

No. 18-2574

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**United States Court of Appeals  
for the Third Circuit**

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SHARONELL FULTON, ET AL.,  
*Plaintiffs-Appellants,*

v.

CITY OF PHILADELPHIA, ET AL.,  
*Defendants-Appellees.*

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On Appeal from the U.S District Court for the  
Eastern District of Pennsylvania,  
No. 2:18-cv-02075-PBT (Hon. Petrese B. Tucker, U.S.D.J.)

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**Brief of Appellants Sharonell Fulton, Cecelia Paul,  
Toni-Lynn Simms-Busch, and Catholic Social Services**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Catholic Social Services represents that it does not have any parent entities and does not issue stock.

/s/ Mark Rienzi  
Mark Rienzi

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## INTRODUCTION

The City of Philadelphia is shutting down Catholic Social Services' century-old foster care program over a purely hypothetical disagreement. Yet the harm to Appellants and the children they serve is anything but hypothetical. As the District Court found, the work of Catholic Social Services ("Catholic") "has benefitted Philadelphia's children in immeasurable ways."<sup>1</sup> Just days before cutting off foster care placements to Catholic, Philadelphia put out an urgent call for 300 more foster parents. Today, Appellants' ministry could benefit some of the 250 children currently living in group homes, children Philadelphia admits it needs to place with loving foster families. But Philadelphia has chosen to let those children languish rather than place them with parents who work with Catholic.

Appellees (collectively, "the City" or "Philadelphia") are excluding Catholic and its foster families simply because Catholic Social Services is part of the Catholic Church, and the City disagrees with the Church's views about same-sex marriage. Same-sex unions have been recognized in Philadelphia for two decades and Catholic has been acting in accordance with its religious beliefs for even longer. But the City is unaware of

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<sup>1</sup> Appx.0006. All "Appx." citations are to the Joint Appendix.

even a single person who has been prevented—or even discouraged—from fostering because of Catholic’s religious ministry. Even so, the City is closing Catholic’s foster care program over a hypothetical question: *if* a same-sex couple approached a Catholic agency seeking a written opinion on their family relationship, could the Catholic Church endorse their union in writing?

Philadelphia cannot demand that religious groups parrot its views as a pre-condition to serving foster children. And it cannot retaliate against Catholic by shutting down its foster care program and punishing foster families for working with Catholic—particularly because already-certified families have nothing to do with Catholic’s treatment of hypothetical future inquiries. On these grounds alone, the City’s punitive actions are impermissible under the Free Exercise and Speech clauses of the First Amendment.

Worse yet, the City engaged in unabashed religious targeting. The City admittedly investigated only *religious* foster agencies. Then it froze Catholic’s foster care intake as punishment for violating supposed policies the City has never announced, much less applied, to secular agencies. The Mayor, City Council, Philadelphia Commission on Human Rights

“PCHR”), and Department of Human Services (“DHS”) have all targeted Catholic. The City even told Catholic to change its religious practices because it is “not 100 years ago” and “times have changed.”<sup>2</sup> It then told Catholic to follow the City’s view of the “teachings of Pope Francis.”<sup>3</sup> These are obviously impermissible actions in any context under the Free Exercise and Establishment Clauses. And the serious, ongoing burdens on the religious exercise of Catholic and its families violate their rights under RFPA.

Without injunctive relief, the City’s actions will force Catholic’s century-old foster care program to close within a matter of months. Meanwhile, more children will be kept out of loving foster homes, and award-winning foster parents (like Appellant Mrs. Paul, a former foster parent of the year) will continue to have their homes sit empty. If the agency is forced to close, Catholic’s foster parents who are currently caring for children face the “devastating” choice of either losing the child they love or losing the supportive religious agency that makes their foster care possible.<sup>4</sup> All this before Appellants can even litigate their case.

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<sup>2</sup> Appx.0325; Appx.0583-84; *see also* Appx.0151.

<sup>3</sup> Appx.0324, 0584.

<sup>4</sup> Appx.0143; Appx.0999.

The City admits that if Catholic shuts down, Philadelphia will have the exact same number of agencies to serve same-sex couples that it has today. But rather than permit respectful disagreement on these deeply important issues, the City moved to eliminate Catholic's foster care program unless Catholic embraces the City's views on same-sex marriage. That is anathema to our pluralistic democracy and forbidden by the First Amendment.

A preliminary injunction is necessary to ensure Catholic's foster program lasts long enough to litigate this case and to prevent additional disruption in the lives of vulnerable foster children and the families who serve them. The District Court's refusal to grant this injunction was erroneous on every single count. The City cannot be permitted to keep children from loving homes simply to make a political point.

### **JURISDICTIONAL STATEMENT**

Appellants filed their complaint on May 17, 2018, seeking to enjoin the City of Philadelphia from discriminating against them based on their religious beliefs and speech. Appellants' complaint brought claims under the First Amendment, the Fourteenth Amendment, the Pennsylvania Constitution, Pennsylvania's Religious Freedom Protection Act

(“RFPA”), and other state and local laws. The District Court had jurisdiction over Appellants’ lawsuit under 28 U.S.C. §§ 1331 and 1343 and had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202.

The District Court denied Appellants’ motion for a preliminary injunction on July 13, 2018, and Appellants filed their notice of appeal to this Court later that day.<sup>5</sup> This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a).

### **STATEMENT OF THE ISSUES**

This appeal presents four main issues:

Issue #1. Whether Appellants demonstrated a reasonable probability of success on their claims under the Free Exercise and Establishment Clauses.

Issue #2. Whether Appellants demonstrated a reasonable probability of success on their claims under RFPA.

Issue #3. Whether Appellants demonstrated a reasonable probability of success on their claims under the Free Speech Clause.

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<sup>5</sup> Appx.0004-05.

Issue #4. Whether the District Court abused its discretion in ruling against Appellants on the remaining preliminary injunction factors.<sup>6</sup>

### **STATEMENT OF RELATED CASES**

This case has not been before this Court previously. Appellants are not aware of any related cases currently pending before this Court.

### **STATEMENT OF THE CASE**

#### **A. Catholic Social Services.**

Catholic is a non-profit under the auspices of the Archdiocese of Philadelphia.<sup>7</sup> It provides care for foster children as a “religious ministry.”<sup>8</sup> Catholic views this ministry as part of Jesus’ call to care for the orphaned and widowed.<sup>9</sup> Catholic’s faith is infused in all aspects of its ministry.<sup>10</sup>

Catholic’s foster care program traces its roots back to 1917.<sup>11</sup> At this time, the City was not involved in the provision of foster care. Instead,

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<sup>6</sup> Each issue was initially raised in Appellants’ Memorandum of Law in Support of Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction, ECF 13-2, and ruled upon in the opinion and order, Appx.0004-0069.

<sup>7</sup> Appx.0282; Appx.0303-05, 0310; Appx.0827, ¶ 3.

<sup>8</sup> Appx.0305.

<sup>9</sup> Appx.0305.

<sup>10</sup> Appx.0303-05; Appx.1032.

<sup>11</sup> Appx.0303-05.

“the religious sisters who ran Catholic Children’s Bureau had a deep network of relationships around the city with parishes and community groups.”<sup>12</sup> These sisters would find homes for at-risk children whose parents were unable to care for them.<sup>13</sup>

It wasn’t until the late 1950s that the City began contracting with private agencies for foster care services. Today, “you would be breaking the law if you tried to provide foster care services without a contract.”<sup>14</sup> Thus, for over fifty years now, Catholic has cared for foster children through an annually renewed contract with the City.<sup>15</sup> Under this contract, the City pays Catholic’s foster care program a *per diem* for each child placed in a foster home that Catholic supervises.<sup>16</sup> This subsidy, however, does not cover the full cost of Catholic’s ministry, and Catholic relies upon private funds to cover expenses and to be able to provide services that go above and beyond those required by its contract with the City.<sup>17</sup>

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<sup>12</sup> Appx.0306.

<sup>13</sup> Appx.0306-07.

<sup>14</sup> Appx.0308-09.

<sup>15</sup> Appx.0308, 0389.

<sup>16</sup> Appx.0490, 0618.

<sup>17</sup> Appx.0309, 0313-14.

**B. Catholic’s foster families.**

Catholic has spent decades cultivating a network of foster families, some of whom have provided loving homes for dozens of children in need. This network allows Catholic to find homes in urgent situations, like when Appellant Sharonell Fulton took four children into her home one Christmas Eve.<sup>18</sup> These children arrived at her doorstep with little more than the clothes on their backs. Catholic’s social workers then jumped in to help, delivering not just necessities but also wrapped gifts to ensure the children could celebrate Christmas.<sup>19</sup> Catholic is able to provide extraordinary service like this because of the dedication of both its employees and the foster parents with whom it has developed enduring relationships.<sup>20</sup>

Three such foster parents are plaintiffs in this case (“foster mothers” or “individual Appellants”). All three are certified, trained, and supported by Catholic. Appellant Cecelia Paul alone has fostered 133 children in her 46 years of service and was named a foster parent of the year by the

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<sup>18</sup> Appx.0991, ¶4.

<sup>19</sup> Appx.0991, ¶4.

<sup>20</sup> Appx.0130-0133.

City.<sup>21</sup> Mrs. Paul works with Catholic because of its commitment to children and their shared beliefs.<sup>22</sup> She “cannot imagine starting from scratch and fostering children without” Catholic’s support.<sup>23</sup>

Ms. Fulton also works with Catholic because she shares Catholic’s religious values.<sup>24</sup> She described Catholic’s staff as “like family” and explained that the loss of their support would be “devastat[ing].”<sup>25</sup> Ms. Fulton has fostered 40 children over 26 years.<sup>26</sup>

Likewise, Appellant Toni Simms-Busch chose Catholic because they “share the same foundational beliefs” and because of her experience working in foster care. As a former social worker with deep knowledge of Philadelphia’s foster care system, she knew Catholic would provide her foster children with outstanding care and support.<sup>27</sup> Ms. Simms-Busch’s decision proved accurate: she testified that her son “run[s] to” Catholic’s social worker, but he barely knows the social workers provided by her

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<sup>21</sup> Appx.0142-45.

<sup>22</sup> Appx.0144.

<sup>23</sup> Appx.0996; *see* Appx.0146.

<sup>24</sup> Appx.0148-49.

<sup>25</sup> Appx.0149-52.

<sup>26</sup> Appx.0148.

<sup>27</sup> Appx.0118-19, 0131-32.

Community Umbrella Organization (“CUA”) because of their high turnover.<sup>28</sup> Ms. Simms-Busch further testified to feeling “backed into a corner” by the City’s decision to force Catholic out of foster care in Philadelphia.<sup>29</sup>

### **C. Foster care in Philadelphia.**

The minimum requirements to become a certified foster parent are set by the state of Pennsylvania and require a foster care agency to evaluate, among other things, an applicant’s “existing family relationships” and “[a]bility . . . to work in partnership” with the foster agency.<sup>30</sup> This evaluation is called a “home study,” and results in the agency’s “decision to approve, disapprove or provisionally approve the foster family.” *Id.*

Separate from this process, DHS must also decide whether to approve a potential foster parent.<sup>31</sup> It does this by looking at, among other things, the applicant’s family history and performing an additional background check.<sup>32</sup> All foster child placements come through DHS’s Central Referral

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<sup>28</sup> Appx.0130-35.

<sup>29</sup> Appx.0136.

<sup>30</sup> 55 Pa. Code §§ 3700.64, 3700.69.

<sup>31</sup> Appx.0171-72.

<sup>32</sup> Appx.0171-72.

Unit (“CRU”).<sup>33</sup> The CRU considers a child’s age, sibling relationships, race, medical needs, and disability when making a foster care placement.<sup>34</sup> The CRU then sends that information to foster agencies like Catholic, who match children with foster parents “based on the referral information” from the CRU.<sup>35</sup>

#### **D. Catholic’s contract with the City.**

Under Catholic’s contract with the City, home studies are “not expressly funded . . . because CSS’ compensation is based on the number of children in its care rather than on the number of home studies performed.”<sup>36</sup> The contract does not dictate Catholic’s recruitment strategy, nor require Catholic to perform a certain number of home studies or certifications. Instead, Catholic “provide[s] certified resource care homes,”

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<sup>33</sup> Appx.0178.

<sup>34</sup> Appx.0425, 0515-16.

<sup>35</sup> Appx.0171-72, 0178, 0424, 0515-17.

<sup>36</sup> Resp. in Opp’n to Emergency Appl. for Inj. Pending Appellate Review or, in the Alternative, Pet. for Writ of Certiorari & Inj. Pending Resolution (hereinafter “Resp. in Opp’n”), at 26, *Fulton v. City of Phila.*, No. 18A118 (U.S. Aug. 13, 2018); *see also* Appx.0490; Appx.0618.

for foster children, supports those families, and is paid a fixed daily rate for each child placed in a certified home.<sup>37</sup>

The contract also highlights Catholic's religious character. For example, the contract includes Catholic's 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."<sup>38</sup> It similarly 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."<sup>39</sup> Nor shall Catholic "in any way represent" otherwise.<sup>40</sup>

Finally, the contract includes a non-discrimination provision, requiring that providers not "discriminate or permit discrimination against any

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<sup>37</sup> Appx.0024; Appx.1029-30. Catholic's prior contracts also covered St. Joseph & St. Vincent Homes and St. Gabriel's System, which are congregate care facilities run by the Archdiocese for youth currently unable to be placed in foster care homes. These services are unaffected by this litigation.

<sup>38</sup> Appx.1032.

<sup>39</sup> Appx.1103, 0534.

<sup>40</sup> Appx.1103.

individual because of race, color, religion, or national origin.”<sup>41</sup> The contract then specifies that, in any “employment, housing and real property practices and/or public accommodation practices,” providers will not “discriminate or permit discrimination” on a number of bases including marital status and sexual orientation.<sup>42</sup> The language in this second sentence is a restatement of the City’s Fair Practices Ordinance (“FPO”). Phila. Code § 9-1100, *et seq.*

**E. Catholic’s policy regarding marriage.**

As part of the Catholic Church, Catholic operates in accordance with its sincere belief “that a marriage is a sacred bond between a man and a woman.”<sup>43</sup> Catholic cannot take any actions which it views as an endorsement of same-sex relationships. “[T]o 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.”<sup>44</sup>

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<sup>41</sup> Appx.1114.

<sup>42</sup> Appx.1115.

<sup>43</sup> Appx.0310-12, 0482.

<sup>44</sup> Appx.0312.

Were Catholic ever approached by a same-sex couple seeking to become foster parents, Catholic would refer the couple to one of 29 other agencies in Philadelphia—several within blocks of Catholic’s headquarters—that would be able to work with them.<sup>45</sup> This is a purely hypothetical question, however, as no same-sex couple has ever approached Catholic seeking its written endorsement to become foster parents.<sup>46</sup> Nor is there any evidence that Catholic’s religious beliefs stopped, or even discouraged, anyone from becoming a foster parent.<sup>47</sup>

**F. The investigation and termination.**

In March 2018, after a complaint about another agency (Bethany Christian), DHS Commissioner Figueroa called “faith-based [foster care] institutions . . . to ask them their position regarding serving same-sex couples.”<sup>48</sup> Figueroa contacted only one non-religious organization, as she

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<sup>45</sup> Appx.0321.

<sup>46</sup> Appx.0312.

<sup>47</sup> Appx.0497.

<sup>48</sup> Appx.0432-33; *see also* Appx.0323.

was friends with its CEO.<sup>49</sup> She still has not called any other non-religious agencies to inquire about their practices, or inform them of their duty to follow the policies the City is now applying to Catholic.<sup>50</sup>

Commissioner Figueroa then summoned Catholic's senior management to DHS headquarters.<sup>51</sup> At this meeting, Commissioner Figueroa questioned why Catholic would not certify same-sex couples and told Catholic that it should follow the City's understanding of "the teachings of Pope Francis."<sup>52</sup> When James Amato, head of Catholic, noted that it had been serving foster children for over 100 years, Commissioner Figueroa told him "times have changed," "attitudes have changed," and it is "not 100 years ago."<sup>53</sup>

Figueroa also told him that this issue had the attention of the "highest levels of City government," meaning the Mayor.<sup>54</sup> Figueroa had even assured Mayor Kenney that she was working to "address[]" these "issues."<sup>55</sup>

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<sup>49</sup> Appx.0582-83.

<sup>50</sup> Appx.0582-83.

<sup>51</sup> Appx.0324,0999.

<sup>52</sup> Appx.0324,0583-84.

<sup>53</sup> Appx.0325,0583-84.

<sup>54</sup> Appx.0585-0586.

<sup>55</sup> Appx.0586.

The Mayor has a long history of publicly criticizing the Archdiocese. Mayor Kenney has said, among other things, that he “could care less about the people at the Archdiocese,” called Archbishop Chaput’s actions “not Christian,” and exhorted Pope Francis “to kick some ass here!”<sup>56</sup>

Minutes after the meeting, the City notified Catholic that it was shutting down their foster care intake.<sup>57</sup> The City also closed Bethany’s intake.<sup>58</sup> Around the same time, the PCHR opened an inquiry into Catholic’s practices at the behest of the Mayor, and the City Council passed a resolution calling for an investigation and expressing concern over discrimination occurring “under the guise of religious freedom.”<sup>59</sup>

### **G. The City’s justification.**

In a subsequent letter to Catholic, the City claimed that Catholic violated two policies: (1) that agencies must provide home studies to every applicant who wanted one, and (2) the public accommodations portion of

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<sup>56</sup> Appx.0878, 0885 (available at <http://bit.do/es4xH>); Appx.0876-82.

<sup>57</sup> A shutdown means that no children can be placed in the homes of families certified and supported by that foster agency. Appx.0485-86, 0830.

<sup>58</sup> Appx.0491.

<sup>59</sup> Appx.0838.

the FPO.<sup>60</sup> With regard to the first policy (the “must certify” policy), no DHS official could identify a written version of this policy at the evidentiary hearing.<sup>61</sup> The City first stated that it was in the contract, but later admitted that the specific provision it had identified (§ 3.21) applied only to referrals from DHS itself. When a prospective foster family approaches an agency through the normal intake process, this is not a DHS referral.<sup>62</sup> The City also admitted it never told secular foster agencies about this policy, nor monitored their compliance.<sup>63</sup>

Mr. Amato and Ms. Simms-Busch, who have a combined 50+ years of experience in foster care, also testified that agencies commonly decline to certify prospective foster parents and instead refer them elsewhere when another agency would be a better fit; neither had heard of a policy requiring agencies to perform all home studies for any family upon request.<sup>64</sup>

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<sup>60</sup> Appx.1072-73.

<sup>61</sup> Appx.0286-87, 0527-28, 0549.

<sup>62</sup> Appx.0198 (“Q: This is referring to a rejection of a referral *from DHS*, correct? A: Yes.”) (emphasis added); Appx.0127-28.

<sup>63</sup> Appx.0433 (“I called a number of faith-based institutions that same day[.]”); Appx.0582.

<sup>64</sup> Appx.0302, 0321, 0117-19, 0126.

Ms. Simms-Busch further testified that, based on her experience as a social worker at another agency, “referrals are made all the time.”<sup>65</sup>

Specific examples include referrals for geographic proximity, medical expertise, behavioral expertise, specialization in pregnant youth, work with Native American children, and language needs.<sup>66</sup> At least one agency advertises that it exclusively works in kin care (a term for foster placements with extended family or friends).<sup>67</sup> The City also acknowledged that agencies may decline to certify prospective foster parents if they do not have the specialties necessary to care for children with specific medical or behavioral issues.<sup>68</sup>

With regard to the FPO, no witness could provide an example of a situation in which—prior to this litigation—the City treated foster care as a public accommodation.<sup>69</sup> Figueroa could not recall training staff or even discussing public accommodation laws in the foster care context, nor

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<sup>65</sup> Appx.0127.

<sup>66</sup> Appx.0126-28, Appx.0174-75, 0200, 0208-09, 0316, 0318, 0502, 0911-0912; *see also* Appx.0092-95.

<sup>67</sup> Appx.0320-21; Appx.1140.

<sup>68</sup> Appx.0200, 0208-10.

<sup>69</sup> Appx.0288-89, 0327-28, 0513-14, 0517, 0525.

could she recall doing “anything [as Commissioner] to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work.”<sup>70</sup> The City also acknowledged that it sometimes considers race and disability when making foster care placement decisions.<sup>71</sup>

#### **H. Impact of the intake freeze and threat to terminate.**

Shortly before the intake freeze, the City put out an “urgent call” for 300 more foster families.<sup>72</sup> Philadelphia has a shortage of foster homes and admits it needs to get 250 children out of group homes and into the “most family-like setting” possible, as required by state law.<sup>73</sup> But due to the intake freeze, the City is refusing to place children with Catholic’s families.<sup>74</sup> Normally, Catholic would have four or five openings at a time.<sup>75</sup> Today, Catholic has over 35 homes ready for children, including that of Mrs. Paul, a former pediatric nurse whom the City named a foster

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<sup>70</sup> Appx.0513-14.

<sup>71</sup> Appx.0514-18.

<sup>72</sup> Appx.1141-43; Appx.0569-70.

<sup>73</sup> *Id.*; 11 P.S. § 2633(4).

<sup>74</sup> Appx.0830.

<sup>75</sup> Appx.0344.

parent of the year.<sup>76</sup> Since March, the City has refused to place any children in her home solely because she is certified by Catholic. Mrs. Paul has testified that she feels “lost” without children to care for.<sup>77</sup>

Due to the intake freeze, Catholic has had difficulty ensuring that children are placed with siblings or returned to the homes of prior foster parents they know and love.<sup>78</sup> Shortly after the freeze began, Catholic accepted a foster placement to reunite two siblings, and notified DHS it had done so.<sup>79</sup> In response, DHS sent an email to its partners informing them there should be “NO referrals” to Catholic.<sup>80</sup> That email did not mention any exceptions to this new rule.<sup>81</sup>

After filing suit, Catholic also learned of a young autistic boy who could be reunited with his former foster mother, a woman who is certified by Catholic and had cared for this child for over a year.<sup>82</sup> But DHS denied the placement, leaving the boy in respite care rather than a loving, long-

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<sup>76</sup> *Id.*; Appx.0142-44.

<sup>77</sup> Appx.0145.

<sup>78</sup> Appx.0831-32.

<sup>79</sup> Appx.0329-31.

<sup>80</sup> Appx.0226.

<sup>81</sup> Appx.0223-27.

<sup>82</sup> Appx.1002-08.

term home.<sup>83</sup> The City later relented and allowed the placement—only after Catholic brought the matter to the District Court’s attention.<sup>84</sup>

Going forward, DHS senior leadership has made some exceptions based on “individualized assessments” of the situation. But it has not communicated when or whether such exceptions are permissible to its employees responsible for making placements.<sup>85</sup>

Other agencies have informed Catholic that they received placements of children in circumstances where Catholic would have been the “preferred placement.”<sup>86</sup> Thus, because of DHS’s actions, Catholic may never learn of the harm or the missed opportunity to care for a child in need.<sup>87</sup>

Due to the intake freeze, Catholic has already begun winding down its century-old foster care ministry and downsizing staff positions.<sup>88</sup> Absent judicial relief, Catholic will have to close its foster program within

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<sup>83</sup> *Id.*

<sup>84</sup> Appx.0405-07.

<sup>85</sup> Appx.0223-27, 0295-97, 0612.

<sup>86</sup> Appx.0832.

<sup>87</sup> Appx.0384.

<sup>88</sup> Appx.1149-51.

months.<sup>89</sup> If this were to occur, Catholic will lose staff with years of experience in foster care and a network of foster parents it has cultivated for decades.<sup>90</sup> This loss “would take years” to recover from, if possible at all.<sup>91</sup> Worse still, closure would require Catholic’s foster parents to either transfer agencies or be separated from their foster children. Such a disruption in care is something even the City admits can be traumatic for children.<sup>92</sup>

### **I. Procedural history.**

Given Catholic’s long history of working with the City, Catholic hoped to resolve this situation without litigation. But on May 7, the City sent two letters to Catholic making clear that further discussions would be futile, and threatening subpoenas within 10 days.<sup>93</sup> Plaintiffs filed their complaint on May 17, 2018, seeking a TRO and preliminary injunction shortly thereafter. The District Court held a three-day evidentiary hearing, then denied the relief on July 13, 2018. That same day, Appellants filed a notice of appeal. Appellants also moved for an injunction pending

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<sup>89</sup> Appx.1149-50, 0346-47.

<sup>90</sup> Appx.0346-47.

<sup>91</sup> *Id.*

<sup>92</sup> Appx.0291-92.

<sup>93</sup> Appx.1009-14.

appeal, which was denied on July 27, 2018 without opinion. Appellants then moved for an expedited appeal; this Court granted that motion with a slightly modified briefing schedule.

### STANDARD OF REVIEW

“When reviewing a district court’s [denial] of a preliminary injunction, we review the court’s findings of fact for clear error, its conclusions of law *de novo*, and the ultimate decision . . . for an abuse of discretion.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017), *as amended* (June 26, 2017) (quotation omitted). “Despite oft repeated statements that the issuance of a preliminary injunction rests in the discretion of the trial judge[,] whose decisions will be reversed only for ‘abuse,’ a court of appeals must reverse if the district court has proceeded on the basis of an erroneous view of the applicable law.” *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (quotation omitted).

Additionally, “[w]here, as here, First Amendment rights are at issue . . . [Courts of Appeal] have a constitutional duty to conduct an independent examination of the record as a whole[.]” *Brown v. City of Pittsburgh*, 586 F.3d 263, 268-69 (3d Cir. 2009) (internal quotation omitted). This Court must therefore “examine independently the facts in the record

and draw [its] own inferences from them,” as it “cannot defer to the District Court’s factual findings unless they concern witnesses’ credibility.” *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 156-57 (3d Cir. 2002) (internal citation and quotation marks omitted).

## SUMMARY OF THE ARGUMENT

The District Court erred by denying Appellants’ motion for preliminary injunction. Appellants have demonstrated a reasonable probability of success on their claims under the First Amendment and the Pennsylvania Religious Freedom Protection Act. The District Court also abused its discretion in ruling against Appellants on the remaining injunction factors.

## ARGUMENT

### **I. Appellants are entitled to an injunction.**

Preliminary injunctive relief is necessary to stop ongoing, irreparable harm and preserve the status quo. “A primary purpose of a preliminary injunction is maintenance of the status quo until a decision on the merits of a case is rendered.” *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994). “Status quo” refers to “the last, peaceable, noncontested status of the parties.” *Kos Pharm.*, 369 F.3d at 708.

To obtain a preliminary injunction, a plaintiff must show “a reasonable probability of eventual success in the litigation,” “that [the plaintiff] will be irreparably injured . . . if relief is not granted,” and the court must weigh “the possibility of harm to other interested persons . . . [and] the public interest.” *Reilly*, 858 F.3d at 176 (quotation omitted).

To demonstrate a likelihood of success, Appellants need to show “a reasonable chance, or probability, of winning,” but a “likelihood’ does not mean more likely than not.” *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). “[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). Appellants have demonstrated a reasonable probability of success on the merits.

**A. Appellants have a reasonable probability of success on their Free Exercise Clause claims.**

The City’s actions impose an obvious burden on Catholic’s religious exercise: if Catholic wants to continue its religious ministry of providing

foster care, it must provide written endorsements that contradict its religious beliefs.<sup>94</sup> The City has violated the Free Exercise Clause in four different ways. First, through outright discrimination and targeting. *See Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). Second, because its actions are “not neutral.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Third, because its policies are “not of general application.” *Id.* Fourth, because its actions involve “individualized, discretionary exemptions.” *Id.*; *Blackhawk v. Pennsylvania* 381 F.3d 202, 209-10 (3d Cir. 2004) (Alito, J.). Any one would necessitate strict scrutiny; here, all four are present.

### **1. The City targeted Catholic.**

Government actions based on “impermissible hostility toward . . . sincere religious beliefs” are *per se* unconstitutional. *Masterpiece*, 138 S. Ct. at 1729. Here, Catholic has been the target of coordinated actions by

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<sup>94</sup> These actions impose a substantial burden on Appellants under both Pennsylvania law and the Free Exercise Clause. *See infra* at I.C.2.

every branch of City government: the City Council passed a resolution calling for an investigation to weed out “discrimination that occurs under the guise of religious freedom”<sup>95</sup>; PCHR opened an extra-jurisdictional inquiry and threatened subpoenas<sup>96</sup>; the Mayor, who has a history of publicly disparaging the Archdiocese, prompted inquiries by the Commission and DHS<sup>97</sup>; DHS’s commissioner summoned Catholic’s leadership to headquarters, then told them to follow the City’s view of “the teachings of Pope Francis” and that it was “not 100 years ago.”<sup>98</sup> And, just minutes after the meeting, the City shut down Catholic’s foster care intake.

The City also told Catholic that future contracts would “explicit[ly]” require written certifications for same-sex couples, and that the City “has no intention of granting an exception” to Catholic.<sup>99</sup> If this were not

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<sup>95</sup> Appx.0838-39. The Council’s reference to the “guise” of religious freedom is evidence of targeting. *See Masterpiece*, 138 S. Ct at 1729 (“clear and impermissible hostility” where government dismissed religious freedom as “rhetoric”).

<sup>96</sup> Appx.1009-10. The Commission only has power to investigate complaints, *see* Phila. Code § 9-1112; but no one has complained. Appx.0497.

<sup>97</sup> Appx.1009; Appx.0585-86.

<sup>98</sup> Appx.0324-25, 0583-84.

<sup>99</sup> Appx.1011-12.

enough, the City admitted that it investigated only *religious* foster agencies, with a single exception: Figueroa phoned a friend.<sup>100</sup> The City still has not bothered to *ask* whether other secular agencies accept all applicants.<sup>101</sup>

These targeted and disparaging actions “pass[] judgment upon or presuppose[] the illegitimacy of religious beliefs and practices” in violation of the First Amendment. *Masterpiece*, 138 S. Ct. at 1731. It is no defense to argue that the targeting occurred in the context of a government contract. Excluding a religious group from a program due to its religious nature is “odious to our Constitution.” *Trinity Lutheran*, 137 S. Ct. at 2025.

The District Court, however, disagreed because the City also penalized one non-Catholic foster agency, Bethany.<sup>102</sup> But discriminating against *two* religious groups rather than one hardly cures a Free Exercise violation. *See, e.g., Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1258

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<sup>100</sup> Appx.0582 (“Q. When you did that investigation, you only contacted faith-based agencies, correct? A. That’s correct.”).

<sup>101</sup> Appx.0582-83.

<sup>102</sup> Appx.0034, 0039-41. Bethany has since agreed to certify same-sex couples. Appx.1191.

(10th Cir. 2008) (McConnell, J.) (state violated Free Exercise Clause by singling out two universities, one Christian and one Buddhist).

The District Court did not apply *Masterpiece* or *Trinity Lutheran*, instead citing an “absence of case law”<sup>103</sup> and looking to *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). But *Martinez* explicitly refused to consider a policy that “prohibit[ed] discrimination on several enumerated bases, including religion and sexual orientation”—like the FPO—and confined its analysis to “a requirement that all [student organizations] accept all comers.” *Id.* at 675. Foster care certifications are anything but an “all-comers” policy—they are intentionally selective, and the City has even stated that agencies can have “different requirements.”<sup>104</sup> The District Court erred by adopting a strained reading of *Martinez* rather than a straightforward application of *Masterpiece* and *Trinity Lutheran*.

The decision below is also incompatible with *Masterpiece*’s observation that the Constitution would protect a religious decision not to perform

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<sup>103</sup> Appx.0028.

<sup>104</sup> Appx.1017; see Appx.0501-02.

same-sex weddings. Even though marriage requires a government license and government-sanctioned officiant, a religious entity's decision to only perform opposite-sex marriages "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. at 1727. The same is true here, particularly where there is no danger of a "long list" of exceptions creating "community-wide stigma," *id.*, because literally every other agency in the City will certify same-sex couples.

## **2. The City's actions are not neutral.**

The City targeted only religious agencies for investigation, applying standards that have never been applied to secular agencies. In *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, this Court invalidated a city's "invocation of [an] often-dormant Ordinance" to prohibit conduct undertaken for religious reasons, even though it had permitted widespread violations of the ordinance. 309 F.3d 144, 168 (3d Cir. 2002).

The same is true here. The City selectively enforced its "must certify" policy and FPO against Catholic, while never applying those policies to

the City's or non-religious agencies' foster work.<sup>105</sup> The "must certify" policy was found nowhere in the contract, never communicated to agencies, and not applied in practice, where "referrals are made all the time."<sup>106</sup> The City has also announced plans to condition future contracts on a requirement that agencies certify same-sex couples—a requirement admittedly added to prevent a particular religiously motivated practice.<sup>107</sup> This is textbook selective enforcement.

Evidence also showed that the City had never applied the FPO to foster care. Figueroa could not recall doing "anything [as Commissioner] to make sure that people at DHS follow the [FPO] when doing foster care work."<sup>108</sup> DHS expects agencies to consider criteria banned by the FPO when doing home studies, violates the FPO itself by considering race and disability in foster care placements, and has never trained employees on compliance with the FPO.<sup>109</sup> That is no surprise, as the plain language of the FPO shows that foster care home studies and certifications are not

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<sup>105</sup> Appx.0286-89; Appx.0327-28; Appx.0512-14, 516-18, 0525, 0582-83.

<sup>106</sup> Appx.0127, 0191-93, 0202-03.

<sup>107</sup> Appx.1013.

<sup>108</sup> Appx.0513-14.

<sup>109</sup> Appx.0288-89, 512-17, 0522-23, 0525.

public accommodations. They are not a “service[] . . . extended, offered [] or otherwise made available to the public”<sup>110</sup>—rather, their very purpose is to be selective. None of the factors considered in these assessments would be remotely permissible reasons for denying someone a train ticket, a cup of coffee, or any other actual public accommodation.<sup>111</sup>

Even if the FPO applied to Catholic, it would only apply to Catholic’s provision of services to foster children, not its certification of foster parents. Foster parents are certified based on intentionally selective criteria. Accordingly, “a recruiter of foster parents[] is not a public accommodation,” because “it is not open to the public.” *Abukhalaf v. Morrison Child & Family Servs.*, No. CV 08-345-HU, 2009 WL 4067274, at \*7 (D. Or.

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<sup>110</sup> Phila. Code § 9-1102(w).

<sup>111</sup> The District Court also relied upon *Teen Ranch v. Udow*, but that case is primarily an Establishment Clause case where the Court determined that even the Free Exercise claims “boil down to the single issue” of whether teens sent to the ranch had “true private choice,” 389 F. Supp. 2d 827, 834-35 (W.D. Mich. 2005), *aff’d as supplemented*, 479 F.3d 403 (6th Cir. 2007). The case does not control here, where the government targeted religious groups, seeks to foreclose religious conduct that it does not pay for, and prospective parents have a true private choice among dozens of providers.

Nov. 20, 2009). This is true even if the agency “advertise[d] the opportunity to become a foster parent to the public,” because it still “ultimately retain[ed] discretion as to which applicants [we]re chosen.” *Id.* The same is true here. The City’s selective application of the FPO to Catholic is not neutral.

The District Court ruled otherwise because it concluded that the policies were not “drafted or enacted” to target religion.<sup>112</sup> But the “problem is not [just] the adoption of an anti-discrimination policy; it is the implementation of the policy, permitting secular exemptions but not religious ones and failing to apply the policy in an even-handed” manner. *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012); *see also Lukumi*, 508 U.S. at 543 (“[G]overnment, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief . . .”). Both the “must certify” policy and the FPO’s application to foster care are recent inventions used to justify the City’s actions, and have never been applied to anyone else.<sup>113</sup>

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<sup>112</sup> Appx.0032.

<sup>113</sup> Appx.0126-28, 0286-89, 0327-28, 0512-14, 516-18, 0522-23, 0525, 0527-28, 0582-83.

Worse still, the City is penalizing foster parents like Mrs. Paul merely for affiliating with Catholic.<sup>114</sup> Placements with *existing* foster parents are not implicated by the City's interest in *future* home studies. Yet the City refuses to fill the empty beds in homes of families working with Catholic. This punitive action unlawfully "proscribe[s] more religious conduct than is necessary to achieve the[] stated ends." *Lukumi*, 508 U.S. at 538.

### **3. The City's policies are not generally applicable.**

The City's actions also trigger strict scrutiny because they are not generally applicable. See *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999); *Blackhawk*, 381 F.3d at 209-10. As described above, both the "must certify" policy and the application of the FPO to foster are newly-minted policies not applied to other agencies, or the City itself.

The City has no response to the testimony of Mr. Amato and Ms. Simms-Busch that, in practice, referrals happen all the time and for a

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<sup>114</sup> Appx.1013, 0144-45.

variety of reasons.<sup>115</sup> The City does not claim that their testimony is untrue, nor did it present evidence that referrals do not occur. Nor did the District Court question the credibility of this testimony; only its legal weight. The City even admitted that agencies may refer families elsewhere, but insisted that those were different because they were only “information referral[s]” and the choice was with the family.<sup>116</sup>

The existence of such a policy is questionable at best. No DHS official could identify any written copy of this policy.<sup>117</sup> The only source cited for this alleged policy was the contract, but the cited contract provision refers to children or families sent to agencies by the City, not parents who approach agencies independently.<sup>118</sup> Nor could DHS officials identify any time that they had communicated this policy to foster agencies.<sup>119</sup>

Such actions “trigger strict scrutiny because at least some of the [secular] exemptions available . . . undermine the interests” the City claims

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<sup>115</sup> Appx.0126-29, 0318-21.

<sup>116</sup> Appx.0321.

<sup>117</sup> Appx.0286-88, 0526-28, 0549.

<sup>118</sup> Appx.0198, 1012. This is the same contract provision permitting exceptions in the Commissioner’s “sole discretion.”

<sup>119</sup> Appx.0287-88, 0526-28.

to be pursuing. *Blackhawk*, 381 F.3d at 211. Any exception undermines the “must certify” policy, since uniformity is the point of the policy.

The City also permits exceptions which undermine the interests protected by the FPO. Evidence showed that the FPO did not apply to foster care at all—at least until the City needed to justify its actions against Catholic. *See supra*. The City admits to considering *race* and *disability* in its foster care work.<sup>120</sup>

The City not only permits, but expects, foster care agencies to take steps that would violate the FPO (if the FPO applied) when performing home studies. The City expects agencies to follow state law.<sup>121</sup> But state law governing home studies *requires* subjective consideration of factors including “stable mental and emotional adjustment,” possibly including a “psychological evaluation”; a family’s “[s]upportive community ties”; and certifications approving “[e]xisting family relationships, attitudes and expectations.”<sup>122</sup> These requirements cannot be squared with the

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<sup>120</sup> Appx.0515-17.

<sup>121</sup> Appx.0187 (referring to “the 3700 regulations”).

<sup>122</sup> 55 Pa. Code § 3700.64.

FPO, which prohibits discrimination on the basis of “marital status”; “familial status”; or “disability,” including “mental impairment.”<sup>123</sup> Foster care agencies simply cannot follow both state law and the FPO at the same time. Either the City is permitting foster agencies to take actions which undermine its interest in the FPO, or the claim that the FPO applies to foster care was invented for this litigation. The FPO is certainly not *generally* applicable, if it is applicable at all.<sup>124</sup>

#### **4. The City used a system of discretionary exemptions.**

When a law gives the government discretion to grant case-by-case exemptions based on “the reasons for the relevant conduct,” such a “waiver mechanism . . . creates a regime of individualized, discretionary exemptions that triggers strict scrutiny.” *Blackhawk*, 381 F.3d at 207, 210. Here, two types of discretionary exemptions are present. The contract provision on which the City relies for its supposed “must certify” policy

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<sup>123</sup> Phila. Code §§ 9-1102(d), 9-1106.

<sup>124</sup> In prior filings, the City has cited federal guidance as proof that federal antidiscrimination law applies to foster care. But unlike the FPO, that guidance includes lengthy, detailed explanations of how antidiscrimination law applies to foster care. *See, e.g.*, Multiethnic Placement Act of 1994, Pub. L. 103-382, §§ 551-55, 108 Stat. 3518 (1994). The FPO has no such language.

allows exceptions in the Commissioner’s “sole discretion.”<sup>125</sup> But the City said that it “has no intention of granting an exception” to Catholic.<sup>126</sup>

City officials also grant case-by-case exemptions to the intake freeze—based on “individualized assessments”—but not for Catholic’s religious exercise, and not to fill empty homes of parents—like Mrs. Paul—who work with Catholic for religious reasons.<sup>127</sup> These discretionary exemptions, which are granted without any identifiable written guidelines, “are sufficiently open-ended to bring the regulation within the individualized exemption rule.” *Blackhawk*, 381 F.3d at 210. Such discretionary exemptions trigger strict scrutiny. *Id.*

**B. Appellants have a reasonable probability of success on their Establishment Clause claim.**

The City’s actions also violate the Establishment Clause. One of the City’s highest officials called a religious organization into a meeting to tell its leaders how to interpret the Pope’s teachings, then penalized them when they arrived at the “wrong” answer. Not only did the City punish

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<sup>125</sup> Appx.1012; Appx.1071-72.

<sup>126</sup> Appx.1012.

<sup>127</sup> Appx.0612.

Catholic, but it took the vindictive step of refusing to place any children with previously certified foster parents like Mrs. Paul—just because of their religious affiliation with Catholic.<sup>128</sup>

The Establishment Clause exists to ensure “that the people’s religions must not be subjected to the pressures of government for change.” *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962). The Supreme Court has explained that the First Amendment “mandates government neutrality . . . between religion and nonreligion.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The government “may not aid, foster, or promote one religion or religious theory against another.” *Id.* The “clearest command of the Establishment Clause” is that the government cannot prefer one religious belief above others. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Philadelphia violated all of these obligations, and flagrantly so. Rather than remain neutral between religion and non-religion, it targeted religious groups for punishment over policies it never even announced to (much less enforced against) secular agencies. It told Catholic which religious leaders to follow and which beliefs to retain. Then it punished Catholic for non-compliance with these demands. And it punished foster

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<sup>128</sup> Appx.0144.

parents for merely associating with Catholic. It denigrated religious beliefs it disfavors as a mere “guise” for discrimination.

These are precisely the kind of “pressures of government for change” that the Establishment Clause forbids. *Engel*, 370 U.S. at 429-30. Simply put, “it is no part of the business of government” to pick which religious leaders a group should obey, to dictate religious beliefs to anyone, to decide that some religious beliefs are correct and others a mere “guise.” *Id.* at 425; *cf. Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 184 (2012) (“The Establishment Clause prevents the Government from appointing ministers.”). It is unsurprising that the City’s illegal actions left Appellant foster parents feeling “hurt[]” and “insult[ed]” by the City’s “needless[] denigrat[ion]” of their religious beliefs.<sup>129</sup>

These concerns are not minor. The Establishment Clause prohibition on this type of government behavior is “rooted in the foundation soil of our Nation” and “fundamental to freedom.” *Epperson*, 393 U.S. at 103.

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<sup>129</sup> Appx.0993.

Because of the City's open violation of these principles, its actions are invalid, and an injunction is required.<sup>130</sup>

**C. Appellants have a reasonable probability of success under the Religious Freedom Protection Act.**

The Pennsylvania Religious Freedom Protection Act was enacted to ensure Pennsylvanians greater protection for religious exercise than the Free Exercise Clause. *See Brown*, 586 F.3d at 287 (“the purpose of the 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)”).<sup>131</sup>

RFPA uses a test similar to federal RFRA and RLUIPA: plaintiffs

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<sup>130</sup> The District Court suggested that the City could somehow be held responsible for actions taken as part of Catholic's religious ministry. Appx.0036 n.24. This is not the case. First, Catholic is not a state actor. As the Third Circuit has explained, “[n]o aspect of providing care to foster children in Pennsylvania has ever been the exclusive province of the government.” *Leshko v. Servis*, 423 F.3d 337, 343 (3d Cir. 2005). Nor is this analysis changed by the fact that independent contractors are (in some instances) treated like employees for purposes of First Amendment retaliation claims. The fact that the same legal test applies to both independent contractors and employees in some circumstances does not erase the line between the two. Second, as an independent contractor, Catholic's actions will not trigger liability for the City. *See, e.g., County of Schuylkill v. Maurer*, 536 A.2d 479, 481 (1988) (“[I]t is clear that local agencies, such as a county government, have no liability for the negligent acts of independent contractors, but they can be held liable for acts of employees.”).

<sup>131</sup> *See also* Appx.0593 (acknowledging obligations under RFPA).

must establish that they are engaged in (1) sincere religious exercise that (2) has been substantially burdened. 71 P.S. § 2404(a). If so, the burden shifts to the government to demonstrate that its actions can pass strict scrutiny. 71 P.S. § 2404(b).

**1. Appellants are exercising religion.**

Caring for foster children is a fundamental religious exercise for Plaintiffs. “Acts of charity are central to Christian worship.” *Chosen 300 Ministries, Inc. v. City of Phila.*, No. 12-CV-3159, 2012 WL 3235317, at \*17 (E.D. Pa. Aug. 9, 2012) (granting preliminary injunction under RFPA). Catholic’s work is a “religious ministry,” and “care of at-risk children” is “intrinsic to who we are and what we do.”<sup>132</sup> Foster care “continues the work of Jesus.”<sup>133</sup> Catholic faith and teaching are not incidental to this work; they provide the motivation, inspiration, and framework for it.<sup>134</sup> To violate Catholic’s religious beliefs and practices in foster care work would be inimical to the purpose of this work. *See id.* As relevant here, it

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<sup>132</sup> Appx.0305.

<sup>133</sup> Appx.1032.

<sup>134</sup> *See, e.g.*, Appx.0303-07, 0309, 0312; Appx.1032.

would “violate the religious exercise of Catholic Social Services” to “provide a written certification endorsing a same-sex marriage.”<sup>135</sup> This satisfies the first part of the RFPA test.

The District Court questioned whether Catholic’s century-old foster care program was truly a religious exercise. This analysis rested on two errors: first, the court selectively quoted Catholic’s statements to omit the importance of consistency with Catholic teaching.<sup>136</sup> But testimony was clear that performing foster care work consistent with Catholic teaching is a religious exercise,<sup>137</sup> and that Catholic beliefs inspire and guide that work.<sup>138</sup>

Second, the District Court questioned whether charitable work is religious exercise. The court relied upon *Ridley Park United Methodist*

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<sup>135</sup> Appx.0312.

<sup>136</sup> Compare Appx.0051 (Catholic’s religious exercise is “providing foster care to Philadelphia children.”) (quoting Memorandum of Law in Support of Motion for TRO and Preliminary Injunction 13, ECF 13-2) with Memorandum of Law in Support of Motion for TRO and Preliminary Injunction 11, ECF 13-2 (“Caring for foster children *in a manner consistent with Catholic teaching* is a fundamental religious exercise for Plaintiffs.”) (emphasis added) and Catholic’s Proposed Findings of Fact & Conclusions of Law ¶ 120, ECF 46 (“Catholic faith and teaching are not incidental to this work; they provide the motivation, inspiration, and framework for it.”) (internal citation omitted).

<sup>137</sup> Appx.0305.

<sup>138</sup> See, e.g., Appx.0303-07, 0309, 0312; Appx.1032.

*Church v. Zoning Hearing Bd.*, 920 A.2d 953 (Pa. Commw. Ct. 2007). But that case involved a secular daycare recently purchased by a church, apparently to take advantage of a zoning exception. *Id.* at 954-56. The court unsurprisingly concluded that running a daycare was not a “fundamental religious activity.” *Id.* at 960. Here, Catholic has engaged in a religious ministry of caring for at-risk children for over a century; its religious mission is even stated in the contract.<sup>139</sup> Catholic’s century-old ministry is in no way comparable to Ridley Park’s litigation tactic.<sup>140</sup>

In the far more analogous *Chosen 300* case, the court looked to the churches’ history of service and accepted their testimony that they “have a religious obligation to provide sustenance to the poor and needy,” and they “fulfill this religious obligation by conducting outdoor food-sharing programs with the homeless in Fairmount Park.” *Chosen 300 Ministries*, 2012 WL 3235317, at \*16-17. Here, Catholic has a religious obligation to

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<sup>139</sup> Appx.1032-33.

<sup>140</sup> The District Court also relied upon the unpublished decision in *Staple v. Commonwealth*, No. 361 M.D. 2013, 2014 WL 2927286 (Pa. Commw. Ct. June 26, 2014). But that case involved a mandamus action in which the inmate had to establish a “clear legal right” to relief, and used the deferential “legitimate penological interests” standard which RFPA applies only to the prison system. *See id.* at \*4 (citing 71 P.S. § 2405(g)).

“continue[] the work of Jesus by affirming, assisting, and advocating for individuals, families, and communities,” and it fulfills that obligation by providing foster care in a manner consistent with its religious beliefs.<sup>141</sup>

Likewise, the individual Appellants serve foster children as a religious exercise.<sup>142</sup> Ms. Fulton testified that “faith that led me to” become a foster parent, and she chose to work with Catholic because “I share the same values.”<sup>143</sup> Mrs. Paul called foster work a “gift from God,” and testified that she works with Catholic because of “the beliefs that I believe in and they do too.”<sup>144</sup> Ms. Simms-Busch likewise testified that “God placed [foster work] in my heart as a calling,” and that she chose Catholic because of its “core beliefs” and that it was the agency “I felt called to.”<sup>145</sup>

All this is more than sufficient to establish that providing foster care services, and providing them consistently with Catholic religious beliefs, or with an agency who does so, is a religious exercise under RFPA.

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<sup>141</sup> Appx.1032-33, 1043.

<sup>142</sup> Appx.0148; Appx.0131; Appx.0144.

<sup>143</sup> Appx.0148.

<sup>144</sup> Appx.0144.

<sup>145</sup> Appx.0131-32, 0140.

## **2. Appellants' religious exercise is substantially burdened.**

The City's actions substantially burden Appellants' religious exercise.

RFPA defines a substantial burden as a government action which:

(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 P.S. § 2403. Although Plaintiffs need only establish one, all four types of burden are present here.

The City's actions "[s]ignificantly constrain[] or inhibit[] conduct or expression mandated by [Catholic'] religious beliefs" and "curtail[] [Catholic's] ability to express adherence" to its faith because those actions force Catholic to choose between its religious beliefs about marriage and its religious exercise of serving vulnerable children.<sup>146</sup> It is a substantial burden when plaintiffs are forced "to choose" between "abandoning one of the precepts of [their] religion" or "forfeiting benefits." *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). The Supreme Court unanimously held

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<sup>146</sup> 71 P.S. § 2403.

in *Holt* “put[ting] [the prisoner] to this choice” between shaving his religiously mandated beard or facing penalties “easily satisfied” the substantial burden test. *Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015).

Here, the City says it is willing to allow Catholic to continue caring for foster children, but only if Catholic is willing to violate its sincere religious beliefs regarding marriage.<sup>147</sup> The City’s forced choice not only constrains, but completely prevents, Catholic from carrying out its religious exercise. *See also Chosen 300 Ministries*, 2012 WL 3235317, at \*18 (finding substantial burden where Philadelphia’s action “does not simply constrain” charitable activity, “it terminates that activity all together”).

In the same way, the City is also “den[ying]” Appellants “a reasonable opportunity to engage in activities which are fundamental to [their] religion.”<sup>148</sup> Without a foster care contract, Catholic cannot provide foster care to Philadelphia children. Catholic “is not claiming any entitlement” to a contract, but “instead asserts a right to participate in a government benefit program without having to disavow its religious character.” *Trin-*

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<sup>147</sup> *See* Appx.1011-12.

<sup>148</sup> 71 P.S. § 2403.

*ity Lutheran*, 137 S. Ct. at 2022. The City is denying Catholic a reasonable opportunity to carry out the same religious exercise it has carried out for a century.

In order to compete for a contract, the City has been explicit that Catholic must engage in “conduct or expression which violates a specific tenet of [Catholic’s] religious faith.”<sup>149</sup> The City has stated that the Contract must be carried out “in a manner that is consistent with our conception of equality”—i.e., Catholic must be willing to endorse same-sex marriages in home studies.<sup>150</sup> The City thus seeks to “[c]ompel[] conduct or expression” by conditioning foster care work on written certifications contrary to Catholic’s religious beliefs.<sup>151</sup>

The City is also burdening the religious exercise of the individual foster parents. Losing Catholic’s support, especially for children with serious needs,<sup>152</sup> would “[s]ignificantly constrain[] or inhibit[]” their ability to serve as foster mothers, which is a religious exercise. 71 P.S. § 2403.

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<sup>149</sup> 71 P.S. § 2403.

<sup>150</sup> Appx.1011-12.

<sup>151</sup> 71 P.S. § 2403.

<sup>152</sup> Appx.0135-36; Appx.0150-52; Appx.0146-47.

They would also be prevented from affiliating with Catholic for the purpose of religious exercise.<sup>153</sup> The City’s action already “[d]enies [Mrs. Paul] a reasonable opportunity to engage in activities which are fundamental to [her] religion”—she is currently unable to care for foster children, something she has done as a religious exercise for 46 years.<sup>154</sup>

The District Court found no substantial burden, but did so by re-writing both state law and Catholic’s religious beliefs. The court concluded that providing home study certifications for same-sex couples does not “require CSS to express its religious approval of same-sex relationships in contravention of Catholic teaching about marriage.”<sup>155</sup> Remarkably, the court arrived at this conclusion without examining—or even citing—the state law governing home studies.<sup>156</sup> State law requires agencies to consider, among other things, “existing family relationships” and the “[a]bility of the applicant to work in partnership” with an agency. 55 Pa.

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<sup>153</sup> Appx.0136; Appx.0146-47.

<sup>154</sup> 71 P.S. § 2403; *see* Appx.0144-45.

<sup>155</sup> Appx.0052.

<sup>156</sup> *See* Appx.0051-53.

Code §§ 3700.64, 3700.69. Catholic cannot complete home studies without making affirmative findings on those points. And indeed, the City made clear that Catholic's religious beliefs would be an invalid basis for Catholic to decline to certify a same-sex couple.<sup>157</sup>

Nor did the District Court cite Catholic's undisputed testimony: it is Catholic's "sincere belief" that the home study is a "written endorsement" of the foster parents' relationship.<sup>158</sup> 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."<sup>159</sup> The City (and the District Court) may not agree with Catholic's evaluation of the moral implications of such decisions, but "it is not within the judicial function and judicial competence to inquire" whether Catholic "correctly perceived the commands" of its faith. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981). Given both Catholic's religious beliefs and state law, the District Court's conclusion cannot be sustained.

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<sup>157</sup> City's Proposed Findings of Fact & Conclusions of Law 20, ECF 45.

<sup>158</sup> Appx.0389, 0549.

<sup>159</sup> Appx.0312.

The other cases the District Court relied upon are inapplicable. *Brown*, 586 F.3d at 287-88, dealt with the application of RFPA to an unusual circumstance where RFPA would create a content-based speech regime under what had otherwise been a content-neutral law. *Id.* Since this case does not involve an otherwise content-neutral speech regulation, *Brown* is inapplicable. Furthermore, *Brown*'s viability is questionable in light of *McCullen v. Coakley*, 134 S. Ct. 2518, 2523 (2014). See *Bruni v. City of Pittsburgh*, 824 F.3d 353, 357 (3d Cir. 2016) (applying *McCullen*).<sup>160</sup>

The District Court also relied upon RFPA's "clear and convincing evidence" standard.<sup>161</sup> But here, the material facts are not in dispute: Catholic must provide home studies and certifications for same-sex couples, or it may no longer provide foster care services in Philadelphia. The dispute here is legal, not factual: does this forced choice amount to a substantial burden? Under the plain terms of the statute, it does.

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<sup>160</sup> *Commonwealth v. Parente*, 956 A.2d 1065, 1069 (Pa. Commw. Ct. 2008), is likewise inapplicable. There, the plaintiff was able to engage in religiously motivated speech, and even use a sound system, but not at an excessive volume. *Id.* at 1070-71. Here, Catholic's religious exercise is not being turned down a notch, but prohibited within the jurisdiction.

<sup>161</sup> Appx.0048, 0051.

Because the City has imposed a substantial burden on religious exercise, it must prove its actions can survive strict scrutiny.

**D. Appellants have a reasonable probability of success on their compelled speech claim.**

The First Amendment protects speakers from government attempts to “compel[] them to voice ideas with which they disagree.” *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018). It is “always demeaning” when speakers are “coerced into betraying their convictions,” and forced “to endorse ideas they find objectionable.” *Id.* See *NIFLA v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J. concurring) (“[I]t is not forward thinking to force individuals to ‘be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.’”) (citation omitted); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 15-16 (1986) (similar).

Courts apply strict scrutiny to government actions that compel speech and expressive conduct, particularly when sincere religious beliefs are at stake. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (requirement to display state motto on license plates was compelled speech); *Frudden v. Pilling*, 742 F.3d 1199, 1201 (9th Cir. 2014) (school uniform with “Tomorrow’s Leaders” was compelled speech); *Hurley v. Irish-Am.*

*Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (using public accommodations law to force a parade to include a group was compelled speech). Here, strict scrutiny applies because the City is coercing Catholic to engage in speech contrary to its religious beliefs.

As described above, Pennsylvania requires all prospective foster parents to undergo an initial “visit and inspect[ion]” from a foster care provider.<sup>162</sup> After this “home study,” Catholic must “give *written notice* to foster families of its decision to approve, disapprove or provisionally approve the foster family.”<sup>163</sup>

According to the City, while Catholic may find a foster parent unqualified, it “may not refuse to perform the evaluation in the first place or find the parent unqualified for a discriminatory reason.”<sup>164</sup> The City asserts that one such “discriminatory reason” is Catholic’s religious belief that marriage must be between one man and one woman.<sup>165</sup> The City is thus punishing Catholic for declining to make written endorsements that violate its sincere religious beliefs.

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<sup>162</sup> Pa. Code § 3700.69.

<sup>163</sup> *Id.* (emphasis added).

<sup>164</sup> City’s Proposed Findings of Fact & Conclusions of Law 20, ECF 45.

<sup>165</sup> *Id.*

This prohibition on compelled speech applies equally to entities engaged in government contracting. The City cannot compel private speech on a matter outside the scope of the services for which it has contracted. While the government is free to impose conditions on the funding of its programs, it cannot go “beyond ensuring that federal funds not be used to subsidize” private speech, “and instead leverage[] the federal funding to regulate [private] speech outside the scope of the program.” *Agency for Int’l Dev. v. AOSI*, 570 U.S. 205, 216 (2013).

This is exactly what happened here. The City contracted with Catholic to provide and support state-certified foster homes for children in need. It now seeks to interfere in the state certification process because it disagrees with the way in which Catholic performs it. But *who* Catholic certifies and *how* they go about this process is not within the scope of the City’s contract, nor do home studies qualify as services provided by Catholic under this contract. The City’s actions are thus an attempt to reach outside the contract and regulate private speech.

The City has conceded that “certifications and home studies” are “not expressly funded under the contract because CSS’ compensation is based on the number of children in its care rather than on the number of home

studies performed.”<sup>166</sup> The City also admits that it has “nothing to do” with home studies and that agencies can have “different requirements.”<sup>167</sup> The contract does not require Catholic to perform a certain number of home studies or regulate how they are performed.<sup>168</sup> In fact, the requirement that “foster family homes . . . shall have current, full Certificates of Approval and/or licensure” is located under “Requisite Licensure and Qualifications”—it is not located under the “Services” portion of the contract.<sup>169</sup> The contract further states 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.”<sup>170</sup> Catholic’s home studies and foster care certifications are thus private speech, not contracted services.<sup>171</sup>

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<sup>166</sup> Resp. in Opp’n at 26; see also Appx.0490.

<sup>167</sup> Appx.1017.

<sup>168</sup> See Appx.1033.

<sup>169</sup> Appx.1084-85.

<sup>170</sup> Appx.0534, 1103.

<sup>171</sup> For this reason, *Keeton v. Anderson-Wiley*, 664 F.3d 865, 883 (11th Cir. 2011), is easily distinguishable. There, a counseling student sought to “impose” her values on her clients in violation of her profession’s ethics policy, a policy that her school was “required to adopt in order to offer” an accredited counseling program. *Id.* at 869, 873-74. Here, Catholic does not seek to impose its views on anyone, nor has the City pointed to any

In light of this, the City has fallen back on the argument that because the contract requires Catholic to “provide certified resource care homes for dependent children or youth,” and the preparation of a home study is integral to certification, the home study must be integral to the contract too.<sup>172</sup> This bootstrapping concedes that home studies are not actually governed by (or even mentioned in) the contract. Imagine a customer trying to tell Uber that by paying for a ride, she could now dictate the criteria by which Uber screens and certifies its drivers simply because the certification is “integral” to her trip to the airport. Or imagine a client trying to dictate a public accounting firm’s certification requirements for auditors simply because only *certified* auditors can review their books. These hypotheticals highlight the absurdity of the City’s argument.

The City is attempting to “recast” its contract to subsume the compelled speech into “the definition of a particular program” in order to evade First Amendment review. *AOSI*, 570 U.S. 205 at 215. Put another

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similar policy here (nor could it, as Catholic’s actions, unlike the counselor’s conduct in *Keeton*, are not contracted-for services).

<sup>172</sup> Resp. to Mot. for Stay Pending Appeal, No. 18-2574 (July 23, 2018), at 18; Appx.1033.

way, the City is impermissibly leveraging its funding in one area to control speech in another. *Id.* at 214-15. Like in *AOSI*, where the government could not force recipients “to pledge allegiance to the Government’s policy,” here the City has tried to compel Catholic to make written endorsements of same-sex relationships. *Id.* at 218, 220. Indeed, this is an even easier case than *AOSI*, where the organizations could *forego* government funding and “take a different tack with respect to” the relevant policy. *Id.* at 225 (Scalia, J., dissenting). That is not an option for Catholic.<sup>173</sup>

Of course, the City remains free to speak its own message, and to place children with same-sex foster parents. Catholic has never interfered with either endeavor. But the City cannot coerce Catholic to publicly promote the City’s views.

**E. Appellants have a reasonable probability of success on their free speech retaliation claim.**

The City’s actions constitute retaliation for Catholic’s protected speech and religious exercise and thus violate the First Amendment. “To prevail

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<sup>173</sup> Catholic is thus unlike the libraries in *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion) who were “free to [offer unfiltered access] without federal assistance.” *Id.*

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) (citation omitted) (upholding preliminary injunction).

Catholic easily meets these requirements. First, it is engaging in constitutionally protected speech and religious exercise. As described in detail above, *supra* I.C.1., Catholic’s provision of foster care services is a religious ministry and thus constitutes religious exercise under the First Amendment. In addition, Catholic engages in protected speech when it evaluates families as part of a home study. *Supra* I.D.<sup>174</sup>

Second, the City “responded with retaliation” to Catholic’s protected speech and conduct. Indeed, the City’s actions were intended to deter Catholic from its religious exercise and speech, and to coerce it into changing its ways. Loss of a decades-old program is certainly sufficient

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<sup>174</sup> The District Court characterized this as a violation of the contract, not protected speech. *See* Appx.0060-61. But, as described above, Catholic’s statements made during home studies, and its statements regarding same-sex marriage, are private speech not covered by its contract with the City. Indeed, as Commissioner Figueroa admitted, she closed Catholic’s intake based on the agency’s “religious decision” not to certify same-sex couples. Appx.0178-79, 0549-50.

to deter a person of ordinary firmness from exercising her rights. *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).

Third, the City admits that its adverse actions were motivated by Catholic’s protected activity. 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 . . .”).<sup>175</sup> And the City was explicit in its May 7th letter that both Catholic’s speech and its refusal to speak were the reason for the adverse actions: 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.<sup>176</sup> More incriminating still, Commissioner Figueroa testified that the City took action against Catholic because of its “religious decision” not to certify same-sex couples.<sup>177</sup>

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<sup>175</sup> Appx.0843-44.

<sup>176</sup> Appx.0859-60.

<sup>177</sup> Appx.0178-79, 0549-50.

Catholic's protected activity is thus why the City suspended further foster care referrals without cause and in violation of its 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 because of their religious beliefs about marriage, and threatened to subpoena Catholic even though no complaint had been filed against it.

The City has taken adverse action against Catholic because of its speech and religious exercise. This retaliation has harmed Catholic, the foster parents it supports, and the children who have been denied loving homes.

**F. The City's actions cannot pass strict scrutiny.**

For all the reasons described above, the City's actions must face strict scrutiny. This is the "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), one the City cannot hope to pass.

***No compelling interest.*** A compelling interest is an interest "of the highest order," of the type that would justify the most serious government infringements upon constitutional rights. *Lukumi*, 508 U.S. at 546. 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*, 135 S. Ct. at 863 (citation omitted).

The District Court never held that the City has a compelling interest, finding instead that the interests were only “legitimate.”<sup>178</sup> Finding a compelling interest would be impossible given (1) Deputy Commissioner Ali’s concession that the City’s interest in requiring home studies is “no stronger or no weaker than enforcing any other policy”<sup>179</sup>; (2) the City’s failure to notify agencies about (much less enforce) the policy<sup>180</sup>; (3) the City’s failure to apply FPO standards to foster care<sup>181</sup>; (4) the City’s admission that agencies can have “different requirements”<sup>182</sup>; (5) the City’s admission that it has “nothing to do” with certifications<sup>183</sup>; and (6) controlling state law.<sup>184</sup>

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<sup>178</sup> Appx.0034.

<sup>179</sup> Appx.0285.

<sup>180</sup> Appx.0521-22, 0582-83.

<sup>181</sup> Appx.0512-17.

<sup>182</sup> Appx.1017.

<sup>183</sup> Appx.0532-33.

<sup>184</sup> 55 Pa. Code § 3700.64.

The City and the District Court relied heavily on the FPO. But, under both the Ordinance and the Contract, the provision only applies if Catholic is a “public accommodation.”<sup>185</sup> For all the reasons discussed above, it is not. Therefore, the City cannot have a compelling interest in applying the FPO here.<sup>186</sup>

Nor is the City furthering any compelling interest in a diverse pool of foster parents. 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.<sup>187</sup> Indeed, the current referral freeze has already decreased the number of available foster homes, so that 35 places are available and unfilled.<sup>188</sup>

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<sup>185</sup> Appx.0843-44; Phila. Code § 9-1106; Appx.1114-15.

<sup>186</sup> The District Court made much of the fact that the FPO was included in Catholic’s contract. But the City knows how to write an express non-discrimination provision—the contract contains a flat ban on discrimination based upon race, color, religion, or national origin. Appx.1114-15. But the City chose to rely upon the FPO for the remaining non-discrimination terms. *Id.* Moreover, the contract contains a number of boilerplate provisions that by their terms do not apply to foster care, such as professional liability insurance for nursing homes, prohibitions on investment in Northern Ireland, and compliance with law governing prisons. Appx.1062, 1105, 1119.

<sup>187</sup> Appx.0496-97.

<sup>188</sup> Appx.0344.

Even the City’s expert witness—who is the Executive Director of and served as counsel for Intervenors<sup>189</sup>—admitted that there is no evidence anyone has been harmed by Catholic’s religious exercise.<sup>190</sup>

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). The harm the City alleges—that gay foster parents will be discouraged from fostering—is purely hypothetical.

Yet right now, the City is not just discouraging, but entirely preventing foster parents like Mrs. Paul from welcoming foster children into their homes. Catholic has homes available for foster children, homes the City will not fill.<sup>191</sup> The City has no compelling interest in penalizing Mrs. Paul, Ms. Fulton, or Ms. Simms-Busch, and it has not even attempted to make such an argument. The City can have no compelling interest in contravening state law by keeping children out of loving homes.

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<sup>189</sup> Appx.0645.

<sup>190</sup> Appx.0663-65.

<sup>191</sup> Appx.0344.

***Failure to use least restrictive means.*** The longstanding *status quo* was a workable, less restrictive alternative. The City already permits agencies to refer families elsewhere for reasons such as geographic proximity, medical expertise, behavioral expertise, specialization in pregnant youth, work with Native American children, and language needs.<sup>192</sup> Permitting Catholic to refer families elsewhere for religious reasons would maximize the number of (1) foster parents, (2) foster agencies, and (3) foster children placed in loving homes.

The absence of even a single complaint against Catholic shows that the diverse group of 30 foster agencies is meeting the needs of prospective foster parents. And the City has identified, and is pursuing, another less restrictive alternative through its ongoing direct recruitment of LGBTQ foster families.<sup>193</sup>

## **II. The harm to Appellants is irreparable.**

“[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). But even aside from this, Appellants have suffered

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<sup>192</sup>Appx.0126-28, 0208-09, 0218, 0318-19, 0502; Appx.0318.

<sup>193</sup> Appx.0183-84.

and will continue to suffer irreparable harm absent relief. Irreparable harm is a “presently existing actual threat” and requires a “clear showing of immediate irreparable injury” absent relief. *Acierno*, 40 F.3d at 655. This standard is easily satisfied.

Without an injunction, Catholic’s foster care program will be forced to close within months, well before litigation is complete.<sup>194</sup> This loss is not an economic injury redressable with monetary damages. The loss of experienced employees, connections to foster families, and institutional knowledge built over decades of service would make it extremely difficult, if not impossible, for Catholic to rebuild its foster care program.<sup>195</sup> Such harms are irreparable. *See, e.g., Bateman v. Ford Motor Co.*, 302 F.2d 63, 66 (3d Cir. 1962) (“[O]blitera[tion]” of a business is irreparable as monetary damages would be “small consolation.”); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124, 125–26 (2d Cir. 1984) (loss of distributorship “representing many years of effort and the livelihood of its husband and wife owners, constitutes irreparable harm.”).

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<sup>194</sup> Appx.0372, 0377-80, 0381.

<sup>195</sup> Appx.0138, 0347.

Catholic's closure would also cause serious harm to all the foster families it supports. As Appellants testified, it would be "devastating" for them and their foster children were Catholic to close, as the agency has been "like family" to them.<sup>196</sup> Ms. Simms-Busch feels "backed into a corner" by the City's actions, which would force her to either give up the agency she depends on or be separated from children she loves.<sup>197</sup> Mrs. Paul "cannot imagine starting from scratch and fostering children without" Catholic's support.<sup>198</sup> And Mrs. Paul experiences ongoing harm, as she feels "lost" being unable to care for children.<sup>199</sup> Were Catholic to close, the resulting harm would affect not only Catholic and its staff, but also all the foster families it supports, along with each of their foster children.

The intake freeze has also already caused irreparable harm to both Catholic and the individual Appellants. Despite the City's "urgent need" for more foster parents, Catholic is currently unable to place children with the dozens of loving foster parents it has already certified. And without intake, Catholic's program continues to shrink. This, combined with

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<sup>196</sup> Appx.0991-93, 0995-96, 0998-1000.

<sup>197</sup> Appx.0135-36.

<sup>198</sup> Appx.0995-96, 0146-47.

<sup>199</sup> Appx.0145.

the ongoing uncertainty surrounding the future of Catholic's program, has caused Catholic's program to lose two valuable employees and will likely result in further losses before even an expedited appeal is complete.<sup>200</sup>

### **III. The balance of harms favors Appellants.**

This Court assesses the balance of harms by comparing “the likely harm to the movant (absent a stay) (factor two) against the likely irreparable harm to the stay opponent(s) if the stay is granted (factor three).” *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015); *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 143 (3d Cir. 2017) (same). Harms that are “tenuous at best, and *entirely* hypothetical” will therefore not suffice to defeat a preliminary injunction motion. *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. 17-1390, 2018 WL 395750, at \*6 (D. Del. Jan. 8, 2018) (emphasis in original).

Appellants will suffer serious and immediate harms absent a preliminary injunction. But the City's alleged harms are all purely hypothetical. No same-sex couple has ever even asked Catholic to assess their home life for foster care purposes. Nor can the City point to even a single same-

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<sup>200</sup> Appx.0832, ¶ 17; *see also* Letter to the Court 2, ECF 49.

sex couple who has been *discouraged* from becoming a foster parent due to Catholic's religious exercise. The City's expert witness, who was put on the stand to testify to the alleged harms resulting from Catholic's policies, confessed that he "didn't actually know" whether Catholic's policies would cause any harm.<sup>201</sup>

Absent evidence of actual harm, the City is forced to fall back on claims of *hypothetical* harms to *hypothetical* third parties by suggesting that same-sex couples might be discouraged from fostering because of Catholic's beliefs. But there is zero evidence in the record that this has happened.

Were a same-sex couple to ever approach Catholic seeking a home study, all Catholic would want to do is step aside. Catholic would therefore refer that couple to one of the 29 other agencies—several within just a few blocks of Catholic—that would gladly work with them. That couple, just like any other couple referred for secular reasons, would not be blocked from fostering children. And in this case, a referral by Catholic—an agency that is explicitly religious in both name and practice—"would be well understood in our constitutional order as an exercise of religion,

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<sup>201</sup> Appx.0668-69.

an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth.” *Masterpiece*, 138 S. Ct. at 1727. Indeed, this recognition might be why no same-sex couple has sought a home study certification from Catholic.

In short, granting a preliminary injunction to maintain the status quo would save Catholic’s foster care ministry while costing the City nothing. As Commissioner Figueroa admitted, regardless of the outcome of this litigation, the same number of foster care agencies will be available to serve same-sex couples.<sup>202</sup>

Viewed in this light, it becomes clear the City’s actions were not intended increase the number of available foster parents in the City or to help more children find foster homes. The City is instead waging a purely ideological fight to punish Catholic for its views on same-sex marriage, and to punish foster parents merely for working with Catholic.

#### **IV. An injunction is in the public interest.**

Lastly, this Court must consider “where the public interest lies,” by looking at “how a stay decision has consequences beyond the immediate parties.” *In re Revel AC*, 802 F.3d at 568-69 (citation omitted). Here, the

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<sup>202</sup> Appx.0496-97.

calculus is simple. “[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). But even apart from that, there is no question allowing Catholic to continue serving children is in the public interest.

The City has an “urgent need” for 300 more foster homes. Catholic has at least 35 empty beds ready for children in need.<sup>203</sup> The City has admitted that roughly 250 children could be placed in foster homes but instead are stuck in congregate care.<sup>204</sup> At-risk children could be living with loving families certified by Catholic.<sup>205</sup> But when confronted with this fact, the City tries to dodge, pointing to data suggesting that foster care placements have remained steady despite Catholic’s intake closure. The City

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<sup>203</sup> Appx.0339.

<sup>204</sup> Appx.0569-70.

<sup>205</sup> After the litigation began, the City claimed a new reason for the intake freeze: it is not in the best interest of children to place them with Catholic because they might have to be moved if Catholic closes. This is a harm of the City’s own making, as it decided to shut down Catholic’s program over a hypothetical dispute in the first place. This new claim also contradicts the City’s other harm argument, which is that transferring parents to other agencies is not especially burdensome. The City cannot have it both ways. Either it does not believe that transferring agencies is easy, or it is once again making up post hoc justifications for the intake freeze.

also argues that this “is an overexaggeration of the complication of our work.”<sup>206</sup> This ignores its previous public admission that it needs foster care placements not merely to remain steady, but to *increase*. Obviously not every child is going to be a good fit for every available family, but to claim that the intake freeze has had no effect is to ignore both the children in need and the families certified by Catholic who could be caring for them. Whether that number is 35 children or just 5, a single child harmed by the City’s actions is one too many.

The public interest is best served by ensuring that empty foster homes are filled and at-risk children are placed with loving foster parents.

### CONCLUSION

For the foregoing reasons, the District Court’s ruling should be reversed and the case remanded with instructions to grant the preliminary injunction.

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<sup>206</sup> Appx.0573.

Dated: August 27, 2018

Respectfully submitted,

/s/ Mark Rienzi

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**CERTIFICATE OF BAR MEMBERSHIP**

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: August 27, 2018

*/s/ Mark Rienzi*

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*Counsel for Appellants*

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND L.A.R. 31.1**

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B). It contains 12,980 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 29.1(b).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.
3. This brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and Windows Defender has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 27th day of August 2018.

/s/ Mark Rienzi  
Mark Rienzi

### **CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to counsel who have appeared for the parties and are CM/ECF participants.

Executed this 27th day of August 2018.

*/s/ Mark Rienzi*  
Mark Rienzi

No. 18-2574

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**United States Court of Appeals  
for the Third Circuit**

SHARONELL FULTON, ET AL.,

*Plaintiffs-Appellants,*

v.

CITY OF PHILADELPHIA, ET AL.,

*Defendants-Appellees.*

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On Appeal from the U.S District Court for the  
Eastern District of Pennsylvania,  
No. 2:18-cv-02075-PBT (Hon. Petrese B. Tucker, U.S.D.J.)

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**JOINT APPENDIX VOL. 1, pp. Appx.1-69**

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\* For an unredacted version of Ms. Ali’s declaration and attachments see Joint Appendix Volume 4 (filed under seal).

**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

**NOTICE OF APPEAL**

Notice is hereby given that Sharonell Fulton, Cecelia Paul, Toni Lynn Simms-Busch, and Catholic Social Services, Plaintiffs in the above-captioned case, appeal to the United States Court of Appeals for the Third Circuit from the Court's Order (ECF No. 53) denying Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, entered in this action on July 13, 2018.

Dated: July 13, 2018

Respectfully submitted,

/s/ Mark L. Rienzi

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**CERTIFICATE OF SERVICE**

I certify that on July 13, 2018, the foregoing notice of appeal was served on counsel for all parties by means of the Court's ECF system.

/s/ Mark L. Rienzi  
Mark L. Rienzi

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

<b>SHARONELL FULTON, et al.,</b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 18-2075</b>
	:	
<b>CITY OF PHILADELPHIA, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this \_\_13th\_\_ day of July, 2018, upon careful consideration of Plaintiffs’ Motion For A Temporary Restraining Order And Preliminary Injunction (“Injunction Motion”) (Doc. 13), The City Of Philadelphia’s Memorandum Of Law In Opposition To Plaintiffs’ Motion For Temporary Restraining Order And Preliminary Injunction (Doc. 21), Proposed Intervenors’ Memorandum of Law, Or, In The Alternative, Amicus Brief, In Opposition To Plaintiffs’ Motion For A Temporary Restraining Order And Preliminary Injunction (“Amicus Brief”) (Doc. 34),<sup>1</sup> the matters heard at the evidentiary hearings, and Defendants’ Proposed Findings Of Facts And Conclusions Of Law (Doc. 45), and Plaintiffs’ Proposed Findings Of Fact And Conclusions Of Law (Doc. 46), **IT IS HEREBY ORDERED AND DECREED** that Plaintiffs’ Injunction Motion is **DENIED**.<sup>2</sup>

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<sup>1</sup> On June 18, 2018, the Court accepted the Intervenors’ Opposition Brief as an amicus brief. The Court’s decision was memorialized by an order dated June 19, 2018 (Doc. 33).

<sup>2</sup> This Order accompanies the Court’s Memorandum Opinion dated July 13, 2018.

**IT IS FURTHER ORDERED** that Defendants City of Philadelphia, Department of Human Services for the City of Philadelphia, and Philadelphia Commission on Human Relations shall file an answer or otherwise respond to Plaintiffs' Complaint (Doc. 1) no later than **twenty-one (21) days** from the date of this Order.

**BY THE COURT:**

**/s/ Petrese B. Tucker**

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**Hon. Petrese B. Tucker, U.S.D.J.**

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

<b>SHARONELL FULTON, et al.,</b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 18-2075</b>
	:	
<b>CITY OF PHILADELPHIA, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	

**MEMORANDUM**

**Tucker, J.**

**July 13, 2018**

The gratitude we owe to all those working to better the lives of Philadelphia’s most vulnerable children is too great to convey in words. While our gratitude is ultimately ineffable, the Court still begins by recognizing the Parties in this case for their many years of sacrifice and labor. The Court thanks Sharonell Fulton, Cecelia Paul, Toni Lynn Simms-Busch, Catholic Social Services (“CSS”), the City of Philadelphia, the Department of Human Services (“DHS”), and the Commission on Human Relations for their individual sacrifices and contributions in service of Philadelphia’s children and its families. As witnesses called to testify in this case have made clear, fostering children is challenging work, but challenging work that can form part of a full and good life.

Until recent events, the Parties have had a fruitful relationship; a relationship that has benefited Philadelphia’s children in immeasurable ways. For this reason, the Court would prefer that the Parties seek out some compromise to their current dispute without court intervention. Creative problem solving through concerted and thoughtful discourse without court intervention is often the best method to avoid what may appear to the parties, or to other persons in the public, to be harsh legal results. Still, when parties place a matter before the Court, the Court

must act pursuant to its obligations under the law. Accordingly, the Court turns to the legal matter presented in this case.

Before the Court are Plaintiffs' Motion For A Temporary Restraining Order And Preliminary Injunction ("Injunction Motion") (ECF No. 13),<sup>1</sup> The City Of Philadelphia's Memorandum Of Law In Opposition To Plaintiffs' Motion For Temporary Restraining Order And Preliminary Injunction (ECF No. 21), Proposed Intervenors' Memorandum of Law, Or, In The Alternative, Amicus Brief, In Opposition To Plaintiffs' Motion For A Temporary Restraining Order And Preliminary Injunction ("Amicus Brief") (ECF No. 34);<sup>2</sup> Defendants' Proposed Findings Of Facts And Conclusions Of Law (ECF No. 45), and Plaintiffs' Proposed Findings Of Fact And Conclusions of Law (ECF No. 46). Upon careful consideration of the foregoing and all the evidence presented by the Parties in their written submissions and the evidentiary hearing held on June 18, 2018, June 19, 2018, and June 21, 2018, for the reasons explained below, Plaintiffs' Injunction Motion (ECF No. 13) is **DENIED**.

## **I. PROCEDURAL BACKGROUND**

On May 17, 2018, Plaintiffs asserted sixteen causes of action against Defendants related to, among other things, Defendants' suspension of referrals of new children to Plaintiffs' care and Defendants' alleged violations of Plaintiffs' religious and free speech rights. *See generally*

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<sup>1</sup> On June 7, 2018, Plaintiffs filed an Amended Motion for Temporary Restraining Order and Preliminary Injunction because of the Parties' concern that the initial Motion may not have adequately protected the privacy interests of certain minor children identified in the initial Motion. *See* Jun. 20, 2018 Order, ECF No. 32 (dismissing as moot and sealing the initial Motion). Accordingly, unless otherwise noted, the Court's references to the Injunction Motion are references to Plaintiffs' Amended Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 13).

<sup>2</sup> On June 18, 2018, the Court accepted the Intervenors' Opposition Brief as an amicus brief. The Court's acceptance of the Amicus Brief is memorialized by order dated June 20, 2018. Jun. 20, 2018 Order, ECF No. 33.

Compl., ECF No. 1; *but see* Mem. of Law Supp. Pl.s’ Injunction Mot. 8 (asserting that CSS “filed a complaint in this Court on May 16, 2018”). Nineteen days later,<sup>3</sup> on June 5, 2018, Plaintiffs filed their Injunction Motion seeking a court order to compel Defendants to resume referrals of children to Plaintiffs’ care in advance of the June 30 expiration of Plaintiffs’ current services contract with Defendants under which Plaintiffs provide various professional services in exchange for public funds. In view of the urgency of the matter, the Court set an expedited briefing schedule and ordered an evidentiary hearing. Jun. 6, 2018 Order, ECF No. 11. Less than two weeks later, on June 18, 2018, the Court held an evidentiary hearing. The hearing concluded on June 21, 2018.<sup>4</sup>

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<sup>3</sup> If the Court accepts Plaintiffs’ asserted date of May 16, 2018 as the filing date for the Complaint, then Plaintiffs’ Injunction Motion was filed twenty days after first filing suit.

<sup>4</sup> During the evidentiary hearing, testimony by James Amato, Secretary and Executive Vice President of CSS, revealed that it is CSS policy to refuse to certify any prospective foster parent without a “clergy letter” from a religious minister. *See* Jun. 19, 2017 Hearing Tr. 34–35 (Amato) (testifying to Amato’s title and responsibilities at CSS); Jun. 19, 2017 Hearing Tr. 95–96 (Amato) (explaining that a clergy letter is required for certification by CSS because the letter “is a very good indication of [a prospective foster parent’s] commitment to their faith” and explaining that CSS will not, to Amato’s knowledge, certify a prospective resource parent without a clergy letter). While the religious affiliation of the minister writing the clergy letter does not matter, Amato explained that the receipt of a clergy letter on behalf of a prospective foster parent is an absolute condition to CSS’s certification of that prospective foster parent. Jun. 19, 2017 Hearing Tr. 95:12–16, 95:21–23 (Amato). It appears, therefore, that CSS will not certify prospective foster parents who are religious but whose religious exercise does not include a relationship with a minister, prospective foster parents who choose not to associate with any religious tradition, or prospective foster parents who associate with a religious tradition that does not have religious ministers willing or able to provide a clergy letter. This evidence is disconcerting to the Court because it raises serious constitutional as well as contractual questions. Among other things, this policy appears to contravene CSS’s contractual obligations under its contract with DHS under Section 4.1(k). Section 4.1(k) prohibits CSS from discriminating against individuals based on the individuals’ religious beliefs. Section 4.1(k) provides that CSS:

shall inform all individuals to whom Services are provided, whether directly or indirectly, of the following: “The Philadelphia Department of Human Services’ selection of a faith-based provider

## II. FACTUAL BACKGROUND<sup>5</sup>

### A. CSS's Services Contract With DHS And Philadelphia

It is an intractable tragedy that children in our community are sometimes unable to remain in their own homes. Pennsylvania has, in response to this tragic reality, charged individual county agencies with the duty of establishing a system to address the well-being of these children consistent with the best interests of each child. Jun. 19, 2018 Hr'g Tr. 152:18–24 (Figueroa). In Philadelphia County, the county agency charged with this duty is DHS. In performing its duty, DHS contracts with a number of private foster care agencies. Jun. 18, 2018 Hr'g Tr. 87:2–4 (Ali). Presently, DHS has contracts with thirty private foster care agencies. Jun. 19, 2018 Hr'g Tr. 155:14–16 (Figueroa). Each of these private foster care agencies is expected to provide foster care services consistent with a services contract with DHS. *See, e.g.*, Jun. 19, 2018 Hr'g Tr. 162:2 – 12 (Figueroa) (indicating that CSS's services, as a foster agency, are provided under contract with DHS and Philadelphia); Jun. 21, 2018 Hr'g Tr. 12:15–16

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of social services is not an endorsement of the Provider's religious character, practices or beliefs. No Provider of social services may discriminate against you on the basis of religion, a religious belief or your refusal to actively participate in religious practices."

Decl. of James Amato Ex. B, ECF p. 29 of 39, ECF No. 13-4. Indeed, on June 25, 2018, Counsel for CSS delivered a letter to the Court representing that CSS "will agree not to require pastoral letters." Letter from Mark Rienzi, Attorney for Plaintiffs, to Chambers of Judge Petrese B. Tucker (Jun. 25, 2018), ECF No. 40.

Still, as the questions CSS's pastoral letter requirement poses are not squarely before the Court, the Court will, for purposes of the Injunction Motion, refrain from further discussion of the matter.

<sup>5</sup> The following findings of facts are set forth pursuant to Fed. R. Civ. P. 52(a)(2) (requiring that "[i]n granting or refusing an interlocutory injunction, the court must [] state the findings and conclusions that support its action.").

(Figueroa) (indicating that Bethany Christian Services, another foster agency, has a contract similar to the services contract between DHS and CSS).

In November 2015, DHS and CSS entered into Contract Number 16-20030 (“Services Contract”) for certain professional services. Decl. of James Amato Ex. A, ECF p. 13 of 52, ECF No. 13-3 (showing that the original contract was executed in November 2015 and recounting the various amendments since initial execution); *see also* Decl. of James Amato Ex. A, ECF p. 39 of 52, ECF No. 13-3 (identifying the Services Contract as a “Professional Services Contract . . . for Department of Human Services Contracts”). As provided in the Statement of Purpose section of the Services Contract, the Services Contract was:

made and entered into between Catholic Social Services (the Provider) and the Philadelphia Department of Human Services (DHS), and sets forth the services for general, kinship, and teen parent/baby resource home care.

Decl. of James Amato Ex. A, ECF p. 27 of 52, ECF No. 13-3. Under the Scope of Services section of the Services Contract, CSS was to ensure that, among other things, resource caregivers (foster parents) would be “screened, trained, and certified by the Provider [CSS].”<sup>6</sup> Decl. of James Amato Ex. A, ECF p. 28–29 of 52, ECF No. 13-3. The Services Contract reiterates that “[t]he specific issue to be addressed by [CSS] is to recruit, screen, train, and provide certified resource care homes.” Decl. of James Amato Ex. A, ECF p. 28 of 52, ECF No. 13-3.

CSS was to provide the services set forth under the Scope of Services section of the Services Contract in accordance with certain criteria, including criteria under Section 3.21 of the

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<sup>6</sup> Certification of prospective foster parents requires a licensed foster family care agency to evaluate prospective foster parents using the criteria set forth under 55 Pa. Code § 3700.64. *See e.g., Hinnerschitz v. Dep’t of Pub. Welfare*, No. 1977 C.D.2014, 2015 WL 5457824 (Pa. Commw. Ct. 2015) (not precedential) (concluding that Berks County Children and Youth Services’ denial of prospective foster parents’ application to become kinship foster parents was appropriate given the lower administrative courts’ proper consideration of the § 3700.64 factors).

Services Contracts' General Provisions and Article XV: Additional Representations and Covenants of Provider Relating to Certain Applicable Laws.

Section 3.21 limits the reasons that CSS may refuse to provide the services required under the Services Contract. Section 3.21 provides that CSS:

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 [Services Contract], unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.

Decl. of James Amato Ex. B, ECF p. 14 of 39, ECF No. 13-4.

Article XV of the Services Contract further limits the reasons that CSS may refuse to provide the services required under the Services Contract by incorporating into the Services Contract various laws, ordinances, regulations, and executive orders. In particular, Article XV incorporates provisions of the Philadelphia Fair Practices Ordinance relating to non-discrimination and serving all-comers who might seek services from CSS. Article XV stipulates that:

. . . Provider further represents, warrants and covenants that . . . Provider is in compliance with the laws, ordinances, regulations and executive orders described below.

15.1 Non-Discrimination; Fair Practices. This Contract is entered into under the terms of the Charter, the Fair Practices Ordinance (Chapter 9-1100 of the Code) . . . Provider shall not discriminate or permit discrimination against any individual because of race, color, religion or national origin. Nor shall Provider discriminate or permit discrimination against individuals in . . . public accommodation<sup>7</sup> practices whether by direct or indirect practice of

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<sup>7</sup> The term "public accommodation" is defined under the Philadelphia Fair Practices Ordinance as:

exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of . . . sex, sexual orientation, gender identity, marital status, familiar [sic] status . . . or engage in any other act or practice made unlawful under the Charter . . . .

Decl. of James Amato Ex. C, ECF p. 18–19 of 39, ECF No. 13-5 (emphasis added). In the event of CSS’s breach of its covenant under Article XV, DHS and Philadelphia would be permitted “in addition to any other rights or remedies available under this Contract, at law or in equity, [to] suspend or terminate this Contract forthwith.” Decl. of James Amato Ex. C, ECF p. 19 of 39, ECF No. 13-5.

In exchange for “the Services and Materials being provided under” the Services Contract, DHS and Philadelphia agreed to “set the amount of compensation payable to [CSS] for the current contract term at [\$19,430,999.00].” Decl. of James Amato Ex. A, ECF p. 15 of 52, ECF No. 13-3. Despite this lump sum amount, as a matter of practice, payment to CSS was made on a per diem basis pegged to the number of children under its care. *See* Jun. 21, 2018 Hr’g Tr. 11:4–7 (Figueroa) (testifying that many contractors are paid on a per diem basis); Jun. 21, 2018 Hr’g Tr. 139:20–24 (same) (Figueroa). That CSS was receiving significant public funds to perform its public service functions under the Services Contract is underscored by Section 3.30 of the General Provisions that provides “[CSS] shall identify the Department as a funding source in all literature, documents[,] reports or pamphlets which Provider publishes develops or

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Any [] provider, whether licensed or not, which solicits or accepts patronage or trade of the public or whose . . . services, facilities . . . are extended, offered [] or otherwise made available to the public; including all . . . services provided by any public agency or authority; any agency, authority or other instrumentality of . . . the City, its departments, boards and commissions.

Philadelphia Fair Practices Ordinance § 9-1102 (Definitions) at 4, Chapter 9-1100 of the Philadelphia Code.

produces in connection with this Contract.” Decl. of James Amato Ex. B, ECF p. 21 of 39, ECF No. 13-4.

CSS and DHS proceeded under the Services Contract without dispute until March 2018, when DHS learned that it is CSS policy to not serve all-comers. In particular, it is CSS policy to refuse service to same-sex couples CSS services under the Services Contract.

**B. March 2018: DHS Learns Of CSS’s And Another Foster Agency’s Refusal To Comply With Services Contract’s All-Comers Provisions**

On or about March 9, 2018, DHS Commissioner Figueroa came to believe that two of the foster care agencies with which DHS contracts, CSS and Bethany Christian Services, have policies that deny their publicly-funded services to married same-sex couples. Jun. 21, 2018 Hr’g Tr. 3 (Figueroa) (testifying that on March 9, 2010, a reporter contacted Figueroa and that Figueroa’s discussions with the reporter led Figueroa to believe that CSS and Bethany Christian Services had certain policies of refusing service to same-sex couples). Jun. 19, 2018 Hr’g Tr. 164 (Figueroa). Commissioner Figueroa formed this belief after discussions with a *Philadelphia Inquirer* reporter who called Figueroa seeking comment ahead of the publication of an article on two DHS foster care agencies that reportedly maintained policies that would effectively permit these agencies to refuse services to same-sex couples. Jun. 19, 2018 Hr’g Tr. 164 (Figueroa). After Commissioner Figueroa’s discussion with the reporter, Figueroa contacted Bethany Christian Services, CSS, various DHS’s faith-based foster care agencies, and a nonfaith-based agency to determine what those agencies’ policies are in connection with serving same-sex couples. Jun. 19, 2018 Hr’g Tr. 164:16–165:4 (Figueroa); Jun. 21, 2018 Hr’g Tr. 103:6–9 (testifying that Figueroa contacted a nonfaith-based foster care agency).

Commissioner Figueroa’s phone call with James Amato at CSS provided greater clarity regarding what services CSS refused to provide to same-sex couples and why CSS refused to

provide those services. Jun. 21, 2018 Hr'g Tr. 3:18–24 (Figueroa). James Amato explained that there were two services that CSS would not provide to same-sex couples: (1) CSS would not certify same-sex couples as prospective foster parents even if the couples were otherwise eligible foster parents under state regulations, and (2) CSS would not provide a same-sex couple with a home study as part of a same-sex couple's application for adoption. Jun. 21, 2018 Hr'g Tr. 3:18–24 (Figueroa); *see also* Jun. 19, 2018 Hr'g Tr. 55:7–20 (Amato) (testifying that Commissioner Figueroa and another DHS officer asked Amato whether CSS would complete a home study for “a same-sex couple or individual” and that Amato confirmed that CSS would not complete such a home study for a couple and would only provide a home study for an individual if that individual was committed to living single). Amato explained that CSS would not provide these services on religious grounds. Jun. 21, 2018 Hr'g Tr. 3:18–24 (Figueroa). Amato recalled that DHS “said to me that you are discriminating. I said that I am following the teachings of the Catholic Church.” Jun. 19, 2018 Hr'g Tr. 55:22–25 (Amato).

On March 13, 2018, the *Philadelphia Inquirer* published an article titled Two Foster Agencies in Philly Won't Place Kids with LGBTQ People.<sup>8</sup> The article recounted an incident in which a married same-sex couple traveled to a Bethany Christian Services informational event for prospective foster parents. On arrival, a Bethany Christian Services employee told the couple their attendance at the event would be a waste of time because Bethany Christian Services maintained a policy of refusing to serve same-sex couples. *See also* Jun. 19, 2018 Hr'g Tr. 164:5–10 (Figueroa). In the same story, the *Inquirer* reported that a representative for CSS confirmed that CSS maintained similar policies of refusing to serve same-sex couples.

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<sup>8</sup> Julia Terruso, Two Foster Agencies in Philly Won't Place Kids with LGBTQ People, Philly.com (Mar. 13, 2018, 9:05 AM), <http://www.philly.com/philly/news/foster-adoption-lgbtq-gay-same-sex-philly-bethany-archdiocese-20180313.html>.

On March 15, 2018, after meeting with James Amato and CSS’s legal counsel in person, Commissioner Figueroa “decided that it was in the best interest [of children] to close intake, so that [Figueroa] could look more deeply into” CSS’s and Bethany Christian Services’s policies. Jun. 19, 2018 Hr’g Tr. 166:6–21 (Figueroa); Figueroa Decl. ¶ 32, ECF No. 20-6; *see also* Jun. 18, 2018 Hr’g Tr. 96:2–3 (Ali) (testifying that, to Ali’s knowledge, Commissioner Figueroa herself decided to close CSS’s intake of new referrals). That day, Philadelphia City Council separately passed its own resolution authorizing the Committee on Public Health and Human Services to “investigate [DHS] policies on contracting with social services agencies that either discriminate against prospective LGBTQ foster parents and allow non-LGBTQ foster parents to discriminate against children.” City Council Resolution No. 180252 at 2, ECF No. 10-9.

On March 27, 2018, Deputy Commissioner Ali emailed various community umbrella agencies—responsible for case management activities—to communicate that foster agencies should “refrain from making any foster care referrals to Bethany Christian Services and [CSS],” but “[i]f you have questions about a case, please contact me by phone or email.” Ex. 1-E 3, ECF No. 10-12. Deputy Commissioner Ali further communicated that DHS is:

Committed to the safety and stability of children in our care and must consider the needs of the children and youth *currently* served by foster families licensed by these organizations. Our goal is to minimize placement disruptions, and to ensure that a child’s ability to reunify or to continue an adoption process is not delayed because of placement disruption.

Ex. 1-E 3, ECF No. 10-12.

### C. Doe Foster Child #1

Plaintiffs spent some time at the evidentiary hearing exploring a situation involving a minor child identified as Doe Foster Child #1. Plaintiffs point to the situation involving Doe Foster Child #1 as an “example of the harm that has resulted from the City’s intake closure.”

Pls.’ Proposed Findings of Fact and Conclusions of Law 27, ECF No. 46. The circumstances surrounding Doe Foster Child #1 are, as is often the case for children in foster care, complex. The Court notes, however, that by the time of the evidentiary hearing, DHS and CSS, working together, successfully obtained a Philadelphia Family Court order permitting Doe Foster Child #1’s removal from a different living situation and then placement with a CSS-certified foster parent. Ali Decl. ¶ 60, ECF No. 20-1. Through the concerted efforts of DHS and CSS staff, the situation involving Doe Foster Child #1 is now resolved.

Still, Plaintiffs contend that the situation with Doe Foster Child #1 would not have occurred but for DHS’s closure of CSS’s intake of new referrals, while DHS and Philadelphia contend that Doe Foster Child #1’s unique situation was resolved in a timely manner considering the complexity of the case. As a factual matter, the situation with Doe Foster Child #1 is unlikely to occur again given that DHS and CSS are both now fully aware that exemptions from the intake closure have been and continue to be granted consistent with the best interests of individual children. *See, e.g.*, Jun. 19, 2018 Hr’g Tr. 84:2–9 (Amato) (testifying that he is aware that DHS will grant exceptions in some cases for placements with Catholic Social Services when such placements are in the best interests of the child); Jun. 19, 2018 Hr’g Tr. 86:8 – 11 (Amato) (testifying that CSS has, in fact, sought out and received placements for children despite the intake closure when placements were in the best interests of the child).

#### **D. Current Effects Of Closure Of CSS Intake Of New Referrals**

In response to Plaintiffs’ claims that CSS’s intake closure has and will continue to negatively affect foster children, DHS offered evidence showing that the closure of CSS’s intake of new referrals has had little or no effect on the operation of Philadelphia’s foster care system. DHS Commissioner Figueroa testified that CSS’s intake closure “has not resulted in a rise in

children placed in congregate care.”<sup>9</sup> Jun. 21, 2018 Hr’g Tr. 86:4–87:9 (Figueroa). Further, Figueroa testified that CSS’s intake closure “has not resulted in a rise in children staying in DHS’s childcare room.” Jun. 21, 2018 Hr’g Tr. 86:4–87:9 (Figueroa). Figueroa’s testimony was based on her review of “weekly data” that Figueroa receives from DHS’s “performance and technology team that . . . have . . . detailed data.” Jun. 21, 2018 Hr’g Tr. 86:16–87:11 (Figueroa).

That the effects of closing CSS’s intake have been small relative to size and breadth of the Philadelphia foster care system is, unfortunate, but unsurprising given Commissioner Figueroa’s explanation that:

Kids are abused every day. They are neglected every day. They end up in [DHS’s] placement, in [DHS’s] care, because their families can’t care for them. We are incredibly fortunate that we have foster care agencies, but it’s not a one to one.

Jun. 21, 2018 Hr’g Tr. 93:23–94:7 (Figueroa). The number of cases and idiosyncrasies of each child involved in each case means that the mere fact that there are empty, available foster homes does not equate to fewer children in congregate care. Figueroa explained that assuming that “availability [at any one foster agency] [will] reduce the [use of] congregate care is an over [simplification] of the complication of our work.” Jun. 21, 2018 Hr’g Tr. 93:23–94:7 (Figueroa). That the negative effects of closing CSS’s intake have been relatively slight is also supported by the reality that, as of the evidentiary hearing date, at least three foster agencies had intake closures in place and the foster system nevertheless remained stable. *See* Jun. 21, 2018 Hr’g Tr. 5:14–15 (Figueroa) (testifying that “I have closed intake in other circumstances for other providers.”); Jun. 21, 2018 Tr. 8:24-25–9:1 (Figueroa) (testifying that the week before, DHS also

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<sup>9</sup> Congregate care is a broad term used to describe a variety of “nonfamily-like [foster care] settings.” Jun. 18, 2018 Hearing Tr. 93:6 (Ali).

closed intake for another agency); Jun. 21, 2018 Hr’g Tr. 12:9–21 (Figueroa) (testifying that Bethany Christian Services’s intake remained closed as of June 21).

**E. Defendants’ Preference To Continue Work With CSS And Offer Of New Contracts**

DHS and Philadelphia have explicitly stated a preference for continuing their relationship with CSS, despite CSS’s religious nature, so long as CSS complies with its contract responsibilities. *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 9:18–24 (Figueroa) (indicating that DHS would prefer to continue contracting with CSS); Jun. 19, 2018 Hr’g Tr. 120:7 – 11 (Amato) (testifying that DHS and Philadelphia were clear that they did “not plan to agree to any further referrals to CSS . . . absent assurances that CSS is prepared to adhere to contractual obligations). Indeed, DHS and Philadelphia manifested their preference to continue working with CSS by offering CSS two different renewal services contracts. *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 10:1–10 (Figueroa). The first contract would be a renewal on the same terms as CSS’s current Services Contract. The second contract would be an alternate services contract to provide financial support to CSS even if CSS could not agree to certify same-sex couples consistent with the all-comers provisions of the standard services contract . *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 10:5–10. Such alternate contracts have been provided to other foster care agencies in the past to ensure the best interest of foster children. *See, e.g.*, Jun. 21, 2018 Hr’g Tr. 10:20–11:16 (Figueroa). That Defendants have offered two contracts to CSS despite the Parties’ present dispute shows Defendants’ strong desire to keep CSS as a foster care agency.

**III. STANDARD OF REVIEW**

**A. Temporary Restraining Order and Preliminary Injunctive Relief Factors**

A preliminary injunction is “an extraordinary remedy never awarded as of right.”

*Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (citing

*Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). Preliminary injunctive relief is appropriate only “upon a clear showing that the plaintiff is entitled to such relief.” *Id.* (citing *Winter*, 555 U.S. at 22). Ultimately, “the decision to grant or deny a preliminary injunction is committed to the sound discretion of the district court.” *United States v. Price*, 688 F.2d 204, 210 (3d Cir. 1982) (citing *Stokes v. Williams*, 226 F. 148, 156 (3d Cir. 1915)). In deciding whether to grant injunctive relief, the Court must consider whether: (1) Plaintiffs have demonstrated a likelihood of success on the merits; (2) Plaintiffs will be irreparably harmed by the denial of injunctive relief; (3) the balance of equities favors Plaintiffs; and (4) the public interest favors granting the injunction. *See, e.g., Del. Strong Families v. Att’y Gen. of Del.*, 793 F.3d 304, 308 (3d Cir. 2015).<sup>10</sup>

The Third Circuit has explained that the first two factors of this analysis—likelihood of success on the merits, and irreparable harm—act as “gateway factors.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). Accordingly, when confronted by a motion for preliminary injunctive relief, a court must first determine whether the movant has met these two gateway factors before considering the remaining two factors—balance of harms, and public interest. *Id.* at 179. In short, “[i]f these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.” *Id.*

Esteemed jurists have acknowledged that the existence of complex questions of law and disputed matters of fact at the preliminary injunction phase of a case may create “doubt about the probability of [a] plaintiff’s success to justify denying a preliminary injunction.” *Transcon. Gas*

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<sup>10</sup> The standard for issuing a temporary restraining order is the same as that for ordering a preliminary injunction. *Ride the Ducks, LLC v. Duck Boat Tours, Inc.*, No. CIV. A. 04-CV-5595, 2005 WL 670302, at \*4 (E.D. Pa. Mar. 21, 2005).

*Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp., Lancaster Cty., Pa.*, No. 5:17-CV-00715, 2017 WL 1283948, at \*5 (E.D. Pa. Apr. 6, 2017) (citing *St. John of Jerusalem-Knights of Malta v. Messineo*, 572 F. Supp. 983, 990 (E.D. Pa. 1983)). Indeed, in *Transcon. Gas Pipe Line Co.*, the district court collected a number of cases supporting this general proposition. 2017 WL 1283948, at \*5 (citing *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 605 (D. Del. 1971) for the proposition that “[a] Court should not decide doubtful and difficult questions on a motion for a preliminary injunction.”); *see also id.* (citing *Coffee Dan’s, Inc. v. Coffee Don’s Charcoal Broiler*, 305 F. Supp. 1210, 1213 (N.D. Cal. 1969) for the proposition that “[o]n an application for a preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.”).

Although there exists, in this case, a myriad of complex questions of law and a great number of disputed facts such that the Court could justifiably deny injunctive relief on these grounds alone, the Court nevertheless engages in the preliminary injunction analysis below to ensure that the reasons for the Court’s decision are sufficiently articulated for the Parties.

#### **IV. DISCUSSION AND CONCLUSIONS OF LAW<sup>11</sup>**

##### **A. Factual Precedent: Faith-Based Foster Agencies In Other Jurisdictions**

At the outset, the Court notes that while precise legal precedent on the issues raised in this case is absent, there exists some factual precedent. In 2006, for example, in the wake of Massachusetts’s legalization of same-sex marriages, Catholic Charities in Boston shut down its

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<sup>11</sup> The following discussion and conclusions of law are set forth pursuant to Fed. R. Civ. P. 52(a)(2).

foster care agency after it unsuccessfully sought permission from Massachusetts to withhold its services from legally married same-sex couples.<sup>12</sup>

In 2010, Catholic Charities in Washington, DC, like Catholic Charities in Boston, ended its foster care program in response to Washington, DC's legislation to legalize same-sex marriage.<sup>13</sup> As a result, "Catholic Charities' caseload of 43 children and 35 foster families was transferred, along with seven staffers, to the Bethesda, Md.-based National Center for Children and Families so as not to disrupt client care."<sup>14</sup>

In 2011, Catholic Charities in Illinois sued, among others, the State of Illinois after the State indicated that it would not renew its foster care contract with Catholic Charities because Catholic Charities' "failure to provide services to unmarried cohabiting couples was in direct violation of" state law. Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield v. Madigan*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011). The Sangamon County Circuit Court granted the State's Cross Motion for Summary Judgment on grounds that Catholic Charities had no cognizable right to a state government services contract. The court reasoned that Catholic Charities did "not have a legally recognized protected property interest in the renewal of its contracts for foster care and adoption services . . . [and] [t]he fact that [Catholic Charities] have contracted with the State to provide foster care and adoption services for over forty years does not vest the Plaintiffs with a protected property interest." *Id.* After the Sangamon County Circuit Court's decision, Catholic Charities in Illinois ended its foster care

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<sup>12</sup> Patricia Wen, [Catholic Charities Stuns State, Ends Adoptions](http://archive.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/), boston.com (Mar. 11, 2006), [http://archive.boston.com/news/local/articles/2006/03/11/catholic\\_charities\\_stuns\\_state\\_ends\\_adoptions/](http://archive.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/).

<sup>13</sup> Julia Duin, [Catholics End D.C. Foster-Care Program](https://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/), (Feb. 18, 2010), <https://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/>.

<sup>14</sup> *Id.*

and adoption services and agreed to transfer “more than 1,000 foster care children and staff to other agencies in their regions.”<sup>15</sup>

In 2006, in contrast to the decisions by Catholic Charities in Boston, Washington, DC, and Illinois to end its foster care services, Catholic Charities in San Francisco chose to end its full service adoption agency to avoid providing services to same sex couples, but otherwise planned to “provide staff and financial resources to connect needy children to adoptive parents,” and formally collaborate with other adoption agencies who can provide full services to all-comers without violating San Francisco’s anti-discrimination efforts.<sup>16</sup>

Against this backdrop, the Court turns to the Parties’ legal arguments.

**B. Services Contract Requires Contractors To Provide Services Consistent With Fair Practices Ordinance**

**1. The Unambiguous Terms Of The Services Contract Evinces The Parties’ Intent That The Fair Practices Ordinance Apply To CSS’s Services**

As a threshold matter, the Parties disagree on whether the Services Contract requires CSS to provide its services to all-comers in accordance with the Fair Practices Ordinance because such services may or may not constitute a “public accommodation.” While briefing on this issue is scant, the Parties expended significant time arguing this issue at the evidentiary hearing.

*See, e.g.*, Jun. 18, 2018 Hr’g Tr. 9:17–12:14 (Plaintiffs’ Opening Statement); *see also* Pls.’

Proposed Findings of Fact and Conclusions of Law ¶¶ 61–65. In view of the plain terms of

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<sup>15</sup> Manya A. Brachear, 3 Dioceses Drop Foster Care Lawsuit—Catholic Charities To End Service Rather Than Work With Parents In Civil Unions, ChicagoTribute.com (Nov. 15, 2011), [http://articles.chicagotribune.com/2011-11-15/news/ct-met-catholic-charities-foster-care-20111115\\_1\\_civil-unions-act-catholic-charities-religious-freedom-protection](http://articles.chicagotribune.com/2011-11-15/news/ct-met-catholic-charities-foster-care-20111115_1_civil-unions-act-catholic-charities-religious-freedom-protection).

<sup>16</sup> Elizabeth Fernandez, Catholic Agency Finds Way Out Of Adoption Ban/Alliance With other Groups Gets Around Same-Sex Parent Issue, SFGate.com (Aug. 27, 2006, 4:00 AM), <https://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Catholic-agency-finds-way-out-of-2470402.php>.

CSS's covenant to be bound by the Fair Practices Ordinance as set forth in the Services Contract, and in view of the expansive, but plain, definition of "public accommodations" under the Fair Practices Ordinance, the Court concludes that the Fair Practices Ordinance applies to CSS's provision of services under the Services Contract.

It is well-established that:

[c]ontract interpretation is a question of law that requires the court to ascertain and give effect to the intent of the contracting parties as embodied in the written agreement. Courts assume that a contract's language is chosen carefully and that the parties are mindful of the meaning of the language used. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

*Old Summit Mfg., LLC v. Pennsummit Tubular, LLC (In re Old Summit Mfg., LLC)*, 523 F.3d 134, 137 (3d Cir. 2008) (citing *Dep't of Transp. v. Pa. Indus. for the Blind and Handicapped*, 886 A.2d 706, 711 (Pa. Commw. Ct. 2008)); see also *D&M Sales, Inc. v. Lorillard Tobacco Co.*, No. CIV.A.09-2644, 2010 WL 786550, at \*3 (E.D. Pa. Mar. 8, 2010) (providing that "the court's goal is 'to ascertain and give effect to the intent of the contracting parties,'" and "[w]hen the words of an agreement are clear and unambiguous, the court will ascertain the intent of the parties from the language used in the agreement.").

In this case, the Parties' intent that the Fair Practices Ordinance apply to CSS's services is manifest by the clear and unequivocal terms of the Services Contract. In entering into the Services Contract, CSS agreed to the provisions enumerated under Article XV. CSS explicitly "represent[ed], warrant[ed], and covenant[ed] that . . . [CSS was] in compliance with . . . the Fair Practices Ordinance." Decl. of James Amato Ex. C, ECF p. 18–19 of 39, ECF No. 13-5. Accordingly, the plain terms of the Services Contract manifest the Parties' intent that CSS be

bound by the Fair Practices Ordinance by expressly incorporating the Fair Practices Ordinance into the Services Contract.

Having concluded that the Services Contract evinces the Parties' intent that the Fair Practices Ordinance apply to CSS's services rendered under the Services Contract, the Court turns to the issue of whether the Fair Practices Ordinance would require CSS to provide foster parent certifications and home visits for prospective parents in accordance with the all-comers/nondiscrimination provisions of the Fair Practices Ordinance. The resolution of this issue turns on two questions: (1) whether CSS's scope of services includes the provision of certification and home visits in connection with certification in the first instance, and (2) if so, whether those services fall within the meaning of a public accommodation under the Fair Practices Ordinance.

**2. CSS's Scope Of Services Requires CSS To Recruit, Screen, Train, And Certify Resource Caregivers**

Here, as with all questions of parties' obligations under a contract, the Court must look to the intent of the parties as embodied in the plain and unambiguous terms of the contract. In agreeing to perform the Scope of Services under the Services Contract, CSS agreed to "recruit, screen, train, and provide certified resource care homes." Decl. of James Amato Ex. A, ECF p. 28 of 52, ECF No. 13-3. Indeed, CSS's obligation to recruit, screen, train, and certify resource caregivers is emphasized elsewhere in the Scope of Services. Decl. of James Amato Ex. A, ECF p. 28-29 of 52, ECF No. 13-3 (providing that "resource caregivers are screened, trained, and certified by [CSS]"); *see also* Decl. of James Amato Ex. A, ECF p. 27 of 52 n.1, ECF No. 13-3 (providing under the "Statement of Purpose" that "Provider Staff is responsible for recruiting and certifying foster and kinship homes"). The Court concludes that CSS's certification of prospective foster parents and CSS's provision of home studies "to assure [that prospective

foster parents] are qualified and well prepared for the responsibility of foster care”<sup>17</sup> are services that CSS agreed to provide under the Services Contract.

Having determined that certification and home studies are services that CSS was hired to provide under the Services Contract, the Court turns to whether these services constitute “public accommodations” under the Fair Practices Ordinance such that CSS’s provision of these services must be rendered in accordance with the all-comers, anti-discrimination provision of the Fair Practices Ordinance.

### **3. The Services That CSS Provides Are Public Accommodations Within The Meaning Of The Fair Practices Ordinance**

In interpreting a municipal ordinance, a court must employ the same analysis that the court employs when interpreting a statute. *Tri-Cty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 83 A.3d 488, 509 (Pa. Commw. Ct. 2014); *see also Diehl v. City of McKeesport*, 432 A.2d 288, 290 (Pa. Commw. Ct. 1981) (providing that “[t]he rules of statutory construction are applicable to statutes and ordinances alike”). Accordingly, when interpreting an ordinance, a court must determine, as it must when interpreting a statute, the intent of the legislative body that enacted the ordinance. *See Tri-Cty. Landfill, Inc.*, 83 A.3d at 509 (citing 1 Pa. Cons. Stat. § 1921). Generally, the best indicator of the legislative body’s intent is the plain language of the ordinance. *Id.*

The Fair Practices Ordinance provides an expansive, but plain definition of the term “public accommodation.” Under the Fair Practices Ordinance, a public accommodation is:

Any [] provider, whether licensed or not, which solicits or accepts patronage or trade of the public or whose . . . services, facilities . . . are extended, offered [] or otherwise made available to the public; including all . . . services provided by any public agency or

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<sup>17</sup> Foster Care & Adoption Services, <https://cssphiladelphia.org/adoption/> (last visited Jul. 1, 2018).

authority; any agency, authority or other instrumentality of . . . the City, its departments, boards and commissions.

Philadelphia Fair Practices Ordinance § 9-1102 (Definitions) at 4, Chapter 9-1100 of the Philadelphia Code.

In this case, CSS's provision of services meets the definition of public accommodations and, therefore, CSS must provide its services in accordance with the Fair Practices Ordinance as incorporated by Article XV, § 15.1 of the Services Contract. CSS is a "licensed" "provider" under the Services Contract. CSS publicly solicits prospective foster parents and advertises to attract new foster parents.<sup>18</sup> CSS provides professional "services" to the public. In return for its services, CSS receives public funds and the source of those funds are to be disclosed to the public when CSS disseminates information relating to its services under the Services Contract.<sup>19</sup> CSS operates and maintains facilities that are used by staff and members of the public to carry out CSS's work under the Services Contract. Jun. 19, 2018 Hr'g Tr. 36:18–22 (Amato). The Court concludes, therefore, that CSS's services are public accommodations to be provided consistent with CSS's covenant under Article XV, § 15.1, which requires CSS to serve all Philadelphians who seek out its services.

### **C. Likelihood of Success on the Merits**

Having determined that the terms of the Services Contract, including the all-comers, nondiscrimination provisions of the Fair Practices Ordinance incorporated into the Services Contract under Article XV, § 15.1, apply to CSS's provision of services, the Court turns to

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<sup>18</sup> See Jun. 18, 2018 Hearing Tr. 65:17 (Fulton) (testifying to seeing a television commercial about foster care); Foster Care & Adoption Services, <https://cssphiladelphia.org/adoption/> (last visited Jul. 1, 2018) (soliciting prospective foster parents through a website).

<sup>19</sup> Decl. of James Amato Ex. B, ECF p. 35 of 39, ECF No. 13-4 (Services Contract providing that "[CSS] shall identify the Department as a funding source in all literature, documents reports or pamphlets which Provider publishes develops or produces in connection with this Contract.").

CSS's argument that it nevertheless need not comply with these all-comers, nondiscrimination provisions because compliance would violate CSS's rights under the Free Exercise and Establishment Clauses of the First Amendment, the Pennsylvania Religious Freedom Act ("RFPA"), and the Free Speech Clause of the First Amendment.

**1. Free Exercise Clause Claim**

**i. The Services Contract And Fair Practices Ordinance Incorporated In The Services Contract Is A Neutral Law Of General Applicability Subject To Rational Basis Review**

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (quoting U.S. Const. amend. I.) (alteration in original). The strictures of the Free Exercise Clause apply to state and local government under the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (holding the religious protections under the First Amendment apply to the states through the Due Process Clause of the Fourteenth Amendment). "Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 165.

When a challenged law "is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." *Id.* at 165 (citing *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990)); *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364 (3d Cir. 1999) (explaining that in cases involving state laws affecting religious freedoms, *Smith* is the appropriate framework for analysis because the federal Religious Freedom Restoration Act of 1993, passed by Congress in response to *Smith*, does not apply to state actions). Thus, the constitutionality of a neutral and

generally applicable state or local law under the Free Exercise clause is evaluated using the rational basis standard.<sup>20</sup>

By contrast, “if a law is not neutral . . . or is not generally applicable . . . strict scrutiny applies and the burden on the religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.” *Tenaflly Eruv Ass’n, Inc.*, 309 F.3d 144 at 165 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993)). “A law is not neutral if it has as its ‘object . . . to infringe upon or restrict practices because of their religious motivation.’” *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (citing *Lukumi*, 508 U.S. at 533). “A law is not generally applicable when it ‘proscribes particular conduct only or primarily when religiously motivated.’” *Id.* at 275 (citing *Tenaflly*, 309 F.3d at 165).

Even if a law is neutral and generally applicable on its face, if “government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator’s conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct.” *Tenaflly Eruv Ass’n, Inc.*, 309 F.3d 144 at 165–66. Unless there is evidence of government targeting of religious conduct “for distinctive treatment” then the framework for analysis under *Smith*, 494 U.S. 872, will govern the review of a challenged law or action. *Tenaflly Eruv Ass’n, Inc.*, 309 F.3d 144 at 167 (quoting *Lukumi*, 508 U.S. at 534).

In the absence of case law directly addressing the factual circumstances presented in this case, the Court finds the Supreme Court’s decision in *Christian Legal Soc’y Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 698 (2010) instructive. In

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<sup>20</sup> “[R]ational basis review requires merely that the action be rationally related to a legitimate government objective.” *Tenaflly Eruv Ass’n, Inc.*, 309 F.3d 144 at 165 n.24.

*Martinez*, the Supreme Court reviewed a law school’s policy requiring student groups who wished to take advantage of the benefits of official recognition by the law school to comply with an all-comers/nondiscrimination policy. A faith-based student group argued that the University’s insistence that the student group comply with the all-comers policy violated, among other things, the group’s right to the free exercise of religion. *Id.*

A group of law students at a public law school formed a chapter of the Christian Legal Society (“CLS”) that required its members to sign a “Statement of Faith” and adhere to bylaws that would “exclude from affiliation anyone who engages in ‘unrepentant homosexual conduct.’” *Id.* at 672. CLS applied for registered student organization (“RSO”) status with the law school. RSO status would confer on CLS various benefits including subsidies of CLS’s events with funds originating from the school-wide mandatory student-activity fee, use of certain law school facilities, and the ability to advertise events to the student body using the law school’s communication channels and the use of the law school’s name and logo in advertising. *Id.* at 669–70. To qualify for RSO status, the law school required applicants to agree to a nondiscrimination policy that would prohibit the applicant from discriminating against prospective members on the basis of “race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation.” *Id.* at 671. CLS would not adopt the nondiscrimination policy and, accordingly, the school withheld RSO status and its attending benefits from CLS. *Id.* at 673.

In upholding the law school’s conditioning of RSO status and attending benefits on CLS’s acceptance of the nondiscrimination policy, the Supreme Court reasoned that the law school’s policy was, in essence, a neutral “all comers” policy and that the law school, “caught in the crossfire between a group’s desire to exclude and students’ demand for equal access, may

reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership.” *Id.* at 694. The Supreme Court continued stating that:

[t]he question here . . . is not whether [the law school] *could*, consistent with the Constitution, provide religious groups dispensation from the all-comers policy by permitting them to restrict membership to those who share their [sincerely held religious belief]. It is instead whether [the law school] *must* grant that exemption. This Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, . . . unequivocally answers no to that latter question.

*Martinez*, 561 U.S. at 694 n.24. The Supreme Court further considered the fact that RSOs “are eligible for financial assistance drawn from mandatory student-activity fees . . . the all-comers policy ensures that no [law] student is forced to fund a group that would reject her as a member.” *Id.* at 688. Ultimately, the Supreme Court held that the law school’s policy was constitutional despite its incidental effect on CLS and its ability to receive RSO benefits, including financial support for its activities. *Id.* at 698.

The Court also considers the U.S. District Court for the Western District of Michigan’s decision in *Teen Ranch, Inc. v. Udow*, 389 F.Supp.2d 827 (W.D. Mich. 2005), which was affirmed by the Sixth Circuit in *Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007), because the court’s rationale in *Teen Ranch* provides some analytical assistance on the present facts.

In *Teen Ranch*, a faith-based residential home for troubled youth, Teen Ranch, sued a state agency, charged with placing troubled youth in protective care, after the state agency issued a moratorium against further placements of children with Teen Ranch due to Teen Ranch’s policies and practices that violated laws prohibiting the use of state funds for sectarian activities. 389 F.Supp.2d at 829–32. Teen Ranch argued that the state’s moratorium on new placements with Teen Ranch “violate[d] the Free Exercise Clause because it conditions the receipt of a governmental benefit on Teen Ranch’s surrender of its religious beliefs and practices and

burdens the free exercise of Plaintiff’s religious beliefs without satisfying the strict scrutiny standard.” *Id.* at 837. In rejecting Teen Ranch’s free exercise challenge, the district court reasoned that “[u]nlike [cases involving] unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit.” *Id.* at 838 (emphasis added).

The district court relied on the Supreme Court’s decision in *Locke v. Davey* and explained that in *Locke*:

where the [Supreme] Court reviewed a state scholarship program that excluded any student who was pursuing a degree in devotional theology . . . [a]lthough the law was not facially neutral with respect to religion, the [Supreme] Court held that it did not violate the Free Exercise Clause [because the law] ‘imposes neither criminal nor civil sanctions on any type of religious service or rite . . . . And it does not require students to choose between their religious beliefs and receiving a government benefit. The State has merely chosen not to fund a distinct category of instruction.

*Teen Ranch*, 389 F. Supp. 2d at 838 (citing *Locke v. Davey*, 540 U.S. 712, 720–21 (2004)). The district court in *Teen Ranch*, thus, recognized that the context in which a purported burden on religious expression occurs is critical in determining whether the state has violated the Free Exercise Clause. There is a difference between fundamental benefits such as unemployment compensation and voluntary contracts for the provision of government services. *Id.* at 838 (stating that there is no support for the proposition that “the State can be required under the Free Exercise Clause to contract with a religious organization”).<sup>21</sup> On appeal, the Sixth Circuit stated

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<sup>21</sup> The state court in *Catholic Charities of the Diocese of Springfield, et al. v. Madigan, et al.* similarly focused on context in granting summary judgment for the State of Illinois in a factually analogous dispute to the dispute in this case. See Section IV.A for a summary of the case in *Madigan*; see also Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield, et al. v. Madigan, et al.*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011) (concluding that despite Catholic Charities’ long history of participation in foster care, it did not have a right to a state contract for foster care).

“[a]fter thoroughly reviewing the record, we believe that the district court was correct in reaching its conclusions.” *Teen Ranch*, 479 F.3d at 410.

In this case, the Services Contract and the Fair Practices Ordinance incorporated into the Services Contract is, on its face, a neutral law of general applicability under *Smith*, therefore, the Court applies the rational basis test to determine the constitutionality of the Services Contract and its application to CSS.

First the Court concludes that the Services Contract and Fair Practices Ordinance are neutral with respect to religion because there is no evidence that the Services Contract or Fair Practices Ordinance were drafted or enacted with the object “to infringe upon or restrict practices because of their religious motivation.” *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275 (quoting *Lukumi*, 508 U.S. at 533) (emphasis added). The plain language of the Services Contract and the plain language and history of the Fair Practices Ordinance as incorporated into the Services Contract demonstrate neutrality. Article XV, § 15.1 of the Services Contract makes no reference to religion except that § 15.1 would protect individuals receiving services under the Services Contract from religious discrimination. Decl. of James Amato Ex. C, ECF p. 18–19 of 39, ECF No. 13-5 (“Provider shall not discriminate or permit discrimination against any individual because of . . . religion.”). The plain language of the Fair Practices Ordinance likewise supports a finding of neutrality. The Fair Practices Ordinance makes no reference to religion except that it, again, prohibits service providers from discriminating on the basis of religion. Philadelphia Fair Practices Ordinance § 9-1106, Chapter 9-1100 of the Philadelphia Code.

The legislative history and intent of the Fair Practices Ordinance similarly supports a finding of neutrality. Philadelphia City Council first enacted the Fair Practices Ordinance in

1963 long before the present dispute between the Parties. Philadelphia City Council amended the Fair Practices Ordinance in 1982, thirty-six years before the events relevant to this case, to broaden the scope of its inclusion policy to protect Philadelphians on the basis of, among other things, sexual orientation. Indeed, the Legislative Findings section of the Fair Practices Ordinance explained the reasons for its enactment. The Fair Practices Ordinance provides that Philadelphia’s population:

Consists of people of every race, ethnicity, color, religion, national origin, sex, sexual orientation, gender identity, ancestry, age, disability, marital status, and familial status . . . . [and] [d]iscrimination in places of public accommodation causes embarrassment and inconvenience to citizens and visitors of the City, creates breaches of the peace, and is otherwise detrimental to the welfare and economic growth of the City.

§ 9-1101. The history and text of the Fair Practices Ordinance provide no basis to conclude that the Fair Practices Ordinance has as its object the infringement of religious rights. Accordingly, the Fair Practices Ordinance, as incorporated by the Parties into the Services Contract, is neutral.

The Services Contract and the Fair Practices Ordinance are also generally applicable. In this case, the Services Contract was, in fact, applied generally. The general applicability of the Services Contract and Fair Practices Ordinance is not only evident from the text of the Services Contract, but also from the actions DHS and Philadelphia took in this case. First, the Services Contract and Fair Practices Ordinance do not “proscribe particular conduct only or primarily when religiously motivated;” they proscribe only CSS’s ability to turn away qualified Philadelphians on the basis of particular character traits without regard to secular or religious reasons. *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 275 (citing *Tenaflly*, 309 F.3d at 165). Among the character traits that CSS may not consider when refusing to serve qualified Philadelphians are “perceived race, ethnicity, color, sex, sexual orientation, religion, national

origin, ancestry, age, disability, marital status, source of income, familiar [sic] status . . . .”  
Article XV, § 15.1.

As applied in this case, the Services Contract and Fair Practices Ordinance were, in fact, implemented in a general manner. Not only has DHS confirmed that it would not permit any foster agency under contract, faith-based or not, to turn away potential foster parents for the foster parents’ characteristics under the Services Contract and Fair Practices Ordinance, DHS also closed intake of new referrals by CSS and Bethany Christian Services for the same reason. This evidence supports the conclusion that DHS and Philadelphia are not applying the Services Contract or the Fair Practices Ordinance to target particular religious denominations for any religious reason.<sup>22</sup>

Having concluded that the Services Contract and Fair Practices Ordinance are apparently facially neutral and generally applicable and appear to have been neutrally and generally applied in this case, the Court concludes that Defendants’ enforcement of the Services Contract and Fair Practices Ordinance is rationally related to a number of legitimate government objectives. While the standard for rational basis review is well known, it bears repeating:

Under rational basis review, ‘[a] statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not that basis has a foundation in the record.’ . . . . The regulation must be reasonable and not arbitrary and it must bear ‘a rational relationship to a [permissible] state objective.’”

*Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 278 (internal citation omitted). While not directly applicable to the local contracting practices at issue in this case, the imposition of

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<sup>22</sup> This fact contradicts Plaintiffs’ argument that DHS and Philadelphia specifically targeted CSS for its Catholic practices and association with the Archbishop of the Philadelphia Archdiocese. See below Section IV.C.2.ii addressing Plaintiffs’ argument that strict scrutiny should apply in reviewing Defendants’ actions because Defendants purportedly targeted Plaintiffs for Plaintiffs’ religious beliefs.

contractual conditions in government services contracts has a long and well-established history. Indeed, the courts, in reviewing federal contracts, have frequently upheld conditions placed on contractors through federal executive orders. *See, e.g.*, Exec. Order No. 8802, 6 F.R. § 3109 (Jun. 25, 1941) (requiring “[a]ll contracting agencies of the Government of the United States . . . include in all defense contracts . . . a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin” even before the enactment of the Civil Rights Act of 1964); PA Exec. Order 2016-05 (Apr. 7, 2016), [https://www.governor.pa.gov/executive\\_orders/executive-order-2016-05-contract-compliance/](https://www.governor.pa.gov/executive_orders/executive-order-2016-05-contract-compliance/) (prohibiting “discrimination by reason of race, gender, creed, color, sexual orientation, or gender identity or expression” in the “award, selection, or performance of any contracts or grants issued by Commonwealth agencies”).

Here, Defendants have at least six permissible governmental objectives that are furthered by seeking CSS’s compliance with the Services Contract. First, DHS and Philadelphia have a legitimate interest in ensuring that when contractors agree to terms in a government contract, the contractors adhere to those terms. Second, DHS and Philadelphia have a legitimate interest in ensuring that when its contractors voluntarily agree to be bound by local laws, the local laws are enforced. Third, DHS and Philadelphia have a legitimate interest in ensuring that when they employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the services. Fourth, in the context of foster care and adoption, DHS and Philadelphia have a legitimate interest in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers. Fifth, DHS and Philadelphia have a legitimate interest in ensuring that individuals who pay taxes to fund government contractors are not denied access to those

services.<sup>23</sup> Sixth, DHS and Philadelphia have an interest in avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples.<sup>24</sup>

That Defendants have legitimate objectives in this case is clearer still in view of the Supreme Court's decision in *Martinez*, 561 U.S. 661 and the decision in *Teen Ranch*, 389 F. Supp. 2d 827. In *Martinez*, the Supreme Court explained that where a public law school was “caught in the crossfire between a group’s desire to exclude and [an interest in] equal access, [the

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<sup>23</sup> See *Martinez*, 561 U.S. at 688 (concluding that the fact that where University organizations may receive funding derived from a mandatory student-activity fee, that the University has an interest in ensuring that no student “is forced to fund a group that would reject her as a member.”).

<sup>24</sup> See, e.g., *Campaign for Southern Equality v. Mississippi Dep’t of Human Servs.*, 175 F.Supp.3d 691 (S.D. Miss. 2016) (granting injunction to same-sex couples against state department of human services on basis that state law prohibiting adoption by same-sex couples violated federal equal protection under *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)).

The Court notes that while the Third Circuit rejected “avoiding ‘an Establishment Clause controversy’” as a government interest in *Tenaflly*, in that case, the Third Circuit concluded that strict scrutiny applied and, thus, a “possible” Establishment Clause controversy could not meet the exacting requirements of a “compelling” government interest. 309 F.3d at 172. Further, in *Tenaflly*, the Third Circuit concluded that the existence of an Establishment Clause controversy was, in essence, impossible. Here, faced with the Supreme Court’s ruling in *Obergefell*, recognizing marriage for same-sex couples and marriage’s attending benefits, and faced with the fact that CSS conditions the provision of its services on prospective parents’ procurement of a clergy letter, the possibility of an Equal Protection and Establishment Clause claim is not as remote a possibility as was the case in *Tenaflly*.

The Court also notes here that although CSS has disclaimed responsibility as a government actor in connection with some aspects of its claims, CSS, otherwise has urged the Court to consider CSS as a government contractor “akin to a government employee” in connection with its argument on Free Speech grounds. Pls.’ Br. 26, ECF No. 10-2. The Court need not decide whether CSS would qualify as a state actor at this time in connection with any possible Equal Protection or Establishment Clause claim.

law school] may reasonably . . . permit[] *all* organizations to express what they wish but *no* group to discriminate in membership.” 561 U.S. at 694. In this case, DHS and Philadelphia are in much the same position as the law school in *Martinez* and, like the law school in *Martinez*, they may permit government contractors to express what the contractors wish but may also insist that their contractors adhere to contractual obligations to serve all-comers and not discriminate. To permit a contractor to avoid a contractual provision requiring the contractor to accept all those who seek their services unilaterally would permit what the Supreme Court explained could not be permitted in *Martinez*.<sup>25</sup>

In this case, as in *Teen Ranch*, context matters. In *Teen Ranch*, the district court aptly drew a distinction between cases involving essential government benefits such as unemployment compensation or the ability to hold office, and “a state contract for youth residential services, which is not a public benefit.” 389 F. Supp. 2d at 838; *see also* Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield, et al. v. Madigan, et al.*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011) (granting summary judgment for State of Illinois reasoning that Catholic Charities did “not have a legally recognized protected property interest in the renewal of its contracts for foster care and adoption services”). There is no support for the proposition that “the State can be required under the Free Exercise Clause to contract with a religious organization.” *Id.* at 838. Here, CSS seeks, as the plaintiff in *Teen Ranch* sought, a government services contract on terms that it deems acceptable, but unlike those cases where the government withheld essential benefits on religious grounds, CSS is not entitled to a government services contract to perform governmental work. It further bears repeating that there is no evidence in the

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<sup>25</sup> When asked whether the public law school was required to exempt a faith-based student group’s decision from an all-comers/nondiscrimination policy, the Supreme Court answered that “[t]his Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, . . . unequivocally answers no to that . . . question.” *Martinez*, 561 U.S. at 694 n.24.

record that either DHS or Philadelphia has withheld a new contract or contractual compensation to CSS on religious grounds. The Court concludes that the terms of Services Contract, as applied by Defendants in this case, would likely survive rational basis review.

**ii. No Evidence Of Targeting To Trigger Strict Scrutiny**

Although the Court concludes that rational basis review applies in this case, the Court addresses Plaintiffs' argument that strict scrutiny review should apply instead.

At the outset, the Court acknowledges the Parties' varying citations to the recent Supreme Court case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018). *Masterpiece Cakeshop*, however, has little bearing on this case in view of *Masterpiece Cakeshop's* narrow holding. Among other narrow propositions, *Masterpiece Cakeshop* stands for the unfortunately now-remarkable proposition that disputes such as the one before this Court "must be resolved with tolerance." *Id.* at 1732.

In an attempt to show that Defendants' actions are subject to strict scrutiny despite the facial neutrality and general applicability of the Services Contract provisions at issue, and DHS's and Philadelphia's expressed preference to continue contracting with CSS, Plaintiffs allege that Defendants have targeted CSS "purely based on its religious beliefs." Pls.' Br. 17, ECF No. 13-2. In support of their claim of targeting, Plaintiffs point to (1) anti-Archdiocese of Philadelphia and anti-Archbishop of Philadelphia comments made by the Mayor of Philadelphia to show that DHS and Philadelphia intentionally sought to penalize CSS for its religious beliefs and exercise, and (2) the purported selective, discretionary enforcement of "laws or legal instruments in a way that burdens conduct for religious reasons but not secular reasons." Pls.' Br. 21, ECF No. 13-2. Plaintiffs draw too strong a conclusion from the Mayor's comments and misapprehend the way

in which “secular exemptions” might show a government’s actions are not neutral or generally applied so as to trigger strict scrutiny.

First, contrary to Plaintiffs’ contentions, the Mayor’s comments do not support the conclusion that DHS targeted CSS for its Catholic beliefs because (a) there was insufficient evidence at the preliminary injunction phase to show that the Mayor had any influence in DHS’s decisions in this case, thereby rendering the comments irrelevant to these proceedings, and (b) even comments the Mayor made relating to Catholicism do not demonstrate targeting in light of the fact that DHS also closed Bethany Christian Services’s referrals intake, a non-Catholic agency, that similarly would not comply with its obligation to serve all-comers under its foster agency contract.

Plaintiffs cite four comments involving the Mayor of Philadelphia that purportedly show that DHS closed CSS’s intake due to CSS’s Catholic beliefs.<sup>26</sup> First, Plaintiffs cite a nearly three-year-old *Philadelphia Magazine* article about then mayoral candidate Jim Kenney in which Kenney appeared critical of policies of the Archdiocese of Philadelphia and the Archbishop of Philadelphia, but appeared otherwise approving of Pope Francis, Catholic sisters, and other Catholic orders and programs.<sup>27</sup> Second, Plaintiffs cite a nearly two year old *Philadelphia Inquirer* article in which Mayor Kenney was quoted as saying that Philadelphia Archbishop

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<sup>26</sup> The difficulty in Plaintiffs relying on the Mayor’s statements, in part, stems from the fact that the Mayor himself was raised Catholic and, therefore, it is conceivable that when the Mayor has commented on Catholicism in the past, he was commenting on Catholic ideas as they related to his own faith. The Supreme Court has recently reminded the courts that they are to “take care not to engage in [] any judicial psychoanalysis” of lawmakers. *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at \*37 (U.S. June 26, 2018) (Sotomayor, J., dissenting). This is why the courts, when determining the intent of legislators, generally confine their review to statements made contemporaneously with the legislation in question. *Id.*

<sup>27</sup> Patrick Kerkstra, [Jim Kenney’s Long War With The Archdiocese](https://www.phillymag.com/citifed/2015/07/09/jim-kenney-catholic-archdiocese-charles-chaput/), *Phillymag.com*, (July 9, 2015, 11:23 PM), <https://www.phillymag.com/citifed/2015/07/09/jim-kenney-catholic-archdiocese-charles-chaput/>.

Chaput’s guidelines on the implementation of a Catholic text, *Amoris Laetitia*, were “not Christian.”<sup>28</sup> Third, Plaintiffs cite a March 16, 2018 comment by the Mayor where the Mayor stated “we cannot use taxpayer dollars to fund organizations that discriminate against people because of their sexual orientation or because of their same-sex marriage status . . . . It’s just not right.”<sup>29</sup> Fourth, Plaintiffs cite a May 7, 2018 letter indicating that the Philadelphia Commission on Human Relations was investigating CSS’s policy of turning away certain persons based on their status as same-sex and married at “the request of the Mayor.” *See* (initial) Injunction Motion Ex. 1-G (sealed), ECF No. 10-14.

Plaintiffs rely too heavily on these four citations to draw a sweeping conclusion that CSS has suffered impermissible hostility at the hands of the Mayor. The evidence submitted at the three-day evidentiary hearing is insufficient to draw the conclusion Plaintiffs would have the Court draw. There was no evidence to show that the Mayor directed DHS to close CSS’s intake of new referrals or to insist that CSS comply with its contractual obligation to serve all Philadelphians. *See* Jun. 19, 2018 Hr’g Tr. 166:6–21 (Figueroa) (testifying that Commissioner Figueroa herself “decided that it was in the best interest [of children] to close intake, so that [Figueroa] could look more deeply into” CSS’s and Bethany Christian Services’s policies); Figueroa Decl. ¶ 32, ECF No. 20-6 (same); Jun. 18, 2018 Hr’g Tr. 96:2–3 (Ali) (testifying that, to Ali’s knowledge, Commissioner Figueroa herself decided to close CSS’s intake of new

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<sup>28</sup> David O’Reilly, Chaput Edict Draws Mixed Reviews; Kenney Calls It ‘Not Christian’, Philly.com, (Jul. 6, 2016, 11:04 PM), [http://www.philly.com/philly/news/20160707\\_Chaput\\_edict\\_draws\\_mixed\\_reviews\\_\\_Kenney\\_calls\\_it\\_not\\_Christian\\_.html](http://www.philly.com/philly/news/20160707_Chaput_edict_draws_mixed_reviews__Kenney_calls_it_not_Christian_.html). *See* Mot. for Temporary Restraining Order or Preliminary Injunction Ex. 1-J, ECF No. 10-17.

<sup>29</sup> Tom MacDonald, Philly Halts Foster Placements With 2 Faith-Based Agencies Shutting Out LGBT Couples, WHYY.com, (Mar. 16, 2018), <https://whyy.org/articles/philly-halts-foster-placements-2-faith-based-agencies-shutting-lgbt-couples/>. This article was cited in Plaintiffs’ Brief and is attached as Exhibit 1-U to Plaintiffs’ initial Injunction Motion. *See* Mot. for Temporary Restraining Order or Preliminary Injunction Ex. 1-U, ECF No. 10-28.

referrals); Jun. 21, 2018 Hr'g Tr. 108:11–13, 108:18–20 (Figueroa) (testifying that Commissioner Figueroa did not know the Mayor's views on CSS when Figueroa met with CSS, nor did Figueroa “discuss cutting off intake with the Mayor's office”).

That DHS made its own decision to close intake is supported by the fact that DHS has closed intake for other foster care agencies in the past for a number of reasons and, thus, intake closure is a relatively unremarkable DHS administrative action that may be taken to address a number of agency concerns. *See, e.g.*, Jun. 21, 2018 Hr'g Tr. 5:14–15 (Figueroa) (testifying that “I have closed intake in other circumstances for other providers.”); Jun. 21, 2018 Tr. 8:24–25–9:1 (Figueroa) (testifying that the week before, DHS also closed intake for another agency). In short, there is insufficient evidence in the record to show that the Mayor was involved in DHS's decision to close CSS's and Bethany Christian Services's intake of new referrals. Therefore, the Mayor's comments are irrelevant to this case and cannot support Plaintiffs' claim of religious hostility and intentional targeting.

Each of Plaintiffs' four citations purportedly showing DHS's intentional targeting of CSS on religious grounds cannot support Plaintiffs' conclusion for a number of other reasons. Plaintiffs' first two citations are three and two years old, respectively. The events that precipitated this case occurred in March 2018. These first two citations, as a matter of timeliness, if not substance, are irrelevant. Plaintiffs' third citation to the Mayor's comment that “we cannot use taxpayer dollars to fund organizations that discriminate against people because of their sexual orientation or because of their same-sex marriage status . . . . It's just not right” is, by its plain terms, not about religious views, but about whether publicly funded service providers may refuse to serve all Philadelphians, including those that are in same-sex marriages. Plaintiffs' fourth citation, to a May 7, 2018 letter in which the Philadelphia Commission on Human

Relations indicated that the Commission would undertake an investigation, in part, at the request of the Mayor, was sent after DHS made an independent decision to close CSS and Bethany Christian Services's intake. The letter, therefore, cannot support a conclusion that the Mayor was involved in DHS's decision.

Plaintiffs also have pointed to Commissioner Figueroa's statement at the May 15 meeting between DHS officers and CSS management that "it would be great if we listened to the teachings and the words of our current Pope Francis" as another ground on which to rest its targeting and preference allegations. Jun. 21, 2018 Hr'g Tr. 106:1-3 (Figueroa). As with the Mayor's comments, Plaintiffs draw too broad a conclusion from the Commissioner's statement. The fact remains that DHS closed intake for both CSS and Bethany Christian Services, a non-Catholic organization. This fact undercuts Plaintiffs' position that DHS has targeted CSS for its Catholic beliefs. Further, Commissioner Figueroa's words themselves are unclear whether references to "we" and "our current Pope Francis" were references to her own beliefs as a Catholic who was educated by the Jesuit order, or as a representative of DHS. Jun. 19, 2018 Hr'g Tr. 149:5-18. As cautioned by Justice Sotomayor, the Court will not engage in judicial psychoanalysis on these facts. *Trump v. Hawaii*, No. 17-965, 2018 WL 3116337, at \*37.

In another attempt to show that DHS has targeted CSS on religious grounds, Plaintiffs argue that DHS has granted secular exemptions to the Services Contract's fair practices provisions, but now refuse a religious exemption to CSS. Plaintiffs, however, misapprehend how religious targeting may be proven through the government's provision of "secular exemptions." On this issue, the Third Circuit's decision in the case *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, provides the framework for determining whether the government is impermissibly providing secular exemptions to a regulation, and not providing

comparable religious exemptions to the same regulation in violation of the First Amendment. 170 F.3d 359 (3d Cir. 1999).

In *Fraternal Order of Police*, the Third Circuit considered a police department regulation that prohibited its officers from wearing beards to maintain uniformity among the officers. 170 F.3d at 361. The regulation applied generally to all officers, but the police department carved out a categorical exemption for officers who had medical reasons for keeping a beard. *Id.* By contrast, the police department refused to carve out a categorical exemption for officers who had religious reasons for keeping a beard. *Id.* Then Circuit Judge Alito wrote for the Third Circuit that the police department's exemption from the no-beard policy on medical grounds "raise[d] concern because it indicate[d] that the [police department] ha[d] made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* at 366 (emphasis added). The focus of analysis must be on whether the government exempts activities that would violate the policy at issue for secular reasons, but not for religious reasons. Thus, in *Fraternal Order of Police*, the focus was on the police department's provision of a secular exemption from the no-beard policy.

Here, the policy at issue is the fair practice provisions of CSS's Services Contract, that is the all-comers, nondiscrimination provisions. The question is whether DHS grants exemptions to the fair practice provisions of foster agency contracts for secular reasons, but denies CSS an exemption for religious reasons thereby evidencing an impermissible governmental value judgment that secular motivations for violating fair practice provisions are more important than religious motivations. The answer to this question is no. There is no evidence in the record to show that DHS has granted any secular exemption to the requirement that its foster care agencies

provide their services to all comers. Plaintiffs have not alleged, nor have Plaintiffs presented, any evidence that DHS has granted exemptions to any secular agency to permit a secular agency to refuse its services to all comers in contravention of any fair practices provisions of any foster services contract.

The purported secular exemptions to which Plaintiffs point to show religious targeting are not, in fact, exemptions to the fair practices requirements and, as such, cannot be considered evidence of targeting. CSS complains that DHS has permitted “referrals of families for a variety of secular reasons, including proximity, expertise in caring for medical needs, expertise in addressing behavioral needs, ability to find foster placements for pregnant youth, expertise working in a ‘kin care’ program, and other specialties or areas of focus.” Pls.’ Br. 21, ECF No. 13-2. These “secular reasons,” however, are not exemptions from fair practices requirements. DHS permits agencies to “refer” prospective foster parents to specialty agencies equipped to handle certain special needs, but nowhere is there evidence in the record that DHS permits agencies to refuse to provide their services to prospective foster parents in violation of the fair practices policies contained in government contracts or local law. While CSS has represented that it would euphemistically “refer” same-sex couples to other foster agencies willing to serve same-sex couples, CSS’s “referral” to another agency would nevertheless amount to CSS’s refusal to serve that same-sex couple.

As there is insufficient evidence to support the conclusion that DHS has explicitly targeted CSS for religious reasons, strict scrutiny is inapplicable in this case.

## **2. Establishment Clause Claim**

Plaintiffs also assert a claim under the Establishment Clause based on Defendants’ alleged “engag[ment] in denominational preference and targeting.” Pls.’ Br. 24, ECF No. 10-2.

The First Amendment to the U.S. Constitution provides that “there should be ‘no law respecting an establishment of religion.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting the First Amendment)). The Supreme Court has provided two tests for deciding whether government action runs afoul of the Establishment Clause: the “endorsement test” and the *Lemon* test. *Doe v. Indian River School Dist.*, 653 F.3d 256, 282–83 (3d Cir. 2011). Plaintiffs have not articulated how, if at all, Defendants’ actions fit under either test. Instead, Plaintiffs have simply asserted that Defendants have “demonstrate[d] a preference for some religious groups over CSS.” Pls.’ Br. 24, ECF No. 13-2. The Court cannot conclude that Plaintiffs have met their burden of showing entitlement to relief under the Establishment Clause. The Court will, nevertheless, address Plaintiffs’ Establishment Clause arguments as they have articulated them below, despite Plaintiffs’ failure to articulate a claim under the endorsement test or the *Lemon* test.

In support of Plaintiffs’ Establishment Clause claim, Plaintiffs cite to the same purported evidence of religious targeting that they cited in connection with their free exercise claim, that is, evidence of the Mayor’s alleged bias against the Archdiocese of Philadelphia and the Archbishop of Philadelphia. Plaintiffs argue that the Mayor’s comments in tandem with DHS’s actions “demonstrate an intent to target Catholic Social Services based upon disagreement with [CSS’s] religious beliefs.” Pls.’ Br. 25, ECF No. 10-2. As discussed in connection with Plaintiffs’ religious targeting argument, above, the evidence does not support Plaintiffs’ sweeping conclusion.

In pursuing its Establishment Clause claim, CSS glosses over the fact that it has not been singled out for its policy of refusing to serve all qualified Philadelphians. DHS closed Bethany Christian Services’s intake of new referrals for the same reason DHS closed CSS’s intake. Jun. 21, 2018 Hr’g Tr. 12:9–23 (Figueroa) (testifying that DHS closed Bethany Christian Services’s

intake and that its intake remains closed, however, Bethany Christian Services has represented that it will enter into a new contract with the DHS for the coming year and comply with the fair practices requirements under its contract). That DHS closed intake for CSS, which operates under the command of the Archdiocese of Philadelphia, and also closed intake for Bethany Christian Services, not associated with the Archdiocese of Philadelphia, militates against concluding that DHS has engaged in denominational preference and targeting. The Mayor's allegedly anti-Archdiocese of Philadelphia and anti-Archbishop of Philadelphia comments offer no support to Plaintiffs' argument of denominational preference and targeting because DHS also closed Bethany Christian Services's intake, which is not associated with the Archdiocese of Philadelphia or the Archbishop of Philadelphia.

Plaintiffs have not demonstrated entitlement to relief under the Establishment Clause.

### **3. Pennsylvania Religious Freedom Act Claim**

Plaintiffs' next lodge a statutory claim under the Pennsylvania Religious Freedom Act ("RFPA"). 71 Pa. Cons. Stat. Ann. §§ 2401–2407. Before turning to the substance of Plaintiffs' claim, the Court emphasizes that Plaintiffs' claim is a state law claim. Under certain circumstances a district court may abstain from ruling on a state law issue, such as the issue in this case, in favor of allowing the state courts an opportunity to address the issue. Indeed, in *Combs v. Homer-Center School Dist.*, the Third Circuit vacated a district court order awarding a defendant summary judgment on a RFPA claim and ordered the district court to remand the matter to the appropriate state court for adjudication. 540 F.3d 231, 253–254 (3d Cir. 2008). The Third Circuit explained in *Combs*, that “[b]ecause all federal issues have been decided on summary judgment and since [the plaintiffs’] RFPA claim raises a novel and potentially complex issue of State law, we will decline to exercise supplemental jurisdiction over [the plaintiffs’]

pendent state law claim.” 540 F.3d at 254. Notwithstanding the Third Circuit’s guidance that the district courts remain wary of intruding upon state law matters, the Court will address Plaintiffs’ RFPA claim in view of the procedural posture of this case.

At the preliminary injunction stage, the Third Circuit has advised that considerations of the novelty and potential complexity of a state law question “have very little weight.” *New Jersey-Philadelphia Presbytery of the Bible Presbyterian Church v. New Jersey State Bd. of Higher Educ.*, 654 F.2d 868 (3d Cir. 1981) (concluding that the concerns implicated by the *Pullman* doctrine, which permits courts to abstain from deciding certain complex state law matters are of less import at the preliminary injunction stage). While the state law matters presented in this case are complex, the Court finds that state court precedent provides a sound basis for a decision on Plaintiffs’ RFPA claim at the preliminary injunction stage.

Section 2401 of RFPA provides:

- (a) General rule. Except as provided in subsection (b), an agency shall not substantially burden a person’s free exercise of religion, including any burden which results from a rule of general applicability.
- (b) Exceptions. An agency may substantially burden a person’s free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following:
  - (1) In furtherance of a compelling interest of the agency.
  - (2) The least restrictive means of furthering the compelling interest.

71 Pa. Cons. Stat. Ann. § 2404 (emphasis added).

While RFPA would appear, on its face, to protect a wide range of religious activity, the Third Circuit has noted that “[s]ignificantly, not all burdens on the exercise of religion trigger the RFPA’s heightened scrutiny.” *Brown v. City of Pittsburgh*, 586 F.3d 263, 285 (3d Cir. 2009).

The Third Circuit has explained that the nature of our society is such that “virtually all legislation . . . imposes an incidental burden at some level by placing indirect costs on an individual’s activity.” *Id.* at 285 (internal quotation omitted) (alteration in original). When the costs of legislation may affect religious freedoms, the Pennsylvania General Assembly has “identified a substantiality threshold as the tipping point for requiring heightened justifications for governmental action.” *Id.* at 285 (citing *Combs v. Homer-Center School Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, C.J., concurring)). RFPA further “requires ‘as a threshold matter’ that persons invoking its protections ‘prove . . . that their free exercise of religion has or will likely be substantially burdened’ by ‘clear and convincing evidence’.” *Id.* at 285 (citing *Combs*, 540 F.3d at 253 (per curiam)) (emphasis added). The Third Circuit has quoted Chief Judge Scirica’s concurring opinion in *Combs* for the proposition that “by requiring proof of ‘a substantial burden’ by clear and convincing evidence, Pennsylvania appears to have set a higher threshold than other religious restoration statutes.” *Id.* at 285 (citing *Combs*, 540 F.3d at 262 (Scirica, C.J., concurring)) (emphasis added).

Under RFPA, a law substantially burdens a person’s fundamental religious exercise if it:

- (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. Cons. Stat. Ann. § 2403. In determining whether the government substantially burdens a person’s free exercise of religion under RFPA, a state law, the Court looks to the way in which the state law has been interpreted and applied by state courts.

In *Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park*, 920 A.2d 953 (Pa. Commw. Ct. 2007), the Commonwealth Court reviewed a church’s claim that a town zoning ordinance prohibiting the operation of a church-run religious childcare center on the church’s property violated the church’s free exercise under RFPA. The Commonwealth Court framed the issue presented as “whether the Church would be ‘substantially burdened’ if it was precluded from operating a daycare center because it would lose ‘a reasonable opportunity to engage in activities which are fundamental to [its] religion.’” 920 A.2d at 960 (quoting 71 Pa. Cons. Stat. Ann. § 2403). The Commonwealth Court resolved the issue by concluding that:

nothing here impinges on the religious activities of the Church. While it aided in carrying out the Church’s religious mission, the daycare is not a fundamental religious activity of a church. For example, ministering to the sick can flow from a religious mission, but it is not a fundamental religious activity of a church because a hospital may be built to satisfy that mission.

*Id.* at 960. Thus, the Commonwealth Court concluded the zoning ordinance “does not violate the RFPA” because “the [c]hurch failed to meet its burden of proving that it was substantially denied a reasonable opportunity to engage in activities that were fundamental to its religion.” *Id.*

In *Staple v. Dep’t of Corrections*, the Commonwealth Court considered a situation in which the Pennsylvania Department of Corrections confiscated religious texts from an inmate. 2014 WL 2927286 at \*4 (Pa. Commw. Ct. 2014) (not precedential). While *Staple* involved the application of a specific carve out under RFPA that grants correctional facilities greater authority to burden inmates’ religious freedoms, the case, nevertheless, provides some insight into the limits of RFPA. A person’s access to religious texts would ostensibly be one of the most fundamental religious rights, and yet, even under RFPA, a state agency may confiscate and prohibit an individual’s access to such texts. *Id.* at 4. The result in *Staple*, thus, would confirm the Third Circuit’s observation in *Brown* that “Pennsylvania appears to have set a higher

threshold than other religious restoration statutes” and that RFPA does not provide protection in many circumstances. *Id.* at 285 (citing *Combs*, 540 F.3d at 262 (Scirica, C.J., concurring)); *see also Brown*, 586 F.3d at 288 (holding that RFPA provides only as much protection to religiously motivated expression as the First Amendment’s Free Speech Clause).

In *Commonwealth v. Parente*, the Commonwealth Court addressed a defendant’s assertion that a city noise control ordinance prohibiting the defendant’s use of a hand-held microphone with speakers to “exercise his religious beliefs” in accordance with “the dictates of his conscience and serv[ing] God by peacefully preaching and counseling people,” violated his rights under RFPA. 956 A.2d 1065, 1073 (Pa. Commw. Ct. 2008). The Commonwealth Court held that the application of the ordinance and the defendant’s conviction thereunder did not violate the defendant’s rights under RFPA because “the defendant failed to establish that the activities he engaged in were fundamental to his religion.” *Id.* at 1074. Instead, the defendant proved only that “he engaged in these activities based upon his religious beliefs or that [the activities] flowed from a religious mission.” 956 A.2d at 1074 (emphasis added). In so holding, the Commonwealth Court drew a distinction between those activities that are fundamental to a person’s religion and those activities that may be inspired by or flow from a religious mission.

These state court decisions interpreting RFPA highlight what the Third Circuit has noted in other cases: the analytical framework established by RFPA “appears to create some tension between state and federal law.” *Combs*, 540 F.3d at 258. While the “United States Supreme Court has cautioned against making religious interpretations in the First Amendment context,” the Pennsylvania General Assembly and the Commonwealth’s courts appear to require courts to “inquire into . . . whether an activity is fundamental to a person’s religion.” *Id.*

In this case, Plaintiffs have articulated their fundamental religious exercise as “providing foster care to Philadelphia children.” Pls.’ Br. 13, ECF No. 13-2; *see also* Pls.’ Proposed Findings of Fact and Conclusions of Law ¶ 120, ECF No. 46 (stating that “[c]aring for foster children is a fundamental religious exercise for Plaintiffs); Jun. 19, 2018 Hr’g Tr. 37 (Amato) (testifying that “the church’s care for orphans . . . at-risk children . . . [is] intrinsic to who we are and what we do.”). Although the decision in *Ridley Park* raises significant doubt about whether Pennsylvania courts would consider foster care to be a fundamental religious exercise,<sup>30</sup> the Court will assume, for purposes of the Injunction Motion, that “providing foster care to . . . children” constitutes a fundamental religious exercise under RFPA. Pls.’ Br. 13, ECF No. 10-2.

Assuming that providing foster care to children constitutes a fundamental religious exercise, the next question under RFPA analysis is whether holding CSS to its obligations under the Services Contract, in particular its obligation to provide its services to all-comers in accordance with the Fair Practices Ordinance, substantially burdens CSS’s provision of foster care to children. The Court concludes that CSS’s provision of foster care to children is not substantially burdened in this case because CSS is not reasonably likely to show by clear and convincing evidence that its fundamental religious exercise has been substantially burdened under any of the four definitions of “substantial burden” provided under RFPA.<sup>31</sup> Requiring

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<sup>30</sup> As discussed in detail above, the Commonwealth Court held that childcare “is not a fundamental religious activity of a church” even if childcare may “aid[] in carrying out the Church’s religious mission.” *Ridley*, 920 A.2d at 960. Indeed, the Commonwealth Court reasoned that while “ministering to the sick can flow from a religious mission . . . it is not a fundamental religious activity of a church.” *Id.* at 960. There is little question that “providing foster care to . . . children” likely flows from and aides CSS’s religious mission, but it is not as clear, that foster care is a fundamental religious exercise under *Ridley Park*.

<sup>31</sup> Plaintiffs claim that “all four types of burden” considered “substantial” under § 2403 of RFPA are implicated in this case. Plaintiffs assert that DHS’s actions “[s]ignificantly constrain[] or inhibit[] conduct or expression mandated by [Catholic Social Services’] religious beliefs” and “[d]en[y] [CSS] a reasonable opportunity to engage in activities which are fundamental to the

CSS's compliance with the terms of the Services Contract does not: constrain or inhibit CSS from conduct or expression mandated by its religious beliefs, curtail CSS's ability to express adherence to CSS's religious faith, deny CSS a reasonable opportunity to "provide foster care to children," or compel CSS to engage in conduct or expression that violates a "specific tenet" of CSS's religious faith.

Resolution of the issue of "substantial burden" requires the Court to focus on what precisely CSS has been asked to do in this case and whether doing it necessarily results in a conflict with CSS's religious beliefs. CSS has been asked, and indeed CSS agreed when it entered into the Services Contract, to serve all persons who seek CSS's services consistent with the all-comers provisions of the Fair Practice Ordinance. Compliance with the all-comers provisions would, as discussed above, require CSS to provide certification services to prospective parents regardless of, among other things, religion, race, marital status, sexual violence victim status, sex, sexual orientation, gender identity, or age. CSS contends that compliance with the all-comers provision of the Services Contract necessarily compels it to engage in "conduct and expression contrary to Catholic teaching," in particular, Catholic teaching about marriage. Pls.' Br. 14, ECF No. 10-2.

CSS contends that the provision of certification services for same-sex couples would require CSS to express its religious approval of same-sex relationships in contravention of Catholic teaching about marriage. This is not the case. To illustrate this point, if, for example, CSS were to certify a couple where one spouse is previously divorced, CSS's certification would

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[agency's] religion." Pls.' Proposed Findings of Fact and Conclusions of Law ¶ 126, ECF No. 46 (alterations in original); *see also* Pls.' Br. 12, ECF No. 10-2 (asserting same burdens using verbatim language). Elsewhere, Plaintiffs also state that DHS's actions "curtail . . . Catholic Social Services' 'ability to express adherence' to its faith, and attempt to '[c]ompel[] conduct or express which violates a specific tenet of [Catholic Social Services'] religious faith.'" Pls.' Br. 14, ECF No. 10-2 (alterations in original).

not suggest that CSS approved of divorce as a religious matter. In short, CSS was hired to provide a scope of services to the citizens of Philadelphia that is narrower than CSS contends.

The Services Contract requires CSS to “recruit, screen, train, and provide certified resource care homes” consistent with the all-comers provisions of the Fair Practices Ordinance Decl. of James Amato Ex. A, ECF p. 28 of 52, ECF No. 13-3. The Services Contract does not require CSS to do anything in connection with prospective foster parents but certify prospective foster parents as meeting state guidelines for foster care. CSS is imbuing its certifications with meaning that is not required or compelled by the Services Contract. The Services Contract does not require CSS to express its religious approval or disapproval of persons seeking out its services. The Services Contract does not require CSS to do or say anything else in connection with CSS’s religious views.

With this understanding in mind, the Court concludes that DHS has not and is not constraining Plaintiffs’ ability to engage in the provision of foster care to children by imposing on CSS a contractual condition that would require CSS to violate its religious beliefs or curtail CSS’s ability to express its religious beliefs. In essence, if CSS provides its services consistent with the minimal requirements of the all-comers provisions of the Fair Practices Ordinance, then CSS may continue to provide foster care to children. This does not constitute a substantial burden on CSS’s religious exercise of providing foster care to children. As to the individual Plaintiffs, as discussed in detail below and in connection with the irreparable harm prong, the individuals are not constrained by Defendants’ actions in connection with CSS in their fostering of children because the individual Plaintiffs are, as they always have been, entitled to be foster parents with any of the thirty foster care agencies with whom DHS has contracted.

#### 4. Free Speech Claims

Plaintiffs allege two claims under the Free Speech Clause of the First Amendment. First, Plaintiffs allege that the services CSS provides under the Services Contract relating to certification of prospective foster parents are services for which CSS is not paid, therefore, by requiring CSS to provide certifications DHS is compelling CSS to engage in unpaid for speech. Second, Plaintiffs contend that DHS and Philadelphia retaliated against CSS for CSS's comments published in the March 13 *Philadelphia Inquirer* article in violation of the Free Speech Clause. The Court rejects both claims. First, in hiring CSS to perform services under the Services Contract, DHS and Philadelphia did not seek to create a forum for private speech nor did they seek to promote speech at all. Rather, DHS contracted for specific services relating to DHS's responsibility of providing foster care services to the citizens of Philadelphia, including certification services and home visits for prospective foster parents. This is the case whether CSS was paid in a lump sum or per diem as CSS contends. Second, there is insufficient evidence to conclude that DHS retaliated against CSS for CSS's religious views as opposed to CSS's confirmation that its policies directly contradict the Services Contract.

##### i. Compelled Speech

In resolving Plaintiffs' claim that DHS and Philadelphia are impermissibly conditioning CSS's contract on unconstitutionally compelled speech, the Court begins by identifying the purpose of the contract because the purpose of the contract is the springboard for analysis.<sup>32</sup>

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<sup>32</sup> The Court disagrees that DHS and Philadelphia are conditioning the grant of a contract to CSS on CSS's agreement to "adopt [a] particular belief." Pls.' Proposed Findings of Fact and Conclusions of Law 67, ECF No. 46. DHS and Philadelphia ask only what they would ask of any contracting party, that CSS enter into the contract consistent with the duty of good faith and fair dealing. DHS and Philadelphia have asked CSS to confirm that, to the extent CSS would enter into an agreement that CSS could perform in accordance with the contract's fair practices provisions.

The U.S. Supreme Court's decision in *Legal Services Corp. v. Velazquez* advised courts to look to the purpose of a government program when analyzing whether a government condition to participation in the program is constitutional under the First Amendment. 531 U.S. 533 (2001). In *Legal Services Corp.*, a group of lawyers employed by the New York City Legal Services Corp., sought a declaration that Congress's imposition of a funding condition on legal services under the Legal Services Corporation Act was an unconstitutional restriction of their freedom of speech. *Id.* at 536. Congress's funding condition prohibited legal services corporations' use of federal funds to "amend or otherwise challenge existing welfare law." *Id.* In ruling that the funding condition of the Legal Services Corporation Act was unconstitutional, the Supreme Court focused on the purpose of the law. The law was "designed to facilitate private speech, not promote a governmental message." *Id.* at 542. Indeed, advice from legal services corporation attorneys to their clients, the Supreme Court concluded, "cannot be classified as governmental speech even under a generous understanding of the concept." *Id.* at 543.

As the Legal Services Corporation Act's purpose was to facilitate private speech, and as the speech in which legal services corporation attorneys were engaged was not governmental speech, the Supreme Court held that the law's funding condition was unconstitutional. In so holding, the Supreme Court, however, also acknowledged that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Legal Servs. Corp.*, 531 U.S. 533, 541–42 (2001) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)) (emphasis added).

In this case, DHS's purpose in entering into the Services Contract with CSS and its other foster care agencies is for CSS and the other twenty-nine foster care agencies to provide foster care services. The Services Contract is not intended here, in contrast to the Legal Services Corporation Act in *Legal Servs. Corp.*, to create a forum for private speech or to facilitate private speech. CSS and its sister agencies were hired to perform governmental functions for DHS and Philadelphia. That CSS's services under the Services Contract parallel many of DHS's own, provides support for the conclusion that CSS is performing governmental work, including the dissemination of governmental messages. For example, CSS is required under the Services Contract to recruit prospective foster parents, and, in fact, CSS has recruited prospective foster parents in much the same way that DHS has recruited prospective foster parents. *Compare* Jun. 18, 2018 Hr'g Tr. 65:14–19 (testifying that she saw television commercials soliciting prospective foster parents)) and Foster Care & Adoption Services, <https://cssphiladelphia.org/adoption/> (last visited Jul. 1, 2018) (advertising CSS's foster care and adoption services to members of the public through a website) *with* Jun. 18, 2018 Hr'g Tr. 101:19–101:2 (Ali) (describing phone bank recruiting event) and Jun. 19, 2018 Hr'g Tr. 161:23–162:1 (Figueroa) (describing recruitment as a general foster-care responsibility). That CSS's work under the Services Contract was governmental in nature, is further supported by the fact that the Services Contract stipulated that written materials published by CSS relating to services rendered under the Services Contract were to identify DHS as a funding source. CSS's work under the Services Contract is, thus, an extension of DHS's own work and CSS's speech, to the extent any is required under the Services Contract, constitutes governmental speech under *Legal Servs. Corp.*

As CSS's speech, to the extent any is required under the Services Contract, constitutes governmental speech, DHS is permitted to "take legitimate and appropriate steps to ensure that

its message,” that foster care services in Philadelphia are provided to all Philadelphians consistent with the all-comers provision of the Fair Practices Ordinance, was and is “neither garbled nor distorted by” CSS. *Legal Servs. Corp.*, 531 U.S. 541–42.

Plaintiffs rely on *Cradle of Liberty Council, Inc. v. City of Philadelphia*, in support of their argument that Defendants have impermissibly conditioned CSS’s public contract on compelled speech. 851 F. Supp. 2d 936, 948 (E.D. Pa. 2012). Plaintiffs’ reliance on *Cradle of Liberty*, however, is misplaced for at least two reasons. First, *Cradle of Liberty* is not binding on this Court. Second, *Cradle of Liberty* is otherwise not persuasive because the facts at issue in that case are not analogous to the facts at issue here. *Cradle of Liberty* concerned a Boy Scout troop that was using a city-subsidized building to carry out youth activities, all while refusing membership to prospective gay Boy Scouts. The City attempted to change the Boy Scout troop’s general policy on membership for prospective gay Scouts by conditioning the lease of the building on a policy change. Ultimately, the district court concluded that the City could not use the lease to change the tenant Boy Scout troop’s general policies when the policies were not related to the use of the building.

The critical difference between *Cradle of Liberty* and this case is that in *Cradle of Liberty*, the City attempted to use a lease agreement to change a tenant’s policy that was unrelated to the lease. *See id.* at 943 (emphasis added) (providing that the City had informed the tenant that “it had to completely abandon its practice of denying membership to homosexuals, even in contexts unrelated to the subsidized building”). In this case, by contrast, Defendants’ insistence that CSS serve all-comers consistent with the Services Contract is central to the purpose of the Services Contract. Defendants have not conditioned CSS’s Services Contract on CSS changing its activities, views, opinions outside the context of the Services Contract. CSS

may continue to refuse its private services to same sex couples outside the confines of the Service Contract and outside of CSS's role as a DHS foster care agency.

**ii. Retaliation**

CSS concedes that “[a]s a contractor, Catholic Social Services is treated as ‘akin to a government employee’ addressing matters of ‘public concern.’” Pls.’ Br. 26, ECF No. 13-2. For a public employee, to prevail on a retaliation claim, the employee must show that “(1) his speech is protected by the First Amendment and (2) the speech was a substantial or motivating factor in the alleged retaliatory action, which, if both are proved, shifts the burden to the employer to prove that (3) the same action would have been taken even if the speech had not occurred.” *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454, 466 (3d Cir. 2015). The Third Circuit has noted that the “second and third stages of this analysis present questions for the fact finder and are not subject to review. *Baldassare v. New Jersey*, 250 F.3d 188, 194–95 (3d Cir. 2001) (citations omitted).

Plaintiffs’ retaliation claim fails on elements two and three. There is no evidence that it was CSS’s viewpoint, as opposed to CSS’s verbal and written confirmation that its policies directly conflicted with the Services Contract, that motivated DHS to close CSS’s intake of new referrals. Even if CSS’s engagement in protected activity, namely CSS’s commenting to the *Philadelphia Inquirer* about CSS’s policies in connection with a public services contract, was a substantial or motivating factor for DHS’s alleged retaliation, the Court concludes that DHS would likely prevail in establishing that it would have taken the same action had CSS not spoken with the *Philadelphia Inquirer* about its policies.

For purposes of this analysis, the Court assumes that CSS’s statements to the *Philadelphia Inquirer* and the publication of those statements constitute constitutionally-

protected activity. Assuming that CSS has engaged in constitutionally-protected activity, the next analytical step is determining whether CSS's protected activity was a substantial or motivating factor in the alleged retaliatory action. While CSS would have the Court conclude that the evidence in the record shows that DHS closed CSS's intake of new referrals because of CSS's viewpoint as communicated to the *Philadelphia Inquirer*, in fact, the evidence shows that DHS closed CSS's intake of new referrals because CSS confirmed that its policies violate CSS's contractual obligations under the Services Contract. On this issue, the Eleventh Circuit's decision in *Keeton v. Anderson-Wiley* is instructive. 664 F.3d 865 (11th Cir. 2011).

In *Keeton*, the Eleventh Circuit confronted a situation in which the plaintiff, a graduate student in the Counselor Education Program at Augusta State University, sued the University for First Amendment violations after the faculty asked the plaintiff to complete a remediation plan before she could participate in the University's clinical practicum. 664 F.3d at 867. The faculty required the plaintiff to complete the remediation plan as a condition to her actively counseling students as part of a clinical practicum because the faculty learned that the plaintiff intended to "convert students from being homosexual to heterosexual" once the plaintiff obtained access to the clinic. *Id.* at 868–69. University officials concluded that the plaintiff's intended actions would violate various provisions of the American Counseling Association's Code of Ethics, a mandatory code of ethics for all universities providing counseling programs. *Id.* at 869. Ultimately, the plaintiff confirmed that she would not participate in any "remediation plan that I already know I won't be able to successfully complete." *Id.* at 871. The University then withdrew the plaintiff from the counseling practicum and the plaintiff filed suit. *Id.*

In concluding that the plaintiff's free speech rights had not been violated, the Eleventh Circuit focused on the evidence of why the University asked the plaintiff to engage in a

remediation plan and why the University ultimately withdrew the plaintiff from the counseling practicum. *Id.* The Eleventh Circuit explained that the plaintiff “confuse[d] her viewpoint-based objections to ASU’s officials’ actions with viewpoint discrimination.” *Id.* at 875. In other words, the mere fact that the plaintiff disagreed with the legitimate reasons for the University’s actions did not transform the University’s legitimate actions into illegitimate retaliatory actions. Indeed,

the evidence shows that, in requiring Keeton to learn about and interact with the GLBTQ population, to read articles in counseling or psychological journals about counseling the GLBTQ population, and to become familiar with the ALGBTIC Competencies for Counseling Gays and Transgender clients, ASU’s officials sought to teach her how to effectively counsel GLBTQ clients in accordance with the ACA Code of Ethics.

*Keeton*, 664 F.3d at 874. The Eleventh Circuit reiterated elsewhere that:

the record shows that ASU’s officials imposed the remediation plan, not because she expressed her personal religious views regarding homosexuality, but because she was unwilling to comply with the ACA Code of Ethics. That this unwillingness to abide by ASU’s curriculum and her chosen profession’s ethical standards initially became apparent through her writings and class discussions does not cloak it in First Amendment protection.

*Id.* at 878 (emphasis added). Accordingly, the decision in *Keeton* demonstrates that a plaintiff lodging a First Amendment retaliation claim must establish a causal link between the alleged retaliation and that plaintiff’s alleged protected activity. *See also Briscoe v. City of Philadelphia*, 1996 WL 684316 (E.D. Pa. Nov. 27, 1996) (concluding that a contractor who was not offered a new contract was not retaliated against as result of the contractor’s testimony in court against a city program because the contractor failed to prove that decision not to offer her a new contract was causally linked to her protected activity).

Here, the evidence shows that DHS’s closure of CSS’s intake of new referrals was not based on CSS’s viewpoint as expressed in the *Philadelphia Inquirer* article, but instead, based on CSS’s admission that it would not comply with the all-comers provisions of the Services Contract. CSS misperceives the closure of its intake as having to do with its viewpoint in the same way the plaintiff in *Keeton* misperceived “her viewpoint-based objections to [the university’s] officials’ actions with viewpoint discrimination.” 664 F.3d at 875. Although CSS expressed its position on same-sex relationships, it was not that expression that motivated DHS’s actions. Instead, it was CSS’s indication that it maintains a policy in direct conflict with its obligations under the Services Contract. *See, e.g.*, Jun. 19, 2018 Hr’g Tr. 120:7–11 (Amato) (emphasis added) (quoting from Defendants’ letter indicating that Defendants do “not plan to agree to any further referrals to CSS . . . absent assurances that CSS is prepared to adhere to contractual obligations.”).

Testimony established DHS’s reason for closing intake. Commissioner Figueroa testified that she “decided that it was in the best interest [of children] to close intake, so that [Figueroa] could look more deeply into” CSS’s and Bethany Christian Services’s policies. Jun. 19, 2018 Hr’g Tr. 166:6–21 (Figueroa); Figueroa Decl. ¶ 32, ECF No. 20-6; *see also* Jun. 18, 2018 Hr’g Tr. 96:2–3 (Ali) (testifying that, to Ali’s knowledge, Commissioner Figueroa herself decided to close CSS’s intake of new referrals). CSS witness James Amato further testified that he understood that DHS’s position was that CSS was “not complying with the public accommodation requirements” under the Services Contract. Jun. 19, 2018 Hr’g Tr. 60:11–13 (Amato); *see also* Jun. 19, 2018 Hr’g Tr. 56:9–13 (Amato) (testifying that he understood DHS’s concerns were about CSS “not completing home studies for same-sex individuals and couples”).

CSS is not reasonably likely to show that DHS retaliated against CSS for its religious views and comments relating to those views.

Even if CSS could establish that its engagement in protected activity was a substantial or motivating factor for DHS's decision to close intake and not offer CSS a new services contract, DHS would likely meet its burden under the third prong of the retaliation claim that it would have taken such action in the absence of CSS's protected activity. In addition to testimony that DHS would not permit any agency to refuse service to qualified Philadelphians protected by the all-comers provisions of the Fair Practices Ordinance, perhaps the strongest evidence that DHS would have taken the same course of action even in the absence of CSS's purported protected activity is the fact that DHS, indeed, took the same course of action in connection with Bethany Christian Services—who also made comments to the *Philadelphia Inquirer*, that has similar policies in contravention of its services contract. DHS also called all other faith-based agencies and a non faith-based agency to examine their policies on same-sex couples.

#### **D. Irreparable Harm**

Plaintiffs have identified five purported irreparable harms that will result absent injunctive relief: (1) violations of Plaintiffs' religious rights will result in irreparable harm as a matter of law, (2) violations of Plaintiffs' free speech right will result in irreparable harm as a matter of law, (3) without a new government services contract CSS will be forced to lay off staff and possibly shut down its operations entirely, (4) with the closure of CSS, the individual Plaintiffs and other CSS-certified foster parents will not be able to use their skills to foster children, and (5) the closure of CSS will result in a rise in the number of children in congregate care or DHS's overnight foster care room. The Court disagrees because these alleged harms are

either not present on these facts or are otherwise not irreparable for purposes of preliminary injunction analysis.

The first two harms to which Plaintiffs point are harms that would occur only if Plaintiffs First Amendment rights have been violated. As the Court explained at length above, Plaintiffs are unlikely to prevail on the merits of their First Amendment claims. Accordingly, while a loss of First Amendment freedom may be considered irreparable<sup>33</sup> these alleged harms are not present on the facts before the Court.

Plaintiffs' third alleged irreparable harm is the possibility that CSS, without a new government services contract, may lay off staff or shut down its operations. It is hornbook law that the "irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages . . . this is not an easy burden." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484–85 (3d Cir. 2000) (internal citations omitted); *see also Lehigh Valley Cmty. Mental Health Ctrs., Inc. v. Pa. Dep't of Human Servs.*, 2015 WL 6447171 at \* 3 (E.D. Pa. Oct. 26, 2015) (concluding that "going out of business" and "thousands of clients . . . left without proper mental health care" did not meet the standard for irreparable harm). That this burden is particularly exacting was made clear in the Third Circuit's decision in *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989).

In *Air Freight*, the Third Circuit reversed a district court injunction prohibiting the respondent from terminating a pivotal contract with petitioner. *Id.* at 798. The contract

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<sup>33</sup> *See McTernan v. City of York*, 577 F.3d 521, 528 (3d Cir. 2009) (noting that the district court "acknowledged that loss of First Amendment freedom for any period of time can be considered irreparable harm," but holding no First Amendment violation occurred where police arrested religiously motivated protesters who blocked access to a public performance stage and other facilities).

accounted for eighty percent of petitioner's business and, thus, the termination of the contract would have caused the petitioner to "lose the main portion of its business, many if not all of its employees, and its goodwill and reputation." *Id.* at 799. Termination of the contract, the petitioner claimed would "undoubtedly . . . force[] [the petitioner's] shutdown or significantly curtail its operation." *Id.* In reversing the district court's injunction order, the Third Circuit reviewed the petitioner's allegations of irreparable harm including the potential that it would lay off its employees, and close its operations. *Id.* at 802. The Third Circuit, however, was unconvinced that such harms could not be compensated by money damages since possible damages could be calculated with relative precision. *Id.*

As to CSS's claim it will be forced to lay off staff and close its operation unless the Court issues an injunction, the Court finds these harms are economic harms that are insufficient to meet the irreparable harm standard for a preliminary injunction. Evidence shows that CSS is compensated by DHS under the Services Contract and that CSS is paid on a per diem basis. *See* Decl. of James Amato Ex. A, ECF p. 15 of 52, ECF No. 13-3; Jun. 21, 2018 Hr'g Tr. 11:4–7 (Figueroa) (testifying that many contractors are paid on a per diem basis); Jun. 21, 2018 Hr'g Tr. 139:20–24 (same) (Figueroa); Jun. 19, 2018 Hr'g Tr. 41:5–6 (Amato) (testifying that CSS "subsidized [foster care] services to the tune of \$3.8 million"). Given the Parties' familiarity of their financial relationship, the Court concludes that CSS's possible harm in the form of lost revenue under the Services Contract can be quantified and may be fully compensable through money damages.

Plaintiffs have also not established the imminence of their financial collapse in the absence of injunctive relief because CSS has testified that it also has foster care contracts with Montgomery County, PA and Bucks County, PA. Jun. 19, 2018 Hr'g Tr. 89:3–9 (Amato).

There are also interim financial arrangements that are available to CSS. DHS Commissioner Figueroa explained that in the past, when foster care agencies have shut down, DHS, in fact, has provided temporary funding to those foster care agencies to ensure smooth transitions of their staff, foster parents, and the children. Jun. 21, 2018 Hr'g Tr. 10:23–11:9 (Figueroa). Accordingly, the economic harms to which Plaintiffs point in support of injunctive relief are insufficient to meet the exacting standard of irreparable harm.

Plaintiffs' fourth alleged irreparable harm is the purported inability of CSS-certified foster parents to continue providing foster care services if CSS closed its operations and the foster parents were forced to transfer to other agencies. To prove this point, Plaintiffs called each of the four individual plaintiffs in this case to testify to the harms that they would expect to suffer if CSS closed its operations. Ms. Simms-Busch testified that if CSS closed its foster program that she, as of the time of the hearing, had "no idea" how she or her foster children would be impacted. Jun. 18, 2018 Hr'g Tr. 52:16–23 (Simms-Busch). Ms. Simms-Busch also was unsure whether she could or could not transfer to another foster care agency. Jun. 18, 2018 Hr'g Tr. 53:2–7 (Simms-Busch). Ms. Paul likewise was unsure what impact CSS's closure would have on her ability to provide foster care and was unsure whether she could or could not transfer to another foster care agency. Jun. 18, 2018 Hr'g Tr. 63:11–25 (Paul). Ms. Fulton was similarly unsure what impact CSS's closure would have on her provision of foster care, though she would be emotionally devastated. Jun. 18, 2018 Hr'g Tr. 68:20–23 (Fulton). Each of the individual plaintiffs expressed that CSS's closure would be emotionally burdensome.

While transferring to another agency may be difficult, uncertain, and emotionally challenging, transferring to other agencies is neither impossible nor unlikely to be successful.

Decl. Kimberly Ali ¶¶ 27–29, ECF No. 20-1 (explaining the process by which resource parents transfer from one agency to another); Decl. Kimberly Ali ¶¶ 34–36, ECF No. 20-1 (describing how Lutheran Children and Family Service of Eastern Pennsylvania’s voluntary closure was handled and explaining that there were no significant issues in transferring families to other agencies). The Third Circuit, although acknowledging how individuals can suffer mental anguish in connection with litigation, has held that emotional difficulty alone cannot justify the imposition of an injunction.

In *Adams*, the Third Circuit concluded that even where the denial of injunctive relief would force patients to switch doctors and medical providers and that such a switching of doctors would prove “emotionally draining” and could present some medical risk, such harms were not the type of irreparable harm “contemplated by the preliminary injunction standard.” 204 F.3d at 489. The Third Circuit continued stating that “injunctions will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties.” *Id.* at 490. In this case, in the event CSS closes its operations, the individual plaintiffs and other non-party CSS-certified resource parents may transfer to other agencies and continue using their skills to provide foster care to children, even though such transfers may be challenging.

Finally, Plaintiffs argue that in the event CSS closes its operations, the number of children in congregate care living situations will increase or the number of children in DHS’s overnight foster care room will increase. As provided above, in connection with the factual background of this case, DHS has shown that the closure of CSS’s intake of new referrals has had little or no effect on the operation of Philadelphia’s foster care system. DHS Commissioner Figueroa testified that CSS’s intake closure “has not resulted in a rise in children placed in congregate care.” Jun. 21, 2018 Hr’g Tr. 86:4–87:9 (Figueroa). Further Commissioner Figueroa

testified that CSS’s intake closure “has not resulted in a rise in children staying in DHS’s childcare room.” Jun. 21, 2018 Hr’g Tr. 86:4–87:9 (Figueroa). Figueroa’s testimony was based on her review of “weekly data” that Figueroa receives from DHS’s “performance and technology team that . . . have . . . detailed data.” Jun. 21, 2018 Hr’g Tr. 86:16–87:11 (Figueroa). To the extent CSS closes its operations, it would not be the first foster agency to do so in Philadelphia. Decl. Kimberly Ali ¶¶ 34–36, ECF No. 20-1 (explaining that Lutheran Children and Family Service of Eastern Pennsylvania closed its operations in March 2016 and its over 100 foster children were transferred to other foster agencies over a three-month period). Plaintiffs have not established with sufficient evidence that irreparable harm in the form of increased use of congregate care or the DHS overnight foster care room will result absent an injunction.

#### **E. Balancing Of The Harms And The Public Interest**

As the Court has concluded that Plaintiffs are not likely to succeed on the merits of their claims and have presented insufficient evidence of irreparable harm, the Court need not spend undue time analyzing the remaining two factors of the preliminary injunction standard—balancing of the equities, and the public interest. *See Reilly*, 858 F.3d at 180 (providing that the first two factors of the preliminary injunction standard are gateway factors).

In connection with the balancing of harms prong of the analysis, Defendants called Frank Cervone as an expert to testify to the harms that might occur if the Court granted injunctive relief.<sup>34</sup> The Parties disagree on whether Cervone’s testimony should be considered for a variety of reasons. The Court, however, need not, and has not relied on Cervone’s testimony in deciding

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<sup>34</sup> Cervone serves as the executive director of the Center for Child Advocates. Jun. 21, 2018 Hr’g Tr. 153:5–9 (Cervone). Cervone has had, and continues to have, a long and distinguished career in advocating for children. The Court thanks Mr. Cervone for his dedication to a life of public service.

the Injunction Motion, and therefore, the Court will not address the Parties' arguments on the propriety of Cervone's testimony.

Here, even in the absence of Cervone's testimony, the balance of the equities tilts in favor of Defendants. If the Court were to grant Plaintiffs' Injunction Motion, the Court would, in essence, cast aside DHS's and Philadelphia's reasonable objectives in seeking the enforcement of the Services Contract and the Fair Practices Ordinance incorporated into the Services Contract. As discussed in connection with Plaintiffs' claim under the Free Exercise Clause, Defendants' interests in this case are manifold, but at a minimum, include six important governmental objectives.

First, DHS and Philadelphia have a legitimate interest in ensuring that when contractors agree to terms in a government contract, the contractors adhere to those terms. Second, DHS and Philadelphia have a legitimate interest in ensuring that when its contractors voluntarily agree to be bound by local laws, the local laws are enforced. Third, DHS and Philadelphia have a legitimate interest in ensuring that when they employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the services. Fourth, in the context of foster care and adoption, DHS and Philadelphia have a legitimate interest in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers. Fifth, DHS and Philadelphia have a legitimate interest in ensuring that individuals who pay taxes to fund government contractors are not denied access to those services. Sixth, DHS and Philadelphia have an interest in avoiding likely Equal Protection Clause and Establishment Clause claims that would result if

it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples.<sup>35</sup>

Granting an injunction in the face of the foregoing legitimate interests would be in direct conflict with the balance of harms and the public interest. Accordingly, the Court concludes that the balance of harms and the public interest militate in favor of denying the Injunction Motion.

## V. CONCLUSION

For the reasons set forth above, and having considered all four factors implicated by the preliminary injunction standard, Plaintiffs' Amended Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 13) is **DENIED**. An appropriate Order follows.

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<sup>35</sup> Preventing discrimination in the provision of public services is undeniably a legitimate interest. As the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States* proclaimed:

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

379 U.S. 241, 292 (1964).