



CITY OF PHILADELPHIA

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BY HAND DELIVERY AND ECF

The Honorable Petrese B. Tucker
United States District Court for the
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 10106

RE: *Fulton et al. v. City of Philadelphia et al., 18-CV-2075*

Dear Judge Tucker:

The City submits this letter as supplemental briefing based on new evidence adduced at the evidentiary hearing on Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction. This new evidence, adduced from CSS itself, indicates that CSS is engaging in additional conduct that violates the Establishment Clause, as well as violating contractual and legal guarantees that CSS will not discriminate on the basis of religion. As noted in our summation, this new evidence indicates that if the Court orders relief compelling the City to enter into a full contract with CSS, such relief would be problematic.

James Amato testified that CSS requires a "pastoral reference" from all prospective foster parents, and that CSS will not certify a prospective foster parent (or parents) without that pastoral reference. Mr. Amato testified that the pastoral reference letter does not have to be a letter from the Catholic priest or parish, but that the pastoral reference must show that the prospective foster parent engages in "active participation" in any faith.

A requirement that a prospective foster parent be an active participant in a faith community violates both the Establishment Clause as well as CSS' contractual and legal guarantees that it will not discriminate on the basis of religion. The Supreme Court has "repeatedly reaffirmed that neither a State nor the Federal Government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (footnote omitted); *see also*



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McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (holding that Establishment Clause’s prohibition upon governmental endorsement of religion requires that government maintain its neutrality both “between religion and religion, and between religion and nonreligion” such that Ten Commandments display on government property violated Establishment Clause because its purpose was to advance religion).

In *Torcaso*, the Supreme Court invalidated Maryland’s requirement that individuals who seek to become notaries public must affirm they believe in God. The Court held that religious tests or requirements violate the Establishment Clause. *Id.* CSS’ requirement of a pastoral reference letter here is no different. If prospective foster parents cannot provide evidence that they are members in good standing of a faith community, CSS refuses to certify them as a foster parents. Therefore, the pastoral reference requirement amounts to a religious test for prospective foster parents.

Even assuming CSS is a private actor, CSS cannot use its taxpayer-funded contract to provide City social services to run a program that expresses a clear preference for religion in this manner. *See Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126 (1982) (invalidating municipal ordinance that delegated veto power to churches regarding liquor license applications).

Further, in requiring that individuals be active participants in a faith community, CSS is discriminating against nonbelievers on the basis of religion. Pursuant to its contract with the City, CSS agreed not to discriminate in its provision of foster care services based on its religious beliefs. *See* Pltfs. Ex. 1-A (Dkt. 13-4) at 29-30 (§ 4.1(k)). In addition, anti-discrimination guarantees set forth in the contract, and in the City’s Fair Practice Ordinance, state law, and federal law as incorporated into the contract, require CSS not to discriminate in the provision of services on the basis of religion. *Id.* at 18-29 (§ 15.1). By requiring that individuals be members of a faith community, CSS is discriminating against individuals who are non-believers. *See Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 329 (E.D. Pa. 2016) (find that because, “[u]nder Title VII, atheists are entitled to the exact same protection as members of other religions,” employer that required employees to wear ID badge containing religious mission statement violated Title VII when it terminated atheist employee who taped over mission statement).

Respectfully,


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