

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SHARONELL FULTON, CECELIA PAUL,
TONI LYNN SIMMS-BUSCH, and
CATHOLIC SOCIAL SERVICES,

Plaintiffs,

v.

CITY OF PHILADELPHIA, DEPARTMENT
OF HUMAN SERVICES FOR THE CITY OF
PHILADELPHIA, and PHILADELPHIA
COMMISSION ON HUMAN RELATIONS,

Defendants.

Civil Action No. 18-2075

Assigned to the Honorable Judge Tucker

**PLAINTIFFS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

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Introduction

This matter comes before the Court on Plaintiffs' motion for a temporary restraining order or preliminary injunction. Because Plaintiffs meet all the criteria for a preliminary injunction and temporary restraining order, the motion should be granted for the reasons set forth below.

Plaintiffs are facing immediate and irreparable harm unless this Court provides relief. Due to the City's current intake closure, Catholic Social Services' foster care program is being bled dry. Without intake, more and more of Catholic's foster homes like Mrs. Paul's sit empty each month. By the end of this month, there will be approximately 35 available spots available for vulnerable children who desperately need safe homes. As Mr. James Amato testified, in a matter of weeks, Catholic will have to begin laying off staff and, in matter of months, Catholic will be forced to close its foster care program completely. Placements like those of Ms. Fulton's foster children will be disrupted, resulting in needless additional trauma for vulnerable children. What is more, because of the City's failure to clearly communicate its decision to grant *ad hoc* exceptions to Catholic's intake closure, an untold number of children have been, and will continue to be, denied placement in Catholic foster homes even when that placement would clearly be in their best interest.

Plaintiffs have also shown a likelihood of success on the merits on each of the claims raised in their motion. There is no dispute that Catholic's foster care work is a religious exercise, nor is there any question that being forced to provide written certifications endorsing a same-sex relationship as part of a home study would violate Catholic's sincere religious beliefs. Yet the City is using the threat of closing Catholic's foster care program to force Catholic to promise to provide such certifications if the situation ever arises. There is no dispute that the City's actions will put Catholic to an untenable choice: violate its religious beliefs by making endorsements

prohibited by its religious beliefs, or cease its religious exercise of providing foster care to Philadelphia children. Nor is there any dispute that providing foster care to children in Philadelphia is a religious exercise of the individual foster parents. This religious exercise has been cut off entirely for Mrs. Paul and will be made far more difficult, if not impossible, for all three individual foster parents if the City succeeds in closing Catholic's program. Accordingly, under Pennsylvania's Religious Freedom Protection Act, the City must show that it has a compelling government interest in closing Catholic's foster program based on a hypothetical situation that may arise in the future, and that the City's actions are the least restrictive means by which the City can achieve this compelling interest. The City cannot come close to satisfying either requirement.

The City has admitted that its newfound interest in forcing every foster agency to perform home studies and provide certifications for every prospective family is no greater than its interest in *any other* City policy. That it is certainly not a compelling interest. Nor could it be, as (1) the City has not written down such a requirement prior to this litigation or provided any training to employees or agencies about it, (2) the City has never attempted to enforce it against Catholic despite contracting with Catholic for the past 50 years, and (3) multiple witnesses testified that, in practice, it is common for foster care agencies to decline to provide home studies for a myriad of secular reasons.

Nor has the City shown that closing Catholic's foster care program is the least restrictive means available to meet its claimed interests. First, there is no claim that a same-sex couple has ever even requested this service from Catholic, much less been denied. Forcing Catholic to promise to meet an as-yet-hypothetical request is hardly the least restrictive way of ensuring that all qualified foster parents can become certified. Second, as the City's witnesses admitted,

nothing about the City's threatened closure of Catholic will change the number of agencies available to provide foster care certifications for same-sex couples. Regardless of what happens in this litigation, the same number of foster care agencies will provide foster care certifications to same-sex couples. Either Catholic's foster program will operate in accord with its religious beliefs or it will shut down—but in neither instance will this increase the number of foster care options available to same-sex couples. However, closing Catholic will *decrease* the overall number and variety of agencies serving foster families in Philadelphia, *decrease* the number of homes available for children in need, and *increase* the number of already-vulnerable children who will be shuffled into a group home or new placement. Nor is this shutdown needed to ensure that Catholic's religious beliefs do not deter potential foster parents. Not a single individual has complained about Catholic's policy of referring same-sex couples to another agency, nor was the City's expert witness able to provide any evidence that this policy causes actual harm to anyone. What is more, the City has shown that its other initiatives—like performing direct outreach and partnering with LGBTQ friendly organizations—are successful at bringing in new LGBTQ foster families. Shutting down Catholic hurts many people, but helps none. In such circumstances, RFPA forbids the government from imposing such unnecessary and harmful burdens on Catholic.

Catholic has similarly shown a likelihood of success on its Free Exercise and Establishment Clause claims. The City's newly-minted interests are anything but “neutral and generally applicable.” Not only is the City's claimed policy riddled with both individualized and categorical exceptions, but the interest in compliance has been enforced in a wholly discriminatory way—DHS only investigated faith-based organizations for compliance with its policy. First, by the plain terms of its contract and its letter to Catholic, the City imposes a

scheme of individualized and discretionary exemptions, and has denied such an exemption to Catholic. This fact alone is sufficient to subject the City's policy to strict scrutiny under the Free Exercise Clause. Second, the City's policies are not generally applicable because the City makes categorical exceptions for non-religious conduct, but not for Catholic's religious conduct. This, too, subjects the policy to strict scrutiny. And the City's policies are not neutral because the City has engaged in open and unabashed religious targeting.

The City's antagonistic and hostile comments regarding *which* religious leader Catholic should follow, along with the City's admonition that "it is not 100 years ago," make the true motive behind their actions clear. Even though Catholic's record is exemplary and it has never even been asked to certify same-sex couple applicants, the City disagrees with Catholic's religious beliefs and thus wants the agency to "get with the times." Such comments demonstrate that the City is not acting in a neutral way toward religion and is instead targeting religious beliefs it disfavors. Indeed, even by the third day of the hearing, the City admitted that it *still* had not bothered to ask most secular agencies about their policies, and had never told them that they need to provide home studies for everyone who asks. The City seems to have made up a very particular policy for a very particular religious target. Such egregious conduct is subject to strict scrutiny review under both Religion Clauses—a burden the City, again, cannot carry.

Catholic is also likely to succeed on its First Amendment retaliation claim. Catholic was engaged in protected speech and religious exercise, the government responded with actions designed to deter such speech and religious exercise, and those adverse actions were taken because of Catholic's protected speech and religious exercise. Therefore the City has retaliated against Catholic in violation of the First Amendment.

Catholic is also likely to succeed on its compelled speech claim under the First Amendment. Simply put, the City is trying to force Catholic to engage in speech—the certification of particular applicants—that Catholic does not want to engage in. Under the First Amendment, governments are not permitted to use their power to compel speech in this regard, and the City has offered nothing approaching a compelling interest to justify its use of compelled speech.

Catholic has also shown that the balance of equities and the public interest weigh strongly in support of an injunction. The only harm the City has put forward is wholly speculative. As Catholic has stated repeatedly throughout this litigation, not a single individual has complained about Catholic's policy, nor has the City shown that this policy has had any actual harmful impact on anyone. The only other harm the City points to is that if it sends children to Catholic and then closes Catholic's program, those children will have to be transferred and face additional trauma. This is a harm of the City's own making, and one that it can easily avoid for those children and the children who are already at Catholic, if the City just stops engaging in religious discrimination. These completely speculative and self-inflicted harms must be balanced against the real harm suffered by (1) Catholic if it were it forced to lay off employees and close its foster care program, (2) Ms. Fulton and all the other foster parents if they were they forced to lose the crucial help and support they have depended upon for years to enable their foster care work, and (3) the countless children currently being denied placement in a loving foster home due to the City's actions. The City's speculative harms—which apparently have never come to pass, even for a single person, over the past 50 years—cannot come close to outweighing the real, serious, and ongoing harms to actual children, foster families, and agencies that would occur if Catholic is shut down.

Finally, the City has no answer to the argument that remedying a violation of the First Amendment is always in the public interest, as it conceded this point at oral argument.

For all these reasons, Plaintiffs are entitled to a temporary restraining order and a preliminary injunction.

Proposed Findings of Fact

The parties.

1. Plaintiff Catholic Social Services is a “non-profit religious corporation under the auspices of the Archdiocese” whose religious ministry includes providing care for foster children.¹ As a religious organization, Catholic’s faith is infused in its work and its religious beliefs have repeatedly been made known to the City.²

2. Plaintiff Sharonell Fulton has served as a foster mother with Catholic for 26 years. She has fostered 40 children and is currently caring for two siblings who have been with her for nine months.³

3. Plaintiff Toni Simms-Busch is a foster mother who works with Catholic Social Services and who cares for two young children who are siblings. She has also previously served as a youth counselor, foster care agency worker, and child advocate social worker.⁴

4. Plaintiff Cecilia Paul is a foster mother who has worked with Catholic and has fostered children for 43 years. In that time, she has cared for 133 children and adopted six. But today her home sits empty because of the City’s referral freeze.⁵

¹ Pretrial Hearing Transcript (“Tr.”), Day 2, Ali, pg. 14; Tr., Day 2, Amato, pp. 35-37, 42; Decl. of James Amato, ¶ 3.

² Tr., Day 2, Amato, pp. 35-37; PX 15, pg. 26.

³ Tr., Day 1, Fulton, pp. 65-67.

⁴ Tr., Day 1, Simms-Busch, pp. 34-35.

⁵ Tr., Day 1, Paul, pp. 59-62.

5. Defendants City of Philadelphia (City) and its subsidiary agency the Department of Human Services (DHS) contract with private, independent organizations to provide foster care services in Philadelphia.

6. Defendant Commission on Human Relations is also a subsidiary of the City of Philadelphia that is tasked with enforcing the City's civil rights laws.⁶

Catholic's provision of foster care in Philadelphia.

7. The Catholic Church's care for at-risk children in Philadelphia dates back at least to 1797, when the Church "responded to the needs of children whose ... parents had died due to yellow fever."⁷ This program grew into what was known as the "orphanage movement" in the mid-Nineteenth Century.⁸

8. Catholic's formal foster care program can trace its roots back to 1917 when it was originally organized as the Catholic Children's Bureau.⁹ At that time, the City was not involved in the provision of foster care.¹⁰

9. "[T]he religious sisters who ran Catholic Children's Bureau had a deep network of relationships around the city with parishes and community groups."¹¹ When these sisters would learn of a child in need, "they would do a home evaluation."¹² In many cases, removal of the child from their current home would result from the voluntary decision by that child's parents that they were unable to care for the child.¹³

⁶ PX 9.

⁷ Tr., Day 2, Amato, pg. 37.

⁸ Tr., Day 2, Amato, pg. 38.

⁹ Tr., Day 2, Amato, pp. 35-36.

¹⁰ Tr., Day 2, Amato, pp. 40.

¹¹ Tr., Day 2, Amato, pg. 38.

¹² Tr., Day 2, Amato, pg. 38.

¹³ Tr., Day 2, Amato, pp. 38-39.

10. Starting in the late 1940s or early 1950s, the City began to work with private agencies like Catholic, but the private organizations still “had tremendous oversight of the intake function,” often advising the City of a voluntary placement after it had taken place.¹⁴ The City would then “move forward and support that” placement.¹⁵

11. By the 1970s, the foster child intake process had evolved dramatically. The intake of children was now overseen by the Department of Human Services.¹⁶

12. Around this same time, Catholic began to enter into a contract with the City to provide foster care homes to needy children. This contract has been renewed annually for more than 50 years,¹⁷ and under this contract Catholic has “provid[ed] foster care services consistent with [its] religious beliefs” for decades.¹⁸

13. Pursuant to the terms of this contract, Catholic is paid a *per diem* for each child it places in an already certified foster home.¹⁹ Even so, Catholic operates at a loss each year; across all its programs it “subsidized these services to the tune of 3.8 million dollars” in Archdiocesan private donations.²⁰

14. Catholic, like the City, views its commitment to foster care not as a business decision but as a “religious ministry” with a “deep commitment to the poor and the vulnerable in

¹⁴ Tr., Day 2, Amato, pp. 38-40.

¹⁵ Tr., Day 2, Amato, pg. 40.

¹⁶ *Id.*

¹⁷ Tr., Day 2, Amato, pg. 39; Decl. of James Amato, ¶ 3.

¹⁸ Tr., Day 2, Amato, pg. 121.

¹⁹ Tr., Day 3, Figueroa, pg. 11.

²⁰ Tr., Day 2, Amato, pg. 41.

our community.”²¹ As Commissioner Ali readily agreed, neither she nor Catholic is in this line of work for the money, and she views her own work as a “ministry” and a “calling.”²²

15. Catholic has also made clear to the City that it operates in accordance with its religious beliefs—a fact well known to those in the foster care community.²³ In fact, Catholic’s contract with the City includes both a diagram of Catholic’s hierarchy and its mission statement: “Catholic Social Services of the Archdiocese of Philadelphia continues the work of Jesus by affirming, assisting and advocating for individuals, families, and communities.”²⁴

16. The contract also makes clear that Catholic “is an independent contractor and shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City.”²⁵ Nor shall Catholic “in any way represent that” it is acting as a City employee, official, or agent.²⁶

17. Catholic’s social workers have lower caseloads than their counterparts at other agencies. This contributes to the quality of their care and the lower turnover among staff. It also has a direct and positive impact on the children and families that Catholic serves, allowing “foster parents [to] call at any time and get access to our social workers.”²⁷ This immediate access and 24/7 availability have been “a great source of support and hope” for Catholic’s foster parents.²⁸ As Ms. Fulton explained when talking about her experience working with Catholic,

²¹ Tr., Day 2, Amato, pg. 41.

²² Tr., Day 2, Ali, pp. 12-14,

²³ Tr., Day 1, Simms-Busch, pg. 48.

²⁴ Tr., Day 1, Ali, pp. 111-112; PX 15, pp. 15, 26.

²⁵ Tr., Day 3, Figueroa, pg. 55; PX 15, pg. 86.

²⁶ PX 15, pg. 86.

²⁷ Tr., Day 2, Amato, pg. 45-46.

²⁸ Tr., Day 2, Amato, pg. 46.

“[t]he support was there, it was like family. ... I was able to call any hour of the night. ... I always got the support that I needed, and the respect.”²⁹

18. Consistent witness testimony further confirmed that Catholic’s foster care program is one of the best in the City.³⁰

19. Not a single witness questioned the fact that the homes Catholic has certified, and that now sit empty, would be appropriate foster homes for children in need.³¹ Instead, the City’s own expert described Catholic’s foster parents as “entirely noble” and did not question their qualifications as foster parents.³²

20. Catholic’s provision of foster care is a religious exercise and part of Jesus’ call to care for the orphaned and widowed.³³ Mr. Amato confirmed that foster care is “absolutely” a “religious ministry of Catholic Social Services,” and explained further that “the Church’s care for orphans ... [is] so intrinsic to who we are and what we do”³⁴

21. Catholic also “regularly serve[s] proudly people of all faiths, all backgrounds, without regard to sexual identity....”³⁵

22. In performing this work, however, Catholic itself operates in accordance with the religious beliefs and practices of the Catholic Church.³⁶ This includes the belief “that a marriage is a sacred bond between a man and a woman.”³⁷

²⁹ Tr., Day 1, Fulton, Pg. 66.

³⁰ Tr., Day 1, Fulton, pg. 65-66; Tr., Day 1, Simms-Busch, pg. 49.

³¹ Tr., Day 3, Figueroa, pg. 98.

³² Tr., Day 3, Cervone, pg. 183.

³³ Tr., Day 2, Amato, pg. 37.

³⁴ Tr., Day 2, Amato, pg. 37.

³⁵ Tr., Day 2, Amato, pg. 44.

³⁶ Tr., Day 2, Amato, pg. 55.

³⁷ Tr., Day 2, Amato, pg. 44.

23. To continue operating in accordance with its sincerely held religious beliefs, Catholic cannot provide written endorsements certifying a same-sex relationship.³⁸ It is Catholic's sincere belief that the written certification pursuant to a home study is an "endorsement" of the relationship of the prospective foster parents.³⁹

24. Accordingly, "to provide a written certification endorsing a same-sex marriage" as part of the foster parent certification process would "violate the religious exercise of Catholic Social Services."⁴⁰ Nor can Catholic somehow certify same-sex foster families while avoiding this issue, as "the home study is a written evaluation" of the "relationships" of individuals in the potential foster home is required by state law.⁴¹

25. Indeed, no witness has questioned whether this inability to certify same-sex couples is a decision Catholic made based on its sincere religious beliefs and is tied directly to the Catholic Church's position on same-sex marriage.⁴²

26. A home study certification for a same-sex couple has never been requested of Catholic, so there has never been a need to refer a same-sex couple elsewhere.⁴³

27. Catholic would perform a home study for a single LGBTQ individual without objection, as their religious exercise conflicts *only* with the written endorsement and certification of same-sex relationships.⁴⁴ And, for the same religious reasons, Catholic would not perform

³⁸ Tr., Day 2, Amato, pg. 4ed4.

³⁹ Tr., Day 2, Amato, pg. 121.

⁴⁰ Tr., Day 2, Amato, pp. 42-43, 44; Tr., Day 3, Figueroa, pg. 3.

⁴¹ Tr., Day 2, Amato, pp. 43, 121-122; 55 Pa. Code § 3700.64 ("The FFCA shall consider the following when assessing the ability of applicants for approval as foster parents . . . Existing family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships, especially as they might affect a foster child.").

⁴² Tr., Day 3, Figueroa, pp. 70-71.

⁴³ Tr., Day 2, Amato, pg. 44

⁴⁴ Tr., Day 2, Amato, pg. 64.

home studies for unmarried couples of *any* sexual orientation, and would instead refer them to another foster agency.⁴⁵

Foster parents working with Catholic will be harmed.

28. As Mrs. Fulton testified, she works with Catholic because she has always felt supported by Catholic's foster care social workers and she shares Catholic's religious values.⁴⁶ She further described her relationship with Catholic as "like family" and explained that the loss of support from Catholic would be devastating.⁴⁷

29. Likewise, Ms. Simms-Busch chose to work with Catholic as a foster mother because she knew that Catholic "would share the same foundational beliefs" and provide excellent support for the children she fostered.⁴⁸ She explained that she felt "backed into a corner" by the City's actions because she and her foster children have strong relationships with Catholic's social workers and would be negatively impacted without Catholic's continued support.⁴⁹

30. Ms. Paul also testified that she chose to work with Catholic because of their commitment to the children in their care and their shared beliefs.⁵⁰ She indicated that the loss of Catholic's support "would be very, very harmful" for both her and the children she cares for, and that she "couldn't imagine starting from scratch and fostering children without" Catholic's support.⁵¹

⁴⁵ Tr., Day 2, Amato, pg. 94.

⁴⁶ Tr., Day 1, Fulton, pg. 65-66.

⁴⁷ Tr., Day 1, Fulton, pg. 66-69.

⁴⁸ Tr., Day 1, Simms-Busch, pp. 48-49.

⁴⁹ Tr., Day 1, Simms-Busch, pp. 52-53.

⁵⁰ Tr., Day 1, Paul, pg. 61.

⁵¹ Tr., Day 1, Paul, pp. 63-64; Decl. of Cecelia Paul, ¶ 2.

The current foster care system in Philadelphia.

31. Today, every foster care provider in the City must contract with DHS to provide foster care in Philadelphia. As Mr. Amato agreed, “you would be breaking the law if you tried to provide foster-care services without a contract.”⁵²

32. All children who are placed in general foster care today come through the City’s general intake process are referred to private foster care agencies by the City’s Central Referral Unit (CRU).⁵³ The CRU coordinates with Community Umbrella Agencies (CUAs) to find the most appropriate foster agency to serve that child.⁵⁴

33. The foster care agency receiving this child is then responsible for finding an appropriate foster family based on the information provided by CRU.⁵⁵ When such a placement is made in “an emergency situation, then DHS can move the child immediately,” without a court order.⁵⁶ The foster care agency receiving this placement will then work with the child’s foster parent(s) to ensure the child gets the love and support he or she needs.⁵⁷

34. In addition to seeking to place children back in their own communities whenever possible, DHS has also made it a priority to decrease the number of children placed in group homes and institutional care (together, congregate care).⁵⁸ This is because children placed in permanent foster care homes or in kinship care receive more attention, love and support from their foster parents. Placements in foster care are thus preferable to placement in congregate care for

⁵² Tr., Day 2, Amato, pg. 40.

⁶⁴ Tr., Day 1, Ali, pp. 82–84.

⁵⁴ Tr., Day 2, Figueroa, pg. 156.

⁵⁵ Tr., Day 1, Ali, pg. 88.

⁵⁶ Tr., Day 1, Ali, pg. 94.

⁵⁷ Tr., Day 1, Ali, pp. 83-84.

⁵⁸ Tr., Day 2, Figueroa, pg. 158.

most children.⁵⁹ State law similarly requires that placements be made in the most family-like setting possible.⁶⁰

35. When these agencies care for foster children, the agencies are paid on a *per diem* basis; that is, for each child they place and supervise, they get a fixed daily fee.⁶¹ They are thus incentivized to find prospective foster families and place children in their homes. Other than this *per diem* payment for children in their care, foster agencies receive no additional money from the City. Nor is there any provision in the Contract providing for payment to agencies for other activities, such as recruiting or certifying foster families.⁶²

36. Commissioner Figueroa also agreed that different foster agencies can target their recruiting on different segments of the population, and can “have a focus on a cultural or particular community.”⁶³ Nor is there any other provision in the Contract providing for payment to agencies for other activities such as recruiting or certification. Concilio, for example, primarily recruits from the Latino community,⁶⁴ yet this focused recruiting does not violate the contractual requirement that all agencies recruit new, prospective foster parents.

37. Once a placement is made, these foster care agencies work closely with the foster family they have certified, checking in on the child and making sure the whole family is doing well.⁶⁵ As the City observed, it is important that a foster parent feel “confident and comfortable” working with the social workers at these agencies.⁶⁶ For this same reason, “a good fit” between

⁵⁹ Tr., Day 1, Ali, pp. 79-80.

⁶⁰ PX 17, pg. 45.

⁶¹ Tr., Day 3, Figueroa, pg. 11.

⁶² *See, generally*, PX 15.

⁶³ Tr., Day 3, Figueroa, pg. 29.

⁶⁴ Tr., Day 3, Figueroa, pp. 29-30.

⁶⁵ Tr., Day 1, Fulton, pg. 66.

⁶⁶ Tr., Day 1, Ali, pp. 97-98.

the foster parent and the agency they work with is crucial—something the City goes out of its way to encourage.⁶⁷ What is more, Pennsylvania law requires that agencies actually consider the ability of applicants to work in partnership with the agency when certifying a foster family.⁶⁸

38. Sometimes, however, it is necessary to move a child on an emergency basis, or sometimes a long-term foster parent just needs a break for a few days. In these situations, foster care agencies will often turn to a respite foster parent for help. Respite foster parents “are licensed foster parents who are willing to provide temporary care for a child or a youth.”⁶⁹

39. Because state law and DHS generally view placement in foster homes as preferable to group homes and institutional placements for most children, DHS places a priority on making sure that there are sufficient foster homes available for children in need.⁷⁰ In other words, the more foster homes available, the better.⁷¹

40. Unfortunately, however, over the past several years there has been a consistent shortage of foster homes for children in need.⁷² According to Commissioner Figueroa, about 250 of the 700 children currently living in congregate care could be placed in a foster home,⁷³ and the City is working hard to reduce the number of children, especially older teens, living in congregate care.⁷⁴ This was a theme further echoed by Ms. Simms-Busch⁷⁵ and Mr. James

⁶⁷ Tr., Day 1, Ali, pg. 102; Tr., Day 3, Figueroa, pg. 22.

⁶⁸ Tr., Day 1, Ali, pg. 105.

⁶⁹ Tr., Day 1, Ali, pg. 94.

⁷⁰ Tr., Day 3, Figueroa, pg. 97.

⁷¹ Tr., Day 3, Figueroa, pg. 97.

⁷² Tr., Day 2, Amato, pg. 46.

⁷³ PX 19.

⁷⁴ Tr., Day 2, Figueroa, pg. 158; Tr., Day 3, Figueroa, pg. 93.

⁷⁵ Tr., Day 1, Simms-Busch, pg. 36.

Amato, who noted, “absolutely there is a shortage of foster families for children, particularly adolescent children.”⁷⁶

41. The City is not equipped to identify nearly enough new foster homes for the children in its care. Thus, in order to meet this need, the City works with private agencies who identify, train, certify, and supervise foster families who stand ready to accept placements of children in need.⁷⁷

42. These agencies are authorized by the State to supervise children in foster care placements. When identifying potential foster homes, these agencies apply minimum requirements provided by the state and their own judgment and evaluation of prospective homes.⁷⁸ As the City’s website acknowledges, “each agency has slightly different requirements, specialties, and training programs.”⁷⁹

43. Moreover, certain agencies will, at times, focus on or specialize in reaching out to particular groups, such as the Hispanic community or the LGBTQ community.⁸⁰ One example of this diversity outreach is the partnership established between the Mayor’s Office of LGBTQ affairs and two foster care agencies. This partnership was designed to “encourag[e] recruitment of . . . parents to care for LGBTQ youths,” as well as to recruit LGBTQ foster parents.⁸¹

44. While the City sometimes works with particular foster care agencies to help recruit foster parents, the home study evaluation and certification of new foster parents is done

⁷⁶ Tr., Day 2, Amato, pp. 46-47.

⁷⁷ Tr., Day 1, Ali, pg. 86.

⁷⁸ PX 17, pg. 7.

⁷⁹ PX 14, pg. 3.

⁸⁰ Tr., Day 3, Figueroa, pp. 28-29, 93.

⁸¹ Tr., Day 1, Ali, pg. 100.

exclusively by the private foster agencies based on minimum criteria provided by the State.⁸² The City has nothing to do with the home study process.⁸³

45. One important component of the foster parent certification process is the home study, which involves “a thorough review” by the foster agency that takes place in the prospective foster parent’s home.⁸⁴ This interview process includes an assessment of, among other things, the mental and emotional adjustment of the prospective foster family, the foster family’s supportive community ties, their relationships to each other and other family members, and their attitudes and expectations for foster children.⁸⁵ State law also requires that a foster agency provide a clearance for all individuals living in the home.⁸⁶

46. The certification that results from this process therefore includes a written endorsement of, among other things, the relationships between all the adults living in the household, culminating in a family being approved for foster care.⁸⁷

47. Even after the foster agencies makes this certification, DHS has an opportunity to oppose or prevent placement with certain families based on factors like the family’s prior case history with DHS and other similar criteria—criteria that are not part of the foster care contract or required by state law.⁸⁸

⁸² Tr., Day 3, Figueroa, pg. 51.

⁸³ Tr., Day 1, Ali, pp. 86–88.

⁸⁴ Tr., Day 2, Amato, pg. 91.

⁸⁵ Tr., Day 1, Ali, pg. 106.

⁸⁶ Tr., Day 2, Amato, pg. 91; *see* PX 17, pg. 7; 55 Pa. Code § 3700.64 (“The FFCA shall consider the following when assessing the ability of applicants for approval as foster parents . . . Existing family relationships, attitudes and expectations regarding the applicant’s own children and parent/child relationships, especially as they might affect a foster child.”).

⁸⁷ Tr., Day 2, Amato, pp. 42-43.

⁸⁸ Tr., Day 1, Ali, pg. 89.

The “must certify couples” policy.

48. As part of this litigation, DHS has claimed that it would be improper for any agency to decline to perform a home study under any circumstances. But there is no evidence suggesting that this policy had been written down *anywhere* or communicated to *anyone* prior to this litigation, nor is it enforced consistently and even-handedly. In fact, the City’s own testimony contradicts such a sweeping rule. Deputy Commissioner Ali testified that agencies could decline to perform a home study if families wanted to foster children with special behavioral health issues or specialized medical issues outside of the agency’s expertise; in such a case, that family would be “referred to a different agency.”⁸⁹

49. Not a single DHS official was able to produce or even cite to any written evidence of their newly minted “must perform all home studies” rule prior to the start of litigation. Nor could they state with certainty that a written copy of this policy ever existed—the only written document these officials could point to was the contract between DHS and Catholic, but even then, no one could point to or reference the specific contract provision that supported this assertion.⁹⁰

50. Indeed, the alleged basis for this newly-minted requirement provides no support for the City’s claims.⁹¹ The City argues that Contract Provision 3.21 prevents Catholic from refusing to certify a same-sex couple. The City has admitted that this provision, however, only

⁸⁹ Tr., Day 1, Ali, pg. 126-129.

⁹⁰ Tr., Day 2, Ali, pp. 18-20; Tr., Day 3, Figueroa, pp. 48-49, 70.

⁹¹ PX 13, pg. 2

applies to referrals from DHS directly.⁹² It does not include the situation in which a foster parent approaches Catholic directly; this would be considered a “self-referral.”⁹³

51. In comparison to this complete lack of proof, every piece of documentary evidence presented on this issue made clear that private foster care agencies *are* allowed to decline to perform home studies for prospective foster parents in certain circumstances and *can* add additional requirements to the minimum qualifications provided by state law.⁹⁴

52. Neither Mr. Amato nor Ms. Simms-Busch, who have a combined 50+ years of experience working in all aspects of foster care, had heard of a policy requiring agencies to perform all home studies for any family upon request.⁹⁵

53. Ms. Simms-Busch further testified to the fact that, when she served as a foster care worker, she would send potential foster parents to other agencies for any number of reasons.⁹⁶ This was most often done when Ms. Simms-Busch believed a different agency would better meet the needs of the prospective foster parent: “if our agency was not able to cope with that child or the family was unable to cope with it and needed specialized – and that child needed specialized services, we would refer out to a different agency.”⁹⁷ And in each of these cases, she testified that directing applicants to another agency was, in fact, quite common, as “referrals were done all the time.”⁹⁸

54. One example of a permissible referral is for geographic proximity. Sometimes a foster family is geographically far from either the foster agency or the agency’s prospective

⁹² Tr., Day 1, Ali, pg. 115.

⁹³ Tr., Day 1, Simms-Busch, pg. 44-45.

⁹⁴ Tr., Day 3, Figueroa, pp. 58-59; PX 14, 16, 17,

⁹⁵ Tr., Day 2, Amato, pp. 34, 53; Tr., Day 1, Simms-Busch, pp. 34-36.

⁹⁶ Tr., Day 1, Simms-Busch, pg. 43.

⁹⁷ Tr., Day 1, Simms-Busch, pg. 44.

⁹⁸ Tr., Day 1, Simms-Busch, pg. 44.

foster children. In such cases, agencies have directed foster families to a more geographically convenient agency.⁹⁹

55. Similarly, referrals are frequently made when a foster parent seeks to foster a child who has serious medical needs that cannot be met by a general foster care agency,¹⁰⁰ a foster parent asks to foster a child with serious behavioral health issues that are similarly beyond the purview of general foster care,¹⁰¹ and when the language needs of a potential foster family cannot be met by a particular agency.¹⁰²

56. In addition, some foster agencies target or recruit heavily from specific populations, including, the Latino community.¹⁰³ Similarly, some agencies “specialize in servicing kin care” or other specific populations, and advertise that they exclusively serve that population.¹⁰⁴

57. Some agencies in Pennsylvania place Native American foster children, but they only do so with families of Native American descent.¹⁰⁵ Ms. Simms-Busch testified that she looked into the possibility of fostering or adopting a Native American child, and she learned that the agencies in Philadelphia would turn her away if she did so, because she could not prove her Native American lineage.¹⁰⁶

58. The City has itself “targeted particular areas” for recruitment of specific groups of prospective foster parents to increase the number of available foster homes. For example, the

⁹⁹ Tr., Day 2, Amato, pg. 50; Tr., Day 1, Simms-Busch, pp. 43-45.

¹⁰⁰ Tr., Day 2, Amato, pg. 50; Tr., Day 1, Simms-Busch, pp. 43-45.

¹⁰¹ Tr., Day 2, Amato, pg. 50; Tr., Day 1, Ali, pp. 91-92, 125-126.

¹⁰² Tr., Day 1, Ali, pg. 117.

¹⁰³ Tr., Day 1, Ali, pg. 133.

¹⁰⁴ Tr., Day 2, Amato, pp. 52-53; PX 18.

¹⁰⁵ Decl. of James Amato, Attachment R, pp. 8-9.

¹⁰⁶ Tr., Day 1, Simms-Busch, pp. 45-46.

City has recently sought to identify and recruit parents interested in taking on older foster children.¹⁰⁷

59. The diverse array of foster care agencies with different specialties, and the ways in which foster agencies will provide prospective foster families with information about agencies that can better meet the family's needs, makes clear that the City's new interest in forcing all agencies to perform every requested home study cannot be particularly strong.

60. As Commissioner Ali readily admitted, DHS's "must perform all home studies" rule is no more or less important than any other DHS policy, and DHS's interest in enforcing this policy is certainly *not* compelling.¹⁰⁸

Foster care as a public accommodation.

61. The City's other justification for penalizing Catholic and the individual plaintiffs is a contract provision referencing the City's Fair Practices Ordinance. The only portion of the Fair Practices ordinance which the City claims is at issue here is the requirement that public accommodations not discriminate on the basis of sexual orientation.¹⁰⁹ But, not a single witness was able to provide an example of a situation in which, prior to this litigation, foster care was actually described or treated as a public accommodation.¹¹⁰

62. Commissioner Figueroa was unable to recall even a single instance in which she or her staff trained DHS employees on public accommodation laws in the foster care context.¹¹¹ Indeed, she was not able to remember a single discussion with *anyone* regarding whether DHS was a public accommodation in the foster care context, nor could she recall doing "anything [as

¹⁰⁷ Tr., Day 3, Figueroa, pg. 93.

¹⁰⁸ Tr., Day 2, Ali, pg. 17.

¹⁰⁹ PX 9, pg. 1.

¹¹⁰ Tr., Day 2, Ali, pg. 20; Tr., Day 2, Amato, pp. 59–60; Tr., Day 3, Figueroa, pg. 38.

¹¹¹ Tr., Day 3, Figueroa, pp. 34-35.

Commissioner] to make sure that people at DHS follow the fair practice ordinance when doing foster care work.”¹¹²

63. Similarly, neither Deputy Commissioner Ali nor Commissioner Figueroa have ever referred to foster care as a public accommodation.¹¹³

64. When placing children with a particular foster agency, DHS will consider, among other things, the race and language of a child, his or her disabilities, and his or her special medical or behavioral needs.¹¹⁴ Were DHS’s foster care services a public accommodation, consideration of these factors would violate the City’s fair practices ordinance, which makes it “unlawful ... to deny or interfere with the public accommodations opportunities of an individual or otherwise discriminate based on his or her race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, disability, marital status, familial status, or domestic or sexual violence victim status.”¹¹⁵

65. Commissioner Figueroa also acknowledged that DHS received TANF funding from the federal government and that she certifies compliance with TANF requirements, including the independence of religious organizations that work with the City and the ability of those organizations to maintain their religious character.¹¹⁶

¹¹² Tr., Day 3, Figueroa, pp. 34-35.

¹¹³ Tr., Day 2, Ali, pg. 21; Tr., Day 3, Figueroa, pg. 46.

¹¹⁴ Tr., Day 3, Figueroa, pp. 35-38, 43; Tr., Day 1, Simms-Busch, pg. 43.

¹¹⁵ Philadelphia Code § 9-1106.

¹¹⁶ Tr., Day 3, Figueroa, pp. 117, 119.

The City learns of Catholic’s religious beliefs.

66. On March 9, 2018, Commissioner Figueroa received a call from the Philadelphia Inquirer asking whether she knew that two agencies, Catholic and Bethany Christian Services, “would not certify same-sex couples.”¹¹⁷

67. Commissioner Figueroa and First Deputy Commissioner Shapiro then personally “called a number of our faith-based institutions and [they] started by calling Bethany Christian Services as well as Catholic Social Services to ask them their position regarding serving same-sex couples and serving their homes.”¹¹⁸ Of the faith-based agencies contacted, Commissioner Figueroa determined that only Catholic and Bethany had this policy.

68. Commissioner Figueroa also later clarified that she *only* contacted faith-based agencies when assessing whether agencies would perform home studies for same-sex couples—although she did call one non-religious organization because she was friends with the CEO and was curious about their practices.¹¹⁹ She has not called any other non-religious foster agencies to inquire about their practices.¹²⁰

69. When Mr. Amato told the City that Catholic could not certify and endorse a same-sex relationship because of its religious beliefs about same-sex marriage, he was told, “you are discriminating.”¹²¹

70. As Mr. Amato further testified, the City also made clear that this issue had been brought to the attention of the “highest levels of government in the City.”¹²² Commissioner

¹¹⁷ Tr., Day 2, Figueroa, pg. 164-165.

¹¹⁸ Tr., Day 2, Figueroa, pp. 164-165; *see also* Tr., Day 2, Amato, pg. 55.

¹¹⁹ Tr., Day 3, Figueroa, pp. 103-104.

¹²⁰ Tr., Day 3, Figueroa, pp. 103-104.

¹²¹ Tr., Day 2, Amato, pg. 55; Tr., Day 2, Figueroa, pg. 165.

¹²² Tr., Day 2, Amato, pg. 56.

Figueroa clarified that this was a reference to the managing director's office and to her conversation with the Mayor prior to meeting with Catholic.¹²³

The City threatens Catholic unless it changes its religious beliefs.

71. Roughly a week after calling Mr. Amato, Commissioner Figueroa and DHS senior management meet with Catholic's senior management at City Hall.¹²⁴

72. During this meeting, Commissioner Figueroa told Catholic that DHS had "great concerns" about Catholic's practice.¹²⁵ Commissioner Figueroa then told Catholic that it "would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church," *not* Archbishop Chaput, the Archbishop of the City of Philadelphia.¹²⁶

73. When Mr. Amato noted that Catholic had been serving the City for over 100 years, Commissioner Figueroa told him that "times have changed," and "attitudes have changed."¹²⁷ The message was clear: the City believed that Catholic's beliefs also needed to change, as it was "not 100 years ago."¹²⁸

The City closes intake.

74. Just minutes after leaving this meeting, Mr. Amato received a call from Deputy Commissioner Ali stating that Catholic's intake had been closed.¹²⁹ This meant that Catholic would no longer receive referrals for the placement of any new foster children with its foster

¹²³ Tr., Day 3, Figueroa, pp. 106-110.

¹²⁴ Tr., Day 2, Amato, pg. 56.

¹²⁵ Tr., Day 2, Amato, pg. 56; Tr., Day 3, Figueroa, pp. 106-107.

¹²⁶ Tr., Day 2, Amato, pg. 56; Tr., Day 3, Figueroa, pg. 105.

¹²⁷ Tr., Day 2, Amato, pg. 57.

¹²⁸ Tr., Day 2, Amato, pg. 57; Tr., Day 3, Figueroa, pp. 104-105.

¹²⁹ Tr., Day 1, Ali, pg. 96; Tr., Day 2, Amato, 57-58.

families.¹³⁰ On this call, Commissioner Ali did not mention any exceptions to the intake closure—the stoppage appeared to be absolute.¹³¹

75. Commissioner Figueroa and Deputy Commissioner Ali also made clear that the intake closure was due to Catholic’s “religious decision” not to certify same-sex couples.¹³²

76. On March 23, Mr. Amato learned of a situation in which a sibling of a current Catholic foster child needed to be placed in a foster home. Because of the strong interest in keeping families together, it was determined that placing this child with Catholic’s foster family would be in the child’s best interest. Accordingly, and despite the intake closure, NET CUA placed this child with one of Catholic’s foster families to reunite these siblings.¹³³ Mr. Amato then notified Commissioner Figueroa of this placement.¹³⁴

77. Deputy Commissioner Ali soon learned of this placement from Commissioner Figueroa.¹³⁵

78. Three days after Mr. Amato alerted DHS of this placement, Deputy Commissioner Ali emailed all CUA leadership further restricting placement of children with Catholic. In her March 26, 2018, email, Commissioner Ali stated in no uncertain terms that intake was closed for Bethany and Catholic. The subject line of the email was “Intake Closure For Bethany and Catholic Social Services Foster-Care Program.” She further asked that all CUAs refrain from making any new referrals to either agency.¹³⁶ The next day, Catholic then received a follow up email to the same recipients from Staci Boyd at DHS stating that no more

¹³⁰ Tr., Day 2, Amato, pp. 58-59.

¹³¹ Tr., Day 2, Amato, pp. 58-59.

¹³² Tr., Day 3, Figueroa, pg. 70; Tr., Day 2, Ali, pp. 15-16.

¹³³ Tr., Day 2, Amato, pp. 62-63; PX 8.

¹³⁴ PX 8.

¹³⁵ Tr., Day 2, pp. 4-5.

¹³⁶ Tr., Day 2, Ali, pg. 8; PX 3.

referrals be sent to Bethany or Catholic. Staci Boyd also required every CUA to reply to this new email confirming that they had “shared this information with those that could potentially generate, approve, or submit a referral to” Bethany and Catholic and would not allow referrals.¹³⁷

79. Commissioner Figueroa and Deputy Commissioner Ali never communicated a policy of permitting exceptions to this no referral policy to CRU staff, the CUA leadership, or other lower-level DHS officials who would, on a daily basis, be forced to make decisions regarding where to place foster children.¹³⁸ Instead, these officials were simply told that intake was cut off for Catholic and instructed to make sure their staff, “particularly staff with the responsibility to identify placement,” understand.¹³⁹

80. Indeed, at the hearing, Commissioner Ali admitted that she *still* had not told her staff about any policy allowing exceptions for the best interest of the child.¹⁴⁰ She further admitted that DHS staff had not notified her of any such situations since this litigation commenced.¹⁴¹ Commissioner Figueroa also testified that she didn’t know whether she would be notified of all situations in which a referral to Catholic would be in the child’s best interest.¹⁴²

81. DHS leadership said that any exceptions they do grant will be based on their own discretion, on a case-by-case basis, and they do not “have a specific [written] policy” to guide their decision.¹⁴³

¹³⁷ PX 3.

¹³⁸ Tr., Day 2, Ali, pp. 29-31.

¹³⁹ Tr., Day 1, Ali, pp. 142-143.

¹⁴⁰ Tr., Day 2, Ali, pg. 11.

¹⁴¹ Tr., Day 2, Ali, pg. 30.

¹⁴² Tr., Day 3, Figueroa, pg. 136.

¹⁴³ Tr., Day 3, Figueroa, pg. 133.

Plaintiffs seek a reasonable accommodation through negotiations with the City.

82. After learning of this freeze, Catholic sought a reasonable accommodation from the City so that it could continue its important work for children in need without violating its religious beliefs. Catholic, through its attorneys, specifically requested a follow up meeting with DHS to try to find some “middle ground,” but the City’s answer “was clear and crisp ... the answer was no, there is no reason to have a meeting. Either do the home studies or we will be transitioning you gradually out of foster care.”¹⁴⁴

83. After several more letters were exchanged between Catholic and the City throughout March and April, it soon became clear to Catholic that an agreement was unlikely.

84. This conclusion further solidified when the City sent a May 7, 2018 letter threatening Catholic to “respond within ten days ... to avoid the issuance of a subpoena” and an investigation by the Human Relations Commission in a May 7, 2018 letter.¹⁴⁵

85. In another letter also dated May 7, 2018, the City’s Law Department stated that nothing obligates the City to continue to send any referrals to Catholic, but that it believes Catholic is obligated to certify same-sex couples, and that any further contracts with CSS will be explicit in this regard.¹⁴⁶ Faced with unlawful exclusion from providing foster care services, and seeing no other options, Catholic filed a complaint nine days later, on May 16, 2018.¹⁴⁷

Doe Foster Child #1.

86. One example of the harm that has resulted from the City’s intake closure is the unnecessary and prolonged displacement of Doe Foster Child #1.

¹⁴⁴ Tr., Day 2, Amato, pp. 64-65.

¹⁴⁵ PX 9; Tr., Day 2, Amato, pp. 64-65.

¹⁴⁶ PX 13.

¹⁴⁷ Tr., Day 2, Amato, pg. 67.

87. Doe Foster Child #1 was initially placed with Doe Foster Mother #1 in October 2016.¹⁴⁸ Over the next few months, Doe Foster Child #1 was diagnosed with autism and began to bond with Doe Foster Mother #1's family.¹⁴⁹

88. In early 2018, Doe Foster Child #1's social worker asked Doe Foster Mother #1 if she was willing to adopt. While she expressed interest, given her age, she felt comfortable doing this only if one of her adult children would co-sign with her to make sure the child would always have a home.¹⁵⁰ And, "[b]ecause of different events going on in the lives of my adult children," Doe Foster Mother #1 "knew that this would take some time."¹⁵¹

89. When Doe Foster Mother #1 was not able to immediately make this commitment, Doe Foster Child #1 was removed from her home and placed in the home of a family ready to adopt.¹⁵²

90. Soon after Doe Foster Child #1 was transferred, Doe Foster Mother #1 received a call from Doe Foster Child #1's social worker. The social worker told Doe Foster Mother #1 that an emergency had arisen at the home where Doe Child #1 had been living and asked Doe Foster Mother #1 if she would be willing to take the child back. Her immediate response was, "bring my son home."¹⁵³ Doe Foster Mother #1 also spoke with her adult son and learned that he would be prepared to co-sign on Doe Foster Child #1's adoption.¹⁵⁴

91. That same day, however, Doe Foster Mother #1 learned that Doe Child #1 would not be placed back in her home. After inquiring further, she learned that DHS would not approve

¹⁴⁸ Decl. of Doe Foster Mother #1, ¶ 5.

¹⁴⁹ Decl. of Doe Foster Mother #1, ¶ 6.

¹⁵⁰ Decl. of Doe Foster Mother #1, ¶¶ 8, 9.

¹⁵¹ Decl. of Doe Foster Mother #1, ¶¶ 8.

¹⁵² Decl. of Doe Foster Mother #1, ¶¶ 9, 10.

¹⁵³ Decl. of Doe Foster Mother #1, ¶ 11.

¹⁵⁴ Decl. of Doe Foster Mother #1, ¶ 13.

the transfer because “Catholic Social Services is going through a case right now and DHS is not approving him to come back here.”¹⁵⁵ Doe Foster Mother #1 “was devastated when [she] heard this news.”¹⁵⁶ At the time this denial was made, DHS had not identified any other available foster home for Doe Foster Child #1, meaning that Doe Child #1 needed an “emergency placement” and was thus at risk of remaining overnight in the DHS office.¹⁵⁷

92. Instead, Doe Foster Child #1 was placed in a respite home with a different foster agency. Doe Foster Mother #1 also learned that this placement was not in the child’s best interest as he was having trouble eating, performing bodily functions, and was not getting the autism therapy he needed. She told social workers multiple times that “the best thing for Doe Foster Child #1 was to come back to our family.”¹⁵⁸

93. Had DHS leadership told staff to refer children to Catholic when doing so would be in the child’s best interest, placement with Doe Foster Mother #1 could have been approved *immediately* on the evening of May 25. Instead, Ali’s staff failed to notify her of this situation; she only learned of any details because Catholic happened to become aware of them and brought them to her attention.¹⁵⁹

94. Doe Foster Child #1 could have been returned to Doe Foster Mother #1 on May 25, but this transfer did not actually occur until June 12.¹⁶⁰ During this time, Doe Child #1

¹⁵⁵ Decl. of Doe Foster Mother #1, ¶ 12.

¹⁵⁶ Decl. of Doe Foster Mother #1, ¶ 12; Tr., Day 2, Amato, pp. 68-70.

¹⁵⁷ Tr., Day 2, Amato, pp. 69-71.

¹⁵⁸ Decl. of Doe Foster Mother #1, ¶¶ 14, 15.

¹⁵⁹ Tr., Day 2, Ali, pp. 8-9.

¹⁶⁰ Tr., Day 2, Amato, pg. 86.

underwent additional trauma as the result of an unnecessary temporary placement and the loss of therapy for his autism that his former foster mother would have ensured he received.¹⁶¹

95. Countless children who would normally be placed with Catholic are being turned away and placed in homes with other foster agencies as a result of the City's intake closure. Some of these children have previously lived in Catholic's foster homes, or have siblings currently residing in one of Catholic's foster homes.¹⁶²

96. But DHS still has not done anything to change the policy that resulted in Doe Foster Child #1, and there are likely untold other potential foster care referrals that were prevented or delayed as a result of the City's closure of intake and its coinciding failure to make clear that referrals in the best interest of the child should still be made to Catholic.¹⁶³

The City offers a new contract that would make explicit the requirement that Catholic violate its religious beliefs.

97. The City has made clear that, despite a shortage of homes and a need for more foster families, it plans to close one of the best foster agencies in the City unless that agency promises in advance that it will violate its religious beliefs if a hypothetical situation ever arises.

98. To this end, the City has made clear that any future contract will explicitly require that Catholic certify same-sex couples in violation of its sincere religious beliefs.¹⁶⁴

99. The City has also offered Catholic two unacceptable contracts for the upcoming contract year. First, the City has offered Catholic a foster care contract identical to the old contract but with additional "explicit" language saying that Catholic must certify same-sex couples in order to continue its religious ministry of serving Philadelphia's most vulnerable

¹⁶¹ Decl. of Doe Foster Mother #1, ¶¶ 14, 15.

¹⁶² Tr., Day 2, Ali, pg. 27.

¹⁶³ Tr., Day 2, Amato, pg. 116.

¹⁶⁴ Tr., Day 2, Amato, pp. 106-108.

children.¹⁶⁵ The City reiterated this position in more recent contract discussion on June 28, 2018, explaining that for Catholic to receive a full contract, Catholic must agree not only to be willing to perform home studies for anyone who requests a home study, but also to ensure that the outcome of a home study would be an endorsement and certification of the relationship of a same-sex couple.¹⁶⁶ The City made clear that Catholic's religious beliefs would not be an acceptable basis for Catholic's unwillingness to provide a written certification regarding a couple's relationship and to approve that couple for foster care.¹⁶⁷

100. Alternatively, the City has offered Catholic a "contract" that would prevent any new referrals from being sent to Catholic. As discussed below, this would "require Catholic to begin laying off staff next month and to close its foster care program altogether within a matter of months."¹⁶⁸ This new contract is no solution at all, as it is simply the standard process by which the City winds down foster care programs, and it will result in irreparable harm both to Catholic's foster care program, as well as foster children and foster families.

101. The City's proposed contract also means that award-winning foster parents like Mrs. Paul will remain unable to care for children, and it will prevent Mrs. Paul, Ms. Fulton, and Ms. Simms-Busch from being able to receive support from their preferred choice of a foster agency

102. Absent additional referrals, Catholic will also have to start laying off employees in mid-July and the entire program will close in a matter of months.¹⁶⁹

¹⁶⁵ Tr., Day 2, Amato, pp. 105-106, 120-121.

¹⁶⁶ Supp. Decl. of James Amato, ¶ 5.

¹⁶⁷ Supp. Decl. of James Amato, ¶ 5.

¹⁶⁸ Supp. Decl. of James Amato, ¶ 5; Tr., Day 2, Amato, pp. 104, 109-110, 112, 120.

¹⁶⁹ Tr., Day 2, Amato, pp. 76-78.

103. Were Catholic to close, none of its foster families who trust and rely on Catholic social workers would be able to remain with Catholic.

104. What is more, if any parents who work with Catholic felt they were unable to continue without the support they receive from Catholic, the children they foster would “have to be removed from [their families]” and placed with new families, and those foster parents will be lost to the City.¹⁷⁰ The city acknowledges such a disruption “could possibly cause trauma for those children.”¹⁷¹

105. Prior to the referral freeze, Catholic had on average four of five vacancies in its foster homes at any given time and received about nine referrals a month from DHS.¹⁷² By the end of June, Catholic will have roughly 35 homes sitting empty if the referral freeze continues.¹⁷³

An injunction will maintain the status quo ante.

106. In past years, Catholic and DHS have continued to operate under the prior year’s contract for months beyond the June 30th deadline without any problem until a new contract is signed.¹⁷⁴

107. Were this Court to enter an injunction maintaining the status quo ante—in which Catholic received regular referrals from the CRU and the CUAs—Catholic and the City would be able to continue operating during the pendency of this litigation under the prior year’s contract as they have done in the past.

¹⁷⁰ Tr., Day 2, Ali, pp. 23-24.

¹⁷¹ Tr., Day 2, Ali, pp. 23-24; Tr., Day 3, Figueroa, pg. 72.

¹⁷² Tr., Day 2, Amato, pp. 76-77.

¹⁷³ Tr., Day 2, Amato, pg. 76.

¹⁷⁴ Tr., Day 2, Amato, pp. 77-78; Tr., Day 3, Figueroa, pg. 139; Amato Decl., Attachment I.

It will be difficult if not impossible to reopen the program.

108. Once Catholic's foster care program is closed, the loss of staff and the loss of relationships with long time foster parents "would take years" to rebuild, if possible at all. This loss of expertise would mean that Catholic would lose the ability to provide the excellent commitment and service it has for generations and would like not be able to rebuild its program.¹⁷⁵

Any harm to prospective same-sex foster parents is purely hypothetical and speculative, as there has not been a single complaint.

109. No one is aware of a single complaint made against Catholic for performing foster services consistent with its religious beliefs, nor has anyone put forward a single individual who has felt targeted or discouraged from foster care because of Catholic's policies.¹⁷⁶

110. Even the expert witness put on by the City confirmed that he was unsure what, or indeed if any, harm might result from Catholic's policy because he had seen no evidence of any harm and the harm was entirely speculative.¹⁷⁷

111. Commissioner Figueroa testified that same-sex couples will have the same number of foster care options whether or not Catholic receives judicial relief.¹⁷⁸ She and Deputy Commissioner Ali also confirmed that they were "not aware of any" person who was unable to become a foster parent because of Catholic's religious beliefs.¹⁷⁹

¹⁷⁵ Tr., Day 2, Amato, pg. 79.

¹⁷⁶ Tr., Day 1, Ali, pg. 114; Tr., Day 3, Figueroa, pp. 18-19, 71.

¹⁷⁷ Tr., Day 3, Cervone, pp. 184-186.

¹⁷⁸ Tr., Day 3, Figueroa, pp. 17-18.

¹⁷⁹ Tr., Day 3, Figueroa, pp. 18-19; Tr., Day 1, Ali, pg. 114.

Proposed Conclusions of Law

112. Plaintiffs have satisfied each of the four requirements for a preliminary injunction. This Court should therefore enjoin the City’s discriminatory decision to both close intake and threaten not to renew Catholic’s contract based solely on Catholic’s stated unwillingness to endorse a same-sex relationship in a hypothetical situation that has never even arisen.

I. Preliminary Injunction Standard.

113. To obtain a preliminary injunction, a plaintiff must show “(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured [] if relief is not granted.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017), *as amended* (June 26, 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)). “In addition, the district court . . . should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.” *Id.* “[T]he strength of the plaintiff’s showing with respect to one [factor] may affect what will suffice with respect to another.” *Marxe v. Jackson*, 833 F.2d 1121, 1128 (3d Cir. 1987) (citations omitted). Where there is significant imminent harm at stake, such as in this case, an even lesser showing is required for a claim on the merits. *See Reilly*, 858 F.3d at 179. “Courts within this Circuit have noted the similarities between a TRO and a preliminary injunction, and have applied the same standards in determining their application.” *Harper v. Corizon*, No. CIV.A. 14-639, 2015 WL 158798, at *3 (E.D. Pa. Jan. 12, 2015).

114. “[T]he underlying *purpose* of a preliminary injunction is to ensure that the parties do not change the underlying facts of a case in an ‘irreparably harmful’ way before a court has the opportunity to decide a case on the merits.” *City of Philadelphia v. Sessions*, 280 F. Supp. 3d

579, 655 (E.D. Pa. 2017), *appeal docketed*, No. 18-1103 (3d Cir. Jan 18, 2018) (emphasis in original). Thus, “many courts have observed that the purpose of the preliminary injunction is this preservation of the status quo.” *Id.*; *see Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994) (“A primary purpose of a preliminary injunction is maintenance of the status quo until a decision on the merits of a case is rendered.”). “[S]tatus quo” refers to “the last, peaceable, noncontested status of the parties.” *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (citation omitted).

115. Here, the last peaceable, noncontested status quo is that which had prevailed for over 50 years prior to DHS’s actions on March 15, 2018. That is, the parties continued to work together to provide foster homes for children in need throughout the City. In addition, Catholic would receive regular referrals from DHS under its contract with the City but would be able to refer couples to another foster care agency if providing a home study for that couple would violate its sincere religious beliefs.

116. A preliminary injunction is necessary to preserve this status quo, so that Catholic is not forced to close its foster care program before it can obtain final relief on the merits. As described above, and as not contested by the City, the City’s closure of intake will force Catholic to close in a matter of months, in addition to the many harms it will visit on foster children and foster families. An injunction is necessary to prevent these harms and prevent Catholic’s foster program from closure during the case due to the City’s actions that are at issue in this case.

II. Plaintiffs have a reasonable probability of success on the merits.

117. Plaintiffs have demonstrated a reasonable probability of prevailing on the merits of their claims. Plaintiffs seek preliminary injunctive relief under the Pennsylvania Religious Freedom Act, the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause.

As show by the testimony and exhibits presented to the Court, Catholic’s provision of foster care services is part of its sincere religious exercise, the City does not have a compelling interest in requiring every agency to perform every requested home study and does not enforce this policy in a consistent way, the City’s conduct has specifically targeted Catholic and other religious organizations to the exclusion of secular organizations, and the City has made inappropriate and denigrating comments to Catholic about its religious beliefs. In addition, the City is plainly trying to force Catholic to engage in speech—mandating that it must certify particular applicants, regardless of Catholic’s own beliefs. The City’s actions are thus illegal and unconstitutional several times over, giving Catholic a strong probability of success on the merits.

A. Plaintiffs are likely to prevail on their claim under the Pennsylvania Religious Freedom Act (RFPA).

118. The Pennsylvania Religious Freedom Protection Act (RFPA), was enacted to ensure that “neither State nor local government should substantially burden the free exercise of religion without compelling justification.” 71 Pa. Stat. Ann. § 2402. The statute states that “an agency shall not substantially burden a person’s free exercise of religion, including any burden which results from a rule of general applicability.” 71 Pa. Stat. Ann. § 2404. This application to laws of general applicability means that RFPA provides more protection for religious exercise than the federal Free Exercise Clause. *See Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015) (making this point under parallel federal statute). Defendants are agencies within the meaning of the statute, which applies to a “political subdivision, municipal authority or any other local government instrumentality authorized by law.” 71 Pa. Stat. Ann. § 2403. Defendants’ actions,

which are taken under color of law, are governed by RFPA. *See id.*¹⁸⁰ For all the reasons stated below, Plaintiffs are likely to prevail on their RFPA claim.

1. Plaintiffs are engaged in religious exercise.

119. Both the individual plaintiffs and Catholic are engaged in religious exercise within the meaning of RFPA. Under RFPA, courts have recognized that “Acts of charity are central to Christian worship.” *Chosen 300 Ministries, Inc. v. City of Phila.*, No. CIV.A. 12-3159, 2012 WL 3235317, at *17 (E.D. Pa. Aug. 9, 2012).

120. Caring for foster children is a fundamental religious exercise for Plaintiffs. It is a “religious ministry,” and, as Mr. Amato testified, “care of at-risk children” is “intrinsic to who we are and what we do.”¹⁸¹ Through this religious ministry, Catholic “continues the work of Jesus by affirming, assisting, and advocating for individuals, families, and communities.”¹⁸² Catholic’s long history of engaging in the care of foster and other at-risk children, its desire to provide support above and beyond what is required, and its practice of subsidizing this work with over 3.8 million in private donations are evidence of its dedication and religious commitment to this work.¹⁸³ This Catholic faith and teaching are not incidental to this work; they provide the motivation, inspiration, and framework for it.¹⁸⁴ To violate Catholic’s religious beliefs and practices in the provision of this work would be inimical to the purpose of this work. *See id.*

121. Catholic shares the Catholic Church’s religious beliefs regarding marriage.¹⁸⁵ As a result, it cannot certify or endorse same-sex marriages.¹⁸⁶ But part of the home study process

¹⁸⁰ *See also* Tr., Day 3, Figueroa 114 (acknowledging obligations under RFPA).

¹⁸¹ Tr., Day 2, Amato, pg. 37.

¹⁸² PX15 at 15.

¹⁸³ Tr., Day 2, Amato, pp. 37-39, 41; Dkt. 13-3 (Amato Decl.) at 2.

¹⁸⁴ *See, e.g.*, Tr. Day 2, Amato, pp. 35-39, 41, 44; Dkt. 13-3 at 2; PX15 at 15.

¹⁸⁵ Tr., Day 2, Amato, pg. 44.

for foster parents requires an evaluation and endorsement of the relationships among the adults in the home, including marriages.¹⁸⁷ The process also involves consideration and certification of the prospective parents' ability to work in partnership with the agency.¹⁸⁸ To provide such certifications would be a violation of Catholic's religious exercise.¹⁸⁹

122. The individual plaintiffs also engage in serving foster children as an exercise of their faith.¹⁹⁰ As Ms. Fulton testified, "it was my faith that led me to" become a foster parent, and she chose to work with Catholic because, as a Catholic, "I share the same values."¹⁹¹ Mrs. Paul also testified that it was a "gift from God" that led her to love and care for foster children, and that she chose to work with Catholic because of "the beliefs that I believe in and they do too."¹⁹² Ms. Simms-Busch likewise testified that she became a foster parents because "God placed it in my heart as a calling," and that she chose to work with Catholic because of its "core beliefs" and that it was the agency "I felt called to."¹⁹³ All three have given enormously of their time and resources to serve children in need.

123. What is more, no one has expressed any doubt as to the sincerity of Catholic's religious beliefs or questioned whether Catholic's provision of foster care is a religious exercise. Mr. Amato's uncontested testimony showed that the provision of foster care is part of the religious mission of Catholic, and the City's counsel made clear during questioning that he was

¹⁸⁶ Tr., Day 2, Amato, pg. 44.

¹⁸⁷ Tr., Day 2, Amato, pp. 42-43; *see also* 55 Pa. Code § 3700.64.

¹⁸⁸ Tr., Day 2, Amato, pg. 22; *see also* 55 Pa. Code § 3700.64.

¹⁸⁹ Tr., Day 2, Amato, pp. 42-43, 44; Tr., Day 3, Figueroa, pg. 3.

¹⁹⁰ Tr., Day 1, Fulton, pg. 65; Tr., Day 1, Simms-Busch, pg. 48; Tr., Day 1, Paul, pg. 61.

¹⁹¹ Tr., Day 1, Fulton, pg. 65.

¹⁹² Tr., Day 1, Paul, pg. 61.

¹⁹³ Tr., Day 1, Simms-Busch, pg. 48-49, 57.

“not challenging the sincerity of the religious belief or the doctrine you [Mr. Amato] reference regarding same-sex couples.”¹⁹⁴

124. All this is more than sufficient to establish that providing foster care services, and providing them consistently with Catholic religious beliefs, is a religious exercise within the meaning of RFPA.

2. Catholic’s religious exercise is substantially burdened by the City’s attempt to exclude it from the provision of foster care.

125. The City’s actions—both the current intake closure and its threatened contract nonrenewal—substantially burden Plaintiffs’ religious exercise. RFPA defines a substantial burden as a government action

which does any of the following: (1) Significantly constrains or inhibits conduct or expression mandated by a person’s sincerely held religious beliefs. (2) Significantly curtails a person’s ability to express adherence to the person’s religious faith. (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person’s religion. (4) Compels conduct or expression which violates a specific tenet of a person’s religious faith.

71 Pa. Stat. Ann. § 2403. Although Plaintiffs need only establish one, all four types of burden are present here.

126. The City’s actions “[s]ignificantly constrain[] or inhibit[] conduct or expression mandated by [Catholic’s] religious beliefs” and “[d]en[y] [Catholic] a reasonable opportunity to engage in activities which are fundamental to the [agency’s] religion” because they force Catholic to choose between its religious beliefs about marriage and its religious exercise of serving vulnerable children. The government cannot lawfully use its threats to close Catholic’s foster program to pressure Catholic into violating its religious beliefs.

¹⁹⁴ Tr., Day 2, Amato, pg. 90.

127. The Supreme Court has long held that both “indirect” penalties and “outright prohibitions” can be a substantial burden on religious exercise. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). An example of an “indirect” burden is *Sherbert v. Verner*, in which a state denied unemployment compensation to a Seventh-day Adventist who declined to accept work on her Sabbath. 374 U.S. 398, 399-401 (1963). The Supreme Court held that this imposed a substantial burden on her religious exercise because it forced her “to choose” between either “abandoning one of the precepts of her religion” or else “forfeiting benefits.” *Id.* at 403-04.

128. The Supreme Court arrived at the same conclusion when interpreting a federal statute that mirrors Pennsylvania’s RFPA.¹⁹⁵ In *Holt v. Hobbs*, a prison required a Muslim prisoner to either shave the beard he grew for religious reasons or else face disciplinary action. 135 S. Ct. 853, 862 (2015). The Supreme Court unanimously held that “put[ting] [the prisoner] to this choice” “easily satisfied” the substantial burden test. *Id.* at 862-63.

129. Here, the City is using its threats to shut down Catholic’s foster program as a way to pressure Catholic to violate its religious beliefs. The City says it is willing to allow Catholic to continue its exercise of religion by caring for foster children, but only if Catholic is willing to violate its sincere religious belief in the sanctity of marriage as a bond between one man and one woman. Catholic, however, cannot violate its religious beliefs about marriage. This thus not only constrains, but completely prevents, Catholic from carrying out its religious exercise of providing support for foster children.

¹⁹⁵ *Brown v. City of Pittsburgh*, 586 F.3d 263, 287-88 (3d Cir. 2009) (citing federal constitutional and statutory precedent when discussing RFPA and noting that “the purpose of RFPA was to restore, under the auspices of state law, the free exercise jurisprudence that held sway under *Sherbert v. Verner*, 374 U.S. 398 (1963)”).

130. In a similar situation, this court noted that sometimes a regulation “does not simply constrain plaintiffs” charitable activity, “it terminates that activity all together.” *Chosen 300 Ministries*, 2012 WL 3235317, at *18. When this happens, “[t]here can be no doubt that [this] regulation . . . ‘significantly constrains or inhibits’ that activity.” *Id.* In such cases, that regulation “is a substantial burden on plaintiffs’ free exercise of religion.” *Id.*

131. As Mr. Amato testified, if the City does not reopen Catholic’s foster program intake, Catholic will need to start laying off employees in July and will close its foster care program altogether in a matter of months.¹⁹⁶ City officials admit that, without a contract with the City of Philadelphia, there is no way to provide foster services to Philadelphia children.¹⁹⁷ The City’s actions thus constitute a de facto and deliberate prohibition on Catholic’s religious exercise.

132. The City’s actions likewise “significantly curtail[]” Catholic’s “ability to express adherence” to its faith and attempt to “[c]ompel[] conduct or expression which violates a specific tenet of [Catholic’s] religious faith.” The City has ceased all referrals to Catholic and made clear that referrals will not resume unless Catholic stops “expressing adherence” to its faith by changing the way it handles home studies.¹⁹⁸ The City thus also seeks to “[c]ompel[] conduct or expression” by requiring written certifications contrary to Catholic’s religious beliefs.

133. The City has also threatened to make future contracts impossible. The City has stated that the Contract must be carried out “in a manner that is consistent with our conception of

¹⁹⁶ Tr., Day 2, Amato, pp. 77–78.

¹⁹⁷ Tr., Day 2, Amato, pg. 40.

¹⁹⁸ See PX 13 (May 7 letter from City).

equality,”¹⁹⁹ that prospective LGBT foster parents may not be referred to another agency, and that “any further contracts with CSS will be explicit in this regard.”²⁰⁰ This action puts Catholic to an untenable choice: either it violates its faith by ceasing foster care services, or it violates its faith by engaging in conduct and expression contrary to Catholic teaching.²⁰¹ This constitutes a substantial burden on its religious exercise under any of the four statutory standards.

134. The City is also burdening the religious exercise of the individual foster parents. Each of them depends upon Catholic to provide the assistance they need to continue their religious exercise of fostering children in need. If Catholic were to lose its ability to contract, they would be left without critical support.²⁰² They would also be inhibited, and perhaps entirely prevented, from affiliating with an agency whose religious beliefs they share and thus from engaging in their own religious exercise.²⁰³ Losing the support which allows them to serve as foster parents, and to serve children with serious needs, would “[s]ignificantly constrain[] or inhibit[]” their ability to serve as foster mothers, which is “conduct or expression mandated by [their] sincerely held religious beliefs.” 71 Pa. Stat. Ann. § 2403. The City’s current action already “[d]enies [Mrs. Paul] a reasonable opportunity to engage in activities which are

¹⁹⁹ Catholic has argued and will continue to argue that the written certifications and home studies provided to prospective foster families are not “services” as that term is defined in the Contract. However, even if written certifications were “Services,” nothing in the contract or in state law requires Catholic to recruit and certify all potential applicants. *See, generally*, PX 9, PX 15. The City has not claimed that Catholic has failed in any duty to recruit and certify. And indeed, the City itself has recognized that targeted recruiting is permissible.

²⁰⁰ PX 13.

²⁰¹ Tr., Day 2, Amato, pp. 37, 90.

²⁰² Tr., Day 1, Simms-Busch, pp. 52–53; Tr., Day 1, Fulton, pg. 67-69; Tr., Day 1, Paul, pp. 63–64.

²⁰³ Tr., Day 1, Simms-Busch, pg. 53; Tr., Day 1, Paul, pp. 63–64.

fundamental to [her] religion”—she is currently unable to care for foster children, something she has done as a religious exercise for 46 years.²⁰⁴

135. Nor does the City suggest that these are not sincere religious beliefs—instead, the City agrees that it is important for foster parents like Ms. Paul, Ms. Fulton, and Ms. Simms-Busch to choose the agency they want to work with.²⁰⁵ For all these reasons, the City’s actions are imposing a substantial burden on Plaintiffs’ religious exercise.

3. Philadelphia does not have a compelling interest in its actions and has not used the least restrictive means available to further its interest.

136. Where a substantial burden on religious exercise exists, the burden shifts to the agency to prove its actions are justified because they are “[i]n furtherance of a compelling interest of the agency” and those actions are “[t]he least restrictive means of furthering the compelling interest.” 71 Pa. Stat. Ann. § 2404. The City cannot show that its burden on the Plaintiffs’ religious exercise is supported by a compelling interest.

137. A compelling interest is an interest “of the highest order,” of the type that would justify the most serious government infringements upon constitutional rights. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). It is not enough simply to name an important interest; the burden is on “the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). Here, the City has failed to advance such an interest. The City claims three compelling interests: first, an interest in its “must perform all home studies” policy. Second, it claims an interest in enforcing its Fair Practices Ordinance. Third, it claims an interest

²⁰⁴ Tr., Day 1, Paul, pg. 62.

²⁰⁵ Tr., Day 2, Ali, pg. 32.

in maximizing the number of available foster families. But none of those interests is compelling here.

138. *Interest in the “must certify couples” policy.* First, the City has no compelling interest in its newly minted “must certify couples” policy. No complaint has ever been lodged against Catholic for its referral practice, and no same-sex couple has ever approached Catholic seeking a written certification to become a foster parent. In fact, Deputy Commissioner Ali testified that she “cannot say” whether the interest in this policy is “strong or weak,” and conceded that DHS’s interest in this is “no stronger or no weaker than enforcing any other policy.”²⁰⁶ This admission alone dooms any claim of a compelling interest.

139. Moreover, the City cannot have a compelling interest in a policy it has not written down or even communicated to Catholic prior to this litigation. The City has never, in at least 50 years under this contract, prohibited Catholic from referring foster families to another foster agency. Nor has it sought to construe the contract to require Catholic to affirmatively commit in advance to violate its religious beliefs as a condition of partnering with the City. Foster agencies are not obligated to provide home studies to the general public under the terms of the contract, and agencies refer families to other agencies for a host of reasons. Where the City has invented a new obligation that it has not enforced for decades, and that it does not enforce in other secular referral contexts, the City cannot come close to demonstrating a compelling interest. The City cannot have a compelling interest in a policy it has not written down or even communicated to Catholic prior to this litigation. The City has never, in at least 50 years under this contract, prohibited Catholic from referring foster families to another foster agency. Nor has it sought to construe the contract to require Catholic to affirmatively commit in advance to violate its

²⁰⁶ Tr., Day 2, Ali, pg. 17.

religious beliefs as a condition of partnering with the City. Foster agencies are not obligated to provide home studies to the general public under the terms of the contract, and agencies refer families to other agencies for a host of reasons. Where the City has invented a new obligation that it has not enforced for decades, and that it does not enforce in other secular referral contexts, the City cannot come close to demonstrating a compelling interest.

140. *Interest in the Fair Practices Ordinance.* The City also claims a compelling interest in enforcing its Fair Practices Ordinance. But that ordinance does not apply to Catholic’s provision of home studies. First, under both the Ordinance and the Contract, the provision only applies if Catholic is a “public accommodation.”²⁰⁷ Charities run by the Archdiocese of Philadelphia have previously been found not to be public accommodations under Pennsylvania law. *Roman Catholic Archdiocese of Philadelphia v. Com., Pennsylvania Human Relations Comm’n*, 119 Pa. Cmwlth. 445, 449 (1988). And testimony demonstrated that foster care services have never been considered to be public accommodations in Philadelphia. No witness was able to recall a time when foster care was considered a public accommodation, and the City’s witnesses admitted that they had never described it that way nor trained staff on their responsibilities as a public accommodation.²⁰⁸ Mr. Amato had never heard of foster care nor the provision of home studies described as a public accommodation prior to the current conflict.²⁰⁹

141. Home studies and certifications are not a good or service made generally available to the public—their very purpose is to be selective in a way that a hotel room or a bus pass or a restaurant meal is not. State law mandates a number of subjective determinations which must be made as part of a home study, such as an applicant’s “stable mental and emotional adjustment,”

²⁰⁷ PX 9, pg. 1; Philadelphia Code § 9-1106; PX 15, pp. 97-98.

²⁰⁸ Tr., Day 2, Ali, pg. 20-21; Tr., Day 2, Amato, pp. 59–60; Tr., Day 3, Figueroa, pg. 34-35, 38.

²⁰⁹ TR., Day 2, Amato, pp. 59-60.

including in some cases a “psychological evaluation,” a prospective family’s “[s]upportive community ties,” certifications approving “[e]xisting family relationships, attitudes and expectations,” and the “[a]bility of the applicant to work in partnership with” the foster care agency.²¹⁰

142. The requirements of the Fair Practices ordinance are also flatly inconsistent with the way that state law requires home studies to be performed, and thus cannot be read to apply to that function. As discussed above, state law mandates that home studies include subjective determinations based upon a foster parent’s marital relationship, familial relationships, community ties, and mental health, while the Fair Practices Ordinance prohibits discrimination on the basis of “marital status”; “familial status”; “domestic or sexual violence victim status,” including individuals in danger due to abuse or stalking; or “disability,” which includes “mental impairment that substantially limits one or more of his or her major life activities.”²¹¹ While the Fair Practices ordinance was included in Catholic’s contract, that contract includes a number of services other than foster care, and the contract includes many boilerplate City contracting provisions which do not apply to foster care, such as professional liability insurance for nursing homes, prohibitions on investment in Northern Ireland, and compliance with the Prison Rape Elimination Act of 2003.²¹² Both the history of the foster care system and the facial inconsistency between state law requirements for home studies and the Fair Practices Ordinance make clear that home studies are not a public accommodation. Therefore the City cannot have a

²¹⁰ 55 Pa. Code § 3700.64.

²¹¹ Philadelphia Code §§ 9-1102(d), 9-1102(f), 9-1106.

²¹² PX 15 pp. 88 (nursing home insurance), 102 (Northern Ireland), 45 (Prison Rape Elimination Act).

compelling interest in applying the Fair Practices Ordinance to Catholic's provision of foster care.

143. *Interest in increasing the number of foster families.* Finally, the City might claim it has a compelling interest in maximizing the number of foster families. But not only do its actions here fail to advance that interest, they actually undercut it. If the City prevails, there will be one less agency to certify foster families in Philadelphia, and the City may lose foster parents like Ms. Fulton and Mrs. Paul. Commissioner Figueroa conceded that, if the City prevails in this action, the result will be that the City has the exact same number of foster agencies available to certify LGBT couples.²¹³ Indeed, one thing we know for sure is that the current referral freeze has already decreased the number of available foster homes below what it could be, so that 35 places will be available and unfilled by the end of June.²¹⁴ The City's counterintuitive fear that allowing Catholic's participation will instead lead to fewer foster families is entirely speculative. As even the City's expert witness—who has signed briefs as an amicus and potential intervenor in the case claiming to have an interest in the outcome—admitted,²¹⁵ there is no evidence that anyone has *actually* been harmed by Catholic's religious exercise. The best their expert could say is that Catholic's decision to refer same-sex couples elsewhere *may* be harmful, but he didn't "actually really know" one way or the other.²¹⁶ But when the City attempts to justify imposing a substantial burden on First Amendment rights, the mere speculative possibility of harm will not suffice to carry the government's constitutional burden. In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court made clear that the

²¹³ Tr., Day 3, Figueroa, pp. 17-18.

²¹⁴ Tr., Day 2, Amato, pg. 76.

²¹⁵ Tr., Day 3, Cervone, pg. 166.

²¹⁶ Tr., Day 3, Cervone, pp. 184-186.

government cannot demonstrate a compelling interest in enforcing a policy where it relies on, at best, “ambiguous proof.” 564 U.S. 786, 799–800 (2011). There, the Supreme Court struck down a California ban on violent video games, holding that the State could not justify its intrusion on the first amendment rights of video game makers based on studies that show “at best some correlation between exposure to violent entertainment and minuscule real-world effects.” *Id.* The City here has not even shown that. Instead, the entire harm the City alleges—that gay foster parents will be discouraged from fostering—is purely hypothetical. The City’s counterintuitive fear that allowing Catholic’s participation will instead lead to fewer foster families is entirely speculative. As even the City’s expert witness—who has signed briefs as an amicus and potential intervenor in the case claiming to have an interest in the outcome—admitted,²¹⁷ there is no evidence that anyone has *actually* been harmed by Catholic’s religious exercise. The best their expert could say is that Catholic’s decision to refer same-sex couples elsewhere *may* be harmful, but he didn’t “actually really know” one way or the other.²¹⁸ But when the City attempts to justify imposing a substantial burden on First Amendment rights, the mere speculative possibility of harm will not suffice to carry the government’s constitutional burden. In *Brown v. Entertainment Merchants Ass’n*, the Supreme Court made clear that the government cannot demonstrate a compelling interest in enforcing a policy where it relies on, at best, “ambiguous proof.” 564 U.S. 786, 799–800 (2011). There, the Supreme Court struck down a California ban on violent video games, holding that the State could not justify its intrusion on the first amendment rights of video game makers based on studies that show “at best some correlation between exposure to violent entertainment and minuscule real-world effects.” *Id.* The City here

²¹⁷ Tr., Day 3, Cervone, pg. 166.

²¹⁸ Tr., Day 3, Cervone, pp. 184-186.

has not even shown that. Instead, the entire harm the City alleges—that gay foster parents will be discouraged from fostering—is purely hypothetical.

144. Yet right now, the City is not just discouraging, but entirely preventing foster parents like Mrs. Paul from welcoming foster children into their homes. By June 30, Catholic will have 35 places available for foster children, homes the City will not fill.²¹⁹ The City has no compelling interest in penalizing Mrs. Paul, Ms. Fulton, or Ms. Simms-Busch, and it has not attempted to make an argument such an interest exists against the individual foster families.

145. Worse yet, the City refuses to fill Mrs. Paul’s home and dozens of others despite the City’s admitted interest in more foster homes and the need to move 250 children currently in congregate care into family homes.²²⁰ Pennsylvania’s Children in Foster Care Act states that foster children have the right to be provided with the “ability to live in the least restrictive, most family-like setting that is safe, healthy and comfortable and meets the child’s needs.” 11 Pa. Stat. Ann. § 2633(4). Government agencies, such as DHS, are also required to cooperate “with other providers” to “ensure the appropriateness . . . of referrals.” 55 Pa. Code § 3130.31. The City can have no compelling interest in inflicting this type of harm on children contrary to its own express interests and state law.

146. *Failure to use least restrictive means.* Moreover, aside from not having a compelling interest, the City has not employed the least restrictive means of accomplishing its interest. Pennsylvania courts scrutinize the least restrictive means portion of the statute carefully, recognizing that plaintiffs have a “clear right to the least intrusive means” to satisfy a government interest, and requiring exploration on the feasibility of various alternatives. *Yoder v.*

²¹⁹ Tr., Day 2, Amato, pg. 76.

²²⁰ PX 19.

Sugar Grove Area Sewer Auth., No. 1956 C.D. 2015, 2016 WL 3127351, at *8 (Pa. Commw. Ct. June 3, 2016). First, the City's chosen means—stopping referrals even to existing foster families—does not further its alleged compelling interests, nor any interest at all. There is no congruence between what happens with *future* home studies and foster placements to existing families who have already been approved and begun serving based upon *past* home studies. And as described above, refusing to fill empty homes actually undermines the City's interest in maximizing the available homes and its obligations under state law. This punitive action would fail even rational basis scrutiny.

147. Second, Catholic has identified a workable less restrictive alternative: permitting it to direct applicants it would not be able to certify to other agencies, thus maximizing the number of foster parents available, the number of foster care agencies serving children in need, and the number of foster children receiving homes. This alternative would permit Catholic to serve foster children and would allow the individual foster mothers to receive new foster children into their homes, without letting their real-life service get derailed by the City's hypothetical harms. Indeed, the absence of even a single complaint against Catholic underscores the ongoing effectiveness of the existing range of agencies at meeting the needs of all prospective foster parents. What is more, the City's direct outreach to and recruitment of LGBTQ and LGBTQ-affirming foster families shows that the City has less restrictive means available to ensure that it is recruiting a diverse array of foster parents and that prospective LGBTQ foster parents are encouraged to become foster parents.

4. Catholic does not forfeit its religious beliefs by entering into a government contract.

148. It is no answer for the City to say that it has discretion to renew or not renew Catholic's contract and thus Catholic can show no religious exercise that is burdened. The

government is still the government—and still subject to the First Amendment—even when it enforces its policies through contracts. The caselaw is clear: “despite a government employer’s general authority to terminate, or not-renew, an at-will government contract, the First Amendment is violated if the employer would not have taken that action but for the contractor’s exercise of his protected [First Amendment] rights.” *Guillemard-Ginorio v. Contreras-Gomez*, 585 F.3d 508, 527 (1st Cir. 2009) (citing *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 685-686 (1996)). The Supreme Court and the Third Circuit have applied this reasoning to the termination or non-renewal of contracts with independent contractors and refused to limit it to the government employment context. *See Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 684 (1996) (applying First Amendment protections to independent contractor whose annually renewed contract was terminated); *see also Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006) (independent contractor at state mental hospital alleged that his contract was not renewed in retaliation for criticizing the state of care of the hospital; citing *Umbehr*, the court held that his status as a contractor did not prevent the consideration of his First Amendment claim.).

149. Even when a government is exercising discretion in contracting, “we recognize the right of independent government contractors not to be terminated for exercising their First Amendment rights.” *Umbehr*, 518 U.S. at 686. Here, the City has made clear that its decision to cut off intake and threaten nonrenewal of Catholic’s contract is based solely on Catholic’s religious beliefs. This is an abuse of the City’s contracting discretion. To hold otherwise would be to grant the city “unfettered power to reduce [Catholic’s] First Amendment rights by simply imposing a licensing requirement”—a power which, according to the Supreme Court, state actors do not possess. *Nat’l Inst. of Family and Life Advocates v. Becerra*, No. 16–1140, 2018 WL 3116336, at *11 (U.S. June 26, 2018).

B. Plaintiffs are likely to prevail on their Free Exercise and Establishment Clause Claims.

1. Defendants' actions are neither neutral nor generally applicable.

150. The Plaintiffs are also likely to prevail on their Free Exercise Claims (Counts II, III, IV, VII) because the City's actions violate the Free Exercise Clause.

151. Under Supreme Court precedent, a law burdening religious exercise can sometimes avoid strict scrutiny under the Free Exercise Clause if it is neutral and generally applicable. *Employment Division v. Smith*, 494 U.S. 872, 880 (1990). But if the law is “not neutral or not of general application,” it is subject to strict scrutiny; that is, it is unconstitutional unless it is narrowly tailored to advance a compelling governmental interest. *Lukumi*, 508 U.S. at 546. Thus, the key question here is whether the City's actions here are taken pursuant to “neutral law[s] of general applicability.” *Smith*, 494 U.S. at 901.

152. There are three separate reasons why the City's actions here are not neutral and generally applicable: (1) the City is explicitly targeting Catholic for adverse government action based on its religious beliefs, (2) the City is selectively enforcing its ability to suspend referrals of foster children, and (3) the City allows exceptions to its policies for secular reasons but not for religious reasons.²²¹

153. **Explicit Targeting.** The Supreme Court has made clear that if “impermissible hostility toward the sincere religious beliefs” is the motivation for government “objection” to

²²¹ The religious targeting and lack of neutrality here would be subject to strict scrutiny even if the burden on religious exercise were deemed insubstantial. “The rare cases which address acts or laws which target religious activity have never limited liability to instances where a ‘substantial burden’ was proved by the plaintiff. . . . Applying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment.” *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 849-50 (3d Cir. 1994).

religious conduct, then that government action is *per se* unconstitutional and is not even subject to strict scrutiny. *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018).

154. In an opinion joined by seven Justices, the Court held that “disparage[ing]” someone’s religion “is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of . . . anti-discrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.” *Id.* Further, the Court noted that government “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even ‘subtle departures from neutrality’ on matters of religion.” *Id.* at 1731 (citation omitted). As a result, the Court struck down the government action without even subjecting it to strict scrutiny balancing of the government’s interest. *See also Lukumi*, 508 U.S. at 533 (unanimously striking down an ordinance where the government targeted religious conduct “on its face” and thus violated the “minimum requirement of neutrality”); *Trinity Lutheran Church*, 137 S. Ct. at 2021 (penalizing “conduct because it is religiously motivated,” as well as “discriminat[ing] against ‘some or all religious beliefs’”).

155. Frequently, religious discrimination comes in sheep’s clothing, and sham motivations must be carefully revealed as such. “But this wolf comes as a wolf.” *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Here, as in *Masterpiece*, the City has been explicit that its actions are motivated based on disagreement with Catholic’s religious beliefs regarding marriage. The philosophic nature of this religious disagreement is highlighted by the fact that no same-sex couples have been denied the ability to become foster parents because of Catholic, no same-sex couples have filed complaints against Catholic regarding its

provision of services, and no same-sex couple has even requested these services.

156. Even so, upon hearing that some foster care agencies might not perform home studies for same-sex couples, the Commissioner and First Deputy Commissioner personally called religious foster care agencies—not secular agencies—and inquired about their policies.²²² DHS leadership then communicated with the highest levels of government leadership in Philadelphia—including Mayor Kenney—and summoned Catholic to City Hall.²²³

157. At City Hall, the Commissioner explicitly told Catholic’s leadership that it “would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church,” *not* Archbishop Chaput, the Archbishop of the City of Philadelphia.²²⁴ Commissioner Figueroa further testified that she told Catholic that things have changed since 100 years ago and that they should listen to what she understood Pope Francis to be saying.²²⁵

158. After that meeting, DHS stopped foster care referrals to Catholic. Catholic also faced an inquiry from the Human Relations Commission opened at the behest of the mayor, and the City Council passed a resolution calling for an investigation into foster agencies’ practices regarding home studies with same-sex couples.²²⁶ The government cannot single out religious organizations for worse treatment, and it cannot tell a religious organization *which* religious leader it should listen to, attempt to interpret and apply the teachings of a religious leader to a religious organization, or tell a religious organization that it needs to change its religious beliefs.

²²² Tr., Day 2, Figueroa, pp. 164-165; *see also* Tr., Day 2, Amato, pg. 55.

²²³ Tr., Day 2, Amato, pg. 56; Tr., Day 3, Figueroa, pp. 106-110.

²²⁴ Tr., Day 2, Amato, pg. 56; Tr., Day 3, Figueroa, pg. 105.

²²⁵ Tr., Day 2, Amato, pg. 57; Tr., Day 3, Figueroa, pp. 104-105.

²²⁶ PX 9; Decl. of James Amato, Attachment B.

This unabashed religious discrimination mirrors the “disparage[ment] of religion” that the Supreme Court found impermissible in *Masterpiece*.²²⁷

159. ***Secular Referrals***. The City’s actions must face strict scrutiny because they are not generally applicable: they permit exceptions for secular reasons, but not for religious reasons. The Supreme Court and the Third Circuit have repeatedly affirmed that Government may not provide exemptions for secular reasons but refuse similar exemptions for religious reasons. *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1737. This is based on the Free Exercise Clause’s protection of “religious observers against unequal treatment.” *Lukumi*, 508 U.S. at 542 (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 148 (1987)).

160. For example, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the Third Circuit considered a free-exercise challenge to a police department’s grooming policy. The policy exempted beards grown for medical reasons, but not for religious reasons. Writing for the Third Circuit, then-Judge Alito held that the policy was not generally applicable, because the exemption for medical reasons involved “a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome [the government’s] general interest in uniformity but that religious motivations are not.” *Id.* at 366. And “when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny.” *Id.*

161. Here, the City claims that Catholic has violated its “must certify” policy. But the

²²⁷ Worse still, even the City’s supposed expert witness, Mr. Cervone, made it clear that he strongly disagreed with Catholic’s religious beliefs about same-sex marriage and believed that Catholic needed to change its position on this issue. Tr., Day 3, Cervone, pg. 188 (“Q. Do you think Catholic Social Services needs to change its beliefs on sexuality and marriage? A. I would love for them to.”)

City has made a “value judgment in favor of secular motivations” by permitting referrals of families for a variety of secular reasons, including proximity, expertise in caring for medical needs,²²⁸ expertise in addressing behavioral needs,²²⁹ ability to find foster placements for pregnant youth,²³⁰ expertise working in a kincare program,²³¹ and other specialties or areas of focus. But it is refusing to extend any comparable exemption for actions based upon religious motivations. When the government “actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection,” the decision “is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith and Lukumi*.” *Fraternal Order*, 170 F.3d at 365.

162. Here, the City also claims that Catholic has violated the Fair Practices Ordinance. As discussed above, that is not the case, since Catholic’s provision of home studies is not a public accommodation. But even if the Fair Practices Ordinance did apply, it too would run afoul of the general applicability requirement. As discussed above, foster agencies follow state law in the home study process, and state law mandates inquiries that conflict with the Fair Practices Ordinance, including inquiries into marital status, family status, and mental health.²³² City officials testified that they believe foster care agencies must follow state law when conducting home studies.²³³ Therefore the City expects, and state law requires, foster care agencies to deviate from the Fair Practices Ordinance when conducting home studies. The City’s application of the Ordinance thus creates exceptions for secular conduct, but not religious conduct, and it

²²⁸ Tr., Day 2, Amato, pg. 50; Tr., Day 1, Simms-Busch, pp. 43-45.

²²⁹ Tr., Day 2, Amato, pg. 50; Tr., Day 1, Ali, pp. 91-92, 125-126.

²³⁰ Decl. of James Amato, Attachment P.

²³¹ Tr., Day 2, Amato, pp. 52-53; PX 18.

²³² 55 Pa. Code § 3700.64.

²³³ Tr., Day 1, Ali, pg. 105.

must face strict scrutiny.

163. *Selective Enforcement*. The Government is also prohibited from selectively enforcing laws or legal instruments in a way that burdens conduct for religious reasons, but not secular reasons. In *Masterpiece*, for example, the Supreme Court held that it was impermissible for the government to decline to enforce anti-discrimination laws against three secular bakers who objected to baked goods denigrating homosexuality, while choosing to enforce the same law against a baker who objected to provide a cake celebrating a same-sex wedding. *Masterpiece*, 138 S. Ct. at 1738. The Court noted that such a double standard provides “[a]nother indication of hostility” forbidden by the Free Exercise Clause. *Id.* at 1730.

164. Similarly, in *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, the Third Circuit considered a city ordinance that banned the placement of any materials on public utility poles. 309 F.3d 144 (3d Cir. 2002). It was undisputed that this ordinance was neutral and generally applicable on its face. But in practice, the city had not enforced the ordinance absent a complaint. The city had done nothing to prohibit common directional signs, lost animal signs, or holiday decorations. But reacting to “vehement objections” from local residents, the city prohibited lechis placed by Orthodox Jews. The Third Circuit held that the government’s “invocation of the often dormant Ordinance” against religious items triggered strict scrutiny. *Id.* at 153, 168.

165. Likewise, in this case the City claims that it has a “must certify couples” policy for all foster care agencies.²³⁴ But, as discussed above, the City does not enforce any such requirement to prevent referrals for a host of secular reasons—much less enforce it using the draconian measures it used here. As in *Masterpiece* and *Tenafly*, this arbitrary enforcement

²³⁴ Tr., Day 1, Ali, pg. 139.

aimed at disfavored religious belief is subject to strict scrutiny. The same is true for the City's Fair Practices Ordinance—it claims that the Plaintiffs must be penalized because foster care agencies are public accommodations, but it has never before used that language to describe the foster care system, and it does not apply that standard to its own work.²³⁵

166. This selective enforcement problem is exacerbated by the City's testimony that it focused its investigation almost entirely on religious foster agencies, with the single exception being Commissioner Figueroa placing one call to a friend at a secular agency.²³⁶ Even as of the date of the hearing, the City had not even bothered to *ask* whether secular agencies were certifying all applicants.²³⁷ The City's imposition of drastic and painful consequences against Catholic, while not even finding out whether secular agencies engage in similar behavior on this or any other issue, constitutes selective enforcement and must thus face strict scrutiny.

2. Defendants' scheme of individualized and discretionary exemptions is subject to strict scrutiny.

167. Both Supreme Court and Third Circuit precedent have made clear that when a law gives the government discretion to grant case-by-case exemptions based on “the reasons for the relevant conduct,” and a denial of such exemptions burdens religious exercise, strict scrutiny is required. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990)); *see also* *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Blackhawk v. Pennsylvania*, government officials enforced a wildlife permitting fee requirement against Blackhawk, a Lakota tribal member who kept wildlife for religious reasons, even though the law permitted exemptions from the fee when an exemption would be “consistent with sound

²³⁵ Tr., Day 2, Ali, pg. 20-21; Tr., Day 2, Amato, pp. 59–60; Tr., Day 3, Figueroa, pg. 34-35, 38, 46.

²³⁶ Tr., Day 3, pg. 103 (“Q. When you did that investigation, you only contacted faith-based agencies, correct? A. That’s correct.”)

²³⁷ Tr., Day 3, pg. 103-04.

game or wildlife management.” 381 F.3d. 202, 204-05, 210 (3d Cir. 2004). Officials refused Blackhawk’s request for an exemption based on his religious beliefs, and they threatened to penalize him if he did not give up his wildlife or pay a large permitting fee. *Id.* at 205. Then Judge Alito wrote on behalf of the Third Circuit and concluded that “the waiver mechanism . . . create[d] a regime of individualized, discretionary exemptions that triggers strict scrutiny.” *Id.* at 210.

168. Other Circuits have followed this same approach. In *Ward v. Polite*, the Sixth Circuit struck down a rule that permitted “ad hoc” exemptions from a no-referral policy. 667 F.3d 727, 739-40 (6th Cir. 2012). And in *Axson-Flynn v. Johnson*, the Tenth Circuit ruled against a university policy that allowed “ad hoc” exemptions from the university’s curricular requirements. 356 F.3d 1277, 1298-99 (10th Cir. 2004). In each of these cases, the problem was that the law was “sufficiently open-ended” that it allowed the government to grant exemptions based on an “individualized governmental assessment of the reasons for the relevant conduct.” *Blackhawk*, 381 F.3d at 207, 207-210 (quoting *Smith*, 494 U.S. at 884).

169. The same is true in this case. By the City’s own admission, the very contract provisions on which the City relies would allow the City to grant Catholic an exemption from any requirements regarding a denial of service in the City’s “sole discretion.”²³⁸ However, the City stated that it “has no intention of granting an exception” to Catholic based on its religious beliefs. *Id.* This is true even though the City permits exceptions for proximity, expertise in

²³⁸ PX 9 at 2. The full contract provision is as follows: “Provider shall not reject a child or family for Services based upon the location or condition of the family’s residence, their environmental or social condition, *or for any other reason* if the profiles of such child or family are consistent with Provider’s Scope of Services or DHS’s applicable standards as listed in the Provider Agreement, unless an exception is granted by the Commissioner or the Commissioner’s designee, in his/her sole discretion.” Ex. 1, Attach. A at 55.

medical needs, expertise in behavioral needs, specialization in kin care, and other specialties or unique agency focuses.²³⁹ State law also permits discretionary exemptions from foster care licensing requirements, so long as the exception “[d]oes not jeopardize receipt of Federal monies.” 55 Pa. Code § 3700.5.

170. Similarly, even after freezing referrals, the City has made the decision to permit individualized referrals to Catholic when it believes that doing so would be in the child’s best interest. The City has admitted that these referrals are wholly discretionary and made on an individualized basis, apparently without any written guidance.²⁴⁰

171. Where these kinds of discretionary exemptions exist, strict scrutiny is warranted “because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.” *Blackhawk*, 381 F.3d at 209 (citing *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884; *Fraternal Order*, 170 F.3d at 364–65). Just as in *Blackhawk*, the City’s decision to allow completely discretionary individualized exemptions but to deny a religious exemption must be subjected to strict scrutiny.

3. Defendants are engaging in denominational preference and targeting.

172. The City is also engaging in religious preferences and targeting in violation of both Religion Clauses. “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Free Exercise Clause likewise requires strict scrutiny “if the object of a law is to

²³⁹ Decl. of James Amato, ¶ 7.

²⁴⁰ Tr., Day 3, Pg. 133 (“Q. And for this exception process you make individualized assessments, correct? A. That’s correct.”); *id.* (“You do not have a written policy on this? A. That’s correct, yes.”).

infringe upon or restrict practices because of their religious motivation.” *Lukumi*, 508 U.S. at 533. Here, the City’s actions demonstrate a preference for some religious groups over Catholic, as well as an intent to restrict Catholic’s practices because of their religious motivation.

173. While there are a number of faith-based foster care providers in Philadelphia, DHS only closed intake for two such agencies, Bethany and Catholic.²⁴¹ This was done solely because the City disagreed with the religious beliefs and practices of these two agencies. Commissioner Figueroa also chose to review only the *faith-based* agencies for compliance with the City’s newly-minted policy requiring all agencies to perform a home study for all couples who walk through their door.²⁴²

174. The City did not stop there. By stopping referrals to Catholic—even referrals to existing foster families—the City is penalizing Doe Foster Mother #1, Ms. Fulton, Mrs. Paul, and Ms. Simms-Busch for their religious affiliation with Catholic and publicly denigrating beliefs that they share.²⁴³ It is refusing to place children with them solely because of their affiliation with a religious agency, sending the message that they are outsiders in the community. And it is doing so without justification—referrals to *existing* foster parents are not implicated by the City’s interests in ensuring participation by LGBT couples who wish to complete home studies in the future. Therefore, its actions penalizing the foster parents are overinclusive in violation of *Lukumi*: “they proscribe more religious conduct than is necessary to achieve their stated ends.” 508 U.S. at 538. In such cases, “a law which visits ‘gratuitous restrictions’ on religious conduct . . . seeks not to effectuate the stated governmental interests, but to suppress the

²⁴¹ Tr., Day 2, Ali, pg. 8; PX 3.

²⁴² Tr., Day 3, Figueroa, pp. 103-104.

²⁴³ See Decl. of Sharonell Fulton, ¶ 8.

conduct because of its religious motivation.” *Id.* For all these reasons, the City’s actions must face strict scrutiny.

4. Defendants’ actions cannot pass strict scrutiny.

175. For the same reasons discussed above, Defendants’ actions cannot pass strict scrutiny.

C. Plaintiffs are likely to prevail on their Free Speech claims.

1. Defendants are retaliating against Plaintiffs based on their speech.

²⁴⁴176. The City’s stoppage of foster care referrals and its threat to exclude Catholic from foster care work is retaliation for Catholic’s protected speech and religious exercise, and thus violates the First Amendment. “To prevail on a retaliation claim, a plaintiff must prove ‘(1) that he engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation.’” *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010) (upholding preliminary injunction).

177. Catholic easily meets this test. First, it is engaging in constitutionally protected speech and religious exercise. Its speech and religious exercise were obviously about a matter of public concern: foster care.²⁴⁵ “Speech implicates a matter of public concern if the content, form, and context establish that the speech involves a matter of political, social, or other concern to the community.” *Miller v. Clinton Cty.*, 544 F.3d 542, 548 (3d Cir. 2008); *see also Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 559 (W.D. Pa. 2003). Indeed, that is presumably why the *Philadelphia Inquirer* article appeared in the first place.

²⁴⁴ PX 9 at 2.

²⁴⁵ As a contractor, Catholic is treated as “akin to a government employee” when addressing matters of “public concern.” *Luongo v. Pa. State Police*, 156 F. Supp. 3d 599, 610 (E.D. Pa. 2016) (citing *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 673 (1996) (additional citation omitted)).

178. Second, the City responded with retaliation, obviously designed to deter Catholic from its continued speech and religious exercise. *Miller*, 598 F.3d at 152 (retaliation is government action “sufficient to deter a person of ordinary firmness from exercising his constitutional rights”) (citation omitted). The City called for a formal investigation of Catholic, threatened subpoenas for the agency, and for the first time in memory, stopped all foster care referrals to Catholic. *See supra*. And finally, the City threatened to put Catholic to the untenable choice of either engaging in the government’s preferred form of speech or forgoing religious exercise. The City also explicitly communicated to social workers that it was refusing to place a special needs child with his former foster mother working with Catholic because “Catholic Social Services is going through a case right now and DHS is not approving him to come back here.”²⁴⁶ The City’s actions would be sufficient to deter an ordinary person from exercising her rights—deterrence was the point.

179. Third, the City admits that its adverse actions were motivated by Catholic’s protected activity. For example, the Commission’s March 16th letter specifically referenced the earlier *Philadelphia Inquirer* article (highlighting Catholic’s religious beliefs) as the impetus for the agency’s actions (“Based on the information provided in the [March 13, 2018 *Philadelphia Inquirer*] article, it appears that CSS may be in violation of Article XIV, Section 14.1.”).²⁴⁷ And the City was explicit in its letter that both Catholic’s speech and its refusal to speak were the reason for the suspension of referrals and the threat to make future foster care work by Catholic

²⁴⁶ Decl. of Doe Foster Mother #1, ¶ 12.

²⁴⁷ Decl. of James Amato, Attach. C at 2.

impossible: it stated that the cessation of referrals was warranted because “you have clearly reaffirmed that CSS intends” to provide foster care consistent with its religious beliefs.²⁴⁸

180. Catholic’s protected activity is thus the reason that the City suspended further foster care referrals to Catholic without cause and in violation of its own contract, coerced fellow foster agencies to stop referring children to Catholic, threatened not to renew Catholic’s contract, passed a City Council resolution aimed at investigating faith-based agencies like Catholic purely because of their religious beliefs about marriage, and threatened to subpoena Catholic even though no complaint had been filed against it.

181. In sum, the City has taken adverse action against Catholic because of its speech, religious exercise, and defense of its federal and state civil rights on a matter of public concern. That retaliation has severe, ongoing consequences for real human beings. And it is forbidden by the First Amendment.

2. Defendants are conditioning government contracts on compelled speech that falls outside the services it compensates Catholic for providing.

182. Government cannot compel speech that falls outside the message it pays the organization to convey. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-43 (2001). In *Velazquez*, grants of federal money were made available to subsidize legal representation of indigent clients. Funding restrictions prevented use of the funds to challenge the validity of welfare laws. The Supreme Court found the limitations unconstitutional because the “program was designed to facilitate private speech, not to promote a governmental message” to third parties. *Id.* at 542. Therefore, it could not restrict the private speech of attorneys to and for their clients.

183. Similarly, in *Agency for International Development*, the Court was faced with a

²⁴⁸ PX 9 at 2.

government program to combat HIV/AIDS which permitted funding only to organizations which “explicitly agree with the Government’s policy to oppose prostitution and sex trafficking.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213 (2013). The court struck down the requirement, holding that “[b]y demanding that funding recipients adopt—as their own—the Government’s view on an issue of public concern, the condition by its very nature affects ‘protected conduct outside the scope of the federally funded program.’” *Id.* at 218 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)). Because the requirement was not limited to the activities funded, but compelled recipients “to pledge allegiance to the Government’s policy,” it could not stand. *Id.* at 220.

184. In *Cradle of Liberty Council, Inc. v. City of Philadelphia*, this Court rejected the City’s argument “that it is not required to subsidize private speech and that it may condition participation in its programs on compliance with its nondiscrimination policies.” 851 F. Supp. 2d 936, 948 (E.D. Pa. 2012). There, the City sought to terminate a rent-free lease with the Boy Scouts due to the Scouts’ position on same-sex relationships. The Scouts prevailed because “when a condition for receipt of a government benefit compromises a First Amendment right, it must be reasonable and viewpoint neutral,” and the jury reasonably determined that the City’s conditions on the Scouts’ speech and association were not. *Id.*

185. Here, the City seeks to compel unpaid-for speech from Catholic in at least two ways. First, as a pre-condition to partnering with the City, Catholic would have to adopt a policy to promising in advance to provide certifications and endorsements of same-sex couples, even though no same-sex couple has ever requested this service. This is precisely the sort of “pledge [of] allegiance to the Government’s policy” that the First Amendment prohibits. *Agency for Int’l Dev.*, 570 U.S. at 220. Second, to add insult to injury, this policy would require Catholic to not

just agree to perform home studies but also to provide the City with written certifications and endorsements that themselves conflict with CSS's religious beliefs. That is why the City and its counsel repeatedly talked not only of performing home studies, but of the need to "approve" or "certify" particular applicants. Transcript of Pretrial Hearing (Tr.), Day 1, Ali, pg. 133; PX 13, pg. 1. Catholic also explored whether there is any option available for compliance that would enable Catholic to receive the full foster care contract it has received in the past. The City made clear that for Catholic to receive a full contract, Catholic must agree not only to be willing to perform home studies for anyone who requests a home study, but also to ensure that the outcome of a home study would be an endorsement and certification of the relationship of a same-sex couple. The City made clear that Catholic's religious beliefs would not be an acceptable basis for Catholic's unwillingness to provide a written certification regarding a couple's relationship and to approve that couple for foster care. Supplemental Amato Decl. ¶ 5. The City's rhetoric further reveals that the goal of its actions is to force Catholic to change its beliefs such as the statements that it's "not 100 years ago anymore" and "times are changing" and Catholic's religious beliefs should change, too. Tr., Day 2, Amato, pg. 57. Such government sponsored efforts to "Forc[e] free and independent individuals to endorse ideas they find objectionable is always demeaning" and cannot be justified by anything less than "immediate and urgent grounds." *Janus v. American Federation of State, County, and Municipal Employees Council*, No. 16-1466, 585 U.S. ___, Slip Op. at 9 (2018).

186. Catholic has no desire to stand in the way of same-sex couples who come to it seeking foster care certifications. Rather, if CSS were ever unable to perform an in-depth home assessment and make a report and written certification to the State for any reason, including consistency with the religious beliefs and mission of Catholic, it would refer the potential foster

parent(s) to one of the 29 other agencies that might better serve their needs. Furthermore, it is difficult to believe that couples actually want to have their evaluations performed by an organization with religious objections, which is presumably why no couple has ever complained about Catholic in the provision of home studies, and no same-sex couple has even asked CSS to provide a home study for them. The City understandably offered no evidence at all to suggest that same-sex couples actually want their home studies performed by religious organizations with whom they disagree.

187. The City's actions would prohibit Catholic from stepping aside and instead force them to speak and "to adopt [the] particular belief," in a written certification to the State, inconsistent with their religious beliefs about marriage, and outside of the services the City actually pays for. *Agency for Int'l Dev*, 570 U.S. at 218. This would clearly contravene "the individual's right to speak his own mind" and instead allow "public authorities to compel him to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

188. In *National Institute of Family and Life Advocates v. Becerra*, No. 16-1140, 585 U.S. ____ (2018) ("NIFLA"), the Supreme Court recently emphasized that any government-imposed requirement that a private entity "speak a particular message" that would "alter the content of their speech" is a content-based restriction on speech and thus subject to strict scrutiny. Slip Op. at 7 (internal quotation marks omitted). The City would require Catholic to provide a formal written certifications and endorsements even if those certifications and

endorsements are inconsistent with the agency's sincere religious beliefs about marriage. Such a condition would force Catholic to "promote the [government]'s own preferred message" and to "contradict their most deeply held beliefs" and is incompatible with the First Amendment. Kennedy Op. at 1.

189. Nor can the City use the fact that the government is involved in foster care as a reason to compel speech by private entities. The Supreme Court has rejected the similar suggestion that licensing requirements grant government entities "unfettered power to reduce a group's First Amendment rights." Slip Op. at 14. To the contrary, the use of licensing requirements to dictate one's speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." Slip Op. at 12 (quoting *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)). This concern about government use of licensing requirements to conscript the unwilling speech of Catholic is particularly relevant here, where Catholic was performing its religious exercise of providing foster services to vulnerable children in Philadelphia long before any government license or program was attached to these services. Tr., Day 2, Amato, pp. 35-36. The Government now mandates Catholic have a contract with the City to perform this service, and then conditions the continued performance under that contract on Catholic's willingness to espouse a view that contradicts its deeply held religious beliefs. This is precisely the sort of "unfettered power" that the First Amendment prohibits and therefore the City's actions are subject to strict scrutiny.

190. For the same reasons the City cannot satisfy strict scrutiny under Plaintiffs' RFPA and free exercise claims, it cannot withstand strict scrutiny required under the compelled speech doctrine. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006) (whether strict scrutiny is triggered by the Free Speech Clause or RFRA, "the

consequences are the same”). Therefore, Catholic is likely to prevail on its compelled speech claim.

III. Plaintiffs will be irreparably harmed absent an injunction.

191. The City’s decision to discriminate against CSS constitutes a paradigmatic irreparable harm, as it is well settled that the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); accord *McTernan v. City of York*, 577 F.3d 521, 528 (3d Cir. 2009) (“The District Court acknowledged that loss of First Amendment freedom for any period of time can be considered irreparable harm[.]”).

192. The City’s actions are also currently causing irreparable harm to needy children and foster parents across Philadelphia. By allowing homes to sit empty, the City is depriving children of loving homes and preventing foster parents from living out their religious commitment to serve those most in need. Instead, due to the City’s actions, unknown numbers of children are caught in limbo with unsuitable respite homes, while other children may end up languishing in institutional placements when they could be in permanent foster care. And still other children will have their placements disrupted if the City carries through on its threat and chooses to wind down Catholic’s foster care program because of Catholic’s religious beliefs. Even a temporary disruption such as the one experienced by Doe Foster Child #1 has had, and will continue to have, a lasting impact on these children.

193. In addition, without this Court’s intervention, Catholic will close in a matter of months.²⁴⁹ What is more, once Catholic shuts down and lays off its employees, it will lose its

²⁴⁹ Tr., Day 2, Amato, pp. 104, 109-110, 112, 120.

connections to foster families, its institutional knowledge and experience, and its ability to place foster children in loving homes.²⁵⁰

194. The immediate and severe nature of these harms—and, in particular, the very real impact the City’s policy is already having on Doe Foster Child #1 and untold other foster children—easily satisfies the TRO standard. *Bieros v. Nicola*, 857 F. Supp. 445, 446 (E.D. Pa. 1994) (granting a TRO requires “a clear showing of immediate irreparable injury”).

IV. An injunction is in the public interest.

195. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012); *see also Ramsey v. City of Pittsburgh*, 764 F. Supp. 2d 728, 735 (W.D. Pa. 2011) (“[C]ourts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.”). And as established by Pennsylvania law, there is also a significant interest in ensuring that children receive foster care placements that are in their best interests. *See, e.g.*, 11 Pa. Stat. Ann. § 2633(4). Here, the public interest is best served by ensuring that empty foster homes are filled and that needy children are placed with loving foster parents. This, by definition, serves the public interest while also protecting CSS’s constitutional rights.

V. The balance of the equities favors Plaintiffs.

196. In considering whether equitable factors favor granting a preliminary injunction, this Court looks to “the potential injury to the plaintiffs without this injunction versus the potential injury to the defendant with it in place.” *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121,

²⁵⁰ Tr., Day 2, Amato, pg. 79.

143 (3d Cir. 2017). Here, the balance of these equities overwhelmingly favors Catholic. As explained above, Catholic—along with potentially dozens of foster parents and an untold number of children—will be harmed if this Court does not act to prevent the City from cutting off referrals under the current contract. This harm is serious, immediate, and irreparable.

197. The City, on the other hand, cannot point to anything but a theoretical harm. First, not a single a complaint has been filed against Catholic by a same-sex couple seeking to foster a child. As discussed above, no same-sex couple has ever even requested this from Catholic, which is hardly surprising. Second, even if a couple had been referred by Catholic to one of twenty-nine different agencies, that couple will no more be blocked from fostering children than any other family referred to other agencies for a host of secular reasons. This is precisely the kind of religious exercise in the marriage context that “would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth,” *Masterpiece*, 138 S. Ct. 1727, because it is by a religious institution and there are many other providers. Moreover, the City’s actions extend far beyond the narrow issue of home studies and penalize current foster parents like Doe Foster Mother #1, Ms. Fulton, Mrs. Paul, and Ms. Simms-Busch, merely for choosing to affiliate with an agency who shares their religious beliefs.

198. What is more, where, as here, Catholic has made a strong and one-sided showing of serious, immediate, harm and the equities clearly favor granting an injunction, an even lesser showing is required for a claim on the merits. *See Marx v. Jackson*, 833 F.2d 1121, 1128 (3d Cir. 1987) (“[T]he strength of the plaintiff’s showing with respect to one [factor] may affect what will suffice with respect to another.”) (citations omitted).

199. In sum, the City's purely hypothetical harm cannot compare to the immediate and irreparable harm suffered by Catholic, the foster families it serves, and at-risk children in Philadelphia. There is no doubt that the equities favor immediate action in the form of a preliminary injunction.

Conclusion

For all these reasons, the Plaintiffs' motion for a temporary restraining order and preliminary injunction should be GRANTED.

Dated: June 28, 2018

Respectfully submitted,

/s/ Mark L. Rienzi

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2018, the foregoing document was filed pursuant to the Court's electronic filing procedures using the Court's CM/ECF system.

/s/ Mark L. Rienzi
Mark L. Rienzi

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SHARONELL FULTON, CECELIA
PAUL, TONI LYNN SIMMS-BUSCH,
and CATHOLIC SOCIAL SERVICES,

Plaintiffs,

v.

CITY OF PHILADELPHIA,
DEPARTMENT OF HUMAN
SERVICES FOR THE CITY OF
PHILADELPHIA, and
PHILADELPHIA COMMISSION ON
HUMAN RELATIONS,

Defendants.

Civil Action No. 18-cv-2075

Assigned to the Honorable
Judge Tucker

SUPPLEMENTAL DECLARATION OF JAMES AMATO

1. My name is James Amato. I am over the age of 21 and am capable of making this declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or been convicted of a crime of dishonesty. I have personal knowledge of all the contents of this declaration.

2. The City asked to hold a meeting with Catholic Social Services (“Catholic”) representatives regarding potential contract options on June 28, 2018. Catholic remains committed to providing foster care services if possible, and I communicated Catholic’s desire to continue doing so in this meeting.

3. The City indicated a willingness to pay *per diem* amounts for foster children currently cared for by Catholic’s families. But the City remains unwilling to

resume normal operations with Catholic, meaning it will not agree to reopen intake to send foster children to Catholic to place with its growing number of empty foster homes.

4. Without intake resuming, any interim approach will require Catholic to begin laying off staff next month and to close its foster care program altogether within a matter of months. This will result in the displacement of foster children who need to remain in foster care and who are cared for by families who cannot continue as foster parents without the support that Catholic offers.

5. Catholic also explored whether there is any option available for compliance that would enable Catholic to receive the full foster care contract it has received in the past. The City made clear that for Catholic to receive a full contract, Catholic must agree not only to be willing to perform home studies for anyone who requests a home study, but also to ensure that the outcome of a home study would be an endorsement and certification of the relationship of a same-sex couple. The City made clear that Catholic's religious beliefs would not be an acceptable basis for Catholic's unwillingness to provide a written certification regarding a couple's relationship and to approve that couple for foster care.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 2018.


James Amato