appeal. Meanwhile, more children will be kept out of loving foster homes, award-winning foster parents (like Applicant Mr. Paul, a former foster parent of the year) will continue to have their homes sit empty, and Catholic's foster parents who are currently caring for children face the "devastating" choice of either losing the child they love or losing the supportive religious agency that makes their foster care possible. All this before Applicants can even litigate their case.

The City is excluding Catholic and its foster families simply because Catholic Social Services is part of the Catholic Church, and the City disagrees with the Church's views about same-sex marriage. Same-sex unions have been recognized in

[1] Appx.5.

Philadelphia for two decades and Catholic has been acting in accordance with its religious beliefs for even longer. But the City is unaware of even a single person who has been prevented—or even discouraged—from fostering because of Catholic's religious ministry. Even so, the City is closing Catholic's foster care program over a hypothetical question: *if* a same-sex couple approached a Catholic agency seeking a written opinion on their family relationships, could the Catholic Church endorse their unions in writing?

Philadelphia cannot demand that religious groups parrot its views as a pre-condition to serving foster children. And it cannot retaliate against Catholic by shutting down Catholic's foster care program and punishing existing foster families for working with Catholic—particularly because these already-certified families have nothing to do with Catholic's future treatment of hypothetical inquiries. On these grounds alone, the City's punitive actions are impermissible under the Free Exercise and Speech clauses of the First Amendment.

Worse yet, the City engaged in unabashed religious targeting. The City admittedly investigated only *religious* foster agencies. Then it froze Catholic's foster care intake as punishment for violating supposed policies the City has never announced, much less applied, to secular agencies. The Mayor, City Council, Human Relations Commission, and Department of Human Services (DHS) have all targeted Catholic. The City even told Catholic to change its religious practices because it is "not 100 years ago" and "times have changed." It then told Catholic to follow the City's view of the "teachings of Pope Francis" rather than their local church leaders.

All this would be flagrantly unconstitutional *even if* the City could point to someone who had been harmed by Catholic. But it cannot. The City even admits that if Catholic shuts down, Philadelphia will have the exact same number of agencies to serve same-sex couples that it has today. Rather than permit respectful disagreement on these deeply important issues, the City moved to eliminate Catholic's foster care program unless Catholic embraces the City's views on same-sex marriage. That is anathema to our pluralistic democracy and forbidden by the First Amendment.

Intervention is necessary to ensure that Catholic's foster program lasts long enough to litigate this case and to prevent additional disruption in the lives of vulnerable foster children and the families who serve them. If Catholic is forced to close its doors, it will lose decades of institutional experience, staff with deep knowledge of the foster system, and a network of families built up over decades of service. Rebuilding will take years, if it is possible at all. Applicants therefore request a temporary injunction pending appeal to allow them time to litigate their appeal without being forced to close before even being heard. *E.g.*, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 571 U.S. 1171 (2014); *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1302 (1974).

For this reason, Applicants respectfully request that this Court enter an order prohibiting Defendants from continuing the intake freeze or otherwise conditioning Applicants' foster care participation on the provision of foster care certifications inconsistent with Catholic's religious beliefs during the pendency of this appeal.

JURISDICTION

Applicants filed their complaint on May 17, 2018, seeking to enjoin the City from discriminating against Applicants based on their religious beliefs and speech. Their complaint brought claims under the First Amendment, the Fourteenth Amendment, the Pennsylvania Constitution, Pennsylvania's Religious Freedom Protection Act (RFPA), and other state and local laws. The District Court had jurisdiction over Applicants' lawsuit under 28 U.S.C. §§ 1331 and 1343 and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202.

The District Court denied Applicants' motion for a preliminary injunction on July 13, 2018, and Applicants timely filed their notice of appeal to the Third Circuit later that day.[2] The Third Circuit had jurisdiction over this appeal under 28 U.S.C. § 1292(a). The Third Circuit denied Applicants' motion for an injunction pending appeal, without opinion, on July 27, 2018.[3] This Court has jurisdiction over this Application under 28 U.S.C. § 1254(1) and has authority to grant the relief that the Applicants request under the All Writs Act, 28 U.S.C. § 1651.

BACKGROUND AND PROCEDURAL HISTORY

1. Catholic's foster care work.

Catholic is a non-profit organization under the leadership and direction of the Archdiocese of Philadelphia.[4] Catholic's religious faith inspires it to provide for

[2] Appx.69-71
[3] Appx.69-71.
[4] Appx.393; Appx. 414-16, 421; Appx.74, ¶ 3.

orphans and at-risk children through its foster care ministry.[5] As Mr. James Amato, the Director of Catholic, confirmed: foster care is "absolutely" a "religious ministry of Catholic Social Services."[6] Indeed, Catholic views its provision of foster care as part of Jesus' call to care for the orphaned and widowed.[7] Catholic's faith is also infused in all aspects of its ministry.[8]

Catholic's formal foster care program can trace its roots back to 1917, when it was originally called the Catholic Children's Bureau.[9] At that time, the City was not involved in the provision of foster care. Instead, "the religious sisters who ran Catholic Children's Bureau had a deep network of relationships around the city with parishes and community groups."[10] These sisters would work to help find homes for at-risk children whose parents were unable to care for them.[11]

Around the 1950s, the City began contracting with private agencies for the provision of foster care. Accordingly, the City entered into a contract with Catholic for foster care services.[12] Today, "you would be breaking the law if you tried to provide foster care services without a contract."[13] Catholic has cared for foster children under an annually renewed contract with the City for over fifty years.[14] Pursuant to the

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[5] Appx.393; Appx. 414-16, 421; Appx.74, ¶ 3.
[6] Appx.416.
[7] Appx.416.
[8] Appx.414-16; Appx.129.
[9] Appx.414-16.
[10] Appx.417.
[11] Appx.417-18.
[12] Appx.417-19.
[13] Appx.419-20.
[14] Appx.419, 500.

terms of this contract, the City pays Catholic a *per diem* for each child it places in an already-certified foster home.[15] Even so, Catholic's program operates at a loss each year; across all its divisions, Catholic "subsidized these services to the tune of 3.8 million dollars" in Archdiocesan private donations.[16] This allows Catholic, among other things, to hire additional case workers who have lower caseloads and thus dedicate more time to each family it serves.[17]

2. The City contract.

The City of Philadelphia today works with 30 different private foster care agencies.[18] Each of these private agencies contracts with the City to place children in homes the agency has certified. All foster care referrals come through DHS.[19] DHS considers numerous factors—including the child's geographic location, age, siblings, race, and disability status—when making referrals to private foster agencies.[20]

To work with a foster care agency in the City, a prospective foster parent must be certified by that agency. The minimum requirements for certification are set by the State—not the City—and State law requires agencies to consider, among other things, "existing family relationships" and the "[a]bility of the applicant to work in partnership" with an agency. 55 Pa. Code §§ 3700.64, 3700.69. This will then result in a "decision to approve, disapprove or provisionally approve the foster family." *Id*.

[15] Appx.602; Appx.730.
[16] Appx.420.
[17] Appx.424-25.
[18] Appx.277.
[19] Appx.288.
[20] Appx.280-81, 288, 535, 627-29.

Thus, to effectively serve foster children in need, Catholic has certified, trained, and continues to provide support to a network of certified families.

Some of these families have now worked with Catholic for decades. Some have fostered dozens of children; Mrs. Paul alone has fostered 133 children in forty years of service.[21] Three such foster parents are plaintiffs in this case ("foster mothers" or "individual Applicants"). All three are certified, trained, and supported by Catholic. Each testified that she chose Catholic because of the strength of its program and their shared religious beliefs.[22]

Catholic's religious character is well known to the City. In fact, Catholic's contract with the City includes a diagram of Catholic's hierarchy and its mission statement: "Catholic Social Services of the Archdiocese of Philadelphia continues the work of Jesus by affirming, assisting and advocating for individuals, families, and communities."[23] The contract also makes clear that Catholic "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."[24] Nor shall Catholic "in any way represent that" it is acting as a City employee, official, or agent.[25]

The contract requires Catholic to provide certified foster families, but it does not specify either how that recruitment is to take place or the number of families Catholic

[21] Appx.252-55.
[22] Appx.241-42, 254, 258.
[23] Appx.129-131.
[24] Appx.136, 646.
[25] Appx.136.

must recruit.[26] As the City has explained, it has "nothing to do" with the certification process, as it all happens under *state* law and is performed solely by the private foster agencies.[27] The City expressly admits that agencies *can* add additional requirements to the minimum qualifications provided by state law, and encourages families to research agencies and "find the best fit for you."[28]

The contract also includes a non-discrimination clause. This clause states that contractors will not "discriminate or permit discrimination against any individual because of race, color, religion, or national origin."[29] The contract also states that providers shall not "discriminate or permit discrimination against individuals in employment, housing and real property practices, and/or public accommodation practices" on a number of other bases, including marital status and sexual orientation.[30] The language in this second sentence is a restatement of the City's Fair Practices Ordinance ("FPO"), which applies in employment, housing, and public accommodations. Phila. Code § 9-1100, *et seq*.

3. Catholic's policy regarding marriage

Catholic operates in accordance with the Catholic Church's belief "that a marriage is a sacred bond between a man and a woman."[31] This means that Catholic cannot take any actions which it views as an endorsement of same-sex relationships.

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[26] Appx.130.
[27] Appx.644-45.
[28] Appx.649-50; Appx.126-29.
[29] Appx.138.
[30] Appx.138.
[31] Appx.423, 421-22, 594.

Accordingly, "to provide a written certification endorsing a same-sex marriage" as part of the foster parent certification process would "violate the religious exercise of Catholic Social Services."[32]Nor can Catholic somehow certify same-sex foster families while avoiding this issue, as "the home study is a written evaluation" of the "relationships" of individuals in the potential foster home as required by state law.[33] Indeed, no one has even questioned whether it is Catholic's "sincere belief" that the home study is a "written endorsement" of the foster parents' relationship.[34]

Catholic, however, does nothing to prevent anyone from becoming a foster parent. Were Catholic ever approached by a same-sex couple seeking to become foster parents, Catholic would refer the couple to one of the 29 other agencies in Philadelphia—several within blocks of Catholic's headquarters—that would be able to work with them.[35]

No same-sex couple has *ever* approached Catholic seeking its written endorsement to become foster parents.[36] Nor is there any evidence that Catholic's religious beliefs stopped, or even discouraged, *anyone* from becoming a foster parent.[37]

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[32] Appx.423.
[33] Appx.422, 500-01; 55 Pa. Code § 3700.64 (requiring consideration of "Existing family relationships").
[34] Appx.500, 661.
[35] Appx.432.
[36] Appx.423.
[37] Appx.609.

4. The investigation and termination.

In March 2018, after a complaint about another agency (Bethany Christian), DHS Commissioner Figueroa called "faith-based institutions . . . to ask them their position regarding serving same-sex couples."[38] Figueroa contacted only one non-religious organization, since she was friends with its CEO.[39] She still has not called any other non-religious agencies to inquire about their practices.[40]

After talking with Catholic on the phone, Figueroa summoned Catholic's senior management to DHS headquarters.[41] At this meeting Figueroa said this issue had the attention of "highest levels of City government," meaning the Mayor.[42] Figueroa testified to talking with the Mayor about these "issues" and assuring him that she was working to "address[]" them.[43] The Mayor has a long history of publicly criticizing the Archdiocese. Among other things, the Mayor has said he "could care less about the people at the Archdiocese," called Archbishop Chaput's actions "not Christian," and exhorted Pope Francis "to kick some ass here!"[44] During the meeting at DHS headquarters, Figueroa also told Catholic it should follow the City's understanding of "the teachings of Pope Francis," *not* Archbishop Chaput.[45] And when Amato noted

[38] Appx.543-44; *see also* Appx.434.
[39] Appx.103-04.
[40] Appx.103-04.
[41] Appx.435; Appx.104.
[42] Appx.697-98.
[43] Appx.698.
[44] Appx.176, 184 (available at http://bit.do/es4xH); Appx.173-80.
[45] Appx.435; Appx.695-96.

that Catholic had been serving foster children for over 100 years, Figueroa told him "times have changed," "attitudes have changed," and it is "not 100 years ago."[46]

Minutes after the meeting, the City called to tell Catholic that it was shutting down[47] Catholic's foster care intake because of its "religious decision."[48] The City also closed Bethany's intake for the same reason.[49] DHS did not act alone: the City's Human Rights Commission opened an inquiry into Catholic's practices at the behest of the mayor, and the City Council passed a resolution concerning "discrimination that occurs under the guise of religious freedom."[50]

5. The City's justification for the referral freeze.

In its initial letters to Catholic, the City claimed that Catholic violated two policies: (1) a policy that agencies must provide home studies to every applicant who wanted one, and (2) the public accommodations portion of the City's Fair Practices Ordinance ("FPO").[51] With regard to the first policy (the "must certify" policy), no DHS official could identify a written version of this policy at the evidentiary hearing.[52] The City even claimed it was in the contract, but later admitted that the specific provision it had identified as containing this requirement (§ 3.21) did not apply to situations where a prospective foster parent approaches Catholic directly and instead only

[46] Appx.436; Appx.695-96.
[47] A shutdown means that no children can be placed in the homes of families certified and supported by that foster agency. Appx.597-98; Appx.77.
[48] Appx.661-62.
[49] Appx.603.
[50] Appx.158.
[51] Appx.138-39.
[52] Appx.397-98; Appx.639-40, 661.

covered referrals from DHS.[53] The City also admitted it never told secular foster agencies about this policy.[54]

Mr. Amato and Ms. Simms-Busch, who have a combined 50+ years of experience working in all aspects of foster care, also testified that agencies commonly refer prospective foster parents elsewhere, and neither had heard of a policy requiring agencies to perform all home studies for any family upon request.[55] Ms. Simms-Busch further testified that, when she was a social worker at another agency, "if our agency was not able to cope with that child or the family was unable to cope with it and needed specialized—and that child needed specialized services, we would refer out to a different agency."[56] In fact, "referrals are made all the time."[57]

Specific examples include referrals for geographic proximity, medical expertise, behavioral expertise, specialization in pregnant youth, and language needs.[58] At least one agency advertises that it exclusively works in kin care (a term for foster placements with extended family or friends).[59] Similarly, Ms. Simms-Busch testified that an agency specializing in Native American placements would have no choice but to "refer [her] to" another agency because she had been unable to verify her Native

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[53] Appx.308 ("Q: This is referring to a rejection of a referral *from DHS*, correct? A: Yes.") (emphasis added).
[54] Appx.544 ("I called a number of faith-based institutions that same day[.]"); Appx.694.
[55] Appx.413, 432, Appx.227-29, 236.
[56] Appx.237.
[57] Appx.237.
[58] Appx.427; Appx.429, 614; Appx.429; Appx.236-38; Appx.284-85; Appx.318-19, Appx.614; Appx.190-92; Appx.310; *see also* Appx.202-05.
[59] Appx.431-32; Appx.146.

American ancestry.[60] The City also acknowledged that agencies may refer prospective foster parents elsewhere, to agencies with particular certifications.[61]

With regard to the FPO, no witness could provide an example of a situation in which—prior to this litigation—foster care was considered a public accommodation.[62] Figueroa could not recall training staff or even discussing public accommodation laws in the foster care context, nor could she recall doing "anything [as Commissioner] to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work."[63] The City even acknowledged that it sometimes considers race and disability when making foster care placement decisions.[64]

6. Impact of the intake freeze and threat to terminate.

The City's intake closure has harmed those most in need. Philadelphia has a shortage of foster homes and admits it needs to get 250 children out of group homes[65] and into the most "most family-like setting" possible, as required by state law.[66] But due to the intake freeze, those children cannot be placed with Catholic's families.[67] Catholic has at least 35 empty homes ready for children, including that of Mrs. Paul, a former pediatric nurse who has fostered 133 children and whom the City named a

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[60] Appx. 238.
[61] Appx.310, 318-20
[62] Appx.399-400; Appx.438-39; Appx.625-26, 629, 637.
[63] Appx.625-26.
[64] Appx.626-31.
[65] Appx.148-50; Appx.681-82.
[66] 11 Pa. Stat. Ann. § 2633(4).
[67] Appx.77.

foster parent of the year.[68] Since March, the City will not place any children in her home solely because she is certified by Catholic.

Due to the intake freeze, Catholic has also faced difficulty ensuring that children can be placed with siblings or returned to the homes of prior foster parents whom they know and love.[69] Shortly after the freeze began, Catholic accepted a foster placement to reunite two siblings, and notified DHS it had done so.[70] DHS then sent an email to all community umbrella agencies informing them there should be "NO referrals" to Catholic.[71] That email did not mention any exceptions to the rule.[72] After filing this lawsuit, Catholic learned of a young autistic boy in temporary respite care who could be reunited with his former foster mother, a woman who is certified by Catholic and had cared for the child since he was an infant.[73] DHS denied that placement, leaving the boy in respite care rather than a loving, long-term home.[74] The City later relented and allowed the placement only after Catholic brought the matter to the District Court's attention in its motion for a TRO.[75]

The City claims it has a policy of permitting children to be placed with Catholic in certain dire situations even during the intake freeze. But it has not communicated

[68] *Id.*; Appx.252-54, 940.
[69] Appx.78-79.
[70] Appx.440-42.
[71] Appx.336.
[72] Appx.333-37.
[73] Appx.108-114.
[74] *Id.*
[75] Appx.516-18.

that policy to the employees actually responsible for making such placements.[76] Instead, "[i]ndividualized assessments" are made by DHS leadership, but only when and if they are notified that an exception is needed.[77]

Catholic has been informed by other agencies that they have received placements of children in circumstances where Catholic would have been the "preferred placement" for those children.[78] While the District Court was considering its decision, DHS staff refused to place siblings with a kin care family certified by Catholic, a situation only rectified after Catholic sought an exception from the Deputy Commissioner.[79] Similar situations will continue to recur so long as the intake freeze continues, and unfortunately in many cases Catholic may never learn of the harm and the missed opportunity to care for a child in need.[80]

Absent relief, Catholic will most likely have to close its foster program before its appeal to the Third Circuit is complete.[81] Catholic has already begun the wind-down process.[82] If Catholic is forced to close its doors, it will lose staff with years of experience in foster care and a network of foster parents it has cultivated for decades.[83] This loss "would take years" to recover from, if it is possible at all.[84] And

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[76] Appx.333-37, 406-09.
[77] Appx.724.
[78] Appx.79.
[79] Appx.89-90.
[80] Appx.495.
[81] Appx.85-86, 457-58.
[82] Appx.90, 940.
[83] Appx.457-58.
[84] *Id.*

Catholic would permanently lose a hallmark of its program: the staff that foster families have relied on and known for decades.[85] Worse still, closure would require Catholic's foster parents to either transfer agencies or lose their current foster children. This disruption is something even the City admits can harm children.[86]

The three individual Appellants also testified that losing the loving support of Catholic's social workers would be "devastating" for them and their foster children, as Catholic has been "like family."[87] Ms. Simms-Busch testified to feeling "backed into a corner" by the City's actions, which would force parents to either give up foster care or lose the support they depend upon.[88] Mrs. Paul testified that the loss of Catholic's support "would be very, very harmful," and she "cannot imagine starting from scratch and fostering children without" Catholic's support.[89]

7. Procedural history

As described above, Plaintiffs filed their complaint on May 17, 2018, and sought a temporary restraining order or preliminary injunction shortly thereafter. The District Court held a three-day evidentiary hearing, then denied the relief on July 13, 2018. The same day, Appellants filed a notice of appeal. Appellants also moved for an injunction pending appeal, but it was denied on July 27, 2018. Appellants have moved to expedite their appeal, but that motion has not yet been decided.

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[85] *Id.*
[86] Appx.402-03.
[87] Appx.94-96, 99-100, 103-05.
[88] Appx.245-46.
[89] Appx.99-100, 256-57.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman* v. *Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers) (alterations in original); *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); and 28 U.S.C. § 1651(a)). This extraordinary relief, *see Lux* v. *Rodrigues,* 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), is warranted in cases involving the imminent and indisputable violation of civil rights. *See Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act); *American Trucking Ass'ns* v. *Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same). Applicants present such a case.

I. The circumstances are critical and exigent.

Without relief in the form of a temporary injunction pending appeal, Catholic will likely be forced to close its doors and all Applicants will face irreparable harm. But the City has not identified a single irreparable harm it will face were temporary relief to be granted. In such a situation, interim relief is proper. *See, e.g., Williams*, 89 S.

Ct. at 2 (holding that interim relief is appropriate when the balance of harms tips strongly in favor of applicants).

A. The harm to Applicants is real and immediate.

No litigant has contested the fact that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). But even putting that aside, Catholic has already been forced to begin the wind-down process and will likely be forced to close before its Third Circuit appeal is complete.[90] This loss is more than a mere "economic harm[]"[91]; the testimony showed that it would extremely difficult, if not "impossible,"[92] for Catholic to rebuild after the loss of employees, connections to foster families, and its institutional knowledge and experience built over decades of service.[93] And the

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[90] The City and the District Court contend that the harm is not urgent because an interim contract will ameliorate these harms, Appx.64, but that contract was designed for the very purpose of "wind[ing] down" Catholic's operations "in an orderly fashion." Appx.815. Indeed, the District Court's opinion was even more candid, explaining that this contract would "provide[] temporary funding" as part of Catholic's "shut down." Appx.64. Irreparable harm, imposed "in an orderly fashion," remains irreparable.

[91] Appx.63.

[92] The District Court downplayed the harm to Catholic from the denial of preliminary relief, suggesting that any harm to Catholic will be simply monetary and claiming that Catholic can rebuild its program, even though Catholic's Director stated it would "take years" to rebuild. Just a few lines earlier in his testimony, and in response to a very similar question, he made clear that it would be "impossible" to fully recover from the loss of knowledge, experience, and expertise were Catholic's program to close, forcing its employees to pursue other career opportunities. Appx.457-58.

[93] The Third Circuit has issued a briefing schedule for Applicant's preliminary injunction in which briefing would not be complete until mid-October. Catholic is seeking an expedited appeal, but that motion has not yet been ruled upon. If the appeal is not expedited, Catholic may be forced to close before the appeal is complete. Even with an expedited appeal, the harm to the Applicants and to at-risk children is ongoing and irreparable.

immeasurable benefits of Catholic's work would be lost to the individual Applicants and to foster children who could be living with Catholic's foster families today.

What is more, the City and the District Court's primary response to Catholic's claim of imminent harm is to suggest that Catholic's contracts with two other counties somehow solves this problem.[94] This is erroneous for two reasons. First, as the Supreme Court held in *Missouri ex rel. Gaines* v. *Canada*, the obligation to allow Appellants to exercise their religion "cannot be cast by [Philadelphia] upon another jurisdiction." 305 U.S. 337, 350 (1938). Second, without a contract in Philadelphia, Catholic would still be forced to close its program, as only a small fraction of Catholic's services are performed outside of the City.[95] Foster care regulations, which encourage keeping children in their current schools and near their birth families where possible, also mean that foster care is necessarily a localized service.[96]

The irreparable harm that Catholic will suffer without emergency relief is further illustrated by the shuttered doors of Catholic adoption agencies across the country. In the cities of Boston, San Francisco, and Washington D.C., and the State of Illinois, Catholic charities were similarly forced to choose between their religious values and continuing to the serve children in need.[97] Here, the City of Philadelphia's vindictive conduct will lead to displaced children, empty homes, and the closure of a 100-year-old religious ministry. Emergency relief is necessary to prevent this harm.

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[94] Appx.63.
[95] Appx.467-68, 940.
[96] Appx.277, 940.
[97] Appx.19-21.

Moreover, each individual Applicant faces a devastating loss that would be harmful for their families.[98] This situation is certainly not in a child's best interest—if an agency is forced to close, foster parents must make the wrenching choice to either start over with a new agency, one lacking the support they have depended upon, or have their foster children removed from their homes.[99] The City admits such disruptions can "cause trauma for those children."[100]

The City, however, claims the foster parents' harm is simply "piggybacked" upon Catholic's rights. But the foster mothers are each religiously motivated to provide foster care services, they chose Catholic because of shared religious beliefs, and they are being excluded because they work with Catholic.[101] The foster mothers' harm is far more direct and serious than the harm the City alleges will befall purely hypothetical couples that could one day potentially be referred elsewhere by Catholic, were they to ask Catholic to evaluate their homes. This hypothetical dignity harm pales in comparison to the "difficult, uncertain, and emotionally challenging" fate the District Court acknowledged the foster mothers face.[102]

B. The City has presented no evidence of harm.

In comparison to the immediate and irreparable harm facing Catholic, the City presents no evidence of imminent harm, nor could it, as this current state of affairs has prevailed for decades without a single complaint. Neither the City nor the

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[98] *See* Appx.94-106.
[99] Appx.95-96, 99-100, 104-05.
[100] Appx.402-03.
[101] Appx.241-43, 254-56, 258-60.
[102] Appx.64.

proposed intervenors represented by the ACLU have pointed to a *single* individual who has been prevented, or even discouraged, from becoming a foster parent because of Catholic's religious beliefs and exercise.[103] This is unsurprising, as the City has taken steps to increase the number of LGBTQ foster parents in the City by actively reaching out to LGBTQ families to encourage them to become foster parents,[104] and there are 29 agencies in the City who will certify same-sex couples.

Catholic has done nothing to oppose this attempt to increase diversity in foster care. Were an LGBTQ family to come to Catholic, it would direct that family to one of several agencies ready and willing to provide them with a home study and certification. Indeed, as Commissioner Figueroa admitted, whether or not Catholic's program remains open, there will be the same number of agencies in Philadelphia that serve LGBTQ individuals.[105] Thus, Catholic's closure would result only in a *loss* of diversity in foster care providers.

Given this lack of any evidence of harm, the City can point only to generic interests like the enforcement of contracts and its general interest in equality. The City fails to explain why any of these harms are either urgent or irreparable or why granting a religious exception to Catholic would actually undermine that interest. In light of Catholic's long history of both service to the City as a foster care provider and

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[103] Appx.306-08; 609-10, 662. The District Court also permitted proposed intervenors' then-counsel to testify as an expert for the City, but even he could not identify a single individual who had been harmed by Catholic's policy. Appx.776-77. The City's expert did testify, however, that he would like the Catholic Church to change its religious beliefs. Appx.777-79.

[104] Appx.293-94.

[105] Appx.608-09.

adherence to its religious beliefs, an injunction keeping Catholic open during the pendency of this appeal would not harm the City.

II. Applicants have an indisputably clear right to relief.

A. The City's ever-shifting 'policy' violates the Free Exercise Clause.

The City's actions impose an obvious burden on Catholic's religious exercise: if it wants to continue its religious ministry of providing foster care, Catholic must provide written endorsements that contradict its religious beliefs.[106] The City has thus violated the Free Exercise Clause in four different ways: first, through outright discrimination; second, because both the City's contract and its intake freeze admittedly involve individualized, discretionary exemptions, and it refused to extend an exemption to Catholic; third, because its actions are not neutral; and fourth, because its policies are not of general application. The City's actions must face strict scrutiny, which they cannot hope to pass.

1. The City targeted Catholic in violation of the Free Exercise Clause.

Government actions based on "impermissible hostility toward . . . sincere religious beliefs" are *per se* unconstitutional. *Masterpiece Cakeshop Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). Here, Catholic has been the target of coordinated actions by every branch of City government: the City Council passed a

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[106] "[P]ut[ting] [Appellants] to this choice" between religious exercise and penalties "easily satisfie[s]" the substantial burden test. *Holt v. Hobbs,* 135 S. Ct. 853, 862-63 (2015). The same is true of the burdens on foster parents, which the District Court agreed would be "difficult, uncertain, and emotionally challenging." Appx.64. Mrs. Paul's religious exercise of providing foster care is currently prevented altogether. Appx.254-56.

resolution calling for an investigation to weed out "discrimination that occurs under the guise of religious freedom"[107]; the Human Relations Commission opened an extra-jurisdictional inquiry and threatened subpoenas;[108] the Mayor, who has a history of publicly disparaging the archdiocese, prompted inquiries by the Commission and DHS[109]; DHS's commissioner summoned Catholic's leadership to headquarters to discuss their religiously mandated policies, then accused them of not following "the teachings of Pope Francis" and told them it was "not 100 years ago."[110] And minutes after that meeting, the City shut down foster care intake for Catholic.

The City later told Catholic that future contracts would "explicit[ly]" require written certifications for same-sex couples, and that the City "has no intention of granting an exception" to Catholic.[111] Furthermore, the City targeted its investigation to religious entities, has never informed secular agencies of the policies, or even inquired as to whether secular agencies obey them.[112] These targeted and disparaging actions "pass[] judgment upon or presuppose[] the illegitimacy of religious beliefs and practices" in violation of the First Amendment. *Masterpiece,* 138 S. Ct. at 1731;

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[107] Appx.158-59. The Council's reference to the "guise" of religious freedom is evidence of targeting. *See Masterpiece*, 138 S. Ct at 1729 ("clear and impermissible hostility" where government dismissed religious freedom as "rhetoric").
[108] Appx.116-17. The Commission only has power to investigate complaints, *see* Phila. Code § 9-1112; but no one has complained. Appx.609.
[109] Appx.116; Appx.697-98.
[110] Appx.435-36; Appx.695-96.
[111] Appx.120.
[112] Appx.694-95.

Trinity Lutheran Church of Columbia, Inc. v. *Comer*, 137 S. Ct. 2012, 2019 (2017). The Court need go no further.

The District Court, however, held that no targeting occurred. The Court reasoned that there was no violation simply because the City also penalized one other foster agency, Bethany.[113] But discriminating against *two* religious agencies rather than one hardly cures a Free Exercise violation. *See, e.g., Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.) (state violated Free Exercise Clause by singling out two universities, one Christian and one Buddhist).

Worse still, the District Court did not apply *Masterpiece* or *Trinity Lutheran*, instead citing an "absence of caselaw"[114] and looking to *Christian Legal Society* v. *Martinez*. The District Court believed *Martinez* was instructive because it involved an "accept-all-comers" "[n]ondiscrimination policy," and this case involves a nondiscrimination law, the FPO. But *Martinez* "bases all of its analysis on the proposition that the relevant [school] policy is the so-called accept-all-comers policy. This free[d] the Court from the difficult task of defending the constitutionality of . . . the school's written Nondiscrimination Policy . . . ." *Christian Legal Soc'y Chapter of the Univ. of Cal.* v. *Martinez*, 561 U.S. 661, 708 (2010) (Alito, J., dissenting).

The District Court's reliance upon *Martinez* thus cannot be squared with *Martinez* itself. Foster care certifications are anything but an "all-comers" policy—the City

[113] Appx.33, 38-40.
[114] Appx.27.

even admits that agencies can have "different requirements."[115] Foster care home studies and certifications are not a "service . . . extended, offered [] or otherwise made available to the public,"[116] their purpose is to be selective, not to be a public accommodation. None of the factors considered in these assessments would be remotely permissible reasons for denying someone a train ticket, a cup of coffee, or any other actual public accommodation. Even if *Martinez* could be stretched to reach a traditional nondiscrimination policy, it would have nothing to say about the shifting and ultimately illusory policy here.

The District Court's reliance on *Martinez* is also incompatible with *Masterpiece*'s observation that the Constitution would protect a religious decision not to perform same-sex weddings. Even though marriage is both a civil and religious act and requires a government license and government-sanctioned officiant, a decision to only perform some marriages "would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. The same is true of the Catholic Church's religious decisions regarding marriage and parenting, particularly where there is no danger of a "long list" of exceptions creating "community-wide stigma," *id.*, because literally every other

[115] Appx.126.
[116] Phila. Code § 9-1102(w).

agency in the City provides the service in light of Bethany's decision to sign a new contract with the City containing additional anti-discrimination language.[117]

2. *The City's actions must face strict scrutiny under the Free Exercise Clause.*

The City's policies, to the degree they may be called policies at all, are subject to individualized, discretionary exemptions, and are not neutral or generally applicable. Therefore, they are subject to strict scrutiny.

Discretionary exemptions. When a law gives the government discretion to grant case-by-case exemptions based on "the reasons for the relevant conduct," such a "waiver mechanism . . . creates a regime of individualized, discretionary exemptions that triggers strict scrutiny." *Blackhawk* v. *Pennsylvania* 381 F.3d 202, 207, 209-10 (3d Cir. 2004). Here, two types of discretionary exemptions are present. The contract provision on which the City relies for its supposed "must certify" policy allows exceptions in the Commissioner's "sole discretion."[118] But the City said that it "has no intention of granting an exception" to Catholic.[119]

City officials also grant case-by-case exemptions to the intake freeze—based on "individualized assessments"—but not for Catholic's religious exercise, and not to fill

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[117] The District Court also relied upon *Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005), *aff'd as supplemented*, 479 F.3d 403 (6th Cir. 2007). But Teen Ranch arose in different circumstances, where teens were being sent to a religious program by the government, and did not have "true private choice," regarding their placement. *Id.* at 834-35. *Teen Ranch* was primarily an Establishment Clause case, and the court admitted that even the Free Exercise questions there turned upon whether the teens had a true private choice. *Id.* Here, there is no dispute that prospective foster parents have a true private choice among 30 different agencies.

[118] Appx.120; Appx.134-35.

[119] Appx.120.

empty homes of parents—like Mrs. Paul—who work with Catholic for religious reasons.[120] These discretionary exemptions, which are granted without any identifiable written guidelines, "are sufficiently open-ended to bring the regulation within the individualized exemption rule." *Blackhawk*, 381 F.3d at 210. Such discretionary exemptions trigger strict scrutiny. *Id.*

Not neutral. The City's actions must face strict scrutiny because they are not neutral. The City targeted only religious agencies for investigation, applying standards that have never been applied to secular agencies. In *Tenafly Eruv Association, Inc.* v. *Borough of Tenafly*, the Third Circuit invalidated a city's "invocation of [an] often-dormant Ordinance" to prohibit conduct undertaken for religious reasons, even though it had permitted widespread violations of the ordinance. 309 F.3d 144, 153, 168 (3d Cir. 2002). Here, the City selectively enforced its "must certify" policy and the FPO against Catholic, while never applying those principles to the City's or non-religious agencies' foster work.[121]

The City admitted that it investigated only *religious* foster agencies, with a single exception: Figueroa phoned a friend.[122] The City still has not bothered to *ask* whether other secular agencies accept all applicants.[123] To compound this problem, the City is selectively enforcing its newly minted "must certify" policy, continuing to allow other agencies to decline to perform home studies for a range of secular reasons. *See supra*

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[120] Appx.724.
[121] Appx.397-00; Appx.438-39; Appx.624-26, 628-30, 637, 639-40, 694-95.
[122] Appx.694 ("Q. When you did that investigation, you only contacted faith-based agencies, correct? A. That's correct.")
[123] Appx.694-95.

pp. 12-13. The City's decision to shut down Catholic—while not even investigating secular agencies—is textbook selective enforcement. Similarly, the City never considered foster care to be a public accommodation subject to the FPO, until it needed to justify its actions against Catholic.[124]

The District Court found the City's actions neutral because the policies were not "drafted or enacted" to target religion.[125] But even if this were true, the "problem is not [just] the adoption of an anti-discrimination policy; it is the implementation of the policy, permitting secular exemptions but not religious ones and failing to apply the policy in an even-handed" manner. *Ward* v. *Polite*, 667 F.3d 727, 739 (6th Cir. 2012); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543 (1993) ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."). In any case, both the "must certify" policy and the FPO's application to foster care were invented post hoc for religious agencies and have never been applied to anyone else.[126]

The City has also announced plans to condition future contracts on a requirement that agencies certify same-sex couples—a requirement admittedly added to prevent a particular religiously motivated practice.[127] Such actions show that the City has taken these actions not to enforce a neutral law that has always been in force, but to

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[124] Appx.399-00, 624-26, 628-29, 634-35, 637.
[125] Appx.31.
[126] Appx.236-38; Appx.397-00; Appx.438-39; Appx.624-26, 628-30, 634-35, 637, 639-40, 694-95.
[127] Appx.121.

target Catholic. See *Martinez*, 561 U.S. 661, 713 (Alito, J., dissent) ("These belated remedial efforts suggest, if anything, that Hastings had no accept-all-comers policy until this litigation was well under way."). Such shifting, post hoc rationales cannot be neutral laws within the meaning of this Court's precedents.

Worse still, the City is penalizing foster parents like Mrs. Paul merely for their religious affiliation with Catholic.[128] Placements with *existing* foster parents are not implicated by the City's interests in *future* home studies. Yet the City refuses to fill the empty beds in homes of families working with Catholic. This punitive action unlawfully "proscribe[s] more religious conduct than is necessary to achieve the[] stated ends." *Lukumi,* 508 U.S. at 538.

Not generally applicable. The City's actions also trigger strict scrutiny because they are not generally applicable. See *Lukumi,* 508 U.S. at 543-46; *Fraternal Order of Police* v. *City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999); *Blackhawk,* 381 F.3d at 209-10. The City claims that foster care agencies must perform home studies for every applicant and cannot decline to make written certifications for reasons that violate the City's FPO. But evidence demonstrated that the City permits agencies to refer prospective parents elsewhere for a host of secular reasons, but not for religious reasons. *See supra* pp. 12-13.

The City also has no response to the testimony of Mr. Amato and Ms. Simms-Busch that—whether or not the City has an official policy against it—referrals

[128] Appx.121; 254-55.

happen all the time and for a variety of reasons.[129] The City does not claim that their testimony is untrue, nor did it present evidence that referrals do not occur.. Thus, whether or not an official policy exists, the on-the-ground evidence showed that it was not enforced and that exceptions were made all the time. In the face of such evidence, the City cannot simply point to high-level DHS officials who testify to the existence of an official policy that may or may not even be known to the City's own social workers. The undisputed fact that exemptions are frequently made for a variety of reasons undermines any reliance on an official policy.

And even the existence of an official policy is questionable at best. No DHS official identify could identify any written copy of this policy.[130] The only source cited for this alleged policy was the contract, but the contract provision upon which the city relied does not apply to parents who approach agencies independently.[131] Instead, the testimony showed that the City didn't even check with secular providers to see if they were enforcing this so-called "no referrals" policy.

Such actions "trigger strict scrutiny because at least some of the [secular] exemptions available . . . undermine the interests" the City claims to be pursuing. *Blackhawk,* 381 F.3d at 211. Any exception undermines the "must certify" policy, since uniformity is the point of the policy. Indeed, the exceptions here are so sweeping that they prove the City's interests are illusory.

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[129] Appx.236-29, 429-32.
[130] Appx.398-99; 638-40, 661.
[131] Appx.120; Appx.308. This is the same contract provision permitting exceptions in the Commissioner's "sole discretion."

The District Court, however, held the FPO generally applicable because it applies regardless of religious motivation, and held that the exemptions did not undermine the FPO.[132] But evidence showed that the FPO did not apply to foster care at all—at least until the City needed to justify its actions against Catholic. The City's witnesses could not provide any pre-litigation example of a situation in which foster care was considered a public accommodation.[133] Figueroa could not recall doing "anything [as Commissioner] to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work."[134] Indeed, the City itself admitted to considering *race* and *disability* in its foster care work.[135]

The City not only permits, but expects, foster care agencies to violate the FPO when performing home studies. The City expects agencies to follow state law.[136] But state law governing home studies *requires* subjective consideration of factors including "stable mental and emotional adjustment," possibly including a "psychological evaluation"; a family's "[s]upportive community ties"; certifications approving "[e]xisting family relationships, attitudes and expectations"; and the "[a]bility of the applicant to work in partnership with" the foster care agency.[137] These requirements cannot be squared with the FPO, which prohibits discrimination on the basis of "marital status"; "familial status"; or "disability," including "mental

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[132] Appx.32-33, 43.
[133] Appx.399-00, 624-26, 628-29, 634-35, 637.
[134] Appx.625-26.
[135] Appx.627-29.
[136] Appx.297 (referring to "the 3700 regulations").
[137] 55 Pa. Code § 3700.64.

impairment."[138] Foster care agencies simply cannot follow both state law and the FPO at the same time. This means that either the City is permitting exceptions which undermine its interest in the FPO, or the City's claim that the FPO applies to foster care was invented for this litigation. Thus, the FPO is certainly not *generally* applicable, if it is even applicable at all.

3. The City's actions cannot pass strict scrutiny.

The City's reasons for penalizing Catholic boil down to a determination that Catholic's actions are irrational and offensive. But "no bureaucratic judgment condemning a sincerely held religious belief as 'irrational' or 'offensive' will ever survive strict scrutiny under the First Amendment." *Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

No compelling interest. A compelling interest is an interest "of the highest order." *Lukumi*, 508 U.S. at 546 (citation omitted). The District Court never held that the City has a compelling interest, finding instead that the interests were only "legitimate."[139] Indeed, finding a compelling interest would be impossible given (1) Deputy Commissioner Ali's concession that the City's interest in requiring home studies is "no stronger or no weaker than enforcing any other policy"[140]; (2) the City's failure to notify agencies about (much less enforce) the policy;[141](3) the City's failure

[138] Phila. Code §§ 9-1102(d), 9-1106.
[139] Appx.33.
[140] Appx.396.
[141] Appx.633-34, 694-95.

to apply FPO standards to its own or anyone else's foster care practices;[142] (4) the City's own suggestion that agencies can have "different requirements"[143]; (5) the City's admission that it has "nothing to do" with certifications;[144] and (6) controlling state law.[145]

Worst of all, the City's actions contravene its interest in caring for children: Mrs. Paul's home and dozens of others remain empty despite the fact that 250 children currently in congregate care could move into family homes.[146] And the intake freeze has resulted in delays and difficulty in children receiving placements that are in their best interests, such as placements with siblings. The City can have no compelling interest in contravening state law and keeping children from loving homes.

Failure to use least restrictive means. Stopping intake even for existing foster families does nothing to further the City's alleged interests. The City is punishing current foster families over a dispute about hypothetical future home studies.

Further, the longstanding *status quo* was a workable, less restrictive alternative. Allowing religious referrals, like the City allows secular referrals, maximizes the

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[142] Appx.624-29.
[143] Appx.126.
[144] Appx.644-45.
[145] 55 Pa. Code § 3700.64.
[146] Appx.173. Commissioner Figueroa claimed, based upon statistics not offered into evidence, that the intake freeze has not increased the number of children in congregate care. Appx.15-16. But the City needs more than to keep the numbers steady—it needs to *decrease* the numbers. Figueroa admitted the City has 250 children who need to move from congregate care into family-like settings. Appx.148-50; Appx.681-82. Even one such child who is denied a loving home is too many.

number of (1) foster parents, (2) foster agencies, and (3) foster children placed in loving homes.

The absence of even a single complaint against Catholic shows that the diverse group of 30 foster agencies is meeting the needs of prospective foster parents. And the City has identified, and is pursuing, another less restrictive alternative through its ongoing direct recruitment of LGBTQ foster families.[147]

B. Appellants have an indisputably clear right to relief on their Free Speech claims.

The City has imposed an unconstitutional condition on Catholic's ability to provide foster care services. The City has told Catholic that it must, by providing written certifications for same-sex couples, publicly affirm same-sex marriage. This is compelled speech outside the scope of the City's contract with Catholic.

First, the City's restriction is not limited to a restriction on government funding, as Catholic cannot even provide foster care services to Philadelphia children *at all* without a City contract.[148] 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."

Second, even in the funding context, the First Amendment circumscribes the government's ability to leverage funding to control speech. See *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.* (*"AOSI"*), 570 U.S. 205, 214-5 (2013) (government cannot "leverage funding to regulate speech" outside of the funded program). To get

[147] Appx.293-94.
[148] Appx.419-20.

around this, the District Court found that home studies count as the City's *government* speech.[149] This ignores the City's prior admission that it has "nothing to do" with home studies.[150]

Worse, the City has not pointed to a single instance in which it has treated home studies as its own.[151] Instead, home studies are governed only by state law[152]—a law the City never cites; Catholic's compensation under the contract is tied to the number of children in its care, which is unrelated to the number of studies it provides[153]; and the contract makes clear that Catholic is an independent contractor, *not* a City agent.[154] Nor does the contract require Catholic to perform a certain number of home studies, or any at all, or to perform recruitment in any specific manner.[155]

Faced with these facts, the City resorted to the argument that because the contract refers to certifications, and the preparation of a home study is integral certification, the home study is integral to the contract. This bootstrapping concedes that home studies are not actually required by (or even mentioned in) the contract. And the City cannot now attempt to "recast" its contract to subsume the compelled speech into "the definition of a particular program" in order to evade First Amendment review. *AOSI,* 570 U.S. 205 at 215.

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149 Appx.55-56.
150 Appx.644-45.
151 *See id.*
152 Appx.422-23; 55 Pa. Code § 3700.64.
153 Appx.602 (paying agencies a "per diem" based on the number of kids in care).
154 Appx.136.
155 *See* Appx.130.

The First Amendment protects speakers when governments seek to "compel[] them to voice ideas with which they disagree." *Janus* v. *American Fed'n of State, Cty. & Mun. Employees*, 138 S. Ct. 2448, 2464 (2018). It is "always demeaning" when speakers are "coerced into betraying their convictions," and forced "to endorse ideas they find objectionable." *Id*. Such laws are treated as "content-based" because they necessarily "alter[] the content" of the speaker's message. *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018) (citation omitted) ("*NIFLA*").

The City cannot force Catholic to embrace the City's views. *NIFLA*, 138 S. Ct. at 2371. *AOSI* is instructive. There, "[b]y demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern" and forcing recipients "to pledge allegiance to the Government's policy," the government violated the First Amendment. *AOSI,* 570 U.S. at 218, 220. And even if the City imposed a licensing requirement for foster care, the government cannot engage in "invidious discrimination of disfavored subjects." *NIFLA*, 138 S. Ct. at 2375.

Of course, the City remains free to speak its own message, and to place children with same-sex foster parents. Catholic has never interfered with either endeavor. But the City cannot coerce Catholic to publicly promote the City's views.

C. The First Amendment protects government contractors

The District Court relied heavily upon the existence of a government contract to justify the City's actions.[156] But this Court has held that the government cannot

[156] Appx.26-27. The City argues that a preliminary injunction would force the city to enter into a new contract on Catholic's terms. Catholic merely asks that the parties continue the status quo under the old contract, as is routinely done. Appx.456-457.

"automatic[ly] and absolute[ly] exclu[de] [a party] from the benefits of a public program for which [it] is otherwise fully qualified," *Trinity Lutheran*, 137 S. Ct. at 2022. Public programs include government contracts: *Trinity Lutheran* relied upon *Northeastern Florida Chapter, Associated General Contractors of America* v. *Jacksonville*, 508 U.S. 656, 666 (1993), for the proposition that the harm in such cases is "the inability to compete on an equal footing in the bidding process." *Trinity* Lutheran, 137 S. Ct. at 2022.[157]

This Court has further "recognize[d] the right of independent government contractors not to be terminated for exercising their First Amendment rights." *Board of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 686 (1996); *see also Blackburn* v. *City of Marshall,* 42 F.3d 925, 931, 934 (5th Cir. 1995) (holding that a contractor's exclusion from future contracts was subject to First Amendment scrutiny as "a benefit to a person on a basis that infringes his constitutionally protected interests"); *Springer* v. *Henry*, 435 F.3d 268, 275 (3d Cir. 2006) (First Amendment protections "extend[] to independent contractors"). Thus, the existence of a contract does nothing to change the Appellants' indisputably clear right to relief.

III. Injunctive relief would aid this Court's jurisdiction.

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not

[157] The District Court drew a distinction between "public benefits" like unemployment benefits and "public contracts" under the Free Exercise Clause. Appx. 26. But that distinction, if it ever had merit, did not survive *Trinity Lutheran*.

then pending but may be later perfected." *Federal Trade Comm'n* v. *Dean Foods Co.*, 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan* v. *Carland*, 217 U.S. 268, 280 (1910).

The Court should exercise this authority here because without judicial intervention, Catholic's foster program will close before Applicants can litigate their case. *See* Section I *supra*. Applicants' situation is thus similar to, but even more dire than, that of the religious believer who received injunctive relief from this Court to prevent the government from shaving his beard. *See Holt* v. *Hobbs*, No. 13A374 (Nov. 14, 2013). If the Court had not issued relief and the government had shaved his beard, the applicant *could* have grown a beard back later (although he still would have irretrievably lost the protection to which his religious exercise was entitled). Here, Catholic faces the irreparable loss of a religious ministry that it has grown and cultivated for decades and for which it has almost no hope of restarting were it forced to close during this litigation. The foster mothers similarly face the total loss of their religious exercise and the possibility that the children placed in their homes will again be harmed by being forced to move elsewhere. These children need continuity and support, not additional disruptions.

A temporary injunction costs the City nothing; but the lack of an injunction costs Catholic, the foster families it serves, and the children they serve, everything.

IV. The Court should also grant certiorari before judgment.

In the alternative to entering an injunction pending appeal, the Court should grant certiorari before judgment in the court of appeals and enjoin the City's

discriminatory actions pending disposition by this Court. *See* 28 U.S.C. § 2101(e). Given the way in which similar challenges to foster care and adoption services have unfolded in the past, *see supra* p.19, with many agencies being forced to close before having the time or funds to seek appellate review, protection for Applicants here is "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

Certiorari is already warranted due to the importance of the federal questions and the decision conflicting with this Court's precedents. For the same reasons that *Masterpiece Cakeshop* was certworthy, this case likewise presents an important opportunity for this Court to apply the First Amendment to a post-*Obergefell* system in which same-sex marriage and religious diversity co-exist. These issues—which have particularly high stakes for children in the foster and adoption context—will continue to arise. *See, e.g.,* St. Vincent Catholic Charities' Motion to Dismiss, *Dumont* v. *Lyon*, No. 2:17-CV-13080 (E.D. Mich. Dec. 12, 2017), ECF No. 19. The federal government is also defending its ability to work with religious agencies to provide foster care for unaccompanied minors. Complaint, *Marouf* v. *Azar*, No. 18-cv-00378, (D.D.C. Feb. 20, 2018), ECF No. 1. Further, seven states including Texas, South Dakota, and Alabama, have laws protecting conscience rights for religious-based social services providers, laws which are called into question by the decision below. This issue is certainly of national importance, has already been deemed certworthy by this Court, has enormous real-world consequences for vulnerable children and families, and therefore a grant of certiorari is warranted.

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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Dated: July 31, 2018

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Mark L. Rienzi, a member of the Supreme Court Bar, hereby certify that one copy of the attached Application and Appendix was served via electronic mail on July 31, 2018 and by first-class United States Postal Service mail on July 31, 2018 on:

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