No. 19-123

IN THE

Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

—v.—

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,

—and—

Respondents,

SUPPORT CENTER FOR CHILD ADVOCATES AND PHILADELPHIA FAMILY PRIDE,

Intervenor-Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR INTERVENOR-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Intervenor-Respondents Support Center for Child Advocates and Philadelphia Family Pride do not have any parent entities and do not issue stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS TO DENY THE WRIT 15

I. THERE IS NO CIRCUIT SPLIT REGARDING HOW TO ASSESS PETITIONERS' FREE EXERCISE CLAIM. 15

II. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT AN INAPPROPRIATE VEHICLE FOR THIS COURT'S INTERVENTION. 20

III. THIS CASE IS A POOR VEHICLE TO REEXAMINE *SMITH* BECAUSE EVEN UNDER PRE-*SMITH* LAW, THE CITY'S REQUIREMENT THAT CONTRACTORS CARRYING OUT A GOVERNMENT PROGRAM ABIDE BY THE TERMS OF THE PROGRAM WOULD BE VALID. 23

IV. THE THIRD CIRCUIT FAITHFULLY APPLIED THIS COURT'S "UNCONSTITUTIONAL CONDITIONS" PRECEDENTS 29

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Abbott v. Perez, 138 S. Ct. 2305 (2018) 23

Agency for International Development v. Alliance for Open Society International, 570 U.S. 205 (2013) 14

Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004) 17

Bowen v. Roy, 476 U.S. 693 (1986) 25

Buck v. Gordon, No. 1:19-CV-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019) 19, 20

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 16, 17

Employment Division v. Smith, 494 U.S. 872 (1990) .....*passim*

Garcetti v. Ceballos, 547 U.S. 410 (2006) 31

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 28

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) 27

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 26

Legal Servs. Corp. v. Velasquez, 531 U.S. 533 (2001) 30

Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007) 9, 17

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988) 25, 26

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018)..... 17, 22

McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005)..... 23

O'Hare Truck Serv., Inc. v. City of Northlake,
518 U.S. 712 (1996) 29

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984)..... 28

Rust v. Sullivan, 500 U.S. 173 (1991)..... 14, 30

Stormans Inc. v. Wiesman,
794 F.3d 1064 (9th Cir. 2015) 17, 19

Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016). 19

Teen Ranch, Inc. v. Udow,
479 F.3d 403 (6th Cir. 2007) 15, 16

Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002)..... 9

Trump v. Hawaii, 138 S. Ct. 2392 (2018)..... 23

United States v. Lee, 455 U.S. 252 (1982)..... 28

Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981)..... 20

Va. Military Inst. v. United States,
508 U.S. 946 (1993) 21

Washington v. Trump,
847 F.3d 1151 (9th Cir. 2017) 17, 18

CONSTITUTION

U.S. Const. amend. I.....*passim*

OTHER AUTHORITIES

Catholic Charities W. Mich. v. Mich. Dep't of Health & Human Servs., No. 2:19-cv-11661, Docket entry No. 23-4 (Mich. E.D. July 24, 2019) 26

Catholic Social Services: Adoption, http://adoption-phl.org/ 1

Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, Jewish Telegraph Agency (Feb. 5, 2019) 27

Maddonna v. U.S. Dep't of HHS, No. 6:19-cv-00448, Docket entry No. 1 (D.S.C. Feb. 15, 2019) 28

Meg Kinnard, *Lawsuit claims discrimination by foster agency*, Associated Press (Feb. 15, 2019) 27

STATEMENT OF THE CASE

A. Philadelphia's Foster Care System

When the City of Philadelphia (the "City") removes children from their families because of abuse or neglect and takes them into its custody, the City is responsible for ensuring their safety and wellbeing. Like many other cities and states, Philadelphia has chosen to conduct this public function by contracting with private organizations to provide child welfare services for wards of the City. Pet. App. 13a. Pursuant to the City's foster care contracts, private agencies recruit, screen, train, and certify suitable foster families that meet the standards of eligibility established by Pennsylvania law. Pet. App. 13a, 56a-58a. The City pays agencies with taxpayer dollars for providing these government services to children. The contracts are renewable on an annual basis. Pet. App. 13a.

The public function of providing foster care for children in the government's care is entirely distinct from voluntary private adoptions where birth parents choose to place their infant for adoption, and an adoption agency assists in locating adoptive parents. *See* Catholic Social Services: Adoption, http://adoption-phl.org/ (last visited Sept. 20, 2019) (describing CSS's private adoption services). The City does not play any role in the private adoption process, and the contractual provisions at issue in this case do not restrict the ability of birth parents, CSS, or any other agency that administers private adoptions to select families consistent with their faith. This case concerns only the City's program to ensure proper care of children in its custody.

When this litigation began, the City had foster-care contracts with 30 agencies. Pet. App. 57a. For many years, every foster care contract has included a provision prohibiting contractors from discriminating against prospective foster families on the basis of characteristics enumerated in the Philadelphia Fair Practices Ordinance, including sexual orientation. Pet. App. 59a-60a. These contractual provisions ensure that contractors do not discriminate when they act on the City's behalf to perform a public function.[1]

The nondiscrimination requirements in the City's foster care contracts also ensure that the City assembles the largest possible pool of foster families to meet the needs of the children in the City's care.

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[1] Petitioners dispute the City's interpretation of the foster care contracts. They contend that CSS is not a public accommodation under the City's Fair Practices Ordinance, and that the contract requires contractors to follow the City's Fair Practices Ordinance only if the contractor qualifies as a public accommodation. Pet. 11-12.

The Third Circuit concluded that the parties' dispute over how to interpret the contractual language was moot because CSS's foster care contract expired on June 30, 2018, and the City, to avoid any doubt among contractors going forward, added "new, explicit language forbidding discrimination on the ground of sexual orientation as a condition of contract renewal." Pet. App. 25a.

Although the court of appeals did not resolve which party's interpretation of the contract was correct, it noted that the City's interpretation was "hardly frivolous" and rejected CSS's assertion that the City's interpretation of the contract was "invented during this controversy." Pet. App. 34a. The court of appeals found that the record did not support such assertions and that there was no evidence that the City adopted its interpretation "disingenuously or as a pretext." Pet. App. 34.

C.A. J.A. 422, 426. The children for whom the City is responsible come from diverse backgrounds and family circumstances. C.A. J.A. 426-27, 572-73. Every child has unique needs, many children experience significant challenges, and not every family is a good fit for every child. C.A. J.A. 572-73. The more families that are licensed and the more diverse the pool, the better all children's prospects are of being placed in a family that is well matched to meet their needs. C.A. J.A. 426. 428-29.

The City has never authorized a private agency performing its contracted-for foster care services to turn away prospective foster parents in violation of the contracts' nondiscrimination provisions. Pet. App. 34a-35a, 100a-101a. Contracting agencies are permitted to *inform* families that other agencies may be better suited for their needs, such as where an agency is located closer to a family or has specialized expertise. But the City has never authorized agencies to *turn away* families who want to work with them, whether on the basis of race, religion, sexual orientation, or any other characteristic unrelated to the family's ability to care for a child. Pet. App. 35a, 101a.

The City's nondiscrimination requirements for those contracting to perform its foster care responsibilities are consistent with best practices recognized by the Child Welfare League of America and every leading child-welfare organization in the country. *See* Voice for Adoption, *et al.*, C.A. Amicus Br. 3-8. According to these child welfare professionals, allowing foster care agencies to exclude same-sex couples—or any other class of potentially qualified foster families—undermines the best

interest of children by shrinking the available pool of families and thereby limiting children's opportunities to be placed with a family that can meet their needs. *Id.* at 8-12. It is not surprising, therefore, that numerous states have adopted similar nondiscrimination requirements for government-contracted child welfare providers. *See* Massachusetts, *et al.*, C.A. Amicus Br. 4-7.

Any discrimination in the public foster care system undermines efforts to find families for children even if other agencies are willing to "serv[e] the LGBT community." Pet. 7. According to experts in child welfare, when agencies delivering foster care services discriminate, it deters families from pursuing fostering even where there are other agencies that accept all qualified families. *See* Voice for Adoption, *et al.*, C.A. Amicus Br. 3-8. The sting of discrimination prevents some families from risking exposure to further discrimination. *Id.* And the challenge and stress of navigating a system that permits discrimination is not something all families feel able to take on. *Id.*

B. The City's Contracts With Catholic Social Services

For many years, the City has entered into a series of one-year contracts for CSS to act on the City's behalf in providing a range of services to youth in the foster care system. In addition to the contract to recruit, screen, train and certify foster families ("foster care services"), the City contracts with CSS to provide group homes, or "congregate care facilities," for children in the City's custody. The City also contracts with CSS to serve as a "Community

Umbrella Agency," coordinating services for children in foster care.

According to CSS, its family foster care program in 2017-18 served an estimated 120 children, its congregate care program served over twice as many children, and its Community Umbrella Agency served 800 children. C.A. J.A. 305, 355-56. For 2017-2018, the City contracted with CSS for more than $19.4 million in taxpayer funds for these services. C.A. J.A. 1019-20. Only approximately $1.7 million of these funds were for CSS's foster-care services. C.A. J.A. 983.

The City has been aware for decades that CSS believes that marriage should be limited to one man and one woman. This never stopped the City from contracting with CSS because the City assumed that CSS, like other foster care agencies, was operating in accordance with the contract terms, which prohibit discrimination against prospective foster parents.

On March 9, 2018, the City learned for the first time that two of its foster care contractors were unwilling to accept prospective foster families headed by same-sex couples. Pet. App. 14a. A reporter from the *Philadelphia Inquirer* called the Philadelphia Department of Human Services and stated that CSS and Bethany Christian Services would not accept same-sex couples as foster parents because of the agencies' religious objections. *Id.* In response, the Commissioner of Human Services, Cynthia Figueroa, called officials at both CSS and Bethany Christian asking if this report was true. *Id.* Both organizations confirmed the report. *Id.* Commissioner Figueroa then called a number of other foster care agencies

asking whether they had similar policies; none did. Pet. App. 14a-15a.

Commissioner Figueroa met with the Secretary and Executive Vice President of CSS, James Amato, to try to persuade CSS to comply with the contract requirements so the City could continue contracting with CSS for foster care services. But CSS would not agree to comply. Pet. App. 15a. After the meeting, Figueroa put an "intake freeze" on referring children to CSS and Bethany Christian Services, except where necessary to place children with relatives, siblings, or families with whom they had a prior relationship. Pet. App. 15a-16a. Figueroa testified that she implemented the freeze because of her concern that CSS's contractual relationship might end in the near future if it would not comply with the terms of the contract's nondiscrimination requirements. Pet. App. 16a. Given the preference for stability in agency care of children, Figueroa did not want to send any new children to an agency that might well have to cease City-contracted services. *Id.*[2]

Meanwhile, the 2017-18 foster care contracts were set to expire on June 30, 2018. Because CSS disputed the City's interpretation of the contract's nondiscrimination requirements, *see supra* n.1, the City informed CSS that it would add new language to all the 2018-19 contracts to resolve any ambiguity.

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[2] In the wake of the *Philadelphia Inquirer* article, the Mayor and the City Council criticized CSS's practice of refusing to accept same-sex couples as potential foster parents. Pet. App. 17a. The Philadelphia Human Rights Commission also wrote to CSS. *Id.* But Commissioner Figueroa made her decisions independently. Pet. App. 34a, 96a-97a.

The new language would make absolutely explicit that contractors could not discriminate against prospective foster parents based on characteristics protected by the City's Fair Practices Ordinance. Pet. App. 18a, 170a.[3]

Bethany Christian Services agreed to comply with the City's nondiscrimination requirements and enter into a new contract with the City for 2018-19. Pet. App. 103a. CSS declined.

The City continues to contract with CSS for other services for children in foster care where CSS is willing to comply with all contract requirements. Pet. App. 16a, 36a, 50a. These include providing congregate care and coordinating services for children as a Community Umbrella Agency. C.A. J.A. 305, 355-56. Those annual contracts add up to approximately $18.5 million in services each year. C.A. J.A. 380. The only function for which CSS does not have a contract is that of screening and certifying families for foster care, because CSS is unwilling to abide by the terms of this public program.[4]

C. Proceedings Below

1. About six weeks before its 2017-18 contract was set to expire, CSS and several individuals (hereafter, "CSS") filed this lawsuit against the City. CSS claimed that the City's refusal to continue referring children to it violated its First

[3] The text of the new contracts is not included in the evidentiary record.

[4] The City has also offered to enter into a limited foster care contract to compensate CSS for ongoing services to CSS-certified families that already have children in their care. Pet. App. 281a.

Amendment right to free exercise of religion and freedom of speech. Pet. App. 79a.[5]

Shortly thereafter, CSS requested a preliminary injunction requiring the City to resume referrals of children to CSS and to resume operating under the 2017-18 contract, or enter into a new contract that would permit CSS to provide foster care services for children in the public child welfare system while violating the City's nondiscrimination requirements. Pet. App. 19a-20a.[6]

Two weeks later and before discovery could be undertaken, the district court held an evidentiary hearing on the motion for a preliminary injunction. Pet. App. 53a-54a. The district court subsequently denied the motion, concluding that CSS had failed to establish a likelihood of success on its claims or satisfy the remaining preliminary injunction factors. Pet. App. 7a-131a.

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[5] The complaint also asserted claims under the Establishment Clause and under the Pennsylvania Religious Freedom Act, which are not encompassed by CSS's petition for a writ of certiorari. Pet. App. 79a.

[6] Support Center for Child Advocates and Philadelphia Family Pride moved to intervene as defendants because of the impact of this case on the children and families they represent and on their organizations. D. Ct. Doc. 69. Support Center for Child Advocates serves as counsel for children in dependency proceedings for children in foster care in Philadelphia and advocates for public policy that supports their wellbeing. *Id.* at 3-4. Philadelphia Family Pride is a membership organization of LGBTQ+ parents and prospective parents (including foster and adoptive parents) and their children, and works to recruit more foster parents from the LGBTQ+ community. *Id.*

With respect to CSS's claim under the Free Exercise Clause, the district court concluded that the City's contract requirement was a neutral and generally applicable policy under *Employment Division v. Smith*, 494 U.S. 872 (1990). Pet. App. 80a-88a. The district court recognized that a "law is not neutral if it has as its object to infringe upon or restrict practices because of their religious motivation." Pet. App. 80a (quoting *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007)) (alterations incorporated). It also acknowledged that a "law is not generally applicable when it proscribes particular conduct only or primarily when religiously motivated." Pet. App. 80a-81a (internal quotation marks omitted). And the court recognized that government officials "contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct." Pet. App. 81a (quoting *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 166 (3d Cir. 2002)).

Based on the evidence presented at the three-day hearing, the district court concluded that the City's insistence that agencies certifying foster families refrain from discriminating on the basis of characteristics protected by the City's Fair Practices Ordinance was a neutral, generally applicable policy. The City's contractual terms were therefore valid if they survived rational-basis review under *Smith*. Pet. App. 88a.

In reaching this conclusion, the district court found no evidence in the record to support CSS's assertion that the City "has granted secular exemptions to the Services Contract's fair practices

provisions, but now refuse[s] a religious exemption to CSS." Pet. App. 99a. CSS noted that the City allows contracting agencies to make "referrals of families for a variety of secular reasons, including proximity, expertise in caring for medical needs, expertise in addressing behavioral needs, ability to find foster placements for pregnant youth, expertise working in a 'kin care' program, and other specialties or areas of focus." Pet. App. 101a. But the district court found that such referrals were not exemptions from the City's contracting requirements. *Id.* The district court found that the City allows agencies to *inform* families of other agencies that may be better suited for their needs, but does not permit them to *refuse* families that want to work with them. *Id.*

The district court also found no evidence to support CSS's assertion that the City adopted its nondiscrimination policy *post hoc* in response to CSS's actions. The district court concluded that the City's foster care contracts already required contracted agencies to serve all prospective foster parents in accordance with the City's Fair Practices Ordinance. Pet. App. 78a-79a; *see also supra* n.1.

The district court also considered whether statements by City officials demonstrated that the City's enforcement of its nondiscrimination requirement was based on anti-religious targeting or animus. Pet. App. 93a-99a. CSS argued that statements from the Mayor reflected hostility toward the diocese and its religious beliefs. But the court determined that "there was insufficient evidence at the preliminary injunction phase to show that the Mayor had any influence in [the Commissioner's] decisions in this case, thereby rendering the

comments irrelevant to these proceedings." Pet. App. 94a. The district court also concluded—after hearing and evaluating live testimony from Commissioner Figueroa—that her remark encouraging CSS to follow the teachings of Pope Francis was insufficient to support a finding that her actions were motivated by hostility to CSS's religious beliefs about marriage, especially in light of the City's desire to continue contracting with CSS. Pet. App. 98a-99a.

After determining that the City's nondiscrimination requirements were subject to rational basis review under *Smith*, the district court found that the City's policy was supported by several legitimate governmental objectives. Pet. App. 89a-90a. These include an interest in "ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need," and "ensuring that when they employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified." Pet. App. 90a.

With respect to CSS's First Amendment claim based on "compelled speech," the district court concluded that CSS was unlikely to succeed because "CSS's speech, to the extent any is required under the [City's contracts], constitutes governmental speech." Pet. App. 116a. The contract does not require CSS to "chang[e] its activities, views, [or] opinions," and "CSS may continue to refuse its private services to same sex couples outside the confines of" performing its contracted government services. Pet. App. 118a.

Finally, the district court concluded that the remaining preliminary injunction factors counseled

against granting CSS's motion. Pet. App. 123a-131a. The district court explained that CSS's loss of contracts was an economic injury that could be fully compensated with monetary damages. Pet. App. 124a-126a. The district court also found that CSS had failed to prove its allegations that the loss of contracts would harm children in foster care. Pet. App. 128a. To the contrary, the evidence showed that "the closure of CSS's intake of new referrals has had little or no effect on the operation of Philadelphia's foster care system." *Id.* The loss of contracts would also not prevent families that had been certified by CSS from "continu[ing to use] their skills to provide foster care to children" with the assistance of other agencies. *Id.*[7]

2. On appeal, the Third Circuit unanimously affirmed the district court's denial of the motion for preliminary injunction. Pet. App. 22a-51a. Applying de novo review except with respect to witness credibility,[8] the court of appeals considered all of CSS's proffered evidence of religious targeting, including the history of the challenged policy, the alleged availability of secular exemptions, and all other alleged evidence of discriminatory intent. Pet.

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[7] This is consistent with the experience of other states in which an agency chose to cease providing public child welfare services because of its religious beliefs regarding same-sex couples: other agencies, including other faith-based agencies, provided the services, which continued without interruption. *See* Massachusetts, *et al.*, C.A. Amicus Br. 22-27.

[8] For claims under both the Free Exercise and Free Speech Clauses of the First Amendment, the Third Circuit "do[es] not rely on the normal clear-error standard for factual review, but instead conduct[s] an independent examination of the record as a whole." Pet. App. 22a.

App. 32a-38a. Like the district court, the court of appeals concluded that the record did not support CSS's contention that the City adopted its contracting requirements prohibiting discrimination to target or penalize CSS for its religious beliefs. Pet. App. 32a-38a.

In reaching that conclusion, the Third Circuit agreed with the district court that CSS had failed to prove that the City granted secular exemptions from its nondiscrimination obligation but not religious exemptions. Pet. App. 35a. Although CSS contended that "referrals from one agency to another are a routine way of finding the best fit for a given applicant," the Third Circuit explained that under the City's practice, "while agencies are free to inform applicants if they believe a different agency would be a better fit, they must leave the ultimate decision up to the applicants." *Id.*

The court of appeals also agreed with the district court that the Mayor's statements did not taint the agency's actions because "there is nothing in the record before us suggesting that he played a direct role, or even a significant role, in the process." Pet. App. 34a. And the Third Circuit agreed that Commissioner Figueroa's statement about Pope Francis was "made during a negotiation attempting to find a mutually agreeable solution to this controversy," and that "the record does not suggest that the City then sought to punish [CSS] for this disagreement." Pet. App. 33a. To the contrary:

> [T]he City has been working with CSS for many decades fully aware of its religious character. It continues to work with CSS as a congregate care provider

> and as a Community Umbrella Agency even to this day despite CSS's religious views regarding marriage. And the City has expressed a constant desire to renew its relationship with CSS as a foster care agency if it will comply with the City's nondiscrimination policies protecting same-sex couples.

Pet. App. 36a.

The court of appeals also rejected CSS's "compelled speech" claim. Citing *Rust v. Sullivan*, 500 U.S. 173 (1991), the court explained that "[t]he problem with this argument is that the ostensibly compelled speech occurs in the context of CSS's performance of a public service pursuant to a contract with the government." Pet. App. 40a. The court noted that under *Agency for International Development v. Alliance for Open Society International*, 570 U.S. 205 (2013), it would be an unconstitutional condition for the City to "refuse[] to contract with CSS unless it officially proclaimed its support for same-sex marriage." Pet. App. 42a. "But to the contrary, the City is willing to work with organizations that do not approve of gay marriage, as its continued relationship with Bethany Christian, its continued relationship with CSS in its other capacities, and its willingness to resume working with CSS as a foster care agency attest." *Id.* The City's contractual requirement, therefore, does not compel speech of any kind; it simply defines the scope of a public service program that CSS is free to undertake, or not, as it chooses. *Id.* Thus, the court of appeals held that the City's contracts did not

unlawfully compel private speech or penalize CSS for its speech outside the governmental program.

Finally, the court of appeals agreed that CSS had failed to establish the remaining preliminary injunction factors. Pet. App. 50a-51a. Although CSS asserted that it would have to close its foster care services, the court found that CSS had "not met its burden of demonstrating that it is more likely than not to suffer this injury" because its "congregate care and Community Umbrella Agency functions are unaffected" and "it has other foster care contracts with neighboring counties." Pet. App. 50a. Moreover, the court found that "neither the balance of the equities nor the public interest would favor issuing an injunction" because "[p]lacing vulnerable children with foster families is without question a vital public service" and "[d]eterring discrimination in that effort is a paramount public interest." Pet. App. 50a-51a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CIRCUIT SPLIT REGARDING HOW TO ASSESS PETITIONERS' FREE EXERCISE CLAIM.

The decision below is only the second court of appeals *ever* to address a claim by a religious entity that the Free Exercise Clause entitles it to a government contract to perform a public function while violating the contract's neutral and generally applicable terms to comport with its religious beliefs. The only other decision, which was decided over a decade ago, is *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 406 (6th Cir. 2007). In that case, Michigan contracted with a religious organization to provide

residential treatment programs for "neglected, abused, and emotionally troubled" teenagers. *Id.* After learning that the organization was incorporating religious programming and church attendance as part of its performance of the contract, Michigan terminated the contractual relationship, and the organization sued. *Id.* The Sixth Circuit, like the Third Circuit here, rejected the organization's claim that the Free Exercise Clause entitles a religious organization providing government services to dictate how those services are provided to the public. *Id.*[9]

Petitioners nevertheless ask this Court to grant certiorari to resolve a purported circuit split, arguing that the Third and Ninth Circuits demand a higher showing than other circuits to prevail on free exercise claims. But there is simply no circuit conflict to resolve. In accordance with *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), all the courts of appeals, including the Third and Ninth Circuits, recognize that a law is not neutral or generally applicable if it selectively "permits nonreligious conduct that undermines the government's interests 'in a similar or greater degree than [religious conduct] does.'" Pet. 29 (quoting *Lukumi*, 508 U.S. at 543) (alterations by

[9] Instead of arguing, as petitioners do, that the Free Exercise Clause *requires* the government to enter into contracts with religious organizations allowing them to alter government programs to accord with their religious beliefs, Texas and other *amici* states ask the Court to grant certiorari to address whether the Establishment Clause *prohibits* the government from voluntarily doing so. *See* Texas, et al., Amicus Br. 3. The facts of this case, however, do not present that issue.

petitioners).[10] All of the courts of appeals, including the Third Circuit and the Ninth Circuit, also recognize that courts must analyze whether an ostensibly neutral law was passed with discriminatory intent by examining "both direct and circumstantial evidence," including "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540.[11]

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[10] *See* Pet. App. 31a (summarizing Third Circuit precedent applying strict scrutiny to otherwise facially neutral laws when exemptions meant that "religiously motivated conduct was treated worse than otherwise similar conduct with secular motives"); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) ("A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated."); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) ("[I]f a law pursues the government's interest only against conduct motivated by religious belief but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest, then the law is not generally applicable.") (internal quotation marks omitted); *accord* Pet. 23-25 (collecting cases from the Sixth, Tenth, and Eleventh Circuits to the same effect).

[11] *See* Pet. App. 26a-30a (explaining importance of extrinsic evidence of discrimination when discussing *Lukumi* and *Masterpiece Cakeshop*); *Lighthouse Inst. for Evangelism*, 510 F.3d at 275 (concluding that zoning plan was "neutral" because "there is no evidence that it was developed with the aim of infringing on religious practice"); *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir.), *reconsideration en banc denied*, 853

Latching onto a single sentence in the Third Circuit's opinion, petitioners attempt to recast the Third Circuit's application of that well-settled test to the facts here as a novel legal holding. According to petitioners, the Third Circuit adopted a new rule that for purposes of proving anti-religious targeting, "the *only* relevant evidence would be evidence of an exception for 'another organization that did not work with same-sex couples as foster parents but had different religious beliefs.'" Pet. 20 (quoting Pet. App. 32a) (emphasis by petitioners).

But the Third Circuit held no such thing. It did not limit its analysis to exemptions for agencies that did not want to work with qualified same-sex couples. Rather, it made a factual determination that the record did not support petitioner's allegations that the City authorized *any* secular exemptions to compliance with the Fair Practices Ordinance. Although CSS contended that "referrals from one agency to another are a routine way of finding the best fit for a given applicant," the Third Circuit explained that under the City's practice, "while agencies are free to inform applicants if they believe a different agency would be a better fit, they must leave the ultimate decision up to the applicants." Pet. App. 35a.

F.3d 933 (9th Cir. 2017), *and reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), *and cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017) (considering extrinsic evidence to determine whether travel ban was adopted for purpose of discriminating against Muslims); Pet. 25-27 (collecting authority from Second, Sixth, Seventh, Eighth, and Tenth Circuits to the same effect).

Petitioners also accuse the Third Circuit of "ignor[ing]" evidence that the City targeted CSS's conduct by changing its policies and adopting new antidiscrimination provisions for the 2018-19 contracts. Pet. 20. But the district court found—and the Third Circuit agreed—that City officials believed that discrimination against same-sex couples was already prohibited in the 2017-18 contracts, despite CSS's contrary interpretation of the contract. Pet. App. 34a-35a. Petitioners' disagreement with that finding of fact does not create a circuit split.

Petitioners' discussion of the Ninth Circuit's decision in *Stormans Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), suffers from the same failure to distinguish between the court's legal standard and its findings of fact. As three Justices noted when dissenting from denial of certiorari in that case, "[t]he Ninth Circuit did not dispute" that a policy allowing pharmacists to refuse to fill prescriptions for secular reasons, but not religious reasons, would not be neutral and generally applicable. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2438 (2016) (Alito, J., dissenting from denial of certiorari). Instead, the Ninth Circuit held that "the [d]istrict [c]ourt committed clear error in finding that the regulations allow refusals for a host of secular reasons." *Id.* The dissenting Justices criticized the Ninth Circuit for failing to accord the district court's factual findings sufficient deference, not for applying the wrong legal standard. *Id.*

The recent decision in *Buck v. Gordon*, No. 1:19-CV-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019), provides further confirmation that there is no circuit split for this Court to resolve. Unlike the

courts in this case, the district court in *Buck* granted a preliminary injunction to a Catholic foster care agency that refused to work with same-sex couples. But the district court explained that its decision was consistent with the Third Circuit's decision in *Fulton* because of the cases' different factual records. The court concluded that "[u]nlike *Fulton* . . . the record before the Court in this case supports an inference of religious targeting." *Id.* at 12. *Buck* confirms that CSS failed to obtain a preliminary injunction in this case because it had insufficient evidence to prove its claim of anti-religious targeting, not because the Third Circuit used a different legal standard. That failure of proof is not a question of law warranting this Court's review.

II. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT AN INAPPROPRIATE VEHICLE FOR THIS COURT'S INTERVENTION.

1. In denying the motion for preliminary injunction, the Third Circuit emphasized that it was ruling based on a limited evidentiary record. *See* Pet. App. 12a ("At this stage and on this record, we conclude that CSS is not entitled to a preliminary injunction."). Because "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits," "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). On remand, petitioners will have an opportunity to develop the evidentiary record with the full arsenal of discovery at their disposal. And if petitioners do

not prevail, they will have another opportunity to seek this Court's review after a complete evidentiary record is compiled.

Instead of making a full record on remand, petitioners ask the Court to intervene at this interlocutory stage. But the preliminary injunction record is sparse: it was developed in just two weeks without the benefit of discovery. And the preliminary injunction record is stale: CSS's contract with the City has expired, and there is also no evidence in the record to show how the City has enforced the current contractual language for the past two fiscal years. Without a full evidentiary record, CSS's request for this Court's review is premature. *See Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari).

Petitioners assert that the Court should preemptively intervene at this early stage to protect "the future of Catholic foster and adoption agencies throughout the country" that may be "forced to close before litigation can run its course," to the detriment of the "over 400,000 children [who] are in foster care nationwide." Pet. 39. But those assertions are not borne out by anything in the record. This case has no impact on CSS's private adoption services. And the lower courts both concluded that CSS had failed to present sufficient evidence of irreparable harm in light of its remaining contracts with the City and with other local jurisdictions. Pet. App. 50a, 128a. CSS also failed to show that its intake "freeze" had any negative effect on children in the City's foster care system. Pet. App. 128a. And CSS's unsupported assertion about harm to children nationwide is contradicted by the actual experience of other states

enforcing similar nondiscrimination requirements. *See* Massachusetts, *et al.*, C.A. Amicus Br. 22-27.

2. The petition is also a poor vehicle for this Court's review because it arrives to the Court from the denial of a motion for a preliminary injunction where the only available remedy is prospective relief. Petitioners' allegations, even if proved true, might support some form of retrospective relief but they would not support compelling the City to allow CSS to enter into a new government contract to provide a public service while violating the terms of the contract. *See* Pet. App. 25a n.1 (noting that such an injunction "would be highly unusual").

For example, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), the Court held that anti-religious hostility tainted an adjudicatory proceeding and thereby violated the bakery's free exercise rights. The Court therefore invalidated the commission's decision holding the bakery liable for violating the state's nondiscrimination law. But it did not follow that the bakery was free to discriminate in the future. The Court did not enjoin the state from enforcing its public accommodations law going forward, against the bakery or anyone else. *See id.* at 1732 ("However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.").

Whether CSS is entitled to injunctive relief depends on the City's reasons for requiring CSS to adhere to the terms of the current contracts, not the

City's reasons for freezing referrals to CSS under an expired contract. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018). Even if CSS could show that the City acted impermissibly when it froze referrals to CSS, the City's past actions cannot "forever taint any effort on [the government's] part to deal with the subject matter." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 874 (2005); *see also Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (upholding facially neutral policy after facially discriminatory policy expired pursuant to its own terms).

In assessing the permissibility of the City's current contracts, evidence of its past actions "must be weighed together with any other direct and circumstantial evidence" of the City's current motivations. *Abbott*, 138 S. Ct. at 2325. But, as noted above, the preliminary injunction record does not include the text of the current contracts or any evidence about how the City has enforced the terms of the current contracts over the past two fiscal years. Without an evidentiary record containing that critical information, petitioners cannot obtain the preliminary injunction they seek on this interlocutory appeal.

III. THIS CASE IS A POOR VEHICLE TO REEXAMINE *SMITH* BECAUSE EVEN UNDER PRE-*SMITH* LAW, THE CITY'S REQUIREMENT THAT CONTRACTORS CARRYING OUT A GOVERNMENT PROGRAM ABIDE BY THE TERMS OF THE PROGRAM WOULD BE VALID.

Petitioners invite the Court to reconsider *Smith*, but they assert a free exercise right that was

never recognized under pre-*Smith* precedent. Unlike most free exercise challenges to neutral and generally applicable laws, this case does not involve a regulation of private conduct or the provision of a public benefit. Rather, petitioners assert a right to enter into contracts with the government to carry out a public function while dictating that the government operates its program in accordance with petitioners' religious beliefs. Whether considered under pre- or post-*Smith* precedent, the Free Exercise Clause does not give government contractors a religiously based veto over how governmental services are provided to the public. And, even if strict scrutiny applied, the City has a compelling interest in ensuring that governmental services are provided to the public on a nondiscriminatory basis.

1. By prohibiting government contractors from discriminating in the provision of governmental services, the City is not regulating CSS or excluding it from a public benefit. It is simply setting the terms of a contract for a public service, and doing so in generally applicable and religiously neutral terms. That does not constitute a substantial burden on CSS's religious exercise even under pre-*Smith* precedent.

Under pre-*Smith* precedent, this Court recognized that neutral and generally applicable laws could sometimes impose a substantial burden on religious exercise. As summarized by the Court a few years before *Smith*, such a law imposes a substantial burden on religion when individuals are "coerced by the Government's action into violating their religious beliefs" or "governmental action penalize[s] religious activity by denying any person

an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

But pre-*Smith* precedent did not recognize a substantial burden when the government declines to "conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). In *Roy*, eight members of the Court agreed that the government can assign individuals social security numbers as a condition of receiving public benefits, and the government's use of those social security numbers did not impose a "substantial burden" on individuals with religious objections. The Court explained that it had never "interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development." *Id.*

In *Lyng*, a majority of the Court applied the same principle to government construction on government property. The Court explained that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng*, 485 U.S. at 452. "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions." *Id.*

The concerns that animated *Roy* and *Lyng* apply with even greater force in the context of government contracts. "The ability to set such terms for government contractors is critically important to

providing government services to all for whom they are intended, especially given the prevalent use of contractors to provide public services in a wide variety of areas—from road maintenance to corrections to public health." *See* Massachusetts, *et al.*, C.A. Amicus Br. 18. Allowing government contractors to dictate how government services are provided "would at a minimum hinder, and potentially preclude altogether, government agencies' reliance on contractors to deliver services mandated by state law and policy to be provided to all who qualify for them." *Id.* at 19.[12]

Instead of protecting religious freedom, recognizing a free exercise right to discriminate in the provision of government services risks undermining religious freedom by enabling discrimination against members of minority faiths. *See* Anti-Defamation League, *et al.*, C.A. Amicus Br.

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[12] It would also raise substantial concerns under the Establishment Clause by vesting religious organizations authority to exercise governmental power according to religious criteria. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). For example, in Michigan, a state-contracted child placing agency separated a child from his siblings because the siblings were in the care of a same-sex couple and the agency was unwilling to place children "in homes that do not follow Catholic Teachings." *See Catholic Charities W. Mich. v. Mich. Dep't of Health & Human Servs.*, No. 2:19-cv-11661, Docket entry No. 23-4 (Mich. E.D. July 24, 2019). When the state learned of this, it was able to enforce its policy of keeping siblings together by issuing a corrective action plan. *See id.* If requiring government contractors to comply with neutral, generally applicable government program requirements constituted a substantial burden on religion, Michigan would either have to tolerate sibling separation by its agencies or cease contracting out child placing services.

18-24. The current litigation concerns an agency's religious objections to foster families headed by same-sex couples. But other religious agencies object to accepting foster families that do not adhere to a particular faith or religious denomination.[13] Indeed, until this litigation, CSS itself required prospective foster families to submit a "pastoral letter" vouching for a family's observance of a faith in order to work with the agency. Pet. App. 56a. The district court noted that this practice discriminated not only against families that do not associate with a religious tradition, but also families with religious faiths that do not include religious ministers. *Id.*; *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 202 (2012) (Alito, J., concurring) ("[M]ost faiths do not employ the term "minister," and some eschew the concept of formal ordination.").[14]

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[13] *See* Meg Kinnard, *Lawsuit claims discrimination by foster agency*, Associated Press (Feb. 15, 2019), at https://tinyurl.com/y2lzcupp (describing lawsuit based on agency's refusal to approve Catholics and other non-Evangelical Protestants as foster parents); Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, Jewish Telegraph Agency (Feb. 5, 2019), https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish (describing how foster care agency in South Carolina refuses to accept Jewish families).

[14] In Philadelphia, the City itself decides where each child in foster care will be placed, but in other jurisdictions, the foster care agency makes family placements for children with families that the agency has licensed. *See Maddonna v. U.S. Dep't of HHS*, No. 6:19-cv-00448, Docket entry No. 1 (D.S.C. Feb. 15, 2019). In those jurisdictions, a foster care agency that refuses to accept Jewish, Catholic, or Muslim foster families undermines the religious freedom of the Jewish, Catholic, and Muslim

2. This case is also an inappropriate vehicle for reconsidering *Smith* because the City would prevail even under strict scrutiny. The City has a compelling interest in ensuring that government programs do not discriminate based on a person's sexual orientation, and the narrowest way to pursue that interest is to require that those seeking to perform the public service abide by a contractual nondiscrimination provision. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *cf. United States v. Lee*, 455 U.S. 252, 261 (1982).

CSS argues that the City could "serve Philadelphia's diverse population" by contracting with a "broad array of agencies" specializing in serving certain communities. Pet. 6. But the availability of another foster care agency does not erase the injury of discrimination or eliminate its deterrent effect on potential foster families. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring). The City was entitled to make the judgment—consistent with well-established best practices for child welfare and the policies of numerous states—to prohibit discrimination against families for reasons unrelated to the ability to care for a child, including race, religion, and sexual orientation, so that no family is deterred from fostering by the experience or risk of facing discrimination. This Court's pre-*Smith* precedents do not provide a free exercise right to veto that considered judgment. *Cf. O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 724–25 (1996) ("Cities and other governmental entities make a wide

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children in their care who are unable to be placed with a foster family that shares their faith.

range of decisions in the course of contracting for goods and services. The Constitution accords government officials a large measure of freedom as they exercise the discretion inherent in making these decisions.").

For all these reasons, a case involving government contractors providing a government service is a particularly poor vehicle for considering the continued viability *Smith*. If the Court wishes to revisit *Smith*, it should do so in a case that would come out differently under pre-*Smith* precedent.

IV. THE THIRD CIRCUIT FAITHFULLY APPLIED THIS COURT'S "UNCONSTITUTIONAL CONDITIONS" PRECEDENTS

CSS argues that certifying same-sex couples as foster families amounts to unconstitutionally "compelled speech." But, as the court of appeals noted, "[t]he problem with" petitioner's compelled speech argument is that "the ostensibly compelled speech occurs in the context of CSS's performance of a public service pursuant to a contract with the government." Pet. App. 39a. The City has an obligation to find foster families to care for children in its custody. When the City enters into contracts for foster care services it is hiring agencies to perform a governmental function. And when a foster care agency certifies potential foster parents pursuant to its contracts with the City, the agency is acting, and speaking, in its capacity as a governmental contractor carrying out a government program, not as a private entity engaged in its own speech. *See Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 541–42 (2001). Because the nondiscrimination

requirement applies only to the carrying out of the government program and does not restrict the contractor outside that program, it does not impose an unconstitutional condition.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), for example, this Court upheld a content-based restriction on what recipients of Title X funding could tell patients in a government-funded program. The Court rejected a First Amendment challenge because the recipients were voluntarily carrying out the government program and the limitations on their speech applied only to the government program. *Id.* at 199.

The same holds true here. It is not clear that the nondiscrimination requirement regulates speech at all; it prohibits discrimination in the conduct of certifying families for foster care. But even if it did regulate speech, the nondiscrimination requirement limits only what the contractor does and says in carrying out a government program.

This Court's precedents on speech by public employees reflect the same distinction. The First Amendment protects the rights of public employees or government contractors to engage in their own private speech, but it "does not invest [them] with the right to perform their jobs however they see fit." *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 438.

CSS attempts to distinguish this case by contending that without a governmental contract, it has no opportunity to engage in foster care certification in its capacity as a private entity. But it is precisely because foster care is a government service that CSS is not entitled to dictate how that service is provided. "When a government agency contracts out for such services, it does not create a forum for private speech or the exercise of religious belief, but rather a mechanism for fulfilling its obligations to serve the public—for which it must be able to specify requirements." *See* Massachusetts, *et al.*, C.A. Amicus Br. 18-19.

In any event, the City has by no means shut CSS out of the foster-care system. The City continues to contract with CSS for its work as a congregant care provider and Community Umbrella Organization. CSS remains free to use its own resources to recruit foster families and refer them to the City or other agencies to get certified as other agencies have done.[15] It can provide support for children in foster care and foster families. The *only* thing it cannot do is demand that the City allow it to act as a gatekeeper of which families are certified to foster children in the City's care and carry out that

[15] *See* Massachusetts, *et al.*, C.A. Amicus Br. 26-27 (describing how jurisdictions with anti-discrimination requirements continue to contract with Catholic social service organizations "to improve the lives of foster children and other vulnerable children and adults without violating the organizations' religious beliefs"); Voice for Adoption, *et al.*, C.A. Amicus Br. 19-20 (applauding CSS's recruitment and support of foster families and noting that "[m]any avenues remain open to CSS . . . to continue supporting foster children and foster families").

government function in a manner that contravenes the City's policy of welcoming all qualified families.

CONCLUSION

The Court should deny the petition.

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