No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

NICHOLAS M. CENTRELLA
CONRAD O'BRIEN PC
1500 Market Street
Suite 3900
Philadelphia, PA 19102
(215) 864-8098

MARK. L. RIENZI
Counsel of Record
LORI H. WINDHAM
ERIC C. RASSBACH
WILLIAM J. HAUN
NICHOLAS R. REAVES
JACOB M. COATE
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave., NW
Washington, DC 20036
mrienzi@becketlaw.org
(202) 955-0095

Counsel for Petitioners

QUESTIONS PRESENTED

The City of Philadelphia chose to exclude a religious agency from the City's foster care system unless the agency agreed to act and speak in a manner inconsistent with its sincere religious beliefs about marriage. The Third Circuit upheld that action under *Employment Division* v. *Smith*.

The questions presented are:

1. Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views—as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held?

2. Whether *Employment Division* v. *Smith* should be revisited?

3. Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Sharonell Fulton, Toni Lynn Simms-Busch, and Catholic Social Services.

Respondents are the City of Philadelphia, the Department of Human Services for the City of Philadelphia, and the Philadelphia Commission on Human Relations (all of which are original defendants in the case), along with Defendant-Intervenors the Support Center for Child Advocates and Philadelphia Family Pride.

None of the petitioners have any parent entities and they do not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Archdiocese of Philadelphia has been caring for the orphaned, abused, and neglected children of Philadelphia for more than two centuries. It continues that work today through Catholic Social Services of the Archdiocese of Philadelphia, which provides loving homes for foster children. But in March 2018, despite an urgent need for foster families, Philadelphia suddenly stopped allowing foster children to be placed with Catholic Social Services (CSS). Philadelphia took this extraordinary action not in response to any legal violation, nor in response to any complaint it received, but because of CSS's religious beliefs and practices regarding marriage, which City officials read about in the local paper.

City officials read that the Archdiocese follows Catholic Church teachings on marriage. That means, if ever asked, CSS could not provide a written endorsement of a same-sex relationship for a couple seeking to foster. When they read the news, City officials leapt into action: the City Council passed a resolution, the Mayor requested an inquiry, and two different City departments launched investigations. Then Philadelphia announced that going forward, no new foster children would be placed with CSS or with the families it serves, including longtime foster parents like petitioner Sharonell Fulton.

In its rush to penalize this religious exercise, the City failed to figure out whether CSS actually violated any law, much less a neutral, generally applicable one. Instead of a law, Philadelphia had a preferred outcome: the Archdiocese of Philadelphia should get with the times, accept that it is "not 100 years ago," and start endorsing same-sex relationships for foster care.

Philadelphia's actions violated the First Amendment under any standard. But that did not deter the Third Circuit from ruling in favor of the City. It held that Philadelphia's actions were perfectly consistent with the Free Speech Clause, as well as the Free Exercise Clause under *Employment Division* v. *Smith*. The Third Circuit considered Philadelphia's actions "neutral," even though the City concocted six different *post hoc* justifications for penalizing CSS. And the court held Philadelphia's actions "generally applicable," even though the City grants discretionary exemptions from its policies and has never applied those policies across the board. This is a fundamental misreading of *Smith*.

Unfortunately, it is an unsurprising reading of *Smith*. From the beginning, *Smith* has bred confusion in lower courts and emboldened governments to restrict religious exercise with only the thinnest pretext of neutrality. In theory, *Smith* promised an administrable standard; in practice, it has been anything but. The courts' experience with *Smith* does not support retaining it, and neither do the text, history, or tradition of the Free Exercise Clause. *Smith* should be revisited and replaced with a standard that better reflects the Constitutional text, history, and our long tradition of protecting diverse religious exercise.

Philadelphia has decided that the Archdiocese of Philadelphia can believe what it likes about marriage, so long as it speaks and acts to the contrary. Such a conflict was anticipated in *Obergefell,* was exacerbated by the Third Circuit's view of *Smith*, has forced multiple religious foster agencies to close, and threatens CSS now. A properly functioning Free Exercise Clause forecloses that result.

OPINIONS BELOW

The Third Circuit's opinion is reported at 922 F.3d 140 and reproduced at Pet.App.1a-51a. The district court's opinion is reported at 320 F. Supp. 3d 661 and reproduced at Pet.App.52a-132a.

JURISDICTION

The court of appeals entered judgment on April 22, 2019. Petitioners timely filed a petition for writ of certiorari on July 22, 2019, which this Court granted on February 24, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]" U.S. Const. Amend. I.

STATEMENT OF THE CASE

A. The Catholic Church has served Philadelphia children for more than two centuries.

Through Catholic Social Services, the Archdiocese of Philadelphia seeks to "continue[] the work of Jesus" by serving the people of Philadelphia. Pet.App.201a. Since 1797, the Catholic Church in Philadelphia has cared for children in need. Pet.App.12a, 252a-254a. As an arm of the Catholic Church, CSS performs what the Church calls corporal works of mercy. Catechism of the Catholic Church § 2447. Those include caring for "orphans and widows," James 1:27, and the "least of

these." Gospel of St. Matthew 25:40; Pet.App.12a. Today, CSS continues that work by providing foster homes for abused and neglected children. J.A.41.

The Catholic Church was doing this work long before the City of Philadelphia began overseeing foster care. After the yellow fever epidemic hit Philadelphia in the 1790s, Catholics, Jews, and other religious groups established orphanages. J.A.163-166. The first Catholic orphanage in Philadelphia, and one of the first in the United States, was founded in 1798. See Timothy A. Hacsi, Second Home: Orphan Asylums and Poor Families in America 18 (Harvard 1997). As the Catholic Church grew in Philadelphia, so did its ministry to orphaned and neglected children. In 1847, Bishop Kendrick invited the Sisters of St. Joseph to take over St. John's Orphan Asylum. Francesca Steele, "Sisters of Saint Joseph," 8 The Catholic Encyclopedia (1910), https://perma.cc/4WVW-2D7Q. By 1910, the order was caring for almost 26,000 children in the City. *Ibid.* This work extended to foster care, where the Catholic Children's Bureau would find homes for children in need. J.A.166.

Over the course of the twentieth century, the government increased its involvement in (and regulation of) care for abused and neglected children. See Child Placement and Adoption, A Report of the Joint State Government Commission to the General Assembly of the Commonwealth of Pennsylvania at 1, 5-7 (1951), https://perma.cc/VMT7-D8MA (chronicling the growth of Pennsylvania's involvement in child welfare); Andrew Yarrow, *History of U.S. Children's Policy 1900-Present*, First Focus (2009), https://perma.cc/3PC9-WEM9 (highlighting state and federal developments throughout the twentieth century). Today, the City of

Philadelphia takes custody of children who are removed from their homes, most of whom will be placed with foster families. J.A.85-86, 352-353. The City relies upon private child-placing agencies ("private agencies") to find them homes. J.A.694. CSS has had an annually renewed City contract to care for foster children for over 50 years. Pet.App.137a, J.A.504-505.

During that time, CSS has recruited, trained and supported thousands of foster parents, Pet.App.137a, including petitioner Sharonell Fulton, who fostered 40 children over 25 years; petitioner Toni Simms-Busch, a social worker who chose CSS when she was ready to foster; and plaintiff Cecelia Paul, a Philadelphia foster parent of the year who used her training as a pediatric nurse to foster infants born with drug addictions. J.A.38-55, J.A.59-70; C.A.App.0991-1001.

CSS is known for the support it provides to foster families, like delivering wrapped presents to Sharonell Fulton's door when she took in new foster children on Christmas Eve. C.A.App.0992; Pet.App.137a. It relies on private funding to provide services above and beyond what the City's contract requires. J.A.168-169, 172-173. CSS serves all children in need, regardless of religion, race, sex, or sexual orientation. Pet.App.158a.

Currently, CSS must contract with the City to do this work. J.A.82-83. As Philadelphia has argued, "absent its contract with the City, CSS has no preexisting right to determine the fate of Philadelphia's abused and neglected children, whose care is entrusted by law to the government." Phila.BIO 31. The Archdiocese may engage in other ministries, like sheltering homeless women, running group homes for youth with behavioral health issues, or providing community umbrella services. But for foster care, as CSS's leadership

testified, CSS "would be breaking the law if [it] tried to provide foster-care services without a contract." J.A.168.

B. Philadelphia relies on private agencies to provide foster homes.

Today, Philadelphia's Department of Human Services (DHS) is charged by law with investigating allegations of abuse and neglect. 23 Pa. Stat. § 6362. When Philadelphia children must be removed from their homes, they are placed in DHS custody. J.A.684-685; see also 23 Pa. Stat. § 6362. DHS must then find a suitable home for these children, and is required by law to place them in the most family-like setting possible. 11 Pa. Stat. § 2633.

DHS relies on private agencies that find, train, oversee, and support those families. J.A.685. When DHS needs a foster home for a child, it sends out a request, called a referral, to private agencies. These agencies check to see which foster families are available, then notify DHS of any potential match. Agencies provide information about the foster family, and DHS compares that with information about the foster child. DHS then determines which private agency has the most suitable foster family, based upon factors including race, age, family relationships, and disability. J.A. 266-267, J.A.307-310, J.A.79-81. After DHS makes that match, the child is placed with the foster family. The private agency will continue to oversee and support that family to ensure a successful foster placement. J.A.82.

Prospective foster parents must undergo a thorough evaluation and receive a written agency opinion assessing their home and family life. 55 Pa. Code

§ 3700.64. Prospective foster parents can approach any private agency for this "home study." In 2018, Philadelphia contracted with thirty private agencies. Pet.App.13a. This array of agencies helps better serve Philadelphia's diverse population. As Philadelphia says, "[e]ach agency has slightly different requirements, specialties, and training programs." Pet.App.197a.[1] Philadelphia's foster parent recruitment website lists agencies and tells families they should research different agencies to "find the best fit for you" so families can "feel confident and comfortable with the agency." *Ibid.* Three foster care and adoption agencies in Philadelphia have the Human Rights Campaign's (HRC) "Seal of Approval," for their excellence in serving LGBTQ families. HRC, All Children—All Families: Participating Agencies (2020), https://perma.cc/QWA6-FG2M. Philadelphia also sponsors "recruitment and engagement efforts" for the LGBTQ community. J.A.267; Office of LGBT Affairs; Our Office's Favorite Moments of 2018 (2018), https://perma.cc/B7JD-WEA9.

When private agencies conduct a home study, Pennsylvania law requires them to evaluate an applicant's "existing family relationships," "mental or emotional stability," and "[a]bility * * * to work in partnership" with the foster agency. 55 Pa. Code § 3700.64. Home studies are deeply personal; they include an in-home visit, interviews on sensitive topics, and may include psychological evaluations of family members. *Ibid.* The private agency then makes the "decision to

[1] All declarations and accompanying exhibits cited in this brief were offered into evidence and admitted at J.A.439-441.

approve, disapprove or provisionally approve the foster family." 55 Pa. Code § 3700.69.

When an applicant reaches out to an agency, the agency might refer the applicant elsewhere for a variety of reasons. J.A.46-47, 176-177. For example, an applicant might live too far away, or the agency might have a waiting list. Pet.App.138a. Or an applicant might wish to foster Native American children or special needs children, who can only be placed by specially designated agencies. J.A.85-86, 115-117, 123-124, 176-177. As a longtime social worker testified, referrals between agencies "are made all the time." J.A.46-47; see also J.A.108, 115-116, 295-296.

Philadelphia acknowledges it "ha[s] nothing to do" with home studies. Pet.App.302a-303a; J.A.320-322. Foster family recruitment and certification are not contracted-for "Services" under the City's contract. J.A.518-532 (list of "Services" does not include recruitment or certification). Nor are home studies "expressly funded under the [City] contract"; instead, "compensation is based on the number of children in [an agency's] care." Response in Opposition to Emergency Application at 26, *Fulton* v. *City of Philadelphia*, 139 S. Ct. 49 (2018) (No. 18A118) (Mem.). Philadelphia's contract with CSS, like its contract with all private agencies, provides that CSS "is an independent contractor and shall not * * * be deemed * * * an employee or agent of the City," nor shall CSS "in any way represent" otherwise. J.A.323, 634.

Home study certifications signify an agency's approval of a family, and CSS understands the home studies as an endorsement of the relationships of those living in the home. 55 Pa. Code § 3700.69 (approval);

J.A.49-50. Accordingly, CSS cannot certify relationships during a home study that are inconsistent with its Catholic beliefs. J.A.171-172, 237-238. In practice, this means that CSS cannot provide foster care certifications for unmarried couples, regardless of sexual orientation, nor for same-sex married couples. J.A.171-172. This belief and practice has led to the exclusion of Catholic adoption and foster agencies in several cities. U.S. Conference of Catholic Bishops, Discrimination Against Catholic Adoption Services (2018), https://perma.cc/7AGW-7VPL.

If a same-sex couple were to ask for a home study, CSS would refer them to another nearby agency. J.A.178-179. But the record shows that no same-sex couple had ever approached CSS in this way. J.A.171-172. Nor is there any evidence CSS's religious beliefs prevented—or even discouraged—anyone from fostering. J.A.305; Pet.App.139a.

C. Philadelphia excludes CSS from foster care.

On March 13, 2018, the *Philadelphia Inquirer* published a story entitled "Two foster agencies in Philly won't place kids with LGBTQ people." Pet.App.185a-190a. The story was about a complaint against a different agency, but contained a quote from the Archdiocese's spokesperson. He confirmed CSS's longstanding religious policy and also emphasized that CSS had not received inquiries from same-sex couples. *Ibid.*

On March 15, the City Council passed a resolution directing DHS to change its contracting practices and condemning "discrimination that occurs under the guise of religious freedom." Pet.App.147a-148a. On

March 16, at the request of the Mayor, the Philadelphia Commission on Human Relations (PCHR) sent a letter to the Auxiliary Bishop who oversees CSS. Pet.App.149a-152a. PCHR lacked jurisdiction to investigate because no complaint had been filed against CSS. Pet.App.191a-193a; PCHR Regulation 2.3(a). Yet PCHR directed the Bishop to answer detailed questions and provide documentation of CSS's policies, including whether "you have authority as a local affiliate/branch of the larger organiz[ation] to create or follow your own policies." Pet.App.149a-152a.

The Mayor also spoke with the DHS Commissioner. Pet.App.191a-192a 304a, 306a-307a. The Mayor had previously publicly disparaged the Archdiocese by saying he "could care less about the people at the Archdiocese," calling Archbishop Chaput's actions "not Christian," and exhorting Pope Francis "to kick some ass here!" Pet.App.173a, 177a-178a; J.A.372.[2]

The DHS Commissioner, Cynthia Figueroa, told the Mayor she was "working to address the issues." J.A.368. Commissioner Figueroa investigated whether *religious* agencies certified same-sex couples. J.A.273, 364-366. Other than a single call to a friend, Figueroa did not investigate secular agencies. *Ibid.*

On March 16, after that investigation, Figueroa summoned CSS's leadership to DHS headquarters.

---

[2] After Archbishop Chaput retired and Archbishop Perez was installed, the mayor publicly called on him to change direction in this case: "I'm hopeful that this new bishop, who seems to be extremely sensitive and understanding, may have a different approach than the past one." Joe Holden, *Supreme Court To Hear Dispute Over Philadelphia Catholic Agency That Won't Place Foster Children With Same-Sex Couples*, CBS News (Feb. 24, 2020), https://perma.cc/3XRN-58D5.

She urged them to follow "the teachings of Pope Francis," (as interpreted by the Commissioner) and told them that "times have changed," "attitudes have changed," and CSS should change its policy because it is "not 100 years ago." J.A.182, 365-366. Minutes after this meeting, CSS learned that DHS had frozen referrals to CSS, meaning that no new children would be placed with any CSS foster parents. Pet.App.140a-141a; J.A.183-184.

This freeze caused immediate disruption. It blocked children entering foster care from reuniting with siblings who were placed with CSS families, and it blocked children re-entering foster care from returning to CSS foster parents they knew and loved. Pet.App.141a-142a. When CSS worked with another agency to reunite two siblings, DHS emailed all private agencies informing them that there should be "NO referrals" to CSS. J.A.129-131, J.A.184-188. DHS even refused to reunite a young special needs boy with his former foster mother, who wanted to adopt him. J.A.497-503. DHS relented only after CSS sought emergency relief in court. J.A.250-252.[3]

Philadelphia took these actions despite a foster parent shortage. Shortages of foster families are a nationwide problem. Emily Wax-Thibodeaux, *'We are just destroying these kids': The foster children growing up inside detention centers*, Washington Post (Dec. 30, 2019), https://perma.cc/NK29-3JB9. There are more

[3] Afterwards, DHS leadership announced it would allow exceptions to the freeze based on "individualized assessments." J.A.390-391; Pet.App.17a, 65a. DHS would later resume placements with the other agency mentioned in the article, which changed its policy under pressure from the City. J.A.690.

than 5,000 foster children in Philadelphia alone. Phila.BIO 4; J.A.85. Philadelphia faces a chronic shortage of foster homes, including homes for 250 children placed in institutions because there were no available foster families. So, DHS sent out an "urgent" plea for 300 new foster homes. Julia Terruso, *Philly Puts Out 'Urgent' Call—300 Families Needed for Fostering*, Philadelphia Inquirer (Mar. 18, 2018), https://perma.cc/C7UH-GGWZ. This "urgent" plea occurred two days after Philadelphia shut down foster placements with CSS.

Today, CSS has a dozen families ready to provide foster care, but Philadelphia's policy leaves empty beds in their homes. CSS's program is dwindling as children are adopted, age out of care, or return to their birth homes. Delays in family court have caused a dramatic slowdown in adoptions, leaving children in CSS's foster homes longer than expected. See Pat Loeb, *Backlog of 1,400 Adoption Cases Keeps Hopeful Philly Parents, Children Waiting,* Radio.com (Feb. 19, 2019), https://perma.cc/U3ER-3BZW. But the program is still a fraction of its prior size, and with intake closed, CSS's numbers will continue to drop until its program is forced to close.

D. Philadelphia's six *post hoc* justifications.

Philadelphia has at various times asserted six different justifications for penalizing CSS.

1. The Fair Practices Ordinance.

Philadelphia first claimed CSS violated the Fair Practices Ordinance (FPO). Pet.App.149a-150a. The FPO (as incorporated into city contracts) prohibits "discriminat[ion] based on" characteristics including marital status, familial status, mental disability, and

sexual orientation in "public accommodation[s]." Pet.App.149a-150a; Phila. Code § 9-1106 (2016). But foster care has never been treated as a "public accommodation" in Philadelphia. J.A.150-151, 183-185, 305-316. Instead, the City permits—indeed, expects—private agencies to assess the marital status, familial status, and mental disabilities of potential foster parents. See pp. 7-8, *supra*; 55 Pa. Code § 3700.64; J.A.98-100, 236-238. The FPO also applies to "the City, its departments, boards and commissions," Phila. Code § 9-1102(1)(w), but Philadelphia does not apply the FPO to its own foster care operations. J.A.150-151. In fact, Philadelphia considers disability and race when making foster placements. J.A.305-316.

2. Provision 3.21.

Philadelphia next claimed CSS violated contract Provision 3.21. Pet.App.167a-169a. Provision 3.21 states that agencies "shall not reject a child or family for Services" unless "an exception is granted." Pet.App.167a. Philadelphia argued that this provision prevented *all* referrals between agencies. Pet.App.167a-168a. This has been called the "must-certify policy." Pet.App.35a.

But during the evidentiary hearing, Philadelphia admitted that this provision applies only to "a rejection of a referral *from DHS*,"—not from families who apply independently. J.A.107 (emphasis added). Witnesses familiar with the City's foster care system testified that referrals between agencies are commonplace. J.A.47 ("Referrals are made all the time."); *accord* J.A.162-163,178. Specific examples included referrals for location, language, medical or behavioral

expertise, services for pregnant teens, and tribal affiliation. J.A.40-49, 86-87, 108-109, 114-120, 174-177, 295-297.

Provision 3.21 also permits "exception[s]" by "the Commissioner or the Commissioner's designee, in his/her sole discretion." Pet.App.58a-59a. But Philadelphia stated it has "no intention of granting an exception" to CSS. Pet.App.165a-172a.

3. New non-discrimination language.

Philadelphia also announced that it would create a new contract requirement to ensure that private agencies act "consistent with" Philadelphia's "conception of equality." Pet.App.169a. As the City explained, "any further contracts with CSS will be explicit" that CSS must certify same-sex couples. Pet.App.170a. The letter also compared CSS's actions to racial discrimination. Pet.App.166a.

As threatened, Philadelphia changed its contracts after the preliminary injunction hearing. Its new policy is incorporated into Provision 3.21 of FY2019 contracts. It adds language prohibiting sexual orientation discrimination against prospective foster parents. It retains the language about granting exemptions.

4. The City Charter.

For the first time on appeal, Philadelphia relied upon a city charter provision requiring that city contracts contain nondiscrimination language. City C.A. Br. at 7-8. But that provision expressly excludes professional services contracts like CSS's foster care contract. Philadelphia Home Rule Charter § 8-200(2); Pet.App.201a-203a (noting that the foster care contract is not subject to § 8-200). After CSS brought this

exclusion to Philadelphia's attention, Philadelphia dropped the argument.

5. The "Waiver/Exemption Committee."

When opposing certiorari, Philadelphia pointed to a new "Waiver/Exemption Committee" in which its lawyers will balance the "complex constitutional issues" that arise from "any request for a religious exemption." Phila.BIO 15. Such requests would be "handled through the procedures that [the committee] establishes." *Ibid.* At the same time, Philadelphia continued to assert that it would not extend any exemption to CSS. Phila.BIO 27.

6. An "updated and more detailed nondiscrimination provision."

Also identified for the first time at the certiorari stage, Philadelphia amended its FY2020 contracts to include another "updated and more detailed nondiscrimination provision." Phila.BIO 21.

E. The proceedings below.

CSS filed suit on May 17, 2018. After a three-day evidentiary hearing, the district court denied preliminary relief. Citing a lack of precedent, the district relied upon the "all comers" reasoning from *Christian Legal Society* v. *Martinez*, 561 U.S. 661 (2010), and held that Philadelphia had "a neutral law of general applicability under *Smith*." Pet.App.81a, 85a.

Petitioners appealed and sought emergency relief from the Third Circuit, which was denied, and then from this Court. This Court denied emergency relief, but Justices Thomas, Alito, and Gorsuch noted their dissent. *Fulton* v. *City of Philadelphia*, 139 S. Ct. 49 (2018) (No. 18A118) (Mem.) (Aug. 30, 2018).

The Third Circuit affirmed the district court's ruling on April 22, 2019. The key question, according to the panel, was whether Philadelphia "treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs[.]" Pet.App.32a. The court rejected CSS's targeting arguments: the Commissioner's admonition that CSS needed to follow the teachings of Pope Francis was merely "an effort to reach common ground." Pet.App.33a. The Mayor's comments were not "significant," Pet.App.34a. The City Council's resolution labeling CSS's actions "discrimination that occurs under the guise of" religion fell within a "grey zone." Pet.App.32a. DHS's religious-agency-only investigation "made sense" because only religious agencies would object. Pet.App.33a. The FPO was "moot" because it fell under the old contract, and the various exceptions were minimized as "routine regulatory disagreement." Pet.App.25a, 34a-35a.

The Third Circuit thus concluded that Philadelphia was enforcing a neutral and generally applicable policy under *Smith*. Pet.App.37a-38a. To hold otherwise, it warned, would make *Smith* "a dead letter," and "the nation's civil rights laws" as well. Pet.App.38a.

The court also rejected CSS's free speech claim, holding that because Philadelphia funded aspects of CSS's foster care program, "the [City's] condition pertain[ed] to the program receiving government money." Pet.App.42a. Petitioners sought certiorari, which this Court granted.

SUMMARY OF ARGUMENT

Philadelphia demands that a religious agency, an arm of a church, speak and act according to Philadelphia's beliefs. If it does not, Philadelphia will rid itself of the meddlesome agency. The Free Exercise Clause was made for cases like this one.

This Court has long restricted the government's power to control church affairs, to license its religious activity, to penalize religious beliefs or status, or to prescribe what religious teachings are orthodox, on marriage, raising children, or any other topic. These bedrock principles should resolve this case.

Lower courts avoided this straightforward conclusion. They did so by applying *Employment Division* v. *Smith* and determining that Philadelphia was just enforcing a neutral, generally applicable law. But Philadelphia's claim that it is applying a neutral, generally applicable law is missing the predicate: a law.

Philadelphia had no neutral law. Philadelphia decided on an outcome and then tried to find a law to fit. When it couldn't, it reverse-engineered policies to justify its actions. This is the inverse of the neutral law in *Smith*. Philadelphia then compounded that error through express hostility toward CSS's religious exercise.

Nor did Philadelphia have a generally applicable law. A law cannot be generally applicable when it uses individualized exemptions, and Philadelphia has granted the Commissioner and the City's lawyers carte blanche to give exemptions. But no such exemption will be granted for CSS's religious exercise. Philadelphia's policies also fail the general applicability requirement because the City violates its own rules,

and allows other agencies to do so, too. Whatever *Smith* envisioned as a neutral and generally applicable law, it was not this.

Philadelphia's actions also violate the First Amendment because the City is attempting to compel a private organization's speech. Philadelphia conditions participation in the foster care system on making certain written certifications about marriage. If you don't speak the government's preferred message on marriage, you are excluded from providing foster care.

Despite all these constitutional violations, the Third Circuit still ruled against petitioners, and the engine behind that ruling was *Smith*. Since *Smith*, lower courts have fractured over how to apply its rule. *Smith* may have envisioned an administrable system in which legislatures make general laws and courts apply them. But instead, government actors often infringe religious exercise with non-neutral, non-general laws, and courts mistakenly apply *Smith* anyway. The result has been a less, rather than more, administrable standard.

Smith is unsupported by the text, history, and tradition of the Free Exercise Clause—all of which guarantee broad protection for religious beliefs and practices. *Smith* departed from longstanding precedent and is out of step with the treatment of other First Amendment guarantees.

This Court should revisit *Smith*. For years since *Smith*, governments large and small have learned to operate under RFRA, RLUIPA, and state laws much closer to *Sherbert* than to *Smith*. The sky has yet to fall. These standards confer crucial protection for reli-

gious exercise against government hostility, or indifference, from officials high or petty. The best approach is to revisit *Smith* and apply strict scrutiny to government actions infringing on religious exercise. If this Court does not wish to go that far, it should clarify that history must guide the application of the Free Exercise Clause, just as it does for the Establishment Clause. Either approach would mean ruling in favor of petitioners here.

ARGUMENT

I. Philadelphia violated the First Amendment.

A. *Smith* does not apply to all free exercise cases.

The First Amendment has historically protected churches' ability to teach, speak, and act according to their beliefs. This Court has long recognized that there are some things government simply cannot do.

For example, the government may not impose disabilities on account of religious belief or status. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (abolishing test oath); *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (plurality op.) (invalidating exclusion of clergy from legislature). It cannot interfere with "an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 190 (2012). It has only limited ability to license religious activity. See, *e.g.*, *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940) (invalidating licensing scheme for door-to-door solicitation); *Niemotko* v. *Maryland*, 340 U.S. 268, 269 (1951) (overturning convictions for preaching without a license in public park). Even when the government administers wholly discretionary funding programs, it must follow

free exercise constraints. See *Thomas* v. *Review Bd.,* 450 U.S. 707 (1981); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 (2017).

This Court has also long protected religious freedom in the context of marriage and raising children. It has confirmed the rights of parents to raise their children in accord with their religious precepts. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). It has emphasized the importance of allowing churches to maintain their own marriage solemnization practices. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (giving refusal to solemnize a marriage as an example of protected religious exercise). And it has recognized the power of a Catholic religious order "with power to care for orphans" to challenge a law which prohibited the religious education they provided. *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 531-532 (1925). More recently, three justices of this Court warned that that the right to marry conferred in *Obergefell* would lead to future cases such as "a religious adoption agency [that] declines to place children with same-sex married couples." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting).

In *Smith*, this Court restricted the areas to which some of the cases above, and their strict scrutiny analysis, applied. See *Employment Div.* v. *Smith*, 494 U.S. 872, 881-886 (1990). *Smith*'s rule, which "did not entitle the church members to a special dispensation from the general criminal laws on account of their religion," does not purport to cover all free exercise claims. *Trinity Lutheran*, 137 S. Ct. at 2021. The decision was an outlier, contrary to prior precedent, and unsupported

by the text, history, and tradition of the First Amendment. See, *e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1 (1990).

Since it was decided, this Court has repeatedly declined to apply *Smith*. Just three years later, in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, this Court invalidated a set of criminal laws which fell outside *Smith*'s rule because they were neither generally applicable nor neutral, 508 U.S. 520, 531-532 (1993). In free exercise cases since then, this Court has avoided *Smith*. In *Locke* v. *Davey*, it relied not on *Smith*, but on historical anti-establishment values. 540 U.S. 712 (2004). In *Hosanna-Tabor*, it distinguished *Smith* on the basis that *Smith* applied at most to "outward physical acts." 565 U.S. at 190. In *Trinity Lutheran*, this Court held that *Smith* did not require a "special dispensation from the general criminal laws" while applying the *McDaniel* nondiscrimination standard. 137 S. Ct. at 2021. And in *Masterpiece*, this Court applied *Lukumi*, not *Smith*. 138 S. Ct. at 1731-1732. The one exception to this Court's non-application of *Smith* was *Christian Legal Society* v. *Martinez*, which applied *Smith* in a footnote. 561 U.S. at 697 n.27.

At the same time, this Court has continued to apply the historical free exercise protections identified above. See *Lukumi,* 508 U.S. at 531-533 (collecting cases); *Trinity Lutheran*, 137 S. Ct. at 2019-2021 (same). It has also applied *Smith*'s own express exceptions. By its own terms, *Smith* is designed for "an across-the-board criminal prohibition on a particular form of conduct," and expressly does not apply to laws (much less regulations or policies) which are not "neu-

tral" because they are "directed at" a particular religious practice, nor to laws which are not "generally applicable," particularly when they utilize "individualized exemptions." 494 U.S. at 878-880, 884.

Every one of those exceptions is present here.

B. *Smith* never should have applied to this case.

Whatever *Smith*'s continuing vitality, it cannot apply to Philadelphia's attempt to coerce the charitable arm of a Catholic Archdiocese to either violate Catholic teachings on marriage or close down a centuries-old ministry serving at-risk children. This case falls far outside of *Smith* as it has been interpreted and applied by this Court.

First, Philadelphia's actions here fall outside *Smith*'s scope because this case implicates the longstanding free exercise interests discussed above. Philadelphia has imposed special disabilities on CSS because of its religious beliefs (*Torcaso*, *McDaniel*). It is attempting to interfere with the internal decision-making of a church by instructing it how to interpret Catholic doctrine (*Hosanna-Tabor*). It is exploiting its authority to license religious activity (*Cantwell*, *Niemotko*). It is using its contracting and funding authority to exclude a disfavored religious actor. (*Thomas*, *Trinity Lutheran*). It is penalizing a church for its religious practices regarding marriage (*Masterpiece*). It is restricting a religious organization's ability to serve children (*Pierce*). It is interfering with religious decisions about marriage and child-rearing without compelling reason (*Yoder*). This Court has long recognized

that the Free Exercise Clause protects religious organizations in just such circumstances, and it should protect CSS here.

Second, Philadelphia's actions fall squarely into the express exceptions described in the *Smith* opinion. Philadelphia did not act in a neutral manner, and its policies, rather than being generally applicable, are riddled with exemptions.

1. Philadelphia's actions here "prohibit[]" CSS's religious exercise. U.S. Const. Amend. I. *Smith* is limited to laws "not specifically directed at [plaintiffs'] religious practice," where the religious prohibition "is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision." 494 U.S. at 878. Here, the effect on CSS's religious exercise was not "incidental"; it was Philadelphia's object. Such prohibitions must face strict scrutiny under the Free Exercise Clause, and this Court should make clear that such laws fall outside *Smith*'s rule.

The Third Circuit held otherwise because it thought CSS would only be protected if Philadelphia acted "disingenuously" or "as a pretext for persecut[ion]." Pet.App.34a. But *Smith* did not focus only on pretext or persecution—it distinguished all laws "specifically directed at" a religious exercise. 494 U.S. at 878. This includes laws that might be valid in other applications: in *Lukumi*, several of the invalidated ordinances merely incorporated pre-existing state law. 508 U.S. at 526. And in *Masterpiece*, the petitioner conceded that the law could be constitutionally applied in other circumstances. 138 S. Ct. at 1728. The ques-

tion is not whether a policy could be legitimately applied in some applications, but whether the prohibition of a religious practice is "the object of" the law.

Following *Smith* and *Lukumi*, courts of appeals applied strict scrutiny to policies which were "prompted" by a particular religious practice, *Central Rabbinical Cong.* v. *New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 195 (2d Cir. 2014), or where "[a]mple evidence support[ed] the theory that no such policy existed" until officials sought to penalize a religious claimant. *Ward* v. *Polite*, 667 F.3d 727, 739 (2012) (Sutton, J.). These courts had the analysis right, and this Court should confirm that a policy "directed at [plaintiff's] religious practice" falls outside *Smith*.

Philadelphia easily flunks that test here. At every turn, the City's policies have openly and obviously aimed at CSS's religious exercise. See pp. 12-15, *supra*. The City has repeatedly shifted policies and admits that it changed the rules in response to CSS: "[A]ny further contracts with CSS will be explicit in this regard." Pet.App.170a. That is more than enough to demonstrate the City's actions are not a neutral law of the type covered by *Smith*.

Philadelphia's actions are not neutral for a second reason: its express hostility toward CSS's religious beliefs. The City Council labeled CSS's actions "discrimination" taking place "under the guise of religious freedom." Pet.App.147a. The PCHR opened an extra jurisdictional investigation at the request of the Mayor, who has a history of publicly disparaging the Archdiocese. DHS's Commissioner told CSS that it was "not 100 years ago" and CSS should follow "the teachings of Pope Francis," as opposed to the Archbishop.

Pet.App.305a-306a. And when CSS refused to do so, she froze CSS's foster care placements.

Such hostility demonstrates non-neutrality: "Relevant evidence includes, among other things, 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 (opinion of Kennedy, J.) (citing *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-268 (1977)); *Masterpiece,* 138 S. Ct. at 1731 (adopting this standard). Like Phillips in *Masterpiece*, CSS did not receive "[t]he neutral and respectful consideration to which [it] was entitled"; instead, City decisionmakers evinced "clear and impermissible hostility toward the sincere religious beliefs that motivated [its] objection." *Masterpiece*, 138 S. Ct. at 1729.

2. *Smith* is also inapplicable, and Philadelphia must also face strict scrutiny, because the City did not apply any generally applicable law.

First, Philadelphia's policies cannot be generally applicable because they are subject to individualized exemptions. *Smith* does not apply "where the State has in place a system of individual exemptions." *Smith*, 494 U.S. at 884. In such cases, the government may not refuse religious exemptions without a compelling reason. *Ibid.*; see also *Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) ("[A] law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in

a way that discriminates against religiously motivated conduct."). Yet the Third Circuit declined to consider the individualized exemptions at all.

Philadelphia uses two individualized exemption systems. Philadelphia has created a "Waiver/Exemption Committee," which may grant "waivers of, or exemptions from, statutory requirements, contractual terms, or City policies and practices." See *Waiver/Exemption Committee*, The City of Philadelphia (Apr. 2, 2019), https://perma.cc/ZM5P-WTEJ. Those exemptions may be granted for "constitutional issues, such as equal protection, due process, religious liberty, or other First Amendment concerns." *Ibid.* Philadelphia is asserting the power to decide for itself when First Amendment waivers are required, subject to nothing more than rational basis review by this Court (or any court). This is not the situation envisioned by *Smith*, which addressed certain "across-the-board" laws. 494 U.S. at 884.

Philadelphia's foster care contracts also permit exemptions "by the Commissioner or the Commissioner's designee, in his/her sole discretion." J.A.582. That contractual exemption allows providers to reject a referral of a family based upon their "social condition," "environmental * * * condition," the "condition of [their] residence," or "for any other reason," if an exception is granted. Ibid. No other limits are placed upon this discretion, and no guidelines cabin it.

Smith, Sherbert, and *Lukumi* teach that where the government undertakes detailed, discretionary analysis of individualized exemptions, it has stepped outside of *Smith* because it is no longer pursuing a generally applicable law. In *Sherbert* v. *Verner*, the unemployment commission was asked to determine whether

a claimant "fail[ed], without good cause, to accept 'suitable work.'" 374 U.S. 398, 401 (1963). *Smith* said this "'good cause' standard created a mechanism for individualized exemptions," meriting strict scrutiny. 494 U.S. at 884. Likewise, in *Lukumi*, Hialeah's interpretation of one of its animal slaughter ordinances "require[d] an evaluation of the particular justification for the killing," and therefore constituted "a system of 'individualized governmental assessment of the reasons for the relevant conduct.'" 508 U.S. at 537 (citation omitted). Where the government uses such a system, it "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.*

The *Sherbert* exemption required "good cause," and the *Lukumi* exemption required an evaluation of the justification for the action. Philadelphia's system likewise empowers government officials to grant waivers where they see fit, in their "sole discretion." And here, Philadelphia has explicitly stated "the Commissioner has no intention of granting an exception" to CSS. Pet.App.168a. Philadelphia's decision to deny any exemption to CSS must face strict scrutiny. This Court should clarify that decisions made in such a system are outside *Smith*'s rule.

Second, Philadelphia's policies permit various exceptions which undermine its interests. This means they cannot be generally applicable. See *Lukumi*, 508 U.S. at 542. As discussed at length above, Philadelphia does not have a law; it has an open-ended series of *post hoc* justifications. Every time CSS pointed out that Philadelphia's policies were not generally applicable (or not applicable at all), Philadelphia simply invented

a new one. This is nothing like the "across-the-board criminal prohibition" in *Smith*. It is whack-a-mole.

Philadelphia claims that foster agencies must not discriminate according to familial status, marital status, or disability. See Pet.App.169a (citing FPO); J.A.654 (contract). Yet Philadelphia itself *requires* private agencies to consider marital status, familial status, and disability, and they may decline to certify a foster family on that basis. See pp. 7-8, *supra*. Philadelphia claimed that agencies may not refer families elsewhere, but evidence showed that agencies make referrals "all the time." J.A.46-47. They may do so for reasons related to a child's disability or a parent's race, such as for Native American children and parents. See p. 8, *supra*. Philadelphia thus permits private agencies to violate its alleged policies for secular reasons, but declines to permit CSS to refer applicants elsewhere for a religious reason.

Nor does Philadelphia apply nondiscrimination policies to its own actions. Although prohibited by the same FPO Philadelphia claims applies to foster care, DHS considers disability and even race when making foster care placements. See pp. 6, 13, *supra*. Thus, Philadelphia's policies "ha[ve] every appearance of a prohibition" that Philadelphia "is prepared to impose upon [CSS] but not upon itself." *Lukumi,* 508 U.S. at 545.

Philadelphia candidly acknowledges that it "allow[s] agencies to holistically consider protected traits to secure the best interests of a particular child while matching them to a new family," but distinguishes this from "categorically excluding members of a particular group." Phila.BIO 24. That is not a law, nor even a

written policy. It is Philadelphia's explanation for its refusal to apply its written policies across the board.

The Third Circuit considered the policies generally applicable unless CSS could prove that Philadelphia "treat[ed] CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs." Pet.App.32a. This narrow formulation is irreconcilable with *Lukumi*, which did not look myopically at exceptions for ritual slaughter, but considered exceptions permitting "hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia," and even the regulation of garbage dumpsters at restaurants, which posed health threats similar to Santería sacrifice. 508 U.S. at 537, 544-545. Following *Lukumi*, the majority of the circuits to consider the issue focused not upon the similarity of the permitted secular conduct, but on whether the permitted conduct undermined the purpose of the law.[4] Here, Philadelphia's many exceptions undermine the purpose of its policies. Potential foster parents may be referred elsewhere, and may even be excluded based upon subjective judgments about their marriage, family life, or mental disability. Or they may not receive a particular

---

[4] See, *e.g.*, *Ward*, 667 F.3d at 739 (policy not generally applicable where it "permit[ted] referrals for secular—indeed mundane—reasons,"); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004) (zoning law prohibiting houses of worship not "general[ly] applicab[le] because private clubs and lodges endanger" Surfside's interest "as much or more than churches and synagogues"); see also Douglas Laycock and Steven Collis, *Generally Applicable Law & the Free Exercise of Religion*, 95 Neb. L. Rev. 1 (2016) (discussing this line of cases).

child because of the parent's or child's race or disability. Under *Lukumi*, these policies are not generally applicable. This Court should clarify that the position adopted by the majority of the lower courts is the correct one.

Philadelphia's actions were not neutral, nor did it apply any generally applicable policy. Under *Smith*, such actions must face strict scrutiny. But Philadelphia's actions must face strict scrutiny for an additional reason: *Smith* recognized that religious exercise cases which also implicate speech are especially deserving of more stringent review. 494 U.S. at 881-882. Philadelphia's actions here also violate the Free Speech Clause.

C. Philadelphia's actions unconstitutionally compel speech.

"[T]he First Amendment guarantees 'freedom of speech,'" which includes "both what to say and what not to say." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 783 (1988). Thus, the government may not compel a private party "to be an instrument for fostering public adherence to an ideological point of view." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977).

1. Philadelphia requires private agencies, as a condition of providing foster care, to author a written document evaluating and endorsing same-sex and unmarried cohabitating relationships. See p. 8, *supra*. There is no question that the endorsement is speech. It comes in the form of a home study written by CSS, which requires evaluations—both objective and subjective—of everything from the quality of the applicant's intimate relationships to their suitability to raise children. *See Janus* v. *AFSCME*, 138 S. Ct. 2448, 2460 (2018)

(agency fee violated "fundamental free speech rights"); see pp. 8-9 *supra* (describing written home studies). By dictating the content of endorsements written by CSS, Philadelphia seeks to "declar[e] the sponsors' speech itself to be the public accommodation." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 573 (1995).

This is private speech: Commissioner Figueroa testified that the City has "nothing to do with" home studies—nor does it control their content. Compare p. 8, *supra* with *NIFLA* v. *Becerra*, 138 S. Ct. 2361, 2370 (2018) (displaying "government-drafted notice" is compelled private speech). Yet it claims the power to exclude CSS from the city's foster care system if it declines to speak Philadelphia's preferred message on marriage.

As this Court has confirmed on multiple occasions, governments do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 138 S. Ct. at 2375. Manipulating regulatory authority to stifle disfavored speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Id.* at 2374 (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994)).

The City seeks to use its monopoly power to force CSS to either engage in private speech which violates its sincere religious beliefs or end its religious exercise. See pp. 9-12, *supra*. It does so for the express purpose of sending a message: Philadelphia argues that if it accommodates CSS, the "LGBTQ youth population would receive the message that while '[we] support you now, we won't support your rights as an adult.'"

Phila.BIO 6 (quoting Figueroa). In other words, Philadelphia says it must exclude CSS in order to send the message that Philadelphia believes CSS's religious beliefs are insufficiently forward-thinking.

Philadelphia's censorship is even more concerning given the topic on which it seeks forced conformity: marriage and the family. *Obergefell* held that religious organizations may continue "to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell*, 135 S. Ct. at 2607. And it confirmed "[t]he First Amendment ensures that religious organizations and persons are given proper protection" when they teach and speak on this topic. *Ibid*. That rule was broken here.

Philadelphia's censorship is not unique. Nationwide, religious foster care and adoption agencies are facing the impossible choice of giving up an important religious ministry or betraying their sincere religious beliefs. See Peter Smith, *Catholic Charities Battles to Serve Children and Adoptive Parents,* National Catholic Register, March 15, 2018, https://perma.cc/7FTU-ZBP7 (describing disputes across the country). The Constitution does not permit governments to put religious ministries to such a choice absent compelling reason.

Philadelphia's actions—compelling CSS's private speech on pain of the loss of its foster care ministry—are thus subject to "the most exacting scrutiny." *Turner*, 512 U.S. at 642; see also *NIFLA*, 138 S. Ct. at 2371.

2. Government is also prohibited from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected * * * freedom of speech even if he

has no entitlement to that benefit." *Agency for Int'l Dev.* v. *AOSI*, 570 U.S. 205, 214 (2013) (internal quotation marks and citations omitted).

"[T]he relevant distinction" is "between conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *AOSI*, 570 U.S. at 214-215. Philadelphia is attempting to leverage a program it pays for to compel speech it does not pay for.

Philadelphia does not fund home studies. J.A.168. It only pays a *per diem* for children placed with certified families—regardless of the number of home studies an agency performs. Philadelphia seeks to compel speech that occurs before it pays a dime, and speech that might not ever lead to a future payment, as Philadelphia makes its own, additional determination on whether it will place children with a particular family. See p. 6, *supra*; see also Phila. Code § 21-1801 (requiring independent determination by City).

In sum, Philadelphia attempted to coerce a church to speak an unfunded message it opposes in exchange for participating in a ministry it has performed for two centuries. The First Amendment prohibits such coercion.

D. Philadelphia's actions fail strict scrutiny.

Philadelphia cannot possibly meet the burden of proving it satisfies strict scrutiny.

1. Philadelphia's interests are not compelling. Where the lack of neutrality is particularly severe, as it is here, that fact alone is fatal. In *Masterpiece*, this

Court did not engage in strict scrutiny analysis, determining that "[t]he official expressions of hostility to religion * * * were inconsistent with what the Free Exercise Clause requires." *Masterpiece*, 138 S. Ct. at 1732. Similarly, in *Trinity Lutheran*, this Court addressed strict scrutiny only briefly, holding that "[i]n the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling." 137 S. Ct. at 2024. Philadelphia's hostility towards CSS's religious exercise proves its interests cannot be compelling.

In its briefing, Philadelphia claims a "compelling, legitimate interest in prohibiting discrimination in its foster-care services program." Phila.BIO 27. But it previously admitted that this interest is "no stronger or no weaker than enforcing any other policy." J.A.148. This concession belies any claim to an interest "of the highest order." *Lukumi*, 508 U.S. at 547 (citation and internal quotation marks omitted). Further, "a law cannot be regarded as protecting an interest 'of the highest order' * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *Ibid.* (citation omitted). Philadelphia's interest cannot be compelling because, as described above, its rules are honeycombed with exemptions.

The Third Circuit claimed "[i]t is black-letter law that 'eradicating discrimination' is a compelling interest." Pet.App.47a (citing *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984)). But strict scrutiny requires more than just asserting a non-discrimination interest. See, *e.g.*, *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 659 (2000) ("[S]tate interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom

of expressive association."). And as this Court recognized in *Obergefell*, the "First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Obergefell*, 135 S. Ct. at 2607. This Court later acknowledged that the inability to solemnize a same-sex wedding is "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. Particularly in this contested and sensitive context, government actors need to do more than merely assert a broad nondiscrimination interest if they wish to punish a church for its religious exercises concerning marriage.

Philadelphia fares no better by claiming that it is coercing CSS to make foster care endorsements as a way of sending a message to others. Phila.BIO 6. The government does not have a compelling interest in coercing a private, religious organization to send a particular message. See, *e.g.*, *Hurley*, 515 U.S. at 579 (government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government). As the dissent warned in *Obergefell*, "[t]hese apparent assaults on the character of fairminded people will have an effect, in society and in court," and it would be a mistake "to portray everyone who does not share the majority's 'better informed understanding' as bigoted." 135 S. Ct. at 2626 (Roberts, C.J., dissenting). Philadelphia's interest in sending a particular message is not enough to override First Amendment rights.

2. Nor do Philadelphia's means further its ends. Even if it had a compelling interest in applying its nondiscrimination policy to CSS, Philadelphia did not just penalize CSS—it prohibited children from being placed in homes that had already been certified by CSS long before the controversy arose. Worse still, Philadelphia is undermining its interest in finding loving homes for foster children. Philadelphia chose to avoid placing more children with mothers like Sharonell Fulton, Cecelia Paul, and Toni Simms-Busch. It did so at a time when it acknowledged that it has 250 foster children who needed to move out of institutions and into loving family homes. A dozen CSS homes still await foster children.

3. Philadelphia did not use the least restrictive means available to further its interests. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt* v. *Hobbs*, 574 U.S. 352, 365 (2015) (quoting *United States* v. *Playboy Entm't Grp., Inc.,* 529 U.S. 803, 815 (2000)). CSS has a policy to refer same-sex couples to one of the 29 other agencies who can complete their home studies—including three who have received HRC's "Seal of Approval," for their excellence in serving LGBTQ families. Philadelphia has not attempted to prove that referring LGBTQ couples to such agencies would be ineffective. Multiple states and jurisdictions work with religious agencies while also protecting the rights of LGBTQ couples. At least ten states have explicitly adopted laws to protect religious child welfare agencies. See States Amicus Br. 3-7; see also *Holt*, 574 U.S. at 369 ("when so many" other jurisdictions "offer an accommodation, [respondent] must, at a minimum, offer persuasive reasons why it believes that it must

take a different course."). The least restrictive alternative cannot be complete exclusion of religious agencies and the families they serve.

II. *Smith* should be replaced with a standard that reflects the text, history, and tradition of the Free Exercise Clause.

This case never should have been decided under *Smith*. Yet the Third Circuit applied *Smith* and opined that *Smith* would be a "dead letter" if CSS prevailed. This Court can resolve this case by clarifying the limits of *Smith*, but the more straightforward way to clarify the law is to replace *Smith* with a free exercise standard that reflects the text, history, and tradition of the clause.

Smith's predictions about the future of free exercise claims have proven incorrect. "[T]he quality of [*Smith*'s] reasoning; its consistency with related decisions; legal developments since the decision; and [lack of] reliance on" it confirm that *Smith* should be revisited and replaced. See *Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019) (slip op. 17). *Stare decisis*—which "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights," *Janus* v. *AFSCME*, 138 S. Ct. 2448 (2018)—doesn't require this Court to maintain *Smith*.

A. *Smith*'s predictions all proved wrong.

Smith relied not on the text, history, or tradition of the Free Exercise Clause, but on several predictions about the outcome of its rule. Namely, *Smith* predicted that granting religious exemptions would be "courting anarchy," 494 U.S. at 888; that most free exercise claims would involve "laws" rather than administra-

tive rules or policies, see *id.* at 890; and that legislatures would be sufficiently "solicitous" of religious exemption requests, *ibid.* But in the ensuing years, these justifications have rung hollow. This case is Exhibit A.

First, subsequent history debunks *Smith*'s "courting anarchy" prediction. RFRA has now applied to federal law for twenty-seven years, and the Religious Land Use and Institutionalized Persons Act (RLUIPA) has been in place for twenty years. Contrary to *Smith*'s warnings, these statues prove that the judiciary is "up to the task" of determining when laws should trump free exercise rights. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

Decades of experience show that, rather than opening the floodgates, claims under RFRA and RLUIPA have proven to be a small portion of the federal caseload, and only infrequently troubled this Court. See Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353 (2018); Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021 (2012). Outside the long-running dispute over the contraceptive mandate, decisions applying those laws have been unanimous. See *O Centro* (8-0); *Holt* (9-0).

This is to say nothing of state-level guarantees. More than half the states have either adopted state-level RFRAs or applied a similar standard under their state constitutions. See Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466 (2010). These laws have applied for years, with no evidence of a descent into anarchy. See *ibid.*

RFRA, RLUIPA, and similar state standards—not *Smith*—have proven to be the more administrable rule. Courts have proven adept at resolving RFRA and RLUIPA claims. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 722-723 (2005) ("no cause to believe" that the compelling-interest test could "not be applied in an appropriately balanced way"). By contrast, *Smith* led to a deep split over the meaning of neutrality and general applicability. *Smith* has not only created a circuit split over these terms, it has also had the counterintuitive effect of emphasizing the subjective motivations and legislative history behind government actions. See *Lukumi*, 508 U.S. at 558 (criticizing portion of opinion which "departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*") (Scalia, J., concurring) (emphasis in original). Such history can at times be dispositive, as in *Masterpiece*. But *Smith* has incentivized free exercise claimants to peek behind the curtain of every governmental action. This cannot be what the *Smith* majority imagined.

RFRA, RLUIPA, and similar state laws have provided a clear test where *Smith* has failed. They also provide greater protection for religious exercise—that is their purpose. See, *e.g.*, 42 U.S.C. 2000bb(b) (purpose statement). Although these standards are widespread, they are not universal. Important religious exercise interests arise in areas that are not covered by such laws. See, *e.g.*, Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. Rev. 167, 203 (2019) (recounting cases). Or they may arise in states where, as in this case, the applicable state law has been narrowed to the point it does not apply. The result is that even with these protective statutes,

important religious freedom cases fall through the cracks, where religious claimants may be punished for following their consciences. And *Smith* freely allows it.

Second, *Smith* presumed that future religious liberty claims would be against "laws"—a word it uses more than 20 times. See, *e.g.*, 494 U.S. at 888-890. That word is no accident; *Smith* "expected" a society "solicitous" of religion, where religious believers could make their cases in the give-and-take of democratic lawmaking. *Id.* at 890. But subsequent history shows that growing *regulatory* power—not democratic lawmaking—is the source of most religious liberty disputes today. Today, "the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

Yet nothing in *Smith* contemplates government by regulation. See Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. at 56 ("if churches are neutrally subjected to the full range of modern regulation, it is hard to see how they can sustain any distinctive social structure or witness"). Even one of *Smith*'s foremost academic proponents urges limiting its application in cases involving administrative actions. See Phillip P. Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1938-1940 (2015); see also *City of Boerne* v. *Flores*, 521 U.S. 507, 538, 540 (1997) (Scalia, J., concurring) (citing Hamburger's scholarship on *Smith*).

Third, and relatedly, *Smith*'s prediction of democratic "solicitude" toward religion has not been borne out in experience. Restrictions on religious freedom

have been imposed by unsolicitous and unelected administrative officials. See, *e.g., Trinity Lutheran*, 137 S. Ct. at 2017 (agency funding rule); *Holt*, 574 U.S. at 358 (department grooming policy); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696-697 (2014) (agency-crafted mandate); *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433, 2434 (2016) (Alito, J., dissenting from denial) (state pharmacy board rules). Legislative accommodations, such as those for religious foster and adoption providers, are controversial and decried by public officials. See, *e.g.*, *Buck* v. *Gordon*, No. 1:19-CV-286, 2019 WL 4686425, at *7 n.9 (W.D. Mich. Sept. 26, 2019) (attorney general candidate decried law exempting religious adoption agencies as a "victory for the hate-mongers" and reversed state's position after taking office). Even some who helped pass RFRA now repudiate it. See Louise Melling, *ACLU: Why we can no longer support the federal 'religious freedom' law*, Wash. Post (June 25, 2015). This Court has since recognized that it is the history and "text of the First Amendment itself," not the ebb and flow of politics, that "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189.

This case confirms that none of *Smith*'s predictions came true. Philadelphia claimed that accommodating longstanding religious beliefs would produce "mayhem," despite the fact that no same-sex couple had even approached CSS. Phila.BIO 30. Nor is there a general law: CSS is being penalized even as Philadelphia's bureaucrats struggle to fashion new policies to come up with a violation. There neither was nor could be political solicitude: the City Council rushed to condemn "discrimination" under the "guise" of religion,

and the Commissioner decided that CSS would be excluded unless its traditional religious views got with "the times." The Third Circuit had it almost right. *Smith* should become a "dead letter" because none of its premises have held.

B. *Smith* is contrary to constitutional text and history.

Smith's take on the text, history, and tradition of the Free Exercise Clause also proved incorrect.

1. *Smith* reads the text too narrowly. The Free Exercise Clause safeguards an affirmative right for believers to *practice* their religion, not just hold particular religious beliefs. U.S. Const. amend. I. And on its face, the phrase "prohibiting the free exercise thereof" "does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). If a law prohibits a religious practice (say, wearing a yarmulke in court), it does so regardless of whether it *also* prohibits all analogous secular activities ("no hats"). Indeed, just such a prohibition was what the Founders had in mind when crafting the Clause. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1471-1472 & n.320 (1990) (describing the infamous case of William Penn's hat and its effects on the debate over the Bill of Rights).

Nor does the First Amendment—unlike other portions of the Bill of Rights—contain textual limitations. Other amendments include limitations such as "but in a manner prescribed by law" (Third), "unreasonable" (Fourth), "without just compensation" (Fifth), "than according to the rules of the common law" (Seventh),

or "excessive" (Eighth). But the First Amendment contains no such limitations, indicating a broad reservation of rights. That is why this Court applies the highest level of scrutiny to attempts to restrict those rights. "It is odd, given this text, to allow the limitations to swallow up so strongly worded a rule." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1116 (1990).

Founding-era sources confirm that the Free Exercise Clause was meant to be just as restrictive on government as the Establishment, Speech, Press, and Assembly Clauses. When John Marshall suggested that government power over the press might be greater than that over religious establishment, he was refuted by no less than James Madison, who said: "[T]he liberty of conscience and the freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States." McConnell, *Origins*, 103 Harv. L. Rev. at 1487-1488 (quoting James Madison, Report on the Virginia Resolutions (Jan. 18, 1800), reprinted in 5 The Founders Constitution 141, 146 (P. Kurland & R. Lerner eds. 1987)) (emphasis in original). *Smith* did not cite any contrary founding-era sources, yet its rule means that religious exercise receives lesser protection than other portions of the First Amendment.

Thus, "the most straightforward, plain-meaning interpretation of the text" is that it protects an affirmative freedom from government interference. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 337 (1996). *Smith* provides no textual support for its narrow reading, arguing only that it is a "permissible" reading. 494 U.S. at 878. But it is not the most natural one.

2. What the text reflects, history confirms: the Free Exercise Clause embodied an affirmative freedom from government interference. Three data points confirm this reading.

First, "perhaps the best evidence of the original understanding of the" federal Free Exercise Clause is the language of the Clause's state forerunners. *Boerne*, 521 U.S. at 553 (O'Connor, J., dissenting); cf. *District of Columbia* v. *Heller*, 554 U.S. 570, 600-603 (2008) (looking to "analogous arms-bearing rights in state constitutions"). By 1789, most state constitutions contained "a broad guarantee of free exercise or liberty of conscience, coupled with a caveat or proviso limiting the scope of the freedom when it conflicts with laws protecting the peace and safety, and sometimes other interests, of the state." Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 819, 833 (1998); see also Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J.L. & Pub. Pol'y 971, 976 n.20 (2019) (collecting provisions in Table II).

These provisions show that believers could generally exercise their religion unless it conflicted with especially important state interests. *Boerne*, 521 U.S. at 554–55 (O'Connor, J., dissenting). Justice Scalia disputed this proposition, pointing to state constitutions which prohibited "action taken 'for,' 'in respect of,' or 'on account of' one's religion, or 'discriminatory' action." *Boerne*, 521 U.S. at 539 (Scalia, J., concurring). But even that defense was limited, arguing that history "is more supportive * * * than destructive of"

Smith. *Boerne*, 521 U.S. at 544 (Scalia, J., concurring). A closer look at that language shows that these "for" or "respecting" clauses were followed by broader guarantees that were not limited to discriminatory laws. McConnell, *Freedom from Persecution*, 39 Wm. & Mary L. Rev. at 830. Thus, the best reading of state constitutions is that they contained broad protections of religious exercise.

The "peace and safety" provisos indicate that only particularly important state interests could override this broad protection. Justice Scalia argued that virtually any law would promote peace and safety. *Boerne*, 521 U.S. at 538 (Scalia, J., concurring) (citing Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. Law Rev. 915, 918-919 (1992)). But this is inconsistent with the common-law understanding at the time. For example, Blackstone lists thirteen specific offenses as "offences against the public peace," indicating that "the words are confined to public disorder and violent or tortious injury to other persons." McConnell, *Freedom from Persecution*, 39 Wm. & Mary L. Rev. at 835-836; see also 4 William Blackstone, Commentaries *142-153 (including a "riotous assembly of twelve or more," an "affray," or "going armed with dangerous or unusual weaponry"). These definitions support the notion that only a subset of particularly compelling laws could override free exercise rights.

Second, *Smith* runs counter to historical treatment of religious dissenters. At the time of the founding, Quakers and other minority groups objected to swearing oaths and bearing arms. Such laws were generally enacted to further interests like truthful testimony and raising an army, not to target religious dissenters.

Colonial and state governments nevertheless recognized that religious liberty required exemptions from these generally applicable laws. *Boerne*, 521 U.S. at 557-559 (O'Connor, J., dissenting); McConnell, *Origins*, 103 Harv. L. Rev. at 1466-1471.

Early state decisions also recognized exceptions to general laws. For example, in *People* v. *Phillips*, a New York court exempted a Catholic priest from a "general rule": complying with a subpoena that would require him to break the seal of confession. Court of General Sessions, City of New York (June 14, 1813) (described in McConnell, *Origins*, 103 Harv. L. Rev. at 1504). While early precedents are not unanimous, these decisions demonstrate that exemptions from general laws were historically accepted. See McConnell, *Origins*, 103 Harv. L. Rev at 1503-1511 (discussing cases). More recent scholarship has also demonstrated that founding-era courts created exemptions from statutes to protect a host of individual rights, including religious ones, and courts would carefully assess whether applying the law to a specific context would actually advance the government's interest. See Stephanie Barclay, *The Historical Origins of Judicial Religious Exemptions*, Notre Dame L. Rev. (forthcoming 2020) (manuscript at 67-72) (https://bit.ly/3b0btbv). The mode of analysis they engaged in resembled important aspects of modern strict scrutiny. *Ibid*. Simply put, restrictions on religious exercise were permitted only where the government was advancing a particularly important interest.

This understanding was confirmed in the 19th century by the Fourteenth Amendment's framers. Kurt T. Lash, *The Second Adoption of the Free Exercise Clause:*

Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994). For instance, (religion-) neutral and generally applicable laws across the South had the effect of prohibiting the religious exercise of enslaved persons. The Fourteenth Amendment's framers "explicitly target[ed]" these laws "as examples of what would become unconstitutional" through incorporation. *Id.* at 1131-1137, 1149.

Finally, *Smith* is inconsistent with the theoretical foundations of religious liberty in founding-era thought. Madison argued that "the right of every man to exercise" his religion flowed from man's "duty towards the Creator"—a duty that "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), National Archives, Library of Congress, Founders Online, https://perma.cc/T6AR-JKJC. Madison's argument is incompatible with *Smith*: if "the scope of religious liberty is defined by religious duty," then the focus must be on the religious duty, not the type of law that prohibits it. McConnell, *Origins*, 103 Harv. L. Rev. at 1453.

Thus, the historical evidence provides "powerful reason to interpret the [Free Exercise] Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition." *Lukumi*, 508 U.S. at 576 (Souter, J., concurring).

C. *Smith* is a law unto itself.

Smith is also contrary to more recent precedent. "[W]hatever *Smith*'s virtues, they do not include a comfortable fit" with precedent. *Lukumi*, 508 U.S. at

570-571 (Souter, J., concurring). *Smith* limited prior cases by claiming that they either involved previously unrecognized "hybrid situations," or were unemployment compensation cases that merited strict scrutiny because of individualized government assessments. 494 U.S. at 879-883 (distinguishing *Yoder*, *Pierce*, *Sherbert*, and *Thomas*). Not even *Smith*'s defenders support these "fiction[s]." William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 309 (1991); Richard W. Garnett, *The Political (and Other) Safeguards of Religious Freedom*, 32 Cardozo L. Rev. 1815, 1819 (2011) (*Smith*'s distinctions "make for some awkward moments"). The hybrid rights theory, in particular, has been criticized even by *Smith*'s proponents. See, *e.g.*, Marshall, *In Defense of* Smith, 58 U. Chi. L. Rev. at 309 n.3 ("The Court's claim that [*Yoder*] was decided on the basis of a 'hybrid' constitutional right * * * is particularly illustrative of poetic license."). And lower courts have struggled to apply it. See, *e.g.*, *Combs* v. *Homer-Center Sch. Dist.*, 540 F.3d 231, 244 (3d Cir. 2008) ("*Smith*'s hybrid-rights theory has divided our sister circuits.").

Smith claimed the free-exercise mainstream was "described succinctly" by *Gobitis*—a decision overruled by *West Va. St. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), just three years after it was decided. See 494 U.S. at 878-879 (discussing *Minersville Sch. Dist. Bd. of Educ.* v. *Gobitis*, 310 U.S. 586 (1940)). The only good law *Smith* cited for its rule is *Reynolds*. See 494 U.S. at 879 (discussing *Reynolds* v. *United States*, 98 U.S. 145 (1878)). But *Reynolds* was premised on the notion that the Free Exercise Clause protects only beliefs, not conduct, an idea flatly inconsistent with the Clause's text ("exercise") and with cases such as *Cantwell*,

Lukumi and *Yoder*. See *Reynolds*, 98 U.S. at 164. And *Reynolds*, unlike later cases, was analyzed as a request for an automatic exemption, regardless of any countervailing government interests. See *id.* at 150; *Sherbert*, 374 U.S. at 403 (distinguishing *Reynolds*).

A unanimous Court would later acknowledge that *Smith* "largely repudiated the method of analysis used in prior free exercise cases." *Holt*, 574 U.S. at 357. Ten Justices have joined opinions criticizing *Smith*, issued from the day it was decided to just last year. See *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (Alito, J., concurring) (*Smith* "drastically cut back on the protection provided by the Free Exercise Clause"); *Boerne*, 521 U.S. at 566 (Breyer, J., dissenting); *Lukumi*, 508 U.S. at 559, 571-577 (Souter, J., concurring); *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting). Their criticisms should be considered here.

Smith's treatment of the Free Exercise Clause is also out of step with other First Amendment guarantees, where as-applied exemptions are the norm. See, *e.g.*, Stephanie Barclay & Mark Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1643 (2018) (trend continuing after both *O Centro* and *Hobby Lobby*). Limited, as-applied relief is a "basic building block[] of constitutional adjudication." *Gonzales* v. *Carhart*, 550 U.S. 124, 167-168 (2007). Long experience proves that such exemptions are a workable way to safeguard fundamental rights.

D. *Smith* should be revisited and replaced with a standard that is true to the text, history, and tradition of the Free Exercise Clause.

The text, history, and tradition of the First Amendment require broad protection for religious exercise, limited only by particularly important government interests. Longstanding precedent holds that, when the government seeks to restrict First Amendment rights, it must have a particularly important interest at stake. Modern experience with RFRA, RLUIPA, state RFRAs, and the *Sherbert/Yoder* line of cases demonstrates that this rule is workable, administrable, and familiar to governments and courts. Neither the quality of *Smith*'s reasoning, the workability of its rule, its consistency with other decisions, nor reliance interests support maintaining *Smith*. It should be replaced, and this Court should adopt the strict scrutiny test for laws which infringe upon religious exercise.

At a minimum, this Court should—as it has done with the Establishment Clause—look to purpose and history for guidance when interpreting the Free Exercise Clause. See *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019). This Court has recognized the importance of "retaining established, religiously expressive * * * practices," noting that the "passage of time gives rise to a strong presumption of constitutionality." *Id.* at 2085; see also *id.* at 2090-2091 (interpreting circumstances "in light of the basic purposes that the Religion Clauses were meant to serve") (Breyer, J., concurring).

This Court has recognized that the Religion Clauses "radiate[] * * * a spirit of freedom for religious organizations, an independence from secular

control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952)). Leaving space for religious groups to live out their faith is central to the Religion Clauses' ability to "foster a society in which people of all beliefs can live together." *American Legion*, 139 S. Ct. at 2074.

Viewed through the lens of history, Philadelphia's actions cannot be constitutional. The City has attempted to interfere with the decision-making of a church, telling a Catholic ministry how to interpret Catholic doctrine, and penalizing the agency when it followed the Archbishop instead of the DHS Commissioner. This Court's precedents teach that government power is at its nadir when attempting to dictate the internal affairs of a church.

Philadelphia is also attempting to exclude CSS from its historical ministry of caring for foster children. This Court has recognized since *Pierce* that religious ministries engage in work "long regarded as useful and meritorious," and may assert constitutional claims to protect such work. 268 U.S. at 534. Philadelphia is using its licensing authority to restrict a disfavored religious practice, an action condemned since *Cantwell* and *Niemotko*. Philadelphia is insisting that CSS behave in accordance with the government's—not its own—beliefs about marriage and child-rearing, and attempting to use its licensing and funding authority to exclude a disfavored religious group from caring for Philadelphia foster children. But funding authority is not excluded from the Free Exercise

Clause. See *Trinity Lutheran,* 137 S. Ct. at 2021. No historical reading of the Free Exercise Clause allows the government to usurp a field long ago developed by religious institutions, and then demand that those institutions abandon either their beliefs or their ministry.

* * *

The Third Circuit misapplied the First Amendment. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. Yet because of *Smith*, the Third Circuit subjected petitioners' religious exercise to the vicissitudes of Philadelphia politics. The decision below was wrong and should be reversed.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

NICHOLAS M. CENTRELLA
CONRAD O'BRIEN PC
1500 Market Street
Suite 3900
Philadelphia, PA 19102
(215) 864-8098

MARK. L. RIENZI
Counsel of Record
LORI H. WINDHAM
ERIC C. RASSBACH
WILLIAM J. HAUN
NICHOLAS R. REAVES
JACOB M. COATE
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1200 New Hampshire
Ave., NW
Washington, DC 20036
mrienzi@becketlaw.org
(202) 955-0095

Counsel for Petitioners

MAY 2020