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IN THE SUPREME COURT OF THE UNITED STATES

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SHARONELL FULTON, ET AL., )

Petitioners, )

v. ) No. 19-123

CITY OF PHILADELPHIA, PENNSYLVANIA,)

ET AL., )

Respondents. )

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Washington, D.C.

Wednesday, November 4, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

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2  
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12 for the Support Center for Child Advocates  
13 and Philadelphia Family Pride Respondents.  
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case Number 19-123,  
5 Fulton versus City of Philadelphia.

6 Ms. Windham.

7 ORAL ARGUMENT OF LORI H. WINDHAM

8 ON BEHALF OF THE PETITIONERS

9 MS. WINDHAM: Mr. Chief Justice, and  
10 may it please the Court:

11 The courts below made a simple error.  
12 They failed to understand where Employment  
13 Division versus Smith controls and where it  
14 doesn't. Smith doesn't control when the  
15 government uses a system of individualized  
16 exemptions or when it makes other exceptions  
17 that undermine its rules or when it changes the  
18 rules to prohibit a religious practice.

19 Philadelphia made all three of those  
20 errors here. The City still can't identify a  
21 neutral, generally applicable law, even after  
22 six attempts. And it now acknowledges its  
23 decisions are subjective and individualized.

24 Yet, the courts below still applied  
25 Smith. They even said Smith would be a dead

1 letter if Petitioners prevailed. That  
2 demonstrates the confusion and instability Smith  
3 has caused.

4 Respondents, rather than defend Smith,  
5 ask the Court for a newly minted constitutional  
6 standard that's even less protective of  
7 religious exercise. That approach has no basis  
8 in the text, history, or traditions of the Free  
9 Exercise Clause.

10 The City has no compelling reason for  
11 excluding Catholic Social Services, which has  
12 exercised its faith by serving at-risk children  
13 in Philadelphia for two centuries. Nor does it  
14 have any interest in refusing to allow the  
15 agency to step aside and provide referrals  
16 elsewhere. Yet, Philadelphia is refusing to  
17 place children with loving mothers, like  
18 Sharonell Fulton and Toni Simms-Busch, just  
19 because they chose to partner with an agency who  
20 shares their faith.

21 Respondents act as if this is a  
22 zero-sum game: Either LGBTQ couples can foster,  
23 or Fulton and CSS can. But the law and decades  
24 of experience say otherwise. The Free Exercise  
25 Clause is at the heart of our pluralistic

1 society, and it protects Petitioners' vital work  
2 for the Philadelphia community.

3 I welcome the Court's questions.

4 CHIEF JUSTICE ROBERTS: Ms. Windham,  
5 this is a case involving free exercise rights,  
6 but it's in -- they're in tension with another  
7 set of rights, those recognized in our decision  
8 in Obergefell. And whatever you think or  
9 however you think that tension should be  
10 resolved as a matter of government regulation,  
11 shouldn't the City get to strike the balance as  
12 it wishes when it comes to setting conditions  
13 for participating in what is, after all, its  
14 foster program?

15 MS. WINDHAM: Mr. Chief Justice, I  
16 don't believe that that -- that analysis should  
17 control here for a couple of different reasons.

18 This Court's precedents make clear  
19 that when the government is acting as sovereign  
20 using its regulatory authority, like when it's  
21 applying a city-wide Fair Practices Ordinance or  
22 the ordinances in Lukumi, then the Court does  
23 the normal Free Exercise Clause analysis. The  
24 same thing is true when the City is deciding at  
25 the outset who's able to participate in a

1 program like --

2 CHIEF JUSTICE ROBERTS: So you don't  
3 see --

4 MS. WINDHAM: -- through the --

5 CHIEF JUSTICE ROBERTS: -- you don't  
6 see any difference in terms of the analysis  
7 whether it's simply a regulation, the City  
8 issuing a rule that governs across the board, as  
9 opposed to part of the rules for participating  
10 in a program; in other words, not in its  
11 sovereign capacity but in a managerial capacity  
12 or, you know, a business capacity?

13 MS. WINDHAM: The City isn't acting in  
14 one of those capacities here, and I think a key  
15 fact here is the fact that they are relying on  
16 the Fair Practices Ordinance. The fact that  
17 they put that --

18 CHIEF JUSTICE ROBERTS: Well, but do  
19 you think there are --

20 MS. WINDHAM: -- into a new context --

21 CHIEF JUSTICE ROBERTS: -- do you  
22 think there are different rules in those two  
23 different contexts?

24 MS. WINDHAM: Mr. Chief Justice, if  
25 you had a situation which is unlike Lukumi,



1 unlike licensing, unlike Trinity Lutheran or  
2 Espinoza, when the government is managing  
3 internal affairs, then the government's  
4 interests may be stronger.

5 But, here, Philadelphia has said that  
6 CSS is an independent contractor and is not an  
7 employee or agent of the City. That's --

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 MS. WINDHAM: -- in its old contract.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief  
14 Justice.

15 Counsel, following up on the Chief  
16 Justice's question, this seems to involve both  
17 contractual relationships with the City, as well  
18 as, as the Chief said, regulatory or licensing.

19 In that instance, when you have both  
20 aspects of that, do we analyze it as a  
21 government contract, again, referring back to  
22 the Chief's point, or as sort of a licensure  
23 program where the City has basically taken over  
24 an area and now it has certain requirements of  
25 the -- the regulated industry?

1 MS. WINDHAM: Justice Thomas, as Your  
2 Honor acknowledged there at the end, the City is  
3 trying to regulate an area that has historically  
4 been an area of religious practice, and so I  
5 think that that sets this case apart from many  
6 cases the City is citing. It's correct they're  
7 using regulatory authority, they're using  
8 sovereign authority, they're using licensing  
9 authority to decide who gets to participate.

10 Those are cases where this Court's  
11 precedents have said you do the normal  
12 constitutional analysis. There's not some  
13 special rule.

14 And, here, where both the old  
15 contracts and the new contracts say that we're  
16 not an employee or agent of the City, the same  
17 analysis should apply here as did in Lukumi and  
18 Espinoza and Trinity Lutheran.

19 This is different from a case like,  
20 say, Bowen, where you're trying to reach out as  
21 a third-party and tell the City how to run its  
22 internal affairs.

23 Here, the City is reaching out and  
24 telling a private religious ministry which has  
25 been doing this work for two centuries how to

1 run its internal affairs and trying to coerce it  
2 to make statements that are contrary to its  
3 religious beliefs as a condition of continuing  
4 to participate in the religious exercise that  
5 they have carried out in Philadelphia for two  
6 centuries.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Breyer.

10 JUSTICE BREYER: Yes. Thank you.

11 On pages 45 and 46 of the City's  
12 brief, they say that they aren't requiring you  
13 to endorse same-sex marriages. They say all  
14 they're asking you to do is evaluate a couple  
15 without reference to whether they are same-sex  
16 or not.

17 You've read that. It says your  
18 objection is to being required to evaluate and  
19 provide written endorsements of a same-sex  
20 relationship. But they aren't saying to do  
21 that. Indeed, they say add something onto any  
22 response you make and say that you do not  
23 endorse same-sex marriages. Say it.

24 You see what it says. So suppose  
25 pages 45 and 46 were written right into your

1 contract, allowing you to say whatever you want  
2 about same-sex. All they want you to do is  
3 evaluate this couple irrespective of same or  
4 different sex.

5 What is your religious objection to  
6 that?

7 MS. WINDHAM: So, Justice Breyer, I'm  
8 going to point Your Honor to the Joint Appendix  
9 at 210 to 211 and then 237, where that very  
10 question was asked.

11 And the head of Catholic Social  
12 Services testified that certifying a home of a  
13 same-sex couple would be in violation of that  
14 religious belief, that a home study is  
15 essentially a validation of the relationships in  
16 the home, and that a final home study includes a  
17 written endorsement of the relevant  
18 relationships of the foster parent.

19 And the state law as well asks an  
20 agency -- agency to assess the ability of  
21 applicants for approval as foster parents.

22 What the City is asking CSS to do here  
23 is to certify, validate, and make statements  
24 that it cannot make. And I'm not aware of any  
25 case where this Court has said it's okay to

1     compel speech or coerce religious exercise as  
2     long as you can tag a disclaimer onto the end of  
3     it. Respondents certainly haven't cited to any.

4             It would be hurtful for CSS and for  
5     the couple if any couple ever approached them  
6     for them to go into their home, assess their  
7     relationships, interview them about their  
8     intimate relationships and their family, and  
9     then at the end of that have to say we cannot  
10    provide that approval for you and your family.

11            CSS is making a modest request here,  
12    which is to step aside and be able to allow  
13    diverse religious agencies to serve the City of  
14    Philadelphia, as they have done successfully for  
15    many years.

16            JUSTICE BREYER: Well, you don't have  
17    to say, according to them, whether the couple is  
18    married, whether it's not married, whether it's  
19    same-sex, whether it's different sex. You just  
20    put that to the side, make a note that you're  
21    putting it to the side, and say, other than  
22    that, they're okay or they're not okay. That's  
23    all you have to do.

24            Now what's the problem? I still don't  
25    quite see it. You said in your response that

1 you don't want to do it, which I understand that  
2 you don't, but they say they're imposing a  
3 requirement that does not interfere with your --  
4 they can't figure out how does it interfere.  
5 And so we write 45 and 46 right into your  
6 contract word for word.

7           And now tell me once, again, what's  
8 the problem? You -- in your last answer, you  
9 just said they can't make you say anything. I  
10 guess that's true. But we write 45 and 46 and  
11 say you can say something if you want or you  
12 don't have to if you don't want to, but just  
13 take same-sex, different sex, and put it to the  
14 side and say, other than that, are they  
15 qualified.

16           MS. WINDHAM: What they're still being  
17 asked to do is to evaluate, assess, and approve  
18 of a couple under -- under state law. And in  
19 their own written report, that's something that  
20 they have testified that they cannot do.

21           This is also not an unknown or unusual  
22 religious belief. Eleven states have passed  
23 laws to specifically protect religious child  
24 welfare providers in this context. As the USCCB  
25 brief points out, there have been agency

1 closures across the country over this very  
2 issue.

3 What we're asking here --

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Alito.

7 JUSTICE ALITO: Let me ask you a  
8 couple of questions about what's in the record  
9 of this case about the facts of the case.

10 To begin, as far as the record  
11 reflects, how many same-sex couples in  
12 Philadelphia have been denied the opportunity to  
13 be foster parents as a result of Catholic Social  
14 Services' policy?

15 MS. WINDHAM: Zero. In fact, Justice  
16 Alito, none had even approached Catholic Social  
17 Services asking for this approval and  
18 endorsement.

19 JUSTICE ALITO: Before the events at  
20 issue now, how many children had been placed --  
21 were in homes that had been evaluated by  
22 Catholic Social Services?

23 MS. WINDHAM: At the time of the  
24 referral freeze, there were well over 100  
25 children who were currently being served, and

1 over the years, there had been thousands who had  
2 been served by Catholic Social Services.

3 JUSTICE ALITO: How many children are  
4 awaiting placement in foster homes in  
5 Philadelphia?

6 MS. WINDHAM: According to the City of  
7 Philadelphia, at the time when they froze intake  
8 for CSS, there were 250 children who were in  
9 group homes who needed to be moved out of those  
10 homes and into family homes. This is in the  
11 best interest of the children. It's actually an  
12 obligation under state law.

13 But Commissioner Figueroa, at page 352  
14 to 53 of the JA, acknowledged that those  
15 children were still in group homes and that  
16 those children were not going to be moved into  
17 homes that are supported by Catholic Social  
18 Services.

19 JUSTICE ALITO: One of your main  
20 arguments concerns a -- the fact that there are  
21 exemptions to the generally applicable rules  
22 under the City's policy.

23 I'm somewhat uncertain about what the  
24 City's final position is about the availability  
25 of exemptions. What is your understanding of



1 that?

2 MS. WINDHAM: Justice Alito, I  
3 understand that there are individualized  
4 exemptions from provision 3.21 of the contract,  
5 and also through the Waiver Exemption Committee,  
6 that there are categorical exemptions. Whenever  
7 an agency conducts a home study, they have to  
8 consider disability, marital status, and  
9 familial status. That's prohibited by the  
10 City's Fair Practices Ordinance.

11 And so those are the -- and the City  
12 itself actually deviates from the Fair Practices  
13 Ordinance, even though it is bound by it, when  
14 it is making placement decisions in foster care.

15 JUSTICE ALITO: Well, do they make the  
16 exemptions at the initial stage or only at the  
17 placement stage?

18 MS. WINDHAM: Justice Alito, the  
19 City's exemptions are at the placement stage.  
20 But, for the agencies, those exemptions are  
21 happening when they're carrying out the home  
22 studies, so the exact same point in the process  
23 that the City is trying to coerce Catholic  
24 Social Services here.

25 And, of course, the Waiver and

1 Exemption Committee could, in theory, give them  
2 at any stage.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, I'm  
7 interested in why you see yourself as a licensee  
8 as opposed to a government contractor. I  
9 understand that many governments throughout the  
10 country do these home assessments and  
11 certifications internally. They hire employees  
12 within the government, they set up criteria, and  
13 they're the ones who choose to certify a family  
14 or not.

15 So why aren't you any different than a  
16 government contractor?

17 MS. WINDHAM: Well, just --

18 JUSTICE SOTOMAYOR: What license are  
19 you receiving? I've never heard of a license  
20 where they pay you to take the license.

21 MS. WINDHAM: Justice Sotomayor, the  
22 City is exercising a licensing authority because  
23 it is deciding which foster agencies are able to  
24 perform these services in the City of  
25 Philadelphia.

1 JUSTICE SOTOMAYOR: But that's no  
2 different --

3 MS. WINDHAM: This is just using --

4 JUSTICE SOTOMAYOR: -- that's no  
5 different than deciding -- setting forth  
6 criteria to hire someone to do work for you.  
7 It's a lovely argument, but I'm having a very  
8 hard time accepting how, when the City sets  
9 forth a set of criteria, only these people can  
10 do this work for me. That's not a license.  
11 That's an employment contract.

12 MS. WINDHAM: And the City has --

13 JUSTICE SOTOMAYOR: It's an  
14 independent contractor, but it's an employment  
15 contract.

16 MS. WINDHAM: And the City has been  
17 crystal-clear that CSS is not its employee or  
18 agent. Philadelphia -- Pennsylvania has chosen  
19 to partner with --

20 JUSTICE SOTOMAYOR: No, but --

21 MS. WINDHAM: -- private agencies --

22 JUSTICE SOTOMAYOR: -- but state --

23 MS. WINDHAM: -- to do this work.

24 JUSTICE SOTOMAYOR: -- but state -- I  
25 mean, we have often permitted and we have a

1 legion of cases with people who are not state  
2 actors or agents or actual employees but  
3 contractors or people who are -- are being  
4 retained to do things for the government where  
5 we said the government could set the criteria it  
6 wants. Why are you any different?

7 MS. WINDHAM: What the City's trying  
8 to do here is tell religious groups who have  
9 been doing this prior to when the City got  
10 involved we're going to exclude you, you can no  
11 longer carry out this work unless you take  
12 actions that are contrary to your faith.

13 That is something that the Free  
14 Exercise Clause prohibits. That's what  
15 Philadelphia is attempting to do here.  
16 Philadelphia's -- and the Respondents' position  
17 here is the dangerous one, because we're saying  
18 -- they're saying that even if you're not the  
19 employee or agent --

20 JUSTICE SOTOMAYOR: Counsel, but --

21 MS. WINDHAM: -- the government --

22 JUSTICE SOTOMAYOR: -- I'm sorry,  
23 counsel. I don't have much time, but just one  
24 last point.

25 What is dangerous is the idea that a

1 contractor with a religious belief could come in  
2 and say: Exclude other religions from being  
3 families, certifying families. Exclude someone  
4 with a disability. How do we avoid that? Or  
5 exclude interracial couples?

6 MS. WINDHAM: Justice Sotomayor, the  
7 City actually allows agencies to exclude people  
8 with disabilities today. That's one of the  
9 exceptions that they have from their contract.

10 JUSTICE SOTOMAYOR: Well, no, that's  
11 not exclusion. They require an agency to be  
12 specialized in that placement. If the agency  
13 gets the specialization, it can become one.

14 MS. WINDHAM: The agency actually can  
15 exclude parents on the basis of disability from  
16 providing foster care.

17 JUSTICE SOTOMAYOR: Well, what's that  
18 got to --

19 MS. WINDHAM: But to go to your --

20 JUSTICE SOTOMAYOR: -- what does that  
21 have to do with certifying a family? Meaning  
22 those are two different functions. The  
23 certification process is who's eligible, and  
24 they don't require someone to have -- to be  
25 married even, same-sex or not. That's different

1 than placing a child, which is governed by the  
2 best interests of the child.

3 CHIEF JUSTICE ROBERTS: Briefly,  
4 counsel.

5 MS. WINDHAM: Justice Sotomayor, the  
6 state law, at 55 Pennsylvania Code 3700.64, does  
7 take into account disability, including mental  
8 and emotional stability.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Kagan.

12 JUSTICE KAGAN: Good morning,  
13 Ms. Windham. I'd like to take you back to the  
14 Chief Justice's opening questions and give you a  
15 hypothetical.

16 Suppose that there's a state and it  
17 doesn't want to operate its prisons itself, so  
18 it contracts with private organizations to do  
19 so. And in the contract, there's a provision  
20 that says that no employee can use drugs of any  
21 kind. And -- and a -- a -- a -- a group says --  
22 that wants to operate a prison says it wants an  
23 exemption for peyote use. What would be the  
24 result in that case?

25 MS. WINDHAM: Well, Justice Kagan, I

1 think, to know the result in that case, first of  
2 all, we would have to know whether the  
3 government's rules there are neutral and  
4 generally applicable. I believe the free  
5 exercise analysis would apply.

6 JUSTICE KAGAN: Well, you know, I  
7 guess the question that I'm trying to get at is  
8 here's the government in its capacity as a  
9 contractor saying, you know, something -- a  
10 condition that's extremely relevant to the  
11 contract in its view, and shouldn't the  
12 government have leeway to do that, to just say,  
13 you know, it doesn't matter why you want to use  
14 peyote, whether it's religious or anything else;  
15 we're just going to say there -- there should be  
16 no peyote use and no other drug use.

17 MS. WINDHAM: Justice Kagan, I think  
18 that the state would be likely to prevail in  
19 that case for a couple of reasons.

20 One is that, unlike here, the  
21 government's interests are going to be a lot  
22 stronger. The government there is actually  
23 taking something that's traditionally a public  
24 function and handing it out to private  
25 organizations, as opposed to here, taking --

1 moving in and increasingly regulating and  
2 restricting work that has traditionally been  
3 private.

4 Second --

5 JUSTICE KAGAN: But there are a lot --

6 MS. WINDHAM: -- there, they --

7 JUSTICE KAGAN: -- of things that  
8 governments do now. If you would excuse me, Ms.  
9 Windham, just to put another question on the  
10 table. I mean, there are a lot of things that  
11 governments do now that traditionally were done  
12 by private organizations, religious  
13 organizations. I mean, you could go through,  
14 you know, youth homes or homeless shelters, a  
15 lot of old philanthropy is now regulated and  
16 conducted by the government.

17 Why should that matter?

18 MS. WINDHAM: Justice Kagan, because I  
19 think that really points out the question in  
20 this case: Does the Free Exercise Clause shrink  
21 every time the government expands its reach and  
22 begins to regulate work that has historically  
23 and traditionally been done by religious groups?

24 JUSTICE KAGAN: Would you have a  
25 different argument if a religious group that had



1 never engaged in this kind of activity said now  
2 we want to? Would that make a difference to  
3 you?

4 MS. WINDHAM: Justice Kagan, I think  
5 it would make a difference. I think the history  
6 here is important. I think that when you're  
7 looking at the government's interest in that  
8 case, that would be relevant too.

9 Here, the City calls CSS a point of  
10 light in its foster care system, and it has  
11 demonstrated through the years that it can do  
12 this work successfully for the children of  
13 Philadelphia with no detriment to the LGBTQ  
14 population of Philadelphia. And so I think that  
15 the --

16 JUSTICE KAGAN: Thank you,  
17 Ms. Windham.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning,  
21 counsel. What do we do with the fact that the  
22 City seems to be representing to us here and now  
23 that the Fair Practices Ordinance is binding of  
24 its own force and that the department can't  
25 offer any exemptions?

1 MS. WINDHAM: Justice Gorsuch, I think  
2 that that's a very important fact here because,  
3 if we're going to take the City at its word  
4 there, what it means is that we've stepped out  
5 of the contracting context now and we are firmly  
6 in the regulating context.

7 What the City is saying to Catholic  
8 Social Services is that it is illegal for you to  
9 do this work in the City of Philadelphia,  
10 according to your religious exercise, whether  
11 you contract with the government or not.

12 JUSTICE GORSUCH: And -- and -- and  
13 how does Philadelphia, in -- in -- in its  
14 written documents with the Catholic Social  
15 Services, treat it? Is it an employee, an  
16 agent?

17 MS. WINDHAM: The City is quite clear,  
18 at JA 634 and SA 17, that CSS is an independent  
19 contractor and shall not be deemed or intended  
20 to be an employee or agent of the City.

21 JUSTICE GORSUCH: And -- and how long  
22 has Catholic Services been -- been engaged in --  
23 in this activity?

24 MS. WINDHAM: They've been doing it  
25 for two centuries now.

1 JUSTICE GORSUCH: Okay. And what do  
2 we do with your de facto exemption argument,  
3 given the fact that we have a finding by the --  
4 the district court that there are none?

5 MS. WINDHAM: The district court's  
6 error there is an error of law. The district  
7 court said that it was a generally applicable  
8 law as long as it didn't prescribe particular  
9 conduct only or primarily when religiously  
10 motivated. You can see that at Petition  
11 Appendix 87.

12 And so the district court there had  
13 the wrong idea about what counts as an  
14 exception, what counts to make something not  
15 generally applicable, and it made an error of  
16 law there.

17 JUSTICE GORSUCH: If we thought that  
18 were a finding of fact and -- and we were stuck  
19 with it, then -- then what would you argue?

20 MS. WINDHAM: I would argue in that  
21 case, if the Court did think it was a finding of  
22 fact, that under the Court's decisions in Hurley  
23 and Bose, in a First Amendment case, the Court  
24 is going to make an independent review of the  
25 record. And that's particularly pertinent here,

1 where we're talking about the words of a  
2 contract, the words of a city law, the words of  
3 a state regulation. This is the work-a-day  
4 business of the courts to interpret and apply  
5 the law.

6 JUSTICE GORSUCH: And with respect to  
7 section -- oh, I see my time has expired. Thank  
8 you. Thank you, counsel.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Thank you, Mr.  
12 Chief Justice.

13 And good morning, Ms. Windham. I want  
14 to follow up on some of Justice Alito's  
15 questions and just make sure I have some of the  
16 facts down pat here.

17 First, as I understand it,  
18 Philadelphia contracts with about 30 private  
19 foster agencies to find and train and support  
20 foster families, and Catholic Social Services is  
21 just one of them, as I understand it.

22 And, second, if a same-sex couple ever  
23 came to Catholic Social Services, Catholic  
24 Social Services would refer that couple to  
25 another agency that works with same-sex couples

1 so that the couple could participate and be a  
2 foster -- foster parents.

3 And then, third, no same-sex couple  
4 has ever come to Catholic Social Services for  
5 participation in this program, and, therefore,  
6 Catholic Social Services' policy has never  
7 actually denied any same-sex couple the  
8 opportunity to be foster parents in  
9 Philadelphia.

10 I just want to make sure those three  
11 facts are accurate, and you can elaborate as you  
12 see fit.

13 MS. WINDHAM: That's all correct,  
14 Justice Kavanaugh. And that demonstrates,  
15 first, that CSS is not going to prevent any  
16 same-sex couple from being able to foster in  
17 Philadelphia. There are many other agencies out  
18 there. They're merely asking to be able to step  
19 aside and recuse if that situation ever to --  
20 were ever to arise.

21 It also demonstrates the City doesn't  
22 have a compelling interest here. This is a  
23 system that has worked effectively and worked  
24 well for many years. This is an unnecessary  
25 conflict. The City of Philadelphia had an easy

1 option here, which is to allow Catholic Social  
2 Services to continue the great work that it's  
3 been doing.

4           Unfortunately, because the courts  
5 below decided to apply Employment Division v.  
6 Smith, the City thinks that it's under no  
7 obligation to consider, respect, and accommodate  
8 religious exercise, which demonstrates how far  
9 off the rails our free exercise jurisprudence  
10 has gone in this case.

11           JUSTICE KAVANAUGH: Thank you.

12           CHIEF JUSTICE ROBERTS: Justice  
13 Barrett.

14           JUSTICE BARRETT: Good morning, Ms.  
15 Windham. So you just kind of indicated that --  
16 you know, that maybe Smith shouldn't have been  
17 applied here, and you argue in your brief that  
18 Smith should be overruled.

19           But you also say that you win even  
20 under Smith because this policy is neither  
21 generally applicable nor neutral.

22           So, if you're right about that, why  
23 should we even entertain the question whether to  
24 overrule Smith?

25           MS. WINDHAM: Justice Barrett, you're

1 exactly right that we can and should win this  
2 case even under Smith. The question then to the  
3 Court will be how it resolves the legal question  
4 and what guidance it provides to the courts  
5 below.

6 This Court in cases like Trinity  
7 Lutheran and Espinoza looks to the text,  
8 history, and traditions of the Free Exercise  
9 Clause, and those make clear that Smith is a bad  
10 fit. Smith has caused negative results.

11 Developments since Smith was decided  
12 make clear that its prediction has actually not  
13 borne out, that it is possible for the  
14 government to accommodate and partner with  
15 religious organizations to do religious  
16 exercise.

17 JUSTICE BARRETT: What would you  
18 replace Smith with? Would you just want to  
19 return to Sherbert versus Verner?

20 MS. WINDHAM: I believe that the  
21 Court's free exercise jurisprudence gives us  
22 some guidance there. In cases like the  
23 Ministerial Exception or Church Autonomy, the  
24 Court doesn't even look at the Smith/Lukumi line  
25 of cases. In cases like Lukumi and Trinity

1 Lutheran, the Court has looked at the  
2 non-neutrality or targeting.

3 But, in other cases, I think the  
4 question should be pretty simple: Is the free  
5 exercise of -- is the free exercise of religion  
6 being prohibited and, if so, does the government  
7 have a compelling reason for doing so? Here,  
8 the government does not.

9 JUSTICE BARRETT: Last question: If  
10 we did overrule Smith or, frankly, even if we  
11 didn't, let's take this out of the same-sex  
12 marriage context and put it in the interracial  
13 marriage context. Justice Sotomayor was  
14 indicating an example like this.

15 What if there was an agency who  
16 believed that interracial marriage was an  
17 offense against God and, therefore, objected to  
18 certifying interracial couples as foster  
19 families? Would they be entitled to an  
20 exemption and, if so, how is that  
21 distinguishable from -- or, if not, how is that  
22 distinguishable from CSS's refusal to certify  
23 children to couples in same-sex marriages?

24 MS. WINDHAM: No, Your Honor. If that  
25 case were even to get to strict scrutiny, this



1 Court has been clear in Loving and other cases  
2 that government has a compelling interest in  
3 eradicating racial discrimination.

4 It's a far cry from here, where  
5 Commissioner Ali said that the interest is no  
6 stronger or no weaker than enforcing any other  
7 policy.

8 It's hard to imagine the City making  
9 that kind of concession in a case involving  
10 interracial marriage.

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Ms. Windham,  
13 you have a minute to wrap up.

14 MS. WINDHAM: Philadelphia will make  
15 exceptions to its rules for lots of reasons but  
16 not for the reason of CSS's religious exercise.

17 Regardless of the legal mechanism that  
18 Philadelphia uses, the bottom line is that CSS  
19 is breaking the City's law if it even refers  
20 same-sex couples to another agency better suited  
21 to help them.

22 And, as a result, Philadelphia won't  
23 place children with Sharonell Fulton, Toni  
24 Simms-Busch, or CSS unless their church changes  
25 or violates its beliefs.

1           In our pluralistic society, a properly  
2           functioning Free Exercise Clause is supposed to  
3           prevent this kind of unnecessary and harmful  
4           conflict. There are children in need of loving  
5           homes waiting for them. Neither Philadelphia  
6           nor Smith should stand in the way.

7           Thank you.

8           CHIEF JUSTICE ROBERTS: Thank you,  
9           counsel.

10          Mr. Mooppan.

11          ORAL ARGUMENT OF HASHIM M. MOOPPAN  
12          FOR THE UNITED STATES, AS AMICUS CURIAE,  
13          SUPPORTING THE PETITIONERS

14          MR. MOOPPAN: Mr. Chief Justice, and  
15          may it please the Court:

16          Philadelphia has not afforded Catholic  
17          Social Services the tolerance of religious  
18          practice that is required by the Free Exercise  
19          Clause and vital to our pluralistic nation.

20          The City refuses to place foster  
21          children in available foster homes certified by  
22          CSS simply because, if CSS were ever asked to  
23          certify a gay couple, it would respectfully  
24          decline and refer them to another foster agency.

25          The City's draconian response to CSS's

1 hypothetical position discriminates against  
2 religious exercise for two reasons.

3 First, the City lacks a generally  
4 applicable rule because it seeks to apply a  
5 non-discrimination requirement to CSS despite  
6 having exempted comparable secular conduct,  
7 thereby devaluing CSS's religious concerns.

8 Second, the City has not neutrally  
9 applied this rule because it has shown undue  
10 disrespect to CSS's sincere religious beliefs by  
11 pleading a win-win accommodation as too odious  
12 to tolerate.

13 CHIEF JUSTICE ROBERTS: Counsel, you  
14 rely, as does the Petitioner, on contract  
15 provision 3.21, which bans a list of  
16 objectionable practices but then has at the end  
17 this "unless an exception is granted by the  
18 Commissioner in his or her sole discretion."

19 Has an exception ever been granted  
20 under that provision?

21 MR. MOOPPAN: I'm not sure that  
22 there's any evidence of that one way or the  
23 other, Your Honor, but I think the -- the key  
24 exceptions that have been granted and have been  
25 recognized in the record is that the City both

1 requires, tolerates, and itself engages in the  
2 consideration of protected trades when  
3 certifying and placing foster children.

4 In particular, under 55 Pennsylvania  
5 Code 3764, the City requires agencies to  
6 consider both familial status and disability in  
7 certifying foster children -- foster parents.

8 The City has tolerated racial and  
9 ethnic-based outreach to -- for foster parents.  
10 And then the City itself considers race and  
11 disability when placing children.

12 All of those --

13 CHIEF JUSTICE ROBERTS: The federal  
14 government, of course, has an extensive  
15 contracting regime, and it draws distinctions, I  
16 think, between -- on the basis of, for example,  
17 disability, minority ownership, and all that.

18 How does -- do contract rules have to  
19 be neutral and generally applicable across the  
20 board even with respect to protected status?

21 MR. MOOPPAN: Well, Your Honor, the  
22 federal government, of course, is subject to  
23 RFRA, but -- so, for the purposes of a state  
24 government, if a state chooses to recognize  
25 exceptions to its anti-discrimination provisions

1 within its contractual setting, it can no longer  
2 claim to be acting in a generally applicable and  
3 neutral way.

4 And then it just --

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Justice Thomas.

8 JUSTICE THOMAS: I have no questions,  
9 Mr. Chief Justice.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Breyer.

12 JUSTICE BREYER: Yes. Did you --  
13 sorry, the machine didn't work.

14 Can you hear me?

15 MR. MOOPPAN: Yes. Yes, Your Honor.

16 JUSTICE BREYER: Very well. I'd like  
17 to follow up on two questions that have been  
18 asked, the questions of the interracial  
19 marriage. Everything is the same except it's  
20 interracial.

21 The response so far from your side has  
22 been, well, that's a compelling interest. This  
23 isn't.

24 Think of other examples. The  
25 government wants to contract to a food

1 distributor to supply food on all the military  
2 bases, and because they are Orthodox Jews, they  
3 want nothing to do with ham and don't want to  
4 let anybody else -- they want nothing to do with  
5 it. Or consider a -- a religion which says  
6 we're bidding on this contract for local  
7 transportation and we want men and women to sit  
8 separately, or we want women to wear head  
9 scarves.

10 Now, in a contracting basis, is it  
11 your opinion that the government just has to do  
12 that, has to give into the religious belief, or  
13 not?

14 MR. MOOPPAN: Your Honor, I think the  
15 question under our submission is whether the  
16 government is acting in a generally applicable  
17 and neutral way.

18 So, if the government has a blanket  
19 anti-discrimination provision, that would be one  
20 thing. But, if, as in this case, the government  
21 has -- wanted -- is forced to have an  
22 anti-discrimination provision but then itself  
23 recognizes myriad exceptions, it is generally  
24 going to have undermined its compelling interest  
25 and it's going to have to explain why it can

1 tolerate deviations from that  
2 anti-discrimination provision in a whole host of  
3 areas but it cannot tolerate a deviation for a  
4 -- a religious accommodation.

5 JUSTICE BREYER: We can get other  
6 people to supply the ham, they say. And so they  
7 -- that's all right. But we can't do anything  
8 about this, the -- the -- the head scarves, and  
9 we can't do anything about the interracial  
10 marriage.

11 So, in your idea, the -- well, how --  
12 how does that work out?

13 MR. MOOPPAN: Well, so I would  
14 differentiate the interracial marriage from the  
15 rest of them, Your Honor. I -- on interracial  
16 marriage, this Court has made clear repeatedly  
17 that there's a particularly compelling interest  
18 in eradicating racial discrimination.

19 JUSTICE BREYER: So you want to start  
20 marking --

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 JUSTICE BREYER: I'm sorry. I want to  
24 interrupt you right here because now two of you  
25 have said this, that we should write an opinion

1 which says discrimination on the basis of race,  
2 constitutionally speaking, is different than  
3 discrimination on the basis of gender, on the  
4 basis of religion, on the basis of nationality,  
5 on the basis of homosexuality, all right? Is  
6 that the opinion you want us to write?

7 MR. MOOPPAN: Well, Your Honor --

8 CHIEF JUSTICE ROBERTS: Briefly,  
9 counsel.

10 MR. MOOPPAN: Your Honor, I think this  
11 Court in Pena-Rodriguez already said something  
12 very similar about how race is unique in this  
13 country's constitutional history, and  
14 eradicating that type of racial discrimination  
15 pretends -- presents a particularly unique and  
16 compelling interest.

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE ALITO: Didn't the Court in  
19 Obergefell say exactly that? Didn't the Court  
20 say that there are honorable and respectable  
21 reasons for continuing to oppose same-sex  
22 marriage? Would the Court say the same thing  
23 about interracial marriage?

24 MR. MOOPPAN: Certainly, Your Honor,  
25 Obergefell does say that. Loving, of course,



1 didn't say that and never would have said that.  
2 Masterpiece Cake, in addition, also recognized  
3 similarly that there are contexts and  
4 circumstances in which gay couples can recognize  
5 and accept that there are longstanding,  
6 deep-seated, sincere religious beliefs that  
7 oppose same-sex marriage, and in a pluralistic  
8 nation that respects religious tolerance,  
9 accommodating those sort of religious practices  
10 is -- does not undermine the compelling interest  
11 in the same -- sorry -- tolerating those -- that  
12 religious practice is consistent with the Free  
13 Exercise Clause in a -- in a way that, if you're  
14 dealing with interracial marriage, it would not,  
15 given the significant compelling interest in  
16 that context.

17 JUSTICE ALITO: We don't reach  
18 constitutional questions as a general matter  
19 unless we -- unless we have to. That's a strong  
20 policy.

21 But what do the arguments in this case  
22 about -- the complicated arguments about  
23 exemptions and the new arguments about  
24 contracting, the question whether Catholic  
25 Social Services is more like a regular licensee

1 or more like a contractor say about the  
2 stability of the Employment Division versus  
3 Smith precedent?

4 MR. MOOPPAN: Well, Your Honor, the  
5 government, as you know, we haven't taken a  
6 position on Smith. We do think that this is a  
7 relatively straightforward case under Smith,  
8 that the government -- the City has not acted in  
9 a generally applicable and neutral way.

10 We think that the record makes clear  
11 that the City has recognized myriad exceptions  
12 from its anti-discrimination provision and that  
13 the courts below erred just because they made a  
14 legal error in not treating those as exemptions  
15 because they looked too narrowly at whether, if  
16 an entity had engaged in the same practice for a  
17 non-religious reason, would the City have  
18 treated them differently. And that's just  
19 contrary to Lukumi.

20 In Lukumi itself, if there had been a  
21 non-religious actor who had engaged in a ritual  
22 sacrifice of an animal, Hialeah's ordinances  
23 would have picked up those people too, but this  
24 Court --

25 JUSTICE ALITO: All right. Thank --

1 thank you, counsel. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Counsel, I've  
5 always thought that a compelling state interest  
6 that motivated our holdings in racial  
7 discrimination cases was not merely that race  
8 was important but that the burden on the people  
9 who are rejected because of race is an interest  
10 that the state could seek to protect, that a  
11 rejection on the basis of race or any protected  
12 category creates a stigma on that person and  
13 that it's a compelling state interest for the  
14 state to have an anti-discrimination law on the  
15 basis of protected classes.

16 Are you -- are you diminishing that as  
17 a compelling state interest?

18 MR. MOOPPAN: No, Your Honor. I think  
19 that consideration of that just cuts in the  
20 opposite direction here for two reasons.

21 The first reason is no gay couple is  
22 being denied the ability to serve as a foster  
23 parent in this situation, first, as a factual  
24 matter --

25 JUSTICE SOTOMAYOR: May I interrupt

1 you there. They are by C -- by this agency.  
2 CSS is saying to them: I won't certify you. It  
3 is --

4 MR. MOOPPAN: Well --

5 JUSTICE SOTOMAYOR: -- an independent  
6 contractor with the City. And the City has said  
7 to that couple: We won't discriminate against  
8 you, but CSS, our independent contractor,  
9 doesn't want to serve you, doesn't want to  
10 certify you, not on the basis of any of the  
11 criteria that the state has set forth. You  
12 might meet every criteria the state sets forth.  
13 But they're imposing an additional criteria.

14 MR. MOOPPAN: So two points about  
15 that, Your Honor.

16 The first is, as a factual matter, no  
17 gay couple has ever actually tried to use CSS.  
18 And I think that reflects --

19 JUSTICE SOTOMAYOR: Well, I suspect  
20 that --

21 MR. MOOPPAN: -- the point that --

22 JUSTICE SOTOMAYOR: -- I suspect  
23 that's part of -- part of that is just natural,  
24 meaning people gravitate to agencies that are  
25 known by their community.

1           And so I am sure -- and this is one of  
2 the arguments that was resolved against the  
3 Petitioner here -- it's not that the agency has  
4 -- that the City has agencies who cater only to  
5 one community; it's that some agencies live in a  
6 particular community, and so more people will  
7 come to it from that community.

8           MR. MOOPPAN: Well, Your Honor, I  
9 think -- respectfully, I think it might more  
10 reflect the point that Justice Alito made  
11 earlier, that gay couples can recognize and  
12 accept that the Catholic Social Services and the  
13 Catholic Church have a deep-seated, sincere  
14 religious objection to gay marriage and thus  
15 they don't seek out CSS to serve as their foster  
16 agency.

17           But, on the flip side, I think it's  
18 important to emphasize that the City's rules do  
19 consider disability when certifying foster  
20 parents. So foster parents can be denied the  
21 ability to serve as foster parents because of  
22 their disability.

23           So, again, the City is allowing that  
24 sort of dignitary harm that Your Honor pointed  
25 to, and they're saying that sometimes that

1 dignitary harm isn't enough, but they are not  
2 willing to allow that to happen in this context,  
3 where it's a totally hypothetical harm and  
4 whereby enforcing that hypothetical harm,  
5 they're actually harming the children they  
6 purport to serve.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Justice Kagan.

10 JUSTICE KAGAN: Good morning,  
11 Mr. Mooppan. If I understood you correctly, you  
12 said that it is a compelling state interest to  
13 eradicate racial discrimination, but it is not a  
14 compelling state interest to eradicate  
15 discrimination on the basis of sexual  
16 orientation.

17 And I was wondering where in this  
18 scale that you're using would discrimination on  
19 the basis of gender come. Would -- would that  
20 be a compelling state interest? So, for  
21 example, if there's an agency that refuses to  
22 employ women, would the state have to contract  
23 with that agency?

24 MR. MOOPPAN: Well, Your Honor, just  
25 to be clear, because I don't -- my -- my point

1 was that the government in -- Philadelphia in  
2 this case has undermined its compelling  
3 interest, any compelling interest it might have  
4 in eradicating sexual orientation discrimination  
5 because it has recognized a slew of exceptions.

6 And what I was suggesting is, with  
7 respect to racial discrimination, given the  
8 significance --

9 JUSTICE KAGAN: Do you think it is a  
10 compelling state interest to want to eradicate  
11 discrimination against gays and lesbians?

12 MR. MOOPPAN: I -- I'm sorry, Your  
13 Honor. I didn't hear the beginning of your  
14 question.

15 JUSTICE KAGAN: Do you think there's a  
16 compelling state interest to try to eradicate  
17 discrimination against gays and lesbians? Is  
18 that a compelling state interest?

19 MR. MOOPPAN: So we're not denying the  
20 significance of that interest in the abstract.  
21 What we're saying is that --

22 JUSTICE KAGAN: Is it a compelling  
23 state interest, Mr. Mooppan?

24 MR. MOOPPAN: In the abstract,  
25 perhaps, but, on the facts of this case, the

1 government has undermined that interest --

2 JUSTICE KAGAN: I don't want --

3 MR. MOOPPAN: -- by recognizing --

4 JUSTICE KAGAN: -- Is it perhaps, or  
5 is it yes or is it no?

6 MR. MOOPPAN: Well, Your Honor, we  
7 haven't taken a position on that question  
8 because the question in this case is whether the  
9 City of Philadelphia has a compelling interest.  
10 And the City of Philadelphia does not because  
11 they have undermined that interest by  
12 recognizing a series of exceptions.

13 And having recognized all those  
14 exceptions, it no longer has a compelling  
15 interest in insisting that the one situation  
16 where it cannot abide by any discrimination is  
17 sexual orientation, even though --

18 JUSTICE KAGAN: If the City of  
19 Philadelphia --

20 MR. MOOPPAN: -- it tolerates racial  
21 discrimination, it tolerates disabilities --

22 JUSTICE KAGAN: You said -- excuse me,  
23 Mr. Mooppan. You said that the City of  
24 Philadelphia could not do the same thing with  
25 respect to race. And the same supposed



1 exceptions for -- are there too, ready to  
2 undermine it, but you said that that would come  
3 out differently. And I'm seeking to find out a  
4 reason why.

5 MR. MOOPPAN: The -- the reason why is  
6 because -- because racial discrimination is  
7 particularly unique and compelling, as this  
8 Court has held in cases like --

9 JUSTICE KAGAN: That's why it's  
10 super-compelling. Is that the idea?

11 MR. MOOPPAN: That's right. As this  
12 Court said in *Pena-Rodriguez*, where it  
13 recognized an exception to the jury impeachment  
14 rule for racial discrimination, particularly  
15 in --

16 JUSTICE KAGAN: Yes. I mean, race is  
17 *sui generis* in our society in all kinds of ways,  
18 but a compelling state interest usually allows  
19 the state to act. It doesn't usually; it does.

20 MR. MOOPPAN: Right. And the question  
21 is whether the government has undermined that  
22 interest by recognizing exceptions.

23 And what I'm submitting is that the  
24 exceptions that the government has recognized  
25 here don't undermine its compelling interest

1 with respect to racial discrimination because  
2 most of the exceptions don't even involve race.  
3 And the only ones that do involve race involve  
4 an individualized consideration of race.

5 JUSTICE KAGAN: Thank you, Mr.  
6 Mooppan.

7 MR. MOOPPAN: So that doesn't --

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Gorsuch.

11 JUSTICE GORSUCH: Counsel, can we  
12 circle back to the question whether Catholic  
13 Social Services should be treated as an employee  
14 or agent and whether the City can effectively  
15 take over a -- a service that had been provided  
16 privately for -- for some time, and -- and taken  
17 over so much so that it regulates it pervasively  
18 and -- and this analysis shouldn't apply at all.

19 Can -- can you address that concern?

20 MR. MOOPPAN: Well, in this case,  
21 while it's true that the government in some  
22 contexts gets greater latitude when it's acting  
23 in a contracting capacity, what it doesn't get  
24 is the ability to discriminate against its  
25 contractors on the basis of their religion or

1 religious exercise.

2           So, to take Justice Kagan's  
3 hypothetical from earlier, if you have a prison  
4 with prison contractors and it allows prison  
5 guards to bring in peyote, it can't then turn  
6 around and say it won't allow prison guards to  
7 bring in ayahuasca.

8           And the argument here is similar, that  
9 the City of Philadelphia is allowing all sorts  
10 of other exemptions for secular reasons --

11           JUSTICE GORSUCH: Put aside --

12           MR. MOOPPAN: -- but it's not allowing  
13 --

14           JUSTICE GORSUCH: -- put aside the  
15 exemptions argument. Would it otherwise be  
16 identical to a -- a City employee or agent in  
17 the government's view?

18           MR. MOOPPAN: Well, no, because of the  
19 other aspect of this case that we addressed in  
20 our briefs, the Masterpiece Cakeshop type  
21 arguments about the statements that were made by  
22 Commissioner Figueroa and by the City Council.  
23 Those two --

24           JUSTICE GORSUCH: But -- but I'm  
25 asking you to put that kind of stuff aside. You

1 know, otherwise would it be similarly situated  
2 to an employee or agent in your view?

3 MR. MOOPPAN: So if -- if you take all  
4 that -- both -- if you take both the exemptions  
5 and the statements out of the case, Your Honor,  
6 the government hasn't taken a position about how  
7 a case like that should be addressed.

8 JUSTICE GORSUCH: All right.

9 MR. MOOPPAN: Our submission is  
10 focused on both the exemptions and the  
11 statements.

12 JUSTICE GORSUCH: All right. Let --  
13 let -- let's deal with the exemptions. What do  
14 we do with the Fair Practices Ordinance and the  
15 argument by the City -- and we normally take  
16 their representations about their law with  
17 some -- some respect -- that the Fair Practices  
18 Ordinance applies by its own force and that  
19 there are no exemptions here?

20 MR. MOOPPAN: So it's provided by  
21 their clear concession. So let me make two  
22 points.

23 The first is the language of the SPO  
24 bans any differentiation or preference in the  
25 treatment of a person on the basis of any of the

1 protected traits.

2 And the City concedes that it  
3 considers race and disability when placing  
4 children. That's at JA 309 to Mr. Figueroa --

5 JUSTICE GORSUCH: Counsel, thank you.  
6 I appreciate it. My time's expired. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Good morning, Mr.  
10 Mooppan. What if Catholic Social Services were  
11 the only private agency in Philadelphia that  
12 performed this service, meaning that same-sex  
13 couples in Philadelphia simply could not become  
14 foster parents, and let's also assume there are  
15 no exemptions or other statements that are  
16 relevant to the analysis.

17 In that circumstance, would there be  
18 any different analysis or result in a case like  
19 this?

20 MR. MOOPPAN: Yeah, I think that it  
21 would be a significantly harder case because the  
22 City at that point would have a interest that  
23 isn't presented here, namely, the interest in  
24 ensuring that gay couples in Philadelphia would  
25 have the opportunity to serve as foster parents.

1                   But, of course, that isn't the facts  
2                   that we have here. The facts we have in this  
3                   case are that there are dozens of foster  
4                   agencies that are available to serve gay couples  
5                   in the City of Philadelphia. And there's no  
6                   evidence that any gay couples ever even tried to  
7                   use CSS as its agency.

8                   So, on the one hand, what Philadelphia  
9                   is doing here doesn't even help gay couples.  
10                  And what it is doing instead is harming the very  
11                  children it's trying to serve.

12                  JUSTICE KAVANAUGH: Thank you.

13                  CHIEF JUSTICE ROBERTS: Justice  
14                  Barrett.

15                  JUSTICE BARRETT: Good morning. So  
16                  I'm wondering how we decide whether a law is  
17                  generally applicable in the -- in the relevant  
18                  respect.

19                  So you said that the City recognizes a  
20                  slew of exceptions, but none of them are for the  
21                  same-sex anti-discrimination requirement. So  
22                  it's not quite the same thing as granting an  
23                  exemption, say, for, like, Sunday Sabbath  
24                  observance but not Saturday Sabbath observance.  
25                  That's a more apples-to-apples comparison.

1                   So how do we go about identifying what  
2 the, you know, relevant factor is in deciding  
3 whether a law is generally applicable?

4                   MR. MOOPPAN: So, Your Honor, in this  
5 case, the -- the City claims to be enforcing its  
6 Fair Practice Ordinance, which list -- prohibits  
7 differentiation or preference in the treatment  
8 of a person on the basis of a string of  
9 protected traits, and they recognize exemptions  
10 for a variety of those traits.

11                   Now it's true that there isn't an  
12 example of them recognizing exemptions for  
13 sexual orientation, but unless they could say  
14 that for some reason sexual orientation  
15 discrimination is the one type of discrimination  
16 under which they can abide no exemptions  
17 whatsoever, even more so than race, even more so  
18 than disability, it reveals that those are  
19 comparable traits and they're recognizing  
20 exemptions in other contexts for the best  
21 interests of the child.

22                   But, here, when the children would be  
23 better served by recognizing an exemption for  
24 CSS that would allow CSS to continue to provide  
25 this work, the City refuses to do so.

1                   That is the sort of lack of religious  
2 tolerance and the lack of neutrality that cases  
3 like Lukumi and Fraternal Order of Police in the  
4 Third Circuit are focused on.

5                   JUSTICE BARRETT: What if the  
6 ordinance said expressly that there shall be no  
7 exemptions permitted with respect to the  
8 same-sex marriage anti-discrimination  
9 requirement, period, and then had another  
10 section which permitted some exceptions as the  
11 City employs here, like in considering race, for  
12 example, in the placement of a child.

13                   Would that be generally applicable  
14 then, the same-sex anti-discrimination  
15 requirement, I mean?

16                   MR. MOOPPAN: I think it presents a  
17 harder question. I think we would still say  
18 that in that case, in the absence of any  
19 argument for why sexual orientation is the one  
20 form of discrimination that can't abide any  
21 exceptions, even more so than race, that the  
22 City was essentially making a value judgment in  
23 the same way that in Lukumi the City allowed  
24 killing for certain reasons but not other  
25 reasons. You can always imagine parsing out the



1 statute in a different way and sort of  
2 gerrymandering the statute so that the provision  
3 that's being applied to the religious entity has  
4 no exemptions and that its other sub-provisions  
5 have all the exemptions.

6 Ultimately, though, the question is  
7 whether the government is devaluing religious  
8 interests vis-à-vis secular interests. And we  
9 think that's what's happening here, because the  
10 government is recognizing exemptions for the  
11 best interests of the children but not doing it  
12 --

13 JUSTICE BARRETT: Thank you. My time  
14 has expired.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Mr. Mooppan, would you like to wrap up  
18 for a minute.

19 MR. MOOPPAN: Thank you.

20 I think here, Your Honor, at the end  
21 of the day, what the City has done is worse than  
22 cutting off its nose to spite its face. What it  
23 is doing is cutting off homes from the most  
24 vulnerable children in the City to spite the  
25 Catholic Church.

1                   The government itself requires,  
2 tolerates, and itself engages in various forms  
3 of discrimination on the basis of protected  
4 traits for the best interests of children. But  
5 then it turns around and refuses to abide by any  
6 form of discrimination with respect to sexual  
7 orientation in order to deny an accommodation  
8 for the Catholic Church.

9                   And the statements that have been made  
10 by various officials make clear that the reason  
11 they're doing that is that they view this as  
12 some sort of odious anachronism rather than, as  
13 this Court has recognized, a decent and  
14 honorable view that people can recognize and  
15 accept in a country that's committed to  
16 religious tolerance.

17                   CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19                   MR. MOOPAN: Thank you.

20                   CHIEF JUSTICE ROBERTS: Mr. Katyal.

21                   ORAL ARGUMENT OF NEAL K. KATYAL

22                   ON BEHALF OF THE CITY OF PHILADELPHIA,

23                   ET AL., RESPONDENTS

24                   MR. KATYAL: Thank you, Mr. Chief  
25 Justice, and may it please the Court:

1           This case is not about private  
2 activity or beliefs. When an FCA signs a  
3 taxpayer-funded contract, it has delegated  
4 government power to inspect and approve foster  
5 families under Section 3700 of the Pennsylvania  
6 Code.

7           A universal clause in every contract  
8 bars sexual orientation discrimination when  
9 carrying out that delegated power. That clause  
10 contains no exceptions, and it applies equally  
11 to every FCA, religious and secular alike.

12           CSS's constitution compelled the City  
13 to give it a different contract. There is no  
14 precedent for such a thing. This is, as the  
15 Chief Justice said, the City's own program and  
16 its own wards of the state.

17           The government has broad powers to  
18 impose conditions on contractors like CSS that  
19 stand in the government's shoes performing  
20 government functions.

21           Ms. Windham even admitted that the  
22 government has more leeway as a contractor. She  
23 just says CSS isn't one. That's all the debate  
24 narrows down to, and the contract is clear that  
25 they are.

1           Ruling otherwise would insert federal  
2 courts into contracting decisions in all 50  
3 states and imperil government services in many  
4 spheres. It means FCAs could discriminate  
5 against LGBT kids or categorically against  
6 foster parents on gender or religion.

7           Justice Sotomayor asked that question,  
8 apart from race, and I didn't quite hear a  
9 response from the other side.

10           And this is not a hypothetical. The  
11 district court's hearing revealed CSS to require  
12 a clergy letter showing foster parents were  
13 active members of a congregation. Other FCAs  
14 discriminate by religion, such as against  
15 Catholics and Jews in South Carolina.  
16 Petitioners' rule would compel governments to  
17 permit all these practices, balkanizing foster  
18 care agencies and ending their openness to all.

19           And, finally, CSS says it was targeted  
20 for its beliefs, but the district court found,  
21 after three days of live testimony, that never  
22 happened. The Third Circuit agreed. And  
23 nothing my friends have said comes close to the  
24 very obvious and exceptional showing of error  
25 that the two court rule requires to reverse

1 that.

2 CHIEF JUSTICE ROBERTS: Counsel, if a  
3 foster child requested not to be placed with a  
4 same-sex couple, would you take that into  
5 consideration in -- in placing the child?

6 MR. KATYAL: So that's at a very  
7 different stage. That's at a matching stage.  
8 And we certainly, I think, have come across the  
9 idea of foster parents, and we said they can't  
10 request a particular race. I'm not sure if  
11 we've had the question of the child itself.

12 But I do want to say that's a very  
13 different thing. As Justice Alito was saying,  
14 that child matching stage, at that stage, you're  
15 looking to the best interests. This case is  
16 about the pool stage and who is eligible at all  
17 to be a foster parent. And the record is clear  
18 --

19 CHIEF JUSTICE ROBERTS: Well, I  
20 suppose you -- there are certainly different  
21 contexts, but the question is at least in  
22 certain contexts, you are comfortable with the  
23 concept -- concept of discriminating in this  
24 program on the basis of sexual orientation, but  
25 you have a very strict rule, you've said there

1 will be no exceptions to CSS's similar taking  
2 into account of the sexual orientation status of  
3 the would-be parent -- foster parents.

4 MR. KATYAL: No -- no, Mr. Chief  
5 Justice, it's the same rule at both stages. So,  
6 at the pool stage, there's no -- there's --  
7 there's a categorical bar against any  
8 discrimination. It's always up to the parents'  
9 choice to work with an FCA.

10 Now, at the child matching stage, that  
11 looks to the best interests of the child, like  
12 the federal standard and that in all 50 states.  
13 That doesn't categorically exclude anyone. It  
14 looks to all potentially relevant  
15 considerations.

16 And what my friend on the other side  
17 is doing is taking one thing, which is the very,  
18 very narrow limited use of race, that's taken  
19 into account as part of the best interests of  
20 the child, which is mandated by state law. And  
21 I asked the City, when have you ever taken race  
22 into account? They could only find one  
23 instance, and that was when a kid used racial  
24 slurs, so they avoided that placement of the kid  
25 with someone of that race.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 MR. KATYAL: But that's a very  
4 different thing.

5 CHIEF JUSTICE ROBERTS: Justice --  
6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief  
8 Justice.

9 Mr. Katyal, the -- you place,  
10 obviously, in your briefs and your argument  
11 today a lot of reliance on the fact that -- on  
12 your -- your point that CSS is a contractor.

13 Wouldn't -- would -- would your  
14 analysis of this case differ if, rather than  
15 receiving funds from the City or contracting  
16 with the City, CSS was a private organization  
17 that was regulated, solely regulated, as opposed  
18 to the contractual relationship?

19 MR. KATYAL: Absolutely, Justice  
20 Thomas. That would be a very different case,  
21 that because this is the contracting  
22 circumstance, the government has far more leeway  
23 in what is actually similar when you heard all  
24 of those things about race and disability and  
25 the like. Umbehrr says courts must give

1 deference to the government's reasonable  
2 assessments of its interests as contractor.

3 And so, when you're looking to what is  
4 similar and what is different, I think it's very  
5 important to understand that it's not similar in  
6 the Lukumi sense.

7 The government is saying that that --  
8 those distinctions made on the best interests of  
9 the child are made at a point when their  
10 interests are very different. It's about  
11 matching kids, not growing the pool of safe  
12 foster parents.

13 And it's not discrimination. The  
14 government is saying, at that point, it's done  
15 to protect the welfare of an individual child  
16 and is nothing like the across-the-board flat  
17 refusal that they wanted here.

18 So, look, if a Catholic teen wanted to  
19 be with a Catholic family at the teen -- excuse  
20 me -- at the child matching stage, that could be  
21 taken into account. Lots of things can be taken  
22 into account at that stage.

23 But, here, we're talking about that  
24 first stage, as Justice Alito said.

25 JUSTICE THOMAS: Could -- just -- I --



1 I'd like to get one question in before my time  
2 expires. Don't you think it's in the best  
3 interests of the child to also have a pool that  
4 is -- that is beneficial to the child? I don't  
5 understand why that isn't also in the best  
6 interests of the child.

7 MR. KATYAL: Oh, absolutely, Your  
8 Honor, we 100 percent agree. The City's point  
9 is that when you enable the -- an FCA to  
10 discriminate on the basis of orientation, that  
11 will stigmatize the youth. That is a compelling  
12 interest. LGBT kids are an outsize number of  
13 people in the foster care population, and it'll  
14 undermine the ability of the program to operate.

15 But, absolutely, Justice Thomas, we  
16 100 percent agree that a child should be -- you  
17 know, that best interests of the child looks to  
18 what is the best -- best place for that  
19 particular child.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Breyer.

23 JUSTICE BREYER: Yes. What's actually  
24 bothering me quite a lot about this case is I  
25 think that no family has ever been turned down

1 by this agency. Indeed, none has ever applied,  
2 no gay family, no gay couple.

3 And the disagreement seems to be  
4 whether they now have to sign a piece of paper  
5 that says if there were a gay couple, we might  
6 have to look into whether they're qualified.  
7 And you're willing to have them say, but taking  
8 gay into account, you don't have to take it into  
9 account at all, but they don't want to do that.

10 Now that seems to me a very narrow  
11 ground for deciding a case that has enormous  
12 implications. Could you not say, hey, we think  
13 if there ever were a gay couple and it really  
14 was a problem, you'd have to do something about  
15 it, like look into it and don't say gay?

16 And they say: We don't even want to  
17 do that, but it's never come up.

18 I mean, the natural thing for me would  
19 be to say, okay, you say what you want, we'll  
20 say what we want, and if it ever comes up, we'll  
21 deal with it. But it never has.

22 Now is there any way that that has  
23 anything to do with how we would decide this  
24 case?

25 MR. KATYAL: Justice Breyer, this has

1 actually come up. Bethany, the other FCA,  
2 turned a couple away. That's what led to the  
3 newspaper article in this entire set of events.

4 And in response, I think the City  
5 acted reasonably. It had been aware of CSS's  
6 religious beliefs for decades -- that's Joint  
7 Appendix page 165 -- but had never stopped the  
8 contract because it thought that CSS was  
9 operating within the contract terms. They took  
10 CSS at its word, until they learned otherwise.

11 And it was at that point that the City  
12 said: We're worried about being -- making the  
13 City itself a party to discrimination. And even  
14 then, they didn't declare a breach. Rather,  
15 they just said the next annual contract we won't  
16 renew because they're telling us, after our  
17 investigation, they won't fulfill the terms of  
18 the contract.

19 But, notably, of the 17 -- 19 million  
20 dollars they gave CSS for foster care, they took  
21 two away for this child pool -- excuse me -- the  
22 parent pool function, but they left the rest  
23 intact. And to this day, CSS is getting 26  
24 million dollars a year from the City, which is  
25 hardly something demonstrating religious

1 hostility, and that is for foster care and --  
2 and child services.

3 So I think the City took that  
4 reasonable, limited action, and they certainly  
5 don't need to wait for an instance of  
6 discrimination with respect to this particular  
7 entity. I mean, in NASA versus Nelson, there  
8 was no evidence of drug abuse, but the  
9 government still insisted on tests, and this  
10 Court was unanimous in saying that was okay.

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: In your brief in  
13 opposition, when you were trying to persuade us  
14 not to take this case, you represented that the  
15 City had adopted an Exemption/Waiver Committee  
16 "to ensure that in the future any requests for a  
17 religious exemption of the sort at issue here  
18 would be directed to the waiver exemption  
19 committee and handled through the procedures  
20 that it establishes." Page 15.

21 Was that accurate?

22 MR. KATYAL: That is accurate, Your  
23 Honor, that we cite at page 15 that the City had  
24 established, after the events that gave rise to  
25 this case, in its Law Department, something to

1 "address waiver and exemption requests." That's  
2 a general committee. That's not even about  
3 foster care agencies, not even about religion.  
4 It's a general committee for everything that  
5 looked to --

6 JUSTICE ALITO: Well, the plain  
7 meaning of that statement is that if CSS or  
8 another religious organization came to the City  
9 and said that we do not -- it is contrary to our  
10 religious beliefs to certify a same-sex couple,  
11 there would be consideration of an exemption.

12 MR. KATYAL: Your -- Your Honor --

13 JUSTICE ALITO: Is that true?

14 MR. KATYAL: -- the City's policy --  
15 the City's view on this has been clear from the  
16 start. They can't make exceptions on the basis  
17 of the Fair Practices Ordinance at all when it  
18 comes to things like this at the child -- excuse  
19 me -- at the parent pool stage.

20 There are some exceptions that can be  
21 done under 3.21 at the matching stage, when the  
22 child is matched with an agency, but that's  
23 really just about DHS making an individual  
24 referral to a particular agency at that limited,  
25 particularized stage --

1 JUSTICE ALITO: Well, if that's --

2 MR. KATYAL: -- in its --

3 JUSTICE ALITO: -- if that's the  
4 City's policy, then the statement that I just  
5 read seems to me to be quite misleading, but  
6 I'll move on from that.

7 Look, if we -- if we are honest about  
8 what's really going on here, it's not about  
9 ensuring that same-sex couples in Philadelphia  
10 have the opportunity to be foster parents.

11 It's the fact that the City can't  
12 stand the message that Catholic Social Services  
13 and the Archdiocese are sending by continuing to  
14 adhere to the old-fashioned view about marriage.

15 Isn't that the case?

16 MR. KATYAL: Absolutely not, Justice  
17 Alito. The text, of course, of all of this  
18 doesn't say anything like that.

19 As the district court and third  
20 circuit found going evidence by evidence, piece  
21 by piece, they rejected that idea.

22 And I think, Justice Alito, the most  
23 telling fact about that is right now the City is  
24 giving that very entity which you're saying that  
25 -- you know, which you're saying that we can't

1 stand and the like, 26 million dollars a year  
2 for foster care.

3 I think the annual Supreme Court  
4 budget -- that's one-third of the annual Supreme  
5 Court's budget. We're doing that every single  
6 year for this entity. So --

7 JUSTICE ALITO: Well, as far as the  
8 record reflects, no -- what Catholic Social  
9 Services has done has not denied any same-sex  
10 couple the opportunity to be foster parents.

11 And because they would refer such a  
12 couple, if one were to come to them, to one of  
13 the many agencies that is willing to -- to do  
14 what is necessary for them, there's no realistic  
15 chance that that is ever going to happen.

16 But the City, nevertheless, is willing  
17 to cut them off from participating --  
18 participation in this program, even if what that  
19 means is that there will be foster children in  
20 Philadelphia -- there will be children in  
21 Philadelphia who will be denied the opportunity  
22 to have foster parents.

23 That's what the record shows, isn't  
24 it?

25 MR. KATYAL: Justice Alito, three

1 things.

2 One, we are very happy to talk about  
3 the record because we don't think it supports  
4 that at all. Indeed, it supports that CSS told  
5 us that, if this happens, this is precisely what  
6 they would do. It did happen with respect to  
7 Bethany.

8 Second, that was the exact colloquy  
9 you and I had many years ago in NASA versus  
10 Nelson when the petitioner said, hey, there's no  
11 evidence of drug abuse, you've got to wait for  
12 it. And your unanimous opinion for the Court  
13 said, no, the government can -- it doesn't need  
14 to wait in order to act.

15 And that's particularly so -- and this  
16 is my third point here -- because, here, the  
17 government has identified the most compelling of  
18 interests in protecting its own wards of the  
19 state. It needs to maximize the number of  
20 parents in the pool and avoid stigma to parents  
21 and to youth because the --

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel, is there  
25 any evidence that since CSS has not been a part



1 of this program, that less children have been  
2 placed overall?

3 MR. KATYAL: Absolutely not, Justice  
4 Sotomayor. In fact, the district court in the  
5 record found the opposite. And that's also true  
6 in other jurisdictions that have adopted  
7 non-discrimination policies, such as D.C. and  
8 Illinois. That's all in the 22 states' brief.  
9 And the ABA has studied this particular issue  
10 and found that these non-discrimination policies  
11 increase the number of people available, not  
12 decrease, because these -- acts or policies of  
13 discrimination deter people from entering the  
14 pool in the first place.

15 JUSTICE SOTOMAYOR: Have Catholic  
16 family numbers reduced since CSS hasn't been a  
17 part of this program?

18 MR. KATYAL: I don't think we have  
19 numbers on Catholic specifically, but we do have  
20 numbers, for example, from Massachusetts that  
21 when Boston Catholic Charities withdrew, other  
22 agencies filled the gap so that there were at  
23 least more -- there were more kids in foster  
24 care then than now.

25 And we certainly welcome the idea of

1 Catholic -- of CSS and other Catholic entities  
2 protect -- protecting and working with the  
3 foster kids. That's why we're giving them 26  
4 million dollars a year to do so. We  
5 tremendously value what they're doing.

6 We weren't looking for some sort of  
7 fight here. Obviously, the City was torn up  
8 about it. But they looked at the -- the stigma,  
9 they looked at the need to increase the pool,  
10 and they looked at and thought about the fact  
11 that you couldn't have FCAs just grafting on new  
12 requirements to a contract that they themselves  
13 signed.

14 JUSTICE SOTOMAYOR: Going to that  
15 issue in terms of tolerance, because that seems  
16 to be part of the questioning of some of my  
17 colleagues, and you're addressing it by saying  
18 there's tolerance in their work in other areas,  
19 they're receiving a tremendous amount of money  
20 for their work with foster children in other  
21 ways.

22 But looking at this under Smith, that  
23 pool, what did -- when you say there's two  
24 different pools, one is the pool of can you  
25 become an eligible family, and then there's the

1 pool of placing a child.

2 How do you see Smith addressing that?

3 MR. KATYAL: I think what Smith does  
4 is, at least in the contracting context, give  
5 the government wide latitude. You wouldn't even  
6 need it because I think we would win even in the  
7 sovereign context, but I think the fact -- what  
8 you'd be asking is is this really a similar  
9 circumstance at the pool stage or at the child  
10 matching stage. And there are really different  
11 interests -- that's what the government is  
12 saying -- and different harms.

13 An across-the-board flat refusal of a  
14 government agency to say, hey, the doors are  
15 closed to you entirely is very different from  
16 the sort of individualized best interests of the  
17 child determination that they are focusing on.

18 And, you know, they focus on  
19 disability as well, but that absolutely  
20 misstates the record because it's state law that  
21 requires foster care agencies to have a special  
22 license for disability needs. That's all that's  
23 about. Again, that's not discrimination.  
24 That's specialization to meet a child's needs.

25 JUSTICE SOTOMAYOR: Has any parent

1     been, other than disability, but that's because  
2     they can't meet certain criteria that's  
3     independent of their disability, they can't do  
4     certain things for the child which are required,  
5     but has there ever been an agency that has or an  
6     exemption granted on the basis of a protected  
7     characteristic?

8                   MR. KATYAL:  No, Your Honor.  The one  
9     thing that I said -- and we don't think of it as  
10    an exception, we think of it as an application  
11    of the best interests of the child -- was when a  
12    particular child used racial slurs, and so they  
13    avoided placement of the child with -- with --  
14    with someone of that race just for the safety of  
15    that individual child.  That is so --

16                   CHIEF JUSTICE ROBERTS:  Justice Kagan.

17                   MR. KATYAL:  -- fundamentally  
18    different.

19                   JUSTICE KAGAN:  Mr. Katyal, I'm  
20    concerned about Section 3.21 of the contract.  
21    So the 2019 version of the contract says -- and  
22    I'm quoting here -- "that an agency shall not  
23    reject prospective foster or adoptive parents  
24    for services based on sexual orientation unless  
25    an exception is granted by the Commissioner in

1 his or her sole discretion."

2 So why isn't that exactly the kind of  
3 exemption that CSS wants here? And why doesn't  
4 its presence, you know, undermine this -- the --  
5 the state's purported interests?

6 MR. KATYAL: Your Honor, the district  
7 court looked into this and found that DHS has  
8 never made an exception to its  
9 non-discrimination requirement, including under  
10 3.21, because, with 3.2 --

11 JUSTICE KAGAN: Well, let's say that  
12 that's true, Mr. Katyal, I mean, that no  
13 exception has ever been granted under that  
14 provision. I mean, I read Smith and Lukumi to  
15 say that you -- you can't get out of it so  
16 easily, that as long as there is an exemption,  
17 as long as it exists, as long as you could rely  
18 on it in the future, that there is not  
19 neutrality here.

20 MR. KATYAL: Well, I disagree both on  
21 the law and then with respect to the facts.

22 So, with respect to the law, Your  
23 Honor, Smith doesn't say that the mere existence  
24 of the system triggers strict scrutiny.

25 It says you can't give exemptions

1 discriminatorily. So, if the City was exempting  
2 secular organizations from non-discrimination  
3 rules but not religious ones, that would be what  
4 would trigger strict scrutiny.

5 And we know this because Smith said an  
6 across-the-board criminal prohibition is  
7 paradigmatic of something that is generally  
8 applicable, but that's also obviously the  
9 paradigmatic example of something with  
10 exemptions and broad discretion, as this Court's  
11 opinions in Armstrong and McCleskey recognize.

12 And with respect to 3.21, Your Honor,  
13 it does two basic things.

14 First, it says that it bars FCAs from  
15 rejecting a referral from DHS. And a referral  
16 can only be from DHS. And, indeed, their blue  
17 brief at page 13 admits that.

18 And then the second thing it does is  
19 it says DHS can make an exception to that. It  
20 says, "providers shall not reject a child unless  
21 an exception is granted by the Commissioner."

22 So that's about, like, if the child  
23 lives far away or something like that, we're not  
24 going to force the FCA to take it, but there's  
25 nothing about any sort of categorical or

1 classified -- classification on race or gender  
2 or anything like that with respect to 3.21.

3 And it certainly hasn't happened in  
4 practice, which is actually, I think, the  
5 standard of Smith.

6 JUSTICE KAGAN: Thank you, Mr. Katyal.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch.

9 JUSTICE GORSUCH: Good morning,  
10 counsel. I'd -- I'd like to follow up more or  
11 less where we left off. There seems to be some  
12 lack of clarity about which stage we're at here,  
13 whether we're at the matching stage or at the  
14 screening stage.

15 As -- as I understand it, this case is  
16 about the screening stage, whether Catholic  
17 Services would be eligible to participate in a  
18 program at all. Is that correct?

19 MR. KATYAL: Well, when I say  
20 screening, I mean parent screening. Basically,  
21 CSS has said they will not permit LGBT couples  
22 to be part of their screening process.

23 So, if you're a married gay couple,  
24 you can't -- the doors are closed to you, but  
25 not to a -- not to a heterosexual couple.

1 JUSTICE GORSUCH: And -- and that's  
2 the stage of the process we're currently dealing  
3 with, is that right?

4 MR. KATYAL: Correct. Exactly.

5 JUSTICE GORSUCH: All right. And at  
6 the screening stage, my understanding is from --  
7 from your latest brief at least that the -- the  
8 Fair Practices Ordinance forbids any exemptions  
9 at all. Is that right?

10 MR. KATYAL: Correct. And that's  
11 always been our policy.

12 JUSTICE GORSUCH: Okay. And then can  
13 -- can -- just to follow up on Section 3.21 at  
14 the -- at the matching stage, why is that  
15 legally irrelevant here?

16 MR. KATYAL: Well, because it's at a  
17 very different stage. And at least in the  
18 government contracting case, it's not similar in  
19 the Lukumi sense because the City is saying --  
20 and I think it gets a lot of deference -- under  
21 Umbehr, our City interests are different. We're  
22 about trying to grow the number of maximum safe  
23 foster parents, and policies like this deter and  
24 block LGBT parents from coming in and send  
25 signals to LGBT youth.



1           At the matching stage, of course, it's  
2 -- first of all, you're complying with state  
3 law, so it's a very different thing, the best  
4 interests of the child, but, second, that's a  
5 much more particularized inquiry.

6           And, again, it applies evenhandedly.  
7 It just may be that it's in the really rarest of  
8 instances, like the one example I was able to  
9 give you, you know, you might take a protected  
10 classification into account.

11           JUSTICE GORSUCH: Thank you.

12           CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh.

14           JUSTICE KAVANAUGH: Good morning, Mr.  
15 Katyal. I have kind of a bigger picture thought  
16 to express, and you can react as -- as you wish.

17           It seems like this case requires us to  
18 think about the balance between two very  
19 important rights recognized by this Court, the  
20 religious exercise and belief right, obviously,  
21 in the First Amendment, and the same-sex  
22 marriage right, as recognized in Obergefell.

23           And it seems when those rights come  
24 into conflict, all levels of government should  
25 be careful and should often, where possible and

1 appropriate, look for ways to accommodate both  
2 interests in reasonable ways. It's a very --  
3 you know it's very sensitive, controversial.  
4 There are strong -- very strong feelings on all  
5 sides that warrant respect.

6           And it seems like we and governments  
7 should be looking, where possible, for win-win  
8 answers, recognizing that neither side is going  
9 to win completely on these issues given the  
10 First Amendment on the one hand and given  
11 Obergefell on the other.

12           But, when I look at this case, that's  
13 not at all what happened here. It seems like  
14 Philadelphia created a clash, it seems, and was  
15 looking for a fight and has brought that  
16 serious, controversial fight all the way to the  
17 Supreme Court even though no same-sex couple had  
18 gone to CSS, even though 30 agencies are  
19 available for same-sex couples, and even though  
20 CSS would refer any same-sex couple to one of  
21 those other agencies.

22           And to be clear, I fully appreciate  
23 the stigmatic harm. I completely understand  
24 that, fully appreciate it. But we need to find  
25 a balance that also respects religious beliefs.

1 That was the promise explicitly written by the  
2 Court in Obergefell and in Masterpiece,  
3 explicitly promised that respect for religious  
4 beliefs.

5 And what I fear here is that the  
6 absolutist and extreme position that you're  
7 articulating would require us to go back on the  
8 promise of respect for religious believers.

9 MR. KATYAL: So, Justice Kavanaugh,  
10 four things.

11 First, we absolutely agree with you  
12 that these are feelings that warrant respect,  
13 and, you know, both of these rights are  
14 important, and we share that same spirit.

15 Second, I don't think the framing of  
16 this as religion versus same-sex equality is the  
17 right one. The way the City sees this is  
18 actually a case about religion versus religion  
19 because, if you accept what the -- what their  
20 argument is, then they'll allow -- you know,  
21 another -- another FCA can say we won't allow  
22 Baptists, we won't allow Buddhists, or we'll  
23 only allow those things.

24 And in that sense, religion will be  
25 pitted against religion. Foster care agencies

1 will be balkanized. And this will be true not  
2 just in foster care but in any number of other  
3 areas in which the government contracts.

4 Third, practically, I don't think you  
5 can look at this and just say, oh, this is a  
6 small, tiny accommodation, what's the harm in  
7 it, because any individual accommodation will  
8 look reasonable.

9 The problem is, as Chief Justice  
10 Burger's unanimous opinion in United States  
11 versus Lee says, once you do it for one  
12 objector, the Court's going to be stuck doing it  
13 for all.

14 I mean, the accommodation there was a  
15 pittance. It was someone objecting to paying  
16 Social Security. But the Court said income tax  
17 will be next, and you can't have a workable  
18 system, either for Social Security payments or  
19 now for FCAs, with so many religious  
20 accommodations.

21 And then, lastly, when you say the  
22 City was looking for a fight or something, we  
23 couldn't profoundly disagree more. We certainly  
24 didn't rush this case to the Supreme Court.  
25 Indeed, we won it in both courts below and the

1 first one, after a three-day hearing looking at  
2 live testimony, looking at precisely the  
3 allegations you said about religious hostility,  
4 and all of those dissolved.

5 And, indeed, I think --

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett.

8 JUSTICE BARRETT: Thank you, Mr. Chief  
9 Justice.

10 Good morning, Mr. Katyal. I just want  
11 to be sure that I'm clear in thinking about this  
12 question of whether the City was functioning as  
13 a contractor or whether it was granting  
14 licenses.

15 Is it possible for any entity to  
16 participate in the recruitment and certification  
17 of foster families without a contract from the  
18 City?

19 MR. KATYAL: Not with respect to this  
20 function, and so I think that's a very important  
21 point about what Ms. Windham said. She kept on  
22 saying we've been doing this for two centuries,  
23 this. Private entities have never done this  
24 because whatever these entities did before, like  
25 CSS, they never selected who cares for kids in

1 City custody, applying state criteria.

2 Indeed, the whole point of the modern  
3 foster care system is to bring responsibility  
4 for those kids inside the government and not to  
5 leave it into the private hands. I mean, these  
6 are wards of the state, and the City has the  
7 highest interests in screening parents.

8 So this isn't an example at all of  
9 something that could be described as a licensee  
10 function, because a licensee is someone, you  
11 know, when someone's licensed, like to practice  
12 law or run a barber shop, they're not carrying  
13 out the government's work, they're performing  
14 their own work, a private profession, with the  
15 permission of the government.

16 This is the opposite of that, Justice  
17 Barrett. This is about the City's own kids, and  
18 the City's interests here are at their zenith.

19 JUSTICE BARRETT: Well, let's imagine  
20 that the state takes over all hospitals and says  
21 from now on, you know, we are going to be  
22 responsible for hospitals, but we will contract  
23 with private entities to actually run them.

24 And so there's a Catholic hospital and  
25 gets a contract with the City to run it. In

1 fact, it's a -- a Catholic hospital that's in  
2 existence before the state adopts this policy.

3 And its contract with the state  
4 provides that there are -- in the contract the  
5 state gives everyone is that you can get some  
6 exceptions for some medical procedures, but  
7 every hospital has to perform abortions.

8 In that context, do we analyze this as  
9 a licensing question, or, given that the  
10 Catholic hospital can't even enter the business  
11 without this contract, do you still say that  
12 this was the provision of a contractual service?

13 MR. KATYAL: So three things, Your  
14 Honor.

15 First, this is -- just factually, this  
16 is not a monopolization case at all, contrary to  
17 what my friend says. After all, they still have  
18 26 million dollars, the lion's share of their  
19 foster care budget. So it's not as if we're  
20 occupying the field or something -- something  
21 like that.

22 With respect to your hypothetical, I  
23 think there are two problems. One is I think  
24 the real thing that does the force in the  
25 hypothetical is the government somehow

1 monopolizing a private care system, a healthcare  
2 system or hospital system. That itself would  
3 raise any number of constitutional problems.

4 And I think our intuition as to why  
5 that hypothetical sounds so horrible is because  
6 of that. That's what does the work.

7 And secondly --

8 CHIEF JUSTICE ROBERTS: A minute to  
9 wrap up, Mr. Katyal.

10 MR. KATYAL: Thank you.

11 I'd say three things are notable.

12 First, this case, I think, as Justice  
13 Scalia might say, comes as a wolf. Petitioners'  
14 world would enable an FCA to exclude parents of  
15 any religion, from Buddhist to Baptist. And  
16 this Court, because it can't second-guess the  
17 reasonableness of a belief, it opens the door to  
18 all sorts of claims.

19 Indeed, this very case, the clergy  
20 letter. And it radiates far beyond foster care  
21 to all government contracts in all 50 states.

22 Second, the City would act the very  
23 same way if a secular FCA discriminated and the  
24 flip side is true too. The City contracts with  
25 Bethany, which is open to same-sex couples



1 despite its religious opposition. And the City  
2 continues to contract with CSS to the tune of 26  
3 million dollars.

4           These three indicia -- a uniform  
5 policy, continued contracting with Bethany, and  
6 continued contracting with CSS itself -- are  
7 strong evidence the two courts below got it  
8 right.

9           And, finally, my friends never  
10 overcome the two-court rule on neutrality.  
11 After three days of live testimony, the trial  
12 court found the preponderance of evidence  
13 favored the City.

14           For these reasons, we ask the  
15 unanimous judgment of the Third Circuit be  
16 affirmed.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19           Mr. Fisher.

20           ORAL ARGUMENT OF JEFFREY L. FISHER  
21 ON BEHALF OF THE SUPPORT CENTER FOR CHILD  
22 ADVOCATES AND PHILADELPHIA FAMILY  
23 PRIDE RESPONDENTS

24           MR. FISHER: Mr. Chief Justice, and  
25 may it please the Court:

1           I think what makes this feel like a  
2 hard case is that CSS is doing valuable work, it  
3 is acting based on traditional religious  
4 beliefs, and it may appear that the costs of  
5 accommodating it would not be too high.

6           But that overlooks two serious  
7 problems with CSS's claim.

8           First, CSS is not acting in its  
9 private capacity but, rather, as a government  
10 contractor. Its claim, therefore, implicates  
11 the government's managerial interests, as well  
12 as the imperative that governmental services are  
13 made evenhandedly available to all citizens.

14           And, second, free exercise claims  
15 cannot turn on judicial assessments of whether  
16 religious views are honorable or offensive. If  
17 the constitution requires an accommodation here,  
18 as Mr. Katyal said, all manner of other  
19 allowances must be made for foster care and  
20 other service agencies.

21           And because there's no constitutional  
22 difference between independent contractors and  
23 government employees, CSS's position would also  
24 imply, for example, that police officers could  
25 decline on religious grounds to enforce

1 particular laws, prison guards could insist on  
2 evangelizing to inmates.

3           The implications go on and on, but the  
4 upshot is this: Whatever rules might govern  
5 free exercise claims outside of government  
6 contracting, the City's anti-discrimination  
7 requirement is constitutional because it is a  
8 reasonable rule governing the selection of those  
9 who will care for children in the City's  
10 custody.

11           CHIEF JUSTICE ROBERTS: Mr. Fisher,  
12 suppose that the City of Philadelphia decides  
13 that it doesn't like the message that the church  
14 having an all male priesthood -- the message  
15 that that conveys. It doesn't want to expose  
16 foster children to that belief in foster  
17 parents. And so it terminates CSS's contract  
18 because of the church's -- that church -- the  
19 church's belief in that respect.

20           Are they free to do that?

21           MR. FISHER: I think there would be  
22 two big differences between that and this case,  
23 Mr. Chief Justice.

24           Number one, as the Court recognized in  
25 Hosanna-Tabor and the like, clergy members of

1 the church and the way that they are structured  
2 within the church raise Establishment Clause  
3 questions and free exercise questions that are  
4 entirely different from a government contracting  
5 scenario like this on -- on their own terms.

6 And, second of all, I don't understand  
7 any way that that rule would relate to the  
8 carrying out of foster care services. The core  
9 problem, the core question here is whether the  
10 government is imposing a reasonable condition --

11 CHIEF JUSTICE ROBERTS: Well, the way  
12 it would relate --

13 MR. FISHER: -- on the carrying out of  
14 a service.

15 CHIEF JUSTICE ROBERTS: -- the way it  
16 would relate is the same way that the -- the  
17 same-sex ban did because of -- of the church's  
18 view on it, CSS's, is that they think it's  
19 stigmatizing, that it sends the wrong message  
20 for foster parents to belong to an entity that  
21 discriminates on the basis of -- of gender.

22 MR. FISHER: No, I think that the --  
23 the stigma and the harm that the City's looking  
24 to avoid is the discrimination with respect to  
25 people participating in the program. That's

1 very different than the church's own structuring  
2 of its own internal clergy and its own internal  
3 operations, as my --

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief  
8 Justice.

9 Mr. Fisher, I want to go back to the  
10 assessment of the pool, as Mr. Katyal designated  
11 it, and the placement. Do you agree with him  
12 that both of these are in the -- have to be  
13 looked at in the interests, best interests, of  
14 the child?

15 MR. FISHER: Well, I think, just to be  
16 precise, Justice Thomas, the state law best  
17 interests of the child test applies only at the  
18 placement stage. That's -- that's unique to the  
19 placement stage.

20 I think what Mr. Katyal was saying is,  
21 of course, the City and the State are going to  
22 establish rules for certification -- for family  
23 certification at the outset in the -- you know,  
24 in the general interests of children. But,  
25 specifically speaking, the best interests of the

1 child test comes into matching and -- and, just  
2 as under federal law and under other state laws,  
3 applies --

4 JUSTICE THOMAS: So on what --

5 MR. FISHER: -- only to --

6 JUSTICE THOMAS: Excuse me, I'm sorry  
7 to interrupt you. It's just we -- we're short  
8 on time, but -- so what would be the standard?  
9 Why the assessment of the -- of the family then  
10 if it's -- if -- if you say statutorily it's  
11 only the placement that's in the best interests  
12 of the child? What's the policy behind  
13 assessing the family?

14 MR. FISHER: I think the idea behind  
15 assessing the family goes to the core of the  
16 reason why this is a city program, is that these  
17 are children in City custody. And so the City  
18 is establishing criteria that are for -- that  
19 are going to govern which people are allowed to  
20 undertake that, and those criteria --

21 JUSTICE THOMAS: No, I mean,  
22 generally, what are you looking for?

23 MR. FISHER: You're looking for people  
24 that can provide care and loving environments  
25 and safe environments to kids --

1 JUSTICE THOMAS: And -- and why --

2 MR. FISHER: -- which is laid out --

3 JUSTICE THOMAS: -- are you looking  
4 for that kind of a family?

5 MR. FISHER: Pardon me?

6 JUSTICE THOMAS: Isn't that ultimately  
7 just for the best interests of the child?

8 MR. FISHER: I think that's one way to  
9 think about it, Justice Thomas, which is why I  
10 think Mr. Katyal answered your question that  
11 way. I'm -- I'm just trying to be precise about  
12 the way the law works here, which is that the  
13 standards for certification are laid out in  
14 Pennsylvania Code Section 3700.64. And the best  
15 interests of the child standard is not present  
16 there. It's simply a list of secular criteria  
17 that the agencies are being asked to apply.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer.

21 JUSTICE BREYER: In general, what have  
22 you thought should be the right rule? I mean,  
23 I've always thought that Smith is a problem or a  
24 solution to a problem that nobody could figure  
25 out how to answer it.

1           If your opponents win, it's pretty  
2 hard to see how all kinds of government programs  
3 can exist with every religion making exceptions  
4 every which way for all kind of reasons,  
5 sincerely too.

6           If you win, it's pretty hard to see  
7 how, for example, a -- a religious group that  
8 wants to meet on Sunday, the only place to hold  
9 services, but there is a -- there are a no  
10 parking sign, and they can't do it. I mean,  
11 they can't even hold religious services.

12           And -- and we could think of lots of  
13 examples, like abortion and so forth. And that,  
14 I think, is what led Justice Scalia to that more  
15 absolute rule. He couldn't figure out another  
16 one.

17           So have you anything there that you  
18 can suggest?

19           MR. FISHER: But --

20           JUSTICE BREYER: After all, RFRA is  
21 one way, but RFRA they can change, Congress, if  
22 we make a mistake. The Constitution you really  
23 can't. That's why I asked the question just to  
24 see what's in your mind.

25           MR. FISHER: Right, Justice Breyer. I



1 think that Justice Scalia, for the reasons he  
2 laid out in Smith itself and in the City of  
3 Boerne concurrence, reached a quite reasonable  
4 conclusion that is right on its own terms and  
5 entitled to stare decisis effects.

6 But the most important thing I would  
7 tell you here is that you don't even have to ask  
8 that question. The Court recognized before  
9 Smith itself, in cases like Lyng and Roy, that  
10 when we're dealing with internal affairs of the  
11 government and its own operations, that a simple  
12 -- a different test applies.

13 And the test that I would say governs  
14 this case, which is really quite narrow in this  
15 sense because it's a government contracting  
16 case, is the test the Court made -- laid out in  
17 NASA versus Nelson, where the Court asked  
18 whether it was a reasonable rule that the  
19 government was insisting for its contractors.

20 And, actually, the Court in that case  
21 used the phrase "internal operations." So all  
22 you have to do is put Nelson together with Lyng  
23 and Roy, which tell you that the Free Exercise  
24 Clause allows the government the same power when  
25 it deals with its internal operations.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: Do you think it's fair  
3 to say this is simply a government contracting  
4 case when Catholic Social Services and other  
5 agencies cannot participate in this activity at  
6 all, an activity in which some of them at least  
7 have been participating long before it was taken  
8 over by the state, unless they are approved by  
9 the City? Even if it's a -- partially a  
10 contracting case, is it not also partially a  
11 licensing case?

12 MR. FISHER: For two reasons, we don't  
13 think it is, Justice Alito.

14 First, even if the City did monopolize  
15 the services here, it wouldn't be any different  
16 than Lyng, where the government owned the land.  
17 It wouldn't be any different from NASA versus  
18 Nelson, where the government was the only way to  
19 work in the space program.

20 And the government, as Justice Kagan  
21 said earlier, can take over certain operations.  
22 Indeed, the City, as Justice Sotomayor said,  
23 could do the certification itself.

24 But also I want to answer, Justice  
25 Alito, in terms of the history, and I want to

1 echo what my friend, Mr. Katyal, said, which is  
2 that, yes, the same term, "foster care," is used  
3 that was used historically, but it's a  
4 completely different program now because the  
5 children are in City custody and we're talking  
6 about selecting people --

7 JUSTICE ALITO: Well, government has  
8 --

9 MR. FISHER: -- to care --

10 JUSTICE ALITO: -- government has  
11 expanded at all levels, and it has taken over  
12 more and more programs that were previously  
13 conducted by -- by private entities.

14 What -- what if the government took  
15 over all provision of assistance to homeless  
16 people? Would that -- and -- and an issue arose  
17 about whether a private entity could participate  
18 in that charitable activity. Would you say  
19 that's purely a contracting case?

20 MR. FISHER: I think I might have to  
21 hear a little more, but, in general, I do think  
22 the government could take over something like  
23 homeless shelters in a -- in a given county or a  
24 community. I don't think there's any way to  
25 draw a line between what the government can and

1 can't take over. It's --

2 JUSTICE ALITO: Well, what about  
3 Justice -- what about Justice Barrett's example  
4 of a hospital? What if the -- the -- the state  
5 were to take over all hospitals and then  
6 contract that out to private entities?

7 MR. FISHER: Well, I think that that's  
8 really hard to imagine exactly how that would  
9 work. We know healthcare is such a uniquely  
10 complicated context. And I think that even in  
11 systems where the government does take over  
12 healthcare, private options are still available.  
13 So it's hard for me to understand, you know,  
14 exactly how a hypothetical along those lines  
15 would play out.

16 JUSTICE ALITO: Well, you're just  
17 disagreeing with the hypothetical. I don't  
18 think it's hard to imagine at all. But, if you  
19 accept the hypothetical, then what's the answer?

20 MR. FISHER: What's the answer to  
21 whether -- to what? I'm sorry.

22 JUSTICE ALITO: Would your answer be  
23 the same, that -- that if the government took  
24 over all hospitals but contracted it out to  
25 private entities, it could insist that the

1 hospitals perform procedures that are  
2 objectionable on religious grounds to the  
3 contractors, so-called contractors, running  
4 these hospitals?

5 MR. FISHER: I think to some degree,  
6 perhaps, Justice Alito, but I think there'd be  
7 very different questions raised about medical  
8 procedures and doctors that -- that certainly  
9 have the opportunity to decide which kind of  
10 procedures they're going to carry out.

11 I think if this were the federal  
12 government, which I take is what your  
13 hypothetical is raising, you'd also have any  
14 number of RFRA implications that would have to  
15 be layered on to a question like that.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Mr. Fisher,  
19 perhaps we should talk about the function  
20 because there is an amicus brief that suggests  
21 that in normal contractor cases, the Rutherford  
22 brief, that in normal contractor cases you apply  
23 a rationale basis but where the government has  
24 taken over a field, it should be strict  
25 scrutiny.

1                   And this goes back to Justice  
2 Barrett's earlier question about how to define  
3 the field. There are still foster parents that  
4 -- private placement with foster parents that  
5 CSS can still engage in. The only children that  
6 in the -- in the state's custody are those that  
7 have been essentially abandoned or taken away  
8 from their parents, correct?

9                   MR. FISHER: I think in general terms  
10 it's correct, Justice Sotomayor, that -- that  
11 there's on the one hand foster care  
12 certification services for children in the  
13 city's custody, which is something that you can  
14 do only through a contract with the city under  
15 the terms we're discussing here.

16                   And there are other things that, as  
17 Mr. Katyal noted, with the foster care program  
18 that CSS is allowed to do, and there are other  
19 private things that CSS can do without even  
20 contracting with the city related to adoption  
21 and other ways to care for needy children.

22                   JUSTICE SOTOMAYOR: So there is no  
23 occupying a field here, other than these are the  
24 -- these happen to be the kids who either  
25 because of abandonment or abuse have been taken

1 away from their parents that are in the city's  
2 custody, correct?

3 MR. FISHER: I think that's right.  
4 But the thing I would want to make sure I  
5 stress, Justice Sotomayor, is that even if the  
6 other side were right that the City, however you  
7 would want to look at this, has occupied the  
8 field of parental certifications, it would make  
9 it no different than Lyng. It would make it no  
10 different than Nelson. It would make it no  
11 different than Garcetti where the government  
12 occupies the field of prosecutions.

13 The government occupies the field of  
14 law enforcement. There are lots of places where  
15 the government has reasonably made the  
16 determination to carry out a certain service and  
17 is allowed to establish, as Nelson put it,  
18 reasonable rules to carry out that service.

19 JUSTICE SOTOMAYOR: I have one last  
20 question. If one wanted to find a compromise in  
21 this case, can you suggest one that wouldn't do  
22 real damage to all the various lines of law that  
23 have been implicated here?

24 MR. FISHER: Well, I think, Justice  
25 Sotomayor, the place to start in that respect

1 would be where Justice Breyer started earlier  
2 today with the city's concession at pages 45 and  
3 46 of its brief that if what CSS is concerned  
4 about is a perception that by participating in  
5 this program they are endorsing marriage for  
6 same-sex couples, that they can disclaim that  
7 and make very clear that all they're doing is  
8 following state law and to carry out a  
9 government function on the government's behalf  
10 and they're not purporting to speak for  
11 themselves in any certifications.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Mr. Fisher, the -- the  
14 solicitor general's main argument here is that  
15 the city has undermined its asserted interests  
16 in non-discrimination by having a series of  
17 other exemptions to the one that's at issue --  
18 to the one that -- other exemptions that --  
19 similar to what CSS wants.

20 And I talked with Mr. Katyal about  
21 3.21. The solicitor general also references  
22 various policies that have to do with placing  
23 children, a consideration of race and disability  
24 at that stage.

25 So I was wondering if you could



1 explain to me why those are permissible, but --  
2 but the city should not be able to give an  
3 exemption to CSS?

4 MR. FISHER: Of course, Justice Kagan.  
5 Let me say one thing about the law and then give  
6 you a broad-stroke answer and any specifics I'm  
7 happy to answer.

8 First, the solicitor general, I think,  
9 somewhat strangely tried to put entirely aside  
10 the contracting context of this case in asking  
11 these questions about general applicability. As  
12 the Court said in *Umbehr*, the Court has to give  
13 reasonable deference to government's assessment  
14 of its own interest in the contracting space.

15 So even in this general applicability  
16 context, Justice Kagan, I want to stress that  
17 the government contexting -- I'm sorry, the  
18 government contracting context is highly  
19 relevant to this comparability inquiry that is  
20 required.

21 And I don't think the solicitor  
22 general even denies that. And I will just say  
23 in broad strokes, the purported exemptions that  
24 the other side points to when it comes to the  
25 certification process simply do not exist.

1           The closest they've come is to talk  
2 about disability being taken into account, but  
3 it's not disability that's taken into account.  
4 It's just the criteria that I discussed with  
5 Justice Thomas that are neutral and secular as  
6 to the ability to care for a child to which  
7 disability is sometimes relevant.

8           That leaves child placements. And in  
9 child placements, it's just a different set of  
10 rules that apply because that's a different  
11 stage of the process. And so the key answer  
12 there is that the City has reasonably concluded  
13 that that's just not a comparable setting  
14 because the best interest of the child in  
15 matching somebody on an individualized basis  
16 kicks in.

17           And that's not the scenario at the  
18 certification stage, where all we're asking is  
19 whether somebody can care for children.

20           And back to the question about a  
21 compromise, CSS has not disputed that same-sex  
22 couples are equally able to care for children.  
23 And so we think the placement scenario is just  
24 entirely different.

25           JUSTICE KAGAN: Thank you, Mr. Fisher.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch.

3 JUSTICE GORSUCH: I'd -- I'd like you  
4 to expand on that just a little bit further, Mr.  
5 Fisher.

6 One of the challenges of Smith, of  
7 course, is asking whether there's an exception,  
8 and that raises all sorts of questions about at  
9 what level of generality should we look and  
10 what's comparable enough.

11 Why isn't the 3.21 matching process in  
12 that contract process sufficiently like the  
13 screening process that we should consider it?

14 MR. FISHER: Justice Gorsuch, I think  
15 for two reasons, I'd stress. One is, as I  
16 understand Section 3.21, it applies to referrals  
17 from DHS. That is not the certification  
18 process. That is the matching process or  
19 similar situations.

20 JUSTICE GORSUCH: I -- I --

21 MR. FISHER: And so the answer I just  
22 gave to Justice Kagan --

23 JUSTICE GORSUCH: I'm sorry to  
24 interrupt, but I accept the legal point that  
25 they are different stages in the process,

1 formally speaking, legally.

2 But why -- why -- why shouldn't we  
3 take cognizance of it when we're doing the Smith  
4 analysis?

5 MR. FISHER: Okay. Well, let me  
6 answer it this way then. Smith did not say the  
7 mere availability in the air of individualized  
8 treatment is enough to make it not a generally  
9 applicable law because, as Mr. Katyal said, then  
10 the criminal law itself would not be a neutral  
11 generally applicable law.

12 You have to have some disparate  
13 treatment of religious reasons versus secular  
14 reasons. That's what Justice Alito said in the  
15 Fraternal Order of Police opinion, that the  
16 solicitor general relies on, that it is not okay  
17 to let people wear beards for medical reasons  
18 but not for religious reasons.

19 And so as a -- as a Volokh brief also  
20 described, it's not just whether in the air  
21 there's a possibility for exceptions or  
22 different -- differential treatment. It is  
23 whether you've actually had such treatment.  
24 Because otherwise you just simply don't have a  
25 workable system of law.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Good morning, Mr.  
5 Fisher, and welcome. Thank you for your -- and  
6 I want to thank all the parties for their  
7 excellent briefs and arguments and all the  
8 amicus briefs, which have all been very valuable  
9 in thinking through these issues.

10 Just a couple questions to just  
11 confirm a couple things factually here. You  
12 agree, I assume, that Catholic Social Services  
13 does important valuable work for vulnerable  
14 foster children in Philadelphia?

15 MR. FISHER: Of course, yes.

16 JUSTICE KAVANAUGH: And then do you  
17 agree that a same-sex couple in Philadelphia can  
18 become foster parents by going to one of the 30  
19 agencies; indeed, do you agree that no same --  
20 same-sex couple has ever gone to CSS and, if  
21 they did, that they would be referred to one of  
22 those 30 agencies? Do you disagree with any of  
23 that?

24 MR. FISHER: Justice Kavanaugh, no, I  
25 don't, as a factual matter, but remember that a

1 same-sex couple was turned away from Bethany.  
2 And the -- and the caution I would give you to  
3 rely too heavily on this 30-agency idea is that,  
4 remember, we don't know how many agencies will  
5 discriminate against people based on sexual  
6 orientation, religion, or other characteristics  
7 if the City is required to grant exemptions.

8           And I don't think the Court wants to  
9 go down a road of having to count up how many  
10 agencies that at the end of the day are  
11 discriminating on what basis. As you, yourself,  
12 asked, what if there were just one agency? What  
13 if there were two or three or five?

14           I think that's a really difficult area  
15 for the Court to have to get into.

16           JUSTICE KAVANAUGH: Well, I -- I agree  
17 to that, but arguably the other -- the response  
18 to that might be we shouldn't be looking for  
19 problems before we confront them.

20           MR. FISHER: Fair enough, Justice  
21 Kavanaugh, but remember you don't even get to  
22 this set of questions because this is a  
23 government contracting case.

24           And as the Court said in Nelson, you  
25 just ask whether the government's position here

1 is reasonable. And the government has two  
2 eminently reasonable interests it is seeking to  
3 vindicate here. One is to treat all citizens  
4 equally when people are carrying out the  
5 government's own programs and not to vulcanize  
6 its services.

7 And, secondly, the government just has  
8 a managerial interest, as I was just describing  
9 if you have to start granting exemptions, all of  
10 a sudden running a program through the  
11 government gets very, very hard, even to the  
12 point where the City might just say, the heck  
13 with it, we're going to take this in-house and  
14 do it ourselves.

15 And I don't think anybody disputes  
16 that the City could do that. And once you've  
17 admitted the City could just do these  
18 certifications itself, it seems very odd to  
19 conclude that CSS is entitled to insist on own  
20 rules when it's carrying them out on the City's  
21 behalf.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett.

25 JUSTICE BARRETT: Good morning,

1 Mr. Fisher. I have a question about something  
2 that some of the amicus briefs brought up, which  
3 was this third-party harm principle, the  
4 principle that religious beliefs can never give  
5 a believer the right to harm a third party even  
6 slightly.

7 I'm wondering if you agree with that  
8 and, if so, if you could tell me where in law  
9 the principle comes from.

10 MR. FISHER: Justice Barrett, I'm not  
11 sure that that's true as a categorical rule. I  
12 think that, as some of the questions have  
13 pointed out this morning, when you get into  
14 situations like this, you need to balance the  
15 free exercise interests, on the one hand,  
16 against whatever the governmental interests are,  
17 on the other, at least in the abstract.

18 So I think that, as I was just saying  
19 to Justice Kavanaugh, you don't get to a balance  
20 of the harms in this particular case because  
21 it's a government contracting case, and all you  
22 ask under Nelson is whether the government's  
23 rule is reasonable.

24 But even if you did get to that, and  
25 even if it were relevant whether there were



1 third-party harms, as I was just describing, we  
2 would say there are serious governmental harms  
3 and there are also private harms. We've talked  
4 about people being turned away in Philadelphia  
5 and the amicus briefs tell you they're turned  
6 away elsewhere.

7           But, remember, there's also a  
8 deterrent effect. If people are aware that the  
9 government program allows discrimination, they  
10 may never enter the pool in the first place.  
11 There's no brochure that tells people, you know,  
12 this agency prefers people of this -- of your  
13 kind and these other agencies prefer people of  
14 the other kind. And, frankly, if there were a  
15 brochure in that respect, it would just make it  
16 all the worse.

17           JUSTICE BARRETT: I wanted to sneak in  
18 one --

19           MR. FISHER: So I think there are very  
20 harms, Justice Barrett. I wouldn't take the  
21 categorical view, though.

22           JUSTICE BARRETT: I want to sneak in  
23 other question. I think we would agree that  
24 there's really not any circumstance we can think  
25 of in which racial discrimination would be

1 permitted as a religious exemption.

2           Can you think of any example in which  
3 saying, as, you know, CSS has done here, that  
4 they, you know, will not certify same-sex  
5 couples, that -- where an objection to same-sex  
6 marriage would justify an exemption? Or is it  
7 like racial discrimination?

8           MR. FISHER: Well, Justice Barrett, I  
9 think for purposes of your analysis here, it is  
10 like race discrimination. I understand that  
11 race is special in many ways in the Court's  
12 jurisprudence. But, as Justice Gorsuch stressed  
13 in Masterpiece Cakeshop, it is the proudest  
14 boast of free exercise jurisprudence that we do  
15 not judge the legitimacy or the offensiveness of  
16 religious beliefs. If they are deeply felt,  
17 which, as we know from the Bob Jones case, for  
18 example, some religious organizations do have  
19 deeply felt views about interracial marriage.

20           I think the Court would have to accept  
21 them. Then the only question would be whether  
22 the compelling interest test applies differently  
23 in that scenario. And I don't think it would.

24           As a matter of just compelling  
25 interest law, the Court has said not just that

1 governments have an interest in eradicating race  
2 discrimination, but also in Jaycees the Court  
3 said sex discrimination, as we know from last  
4 term in Bostock, this could be thought is of as  
5 sex discrimination. And so I just don't think  
6 you could draw a line in this context between  
7 sexual orientation --

8 CHIEF JUSTICE ROBERTS: A minute to  
9 wrap up, Mr. Fisher.

10 MR. FISHER: Thank you, Mr. Chief  
11 Justice.

12 I think I would just leave you with  
13 the -- with the last -- a couple of the last  
14 points I was making, which is I don't think  
15 anybody can dispute that if the City wanted to  
16 do this work itself, it could. And so the any  
17 -- only question that you have is whether the  
18 analysis is any different because the City is  
19 operating through an independent contractor.  
20 And cases like Nelson and Lyng tell you the  
21 answer is no. Also Rust v. Sullivan, a case we  
22 haven't yet discussed today, tells you the  
23 answer is no. And so that just leaves the  
24 arguments the solicitor general is making about  
25 neutrality and the like.

1           And I think the irreducible fact in  
2           that respect is that the City here would not  
3           allow race discrimination -- I'm sorry, would  
4           not allow this discrimination for any reason.  
5           The district court found this at page 85a to  
6           88a. I don't think anybody really thinks that  
7           this kind of activity would have been allowed in  
8           2018 or going forward for any provider, for any  
9           reason.

10           And for that reason, we think that  
11           this is a case -- one way to think about this is  
12           a case about equal treatment versus special  
13           privileges. The City has satisfied the equal  
14           treatment requirement and it's not required to  
15           give special privileges here.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17           counsel.

18           Three minutes for rebuttal, Ms.  
19           Windham.

20           REBUTTAL ARGUMENT OF LORI H. WINDHAM  
21           ON BEHALF OF THE PETITIONERS

22           MS. WINDHAM: Thank you, Mr. Chief  
23           Justice. Three quick points.

24           First, the discussion this morning has  
25           confirmed that Philadelphia does not have a

1 neutral and generally applicable law. They have  
2 waivers and exemptions. They let agencies  
3 consider factors that are prohibited under the  
4 Fair Practices Ordinance, and they don't follow  
5 that ordinance themselves.

6 Philadelphia now admits it's applying  
7 its public accommodations law, and the analysis  
8 would be different if the Court analyzed the use  
9 of sovereign authority under that law. Even  
10 under Smith, that triggers strict scrutiny, and  
11 the City loses.

12 Second, Respondents ignore the long  
13 history of Catholic Social Services doing the  
14 work it does today, partnering with foster  
15 parents to provide children with a family,  
16 walking with and supporting those families  
17 through a years-long and difficult process.

18 This is the ministry that the City of  
19 Philadelphia is trying to extinguish. The fact  
20 that CSS carries out other ministries and  
21 provides services at a loss, subsidizing the  
22 City, does not change the fact that the City is  
23 trying to extinguish this ministry.

24 And it has done so in the most  
25 restrictive manner, sending the message that

1 Sharonell Fulton must be excluded because she  
2 partners with an agency who shares her faith.

3 Respondents urge the Court to decide  
4 some other case, not this case. They claim all  
5 kinds of harms, but religious foster agencies  
6 continue to serve in most states, and multiple  
7 states have even protected those agencies by law  
8 without negative results.

9 Longstanding protections like RFRA's  
10 protect religious exercise and, yes, even  
11 government contractors. Yet, Respondents cannot  
12 identify where their parade of horrors has  
13 come to pass.

14 Finally, none of this was necessary.  
15 It all could have been avoided by a properly  
16 functioning Free Exercise Clause. The courts  
17 are struggling to parse the exact contours of  
18 general applicability, while loving foster  
19 families remain excluded.

20 The text, history, and traditions of  
21 the Free Exercise Clause teach that when the  
22 government wants to prohibit a longstanding  
23 religious exercise, it needs a compelling reason  
24 to do so. That's a straightforward approach,  
25 and Philadelphia can't hope to pass it here.

1                   In our pluralistic society, this Court  
2 has repeatedly said that there should be room  
3 for those with different views. But Smith's  
4 narrow view of the Free Exercise Clause stands  
5 in the way of that sensible result.

6                   Under Smith, particularly as applied  
7 by the courts below, government officials have  
8 no incentive to reach sensible accommodations,  
9 knowing they will be shielded by the flimsiest  
10 claim to have a generally applicable law.

11                   Our pluralistic society is at its best  
12 when it has a Free Exercise Clause that protects  
13 free exercise, not just of those who agree with  
14 the officials in charge.

15                   Thank you.

16                   CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel. The case is submitted.

18                   (Whereupon, at 11:52 a.m., the case  
19 was submitted.)

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## Official - Subject to Final Review

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