

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 18-2574**

SHARONELL FULTON, ET AL.,
APPELLANTS,

v.

CITY OF PHILADELPHIA, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
No. 2:18-cv-02075-PBT (HONORABLE PETRESE B. TUCKER)

**ERRATA TO THE BRIEF OF *AMICUS CURIAE* COALITION OF
RELIGIOUS AND RELIGIOUSLY AFFILIATED ORGANIZATIONS IN
SUPPORT OF APPELLEES CITY OF PHILADELPHIA, *ET AL.***

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Dated: October 9, 2018

Amicus Curiae OCA – Asian Pacific American Advocates is erroneously identified in the *Amicus Curiae* brief of the Coalition of Religious and Religiously Affiliated Organizations (Document 003113052710) as “Asian Pacific American Advocates,” without the preceding “OCA.” All references in said brief to “Asian Pacific American Advocates” refer to “OCA – Asian Pacific American Advocates.” A revised version of the brief reflecting this change is attached hereto as Exhibit “A” and this change will be reflected in the hard copies of the brief submitted to the Court.

Dated: October 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 9, 2018, a true and correct copy of the foregoing errata was served on all parties to this appeal, via the CM/ECF system, pursuant to Third Circuit Local Appellate Rule 113.4, because counsel for all parties are Filing Users under that Rule and will be served electronically by the Notice of Docket Activity.

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EXHIBIT A

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26, *Amici Curiae* the Anti-Defamation League, OCA – Asian Pacific American Advocates, Bend the Arc: A Jewish Partnership for Justice, Hindu American Foundation, Interfaith Alliance Foundation, the Japanese American Citizens League, Jewish Social Policy Action Network, Jewish Women International, Keshet, Muslim Advocates, National Council of Jewish Women, People for the American Way Foundation, Sikh Coalition, South Asian Americans Leading Together, and T’ruah: The Rabbinic Call for Human Rights have no parent corporations. No publicly held corporation owns 10% or more of the stock of any of the *Amici Curiae*.

CERTIFICATE PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici Curiae* certify that no party or their counsel authored this brief, either in whole or in part, or contributed money that was intended to fund the preparation or submission of this brief, and that no person other than the *Amici Curiae*, their members, and counsel contributed money that was intended to fund the preparation or submission of this brief.

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INTERESTS OF THE AMICI CURIAE

Amici Curiae are religious and religiously affiliated organizations that are committed to fighting religiously motivated discrimination, including overly broad requests for religious exemptions from generally applicable and neutral anti-discrimination laws. Anti-discrimination laws have long played a crucial role in protecting the rights of all, and particularly religious minorities. Appellants' requested faith-based exemption to such laws would severely limit these anti-discrimination protections and would undermine one of our nation's core values—that no one should suffer discrimination because of their religious identity or beliefs. *Amici* and their members therefore urge the court to reaffirm the equality-enhancing values that underlay the First Amendment and affirm the District Court's ruling.

The Anti-Defamation League was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and advocating for civil rights for all. To this end, ADL is a steadfast supporter of anti-discrimination laws as well as the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. ADL staunchly believes that the Free Exercise Clause is a critical means to protect

individual religious exercise, but it must not be used as vehicle to discriminate by enabling some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

The Hindu American Foundation (“HAF”) is a non-profit advocacy organization for the Hindu American community. Founded in 2003, HAF’s work impacts a range of issues—from the portrayal of Hinduism in K-12 textbooks to civil and human rights to addressing contemporary problems, such as environmental protection and inter-religious conflict, by applying Hindu philosophy. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF’s objectives. HAF’s three areas of focus are education, policy, and community. Since its inception, the Hindu American Foundation has made church-state advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of

such issues on Hindu Americans as well as various aspects of Hindu belief and practice in the context of religious liberty.

Interfaith Alliance Foundation is a nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Interfaith Alliance Foundation's members belong to 75 faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom safeguards the rights of all Americans and is not misused to favor the rights of some over others.

The Japanese American Citizens League ("JACL") is a national organization whose ongoing mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by injustice and bigotry. Aware of our responsibilities as the oldest and largest Asian Pacific American civil rights organization, JACL strives to promote a world that honors diversity by respecting values of fairness, equality and social justice.

Jewish Social Policy Action Network ("JSPAN") is a membership organization of American Jews dedicated to protecting the Constitutional Liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, whether they lived in Christian or Muslim societies, Jews were a small religious minority victimized by prejudice and lacking

sufficient political power to protect their rights. In America, the Jewish community found a society dedicated to providing religious liberty to all and to protecting the equal rights of all of its citizens. Perhaps more than any other minority religious group, the Jewish community has been vigilant in asking the courts to ensure that organizations receiving government financial assistance use those funds in a manner consistent with protecting the equal rights of all minority communities and the religious liberties of all the people that they serve.

Jewish Women International (“JWI”) is a Washington, D.C. not-for-profit organization founded in 1897 and incorporated in 1995 (www.jwi.org). JWI is the leading Jewish organization empowering women and girls through healthy relationship training, financial literacy education, and the proliferation of women’s leadership. JWI’s innovative programs, policy advocacy, and philanthropic initiatives protect the fundamental rights of all girls and women to live in safe homes, thrive in healthy relationships, and realize the full potential of their personal strength.

Keshet is a national organization that works for the full equality and inclusion of lesbian, gay, bisexual, and transgender (LGBT) Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet cultivates the spirit and practice of inclusion in all parts of the Jewish community. Keshet is the only organization in the U.S. that works for LGBT inclusion in all facets of Jewish

life—synagogues, Hebrew schools, day schools, youth groups, summer camps, social-service organizations, and other communal agencies. Through training, community organizing, and resource development, it partners with clergy, educators, and volunteers to equip them with the tools and knowledge they need to be effective agents of change.

Muslim Advocates is a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civil education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. As part of its mission, Muslim Advocates is committed to fighting discrimination on all fronts, including against members of the LGBTQ community. The issues at stake in this case directly relate to Muslim Advocates' work fighting for civil rights protections for American Muslim communities and for an understanding of religious liberty that truly protects the rights of religious and other minorities.

The National Council of Jewish Women (“NCJW”) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving

the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition." Consistent with our Principles and Resolutions, NCJW joins this brief.

OCA – Asian Pacific American Advocates ("OCA") is a national Asian American and Pacific Islander ("AAPI") civil rights organization with chapters across the country, including in the greater Philadelphia area. OCA advocates for policies that enhance the social, economic, and political well-being of the AAPI community, some of whom identify as lesbian, gay, bisexual, transgender, or queer. As such, cases that impact the ability of AAPI LGBTQ communities to fully engage in American society are of extreme concern to the organization.

People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty and reproductive choice. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values.

PFAWF strongly supports the principle of the Free Exercise Clause of the First Amendment as a shield for the free exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to unduly harm others, which also violates the Establishment Clause. This is particularly problematic when the effort is to excuse violations of anti-discrimination legislation, which is important to protect religious and other minorities.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. The Sikh Coalition joins this brief out of the belief that anti-discrimination safeguards are essential for religious, ethnic, and other minority communities.

South Asian Americans Leading Together (“SAALT”) is a national, nonpartisan, non-profit organization that fights for racial justice and advocates for the civil rights of all South Asians in the United States. As an organization that is committed to dignity and full inclusion for all, SAALT joins this brief in an effort to ensure government funds are not used to discriminate in the name of religious

liberty and sanction discrimination against not only LGBTQ parents, but religious minorities as well.

T'ruah: The Rabbinic Call for Human Rights (“T'ruah”) brings together rabbis and cantors from all streams of Judaism with all members of the Jewish community to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah trains and mobilizes a network of 1,800 rabbis and cantors and their communities to bring Jewish values to life through strategic and meaningful action. As members of a religious minority, T'ruah supports this brief because it believes Appellants’ position, rather than protecting religious freedom, will only serve to restrict it.

SUMMARY OF ARGUMENT

Freedom of religion, enshrined in the Free Exercise Clause of the First Amendment to the United States Constitution, as well as numerous federal, state, and local anti-discrimination laws, is a shield intended to protect the free exercise of religion for all, not a sword that can be used to impose religious beliefs on or discriminate against others. By seeking a broad, faith-based exemption from anti-discrimination laws that protect religious liberty, among other categories,

Appellants Catholic Social Services and others (hereinafter “CSS”)¹ would turn these laws on their head, and in the process, undermine religious freedom for all.

In the present case, CSS is attempting to take taxpayer money and act as an agent of the City of Philadelphia to provide a government service, while refusing to comply with the neutral anti-discrimination requirements and child welfare policies in its contract with the City, as well as with Philadelphia’s Fair Practices Ordinance, which prohibits “discrimination against any individual because of race, color, religion, . . . national origin[,] . . . marital status [or] sexual orientation.” Phila. Code. § 9-1106; Appellants’ Br. (Doc. 003113019061), at 12-13.

CSS’s position, if adopted by this court, would allow any faith-based organization, on the basis of its religious beliefs, to be exempt from such non-discrimination requirements in the provision of government services. Not only would such an outcome permit widespread discrimination against LGBTQ people, but it would also allow for disparate treatment of any person holding different religious beliefs, including religious minorities in particular, when attempting to participate in a government program.

This threat is not merely hypothetical, other faith-based organizations and individuals have already discriminated against religious minorities in the provision

¹ “CSS” refers collectively to Appellants Sharonell Fulton, Cecelia Paul, Toni-Lynn Simms-Busch, and Catholic Social Services.

of government child welfare services. Indeed, the very people who most depend on the protections of civil rights laws will suffer the full brunt of such exemptions, with a loss of equal protection, equal opportunity, and personal dignity.

ARGUMENT

I. Anti-Discrimination Laws Are Essential to Protecting Against Religiously Motivated Discrimination.

Far from offending religious freedom, public-accommodations laws, such as Philadelphia’s Fair Practices Ordinance,² explicitly serve and advance that fundamental value by protecting against religiously motivated discrimination, which has long plagued our nation.³

Indeed, the scourge of religiously motivated discrimination and oppression dates back as least as early as the first meeting of Europeans in present-day

² Philadelphia’s Fair Practices Ordinance prohibits discrimination on the basis of “race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, disability, marital status, familial status, or domestic or sexual violence victim status” in the delivery of city services or the provision of public accommodations. Phila. Code § 9-1106. In the context of the present case, this Ordinance requires that all potential foster parents—including atheist couples, interfaith couples, interracial couples, cohabitating couples, formerly divorced couples, and same-sex couples—must be served on equal terms and conditions that do not take prohibited aspects of their identity into account.

³ Title II of the Civil Rights Act, the public accommodations laws of 45 states and the District of Columbia, and countless local ordinances such as Philadelphia’s, prohibit discrimination in the provision of goods or services on the basis of religion, as well as forbid various other categories of invidious discrimination. *See, e.g.,* Nat’l Conference of State Legislatures, *State Public Accommodation Laws* (July 13, 2016), available at <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>.

America, more than fifty years before the voyage of the Mayflower, when a group of Spanish citizens massacred a colony of French Protestants seeking religious freedom because the colonists were “scattering the odious Lutheran doctrine in these Provinces.” Kenneth C. Davis, *America’s True History of Religious Tolerance*, Smithsonian Mag. (2010). Soon after, the Puritans who arrived in Massachusetts Bay to escape their own religious persecution founded “a theocracy that brooked no dissent, religious or political.” *Id.* Catholics and other non-Puritans were banned from the colonies, and between 1659 and 1661, four Quakers were hanged in Boston because they stood up for their beliefs. *Id.* In New York, Catholics were constitutionally barred from public office. *Id.* Maryland granted Catholics full civil rights, but did not extend those same rights to Jews. *Id.*

State and federal anti-discrimination laws, like Philadelphia’s Fair Practices Ordinance, seek to outlaw such religiously motivated discrimination. By way of example only, when Congress enacted Title II of the Civil Rights Act in 1964 to bar discrimination in public accommodations, it specifically included religion as a protected category in order to remedy the longstanding systematic refusals of service that it recognized to be occurring on the basis of religion as well as race.⁴

⁴ See 42 U.S.C. § 2000a(a); see also 110 CONG. REC. H1615 (daily ed. Feb. 1, 1964) (statement of Rep. Teague) (noting that Title II barred discrimination against Jews, who were “not allowed in certain hotels”); A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce: Hearing on S. 1732 Before the S. Comm. on Commerce, 88th Cong. 735 (1963)

Indeed, Senate committee hearings included specific references to a hotel in New Hampshire, which rented exclusively to Christians during some weeks, and exclusively to Jews during others, providing “equal but separate facilities” which Congress recognized as a substantial barrier to full participation in civil society that warranted an equally serious and substantial federal remedy.⁵

Today, the United States is more religiously and racially diverse than at any point in our history. *See America’s Changing Religious Landscape*, Pew Research Ctr. (2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/. Prohibitions against religiously motivated discrimination are therefore more important than ever and play a key role in the protection of twin bedrock values that underlie both the U.S. Constitution and American democracy: that the government has a responsibility to avoid promoting or entangling itself in religion, while also protecting the value of pluralism, particularly religious pluralism, in American civil society.

Against this backdrop, secular public rules are safeguarded by the First Amendment’s Establishment Clause, and the independent value of religious pluralism is safeguarded by the First Amendment’s Free Exercise Clause. Non-

(statement of Franklin D. Roosevelt Jr., Under Secretary of Commerce) (explaining that in New York, “it has been traditional, among some of our resort places, to refuse to take members of the Jewish faith”).

⁵ *Id.* at 780 (statement of Sen. Cotton).

discrimination principles advance both values: they assure that the state does not take sides when it comes to religion, favoring one religious tradition over another, and they promote religious pluralism by prohibiting religiously motivated discrimination by private actors in significant sectors of civil society such as employment, housing, public accommodations, and the provision of taxpayer-funded government services.

II. Permitting Broad Faith-Based Exemptions to Generally Applicable Civil Rights Laws Would Harm Religious Liberty.

A. The Protection of Religious Liberty Should Not Be Undermined in the Name of Religious Exercise.

The United States' constitutional commitment to religious liberty has always entailed a corollary commitment to non-discrimination. Indeed, the integrity of the former has always relied upon the enforcement of the latter. This is in large part because liberty and equality are mutually reinforcing norms, each weakened if we unnecessarily place them at odds and are forced to choose between them. The values of religious liberty and equality can and must be harmonized, and religious liberty should be interpreted in equality-enhancing, not equality-denying, ways.

By claiming that its religious beliefs entitle it to refuse service to certain individuals based on aspects of their identity, however, CSS inherently asserts that its religious beliefs and free exercise rights should override the equality rights of others. Yet in the marketplace, the Free Exercise Clause does not sanction the

invocation of religious belief to thwart generally applicable anti-discrimination laws. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719, 1727 (2018) (quotation omitted) (reaffirming that, as “a general rule, [religious and philosophical objections] . . . do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”);⁶ *United States v. Lee*, 455 U.S. 252, 261 (1982) (“When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (hospital’s free exercise rights were “not implicated” by federal prohibitions on age discrimination); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37, 39 (D.C. 1987) (en banc) (Georgetown University’s free exercise rights did not excuse it from violating the D.C. Human Rights Act when it denied tangible benefits to student groups on basis of sexual

⁶ In *Masterpiece*, the Court invalidated the Colorado Civil Rights Commission’s adjudication of unlawful discrimination by a business because it deemed the adjudicative process to be tainted by the adjudicatory body’s hostility toward the business owner’s religious beliefs. This conclusion was based on statements made by members of the Commission, as well as the Commission’s differential treatment of other conscience-based objections to providing a service. *Masterpiece*, 138 S.Ct. at 1729-30.

orientation); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985) (Free Exercise Clause does not permit private health clubs to apply membership criteria based on marital status and religious affiliation in violation of Minnesota Human Rights Law).

Courts aiming to protect both religious liberty and equality have instead struck a balance that does not subjugate one right to the absolute claim of the other. There is a basic reason to continue to adhere to this balance: protections for religious liberty depend on the rigorous enforcement of non-discrimination policies. Stated another way: “Religious liberty was never intended to give one religion dominion over other religions, or a veto power over the civil rights and civil liberties of others.” U.S. Comm’n on Civil Rights, *Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*, at 29 (2016).

B. The Prospective Harm That Would Result from Appellants’ Interpretation of Religious Liberty is Not Hypothetical.

Although this appeal arose in the context of discrimination against members of the LGBTQ community, the relief CSS seeks would have a substantial and disproportionate impact on religious minorities. This is because CSS effectively seeks to discriminate against prospective clients who do not adhere to their religious requirements.

Such discrimination in the context of foster care or adoption is not merely hypothetical. In fact, foster agencies in Philadelphia and across the country have

already discriminated against same sex couples and others based on religious eligibility criteria. In Philadelphia, for example, Bethany Christian Services recently turned away a same-sex couple seeking to become foster parents due to its religious criteria.⁷ Multiple foster care agencies turned away a same-sex couple in Michigan for these same reasons.⁸

Discrimination by foster care agencies goes beyond refusing to work with same-sex couples; other agencies use certain religious criteria in deciding with whom they work. In one recent example a Jewish woman in South Carolina sought to mentor local children in foster care through the Miracle Hill organization, after having been a foster parent for ten years in Florida.⁹ Yet Miracle Hill refused to even provide her with an application, for the sole reason

⁷ See Julia Terruso, *City Resumes Foster-Care Work with Bethany Christian Services After It Agrees To Work With Same-Sex Couples*, Phila. Inquirer, June 28, 2008, available at www2.philly.com/philly/news/foster-care-lgbt-bethany-christian-services-same-sex-philly-lawsuit-catholic-social-services-20180628.html. Bethany Christian Services subsequently changed its policy and is not seeking an exemption to Philadelphia's Fair Practices Ordinance.

⁸ See Isabel Dobrin, *ACLU Sues Michigan After Same-Sex Couples Seeking to Adopt Are Rejected*, NPR, Sept. 23, 2017, available at www.npr.org/2017/09/23/552873416/aclu-sues-michigan-after-same-sex-couples-seeking-to-adopt-are-rejected.

⁹ See Angelia Davis, *Scrutiny of Miracle Hill's Faith-Based Approach Reaches New Level*, Greenville News, Mar. 1, 2018, available at www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/.

that, as a Jewish woman, she “didn’t share the organization’s Christian beliefs.”¹⁰

Miracle Hill’s website still states that it will place foster children only with “Christian foster families.”¹¹

Similar to Miracle Hill, other organizations providing foster and adoption placement services actively advertise that their foster parents must meet certain religious criteria. *See, e.g.*, Georgia Agape Foster Care, www.georgiaagape.org/foster-care/ (last visited Oct. 4, 2018) (“Georgia Agape has faith requirements as criteria for who can serve with us in our foster care program.”); Alabama Baptist Children’s Homes & Family Ministries Foster Parenting, www.alabamachild.org/foster-parenting (last visited Oct. 4, 2018) (advertising the “best, most complete program in the entire state of Alabama for Christian parents looking to service children in foster care”); Adoption Association of Kansas Catholic Charities Preliminary Eligibility, www.adoptionassociationks.org/elibility.html (last visited Oct. 4, 2018) (requiring adoptive parents to be affiliated with a church and provide “a reference from [a] pastor”); Special Delivery Infant Adoption Agency Eligibility Requirements www.specialdeliveryadoptions.org/index.php?page=requirements-to-adopt (last visited Oct. 4, 2018) (“**Special Delivery is a Christian agency and our main**

¹⁰ *Id.*

¹¹ Miracle Hill Ministries Foster Care, <https://miraclehill.org/how-we-help/childrens-home/foster-care/> (last visited Oct. 4, 2018).

criterion is to place children into Christian families. *This requirement WILL NOT be waived.*”) (emphasis in original).

Discrimination against religious minorities seeking to foster children is therefore not a mere possibility, but instead is happening on a daily basis. If this court were to accept CSS’s extraordinary position that it can discriminate in its government-funded services on the basis of religious criteria, this would set a dangerous precedent for religious liberty for all in America.

C. Civil Rights Laws Ensure Religious Liberty for Religious Minorities.

CSS’s claim—that its religious beliefs entitle it to avoid compliance with the City’s anti-discrimination law—amounts to a partial repeal of the Philadelphia Ordinance. Recognizing a religious exemption that would otherwise be treated unequivocally as discrimination would drastically undermine the protections of civil rights laws. The resulting harm to religious freedom—particularly for members of minority faiths—would be severe.

While constitutional and statutory protections against religious discrimination apply to all faiths equally, religious minorities experience a disproportionately high level of discrimination. Indeed, disfavor toward, unequal treatment of, and denials of service to members of minority faiths, persons

adhering to a different faith, and atheists are all too common.¹² And discrimination against others because of their religious beliefs, like other forms of discrimination, may be, and often is, premised on religious views or motivations. Thus, there is no question that the same arguments for a religious exemption permitting denials of service to same-sex couples could be advanced to support denials of service to people of minority faiths. In other words, if CCS's position is accepted by this court, religious minorities would undoubtedly suffer more denials of services, employment and housing within the marketplace. Indeed, numerous court decisions reflect that "but for" civil rights laws, members of minority faiths would suffer such discrimination without recourse.

¹² One recent report from the U.S. Department of Justice sampled cases involving religious discrimination in employment, and of the six cases profiled, each involved a member of a minority religion. See U.S. Dep't of Justice, Civil Rights Div., *Combating Religious Discrimination and Protecting Religious Freedom* (Aug. 6, 2015), available at www.justice.gov/crt/combating-religious-discrimination-and-protecting-religious-freedom-16. The Department of Justice also consistently reports a disproportionately high number of discriminatory incidents against Muslims and Jews in particular. See U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016*, at 4 (2016), available at www.justice.gov/crt/file/877931/download ("[M]inority groups have faced a disproportionate level of discrimination in zoning matters, reflected in the disproportionate number of suits and investigations involving minority groups undertaken by the Department. In particular, the percentage of Department RLUIPA investigations involving mosques or Islamic schools has risen dramatically in the time since the Tenth Anniversary Report was issued—from 15% in the 2000 to August 2010 period to 38% during the period from September 2010 to the present. Investigations involving Jewish institutions remain disproportionate to the percentage of the overall U.S. population that is Jewish.").

In *Minnesota ex rel. McClure v. Sports & Health Club, Inc.*, for example, a health club: allowed “only born-again Christians . . . to be managers or assistant managers”; “question[ed] prospective employees about marital status and religion”; “terminat[ed] employees because of a difference in religious beliefs”; “refus[ed] to promote employees because of differing religious beliefs”; and “fail[ed] to provide ‘open’ public accommodations.” 370 N.W.2d 844, 846-47 (Minn. 1985). Job “applicants were asked whether they attend church, read the Bible, are married or divorced, pray, engage in pre-marital or extra-marital sexual relations, believe in God, heaven or hell, and other questions of a religious nature,” in keeping with the gym owners’ “fundamentalist religious convictions [that] require[d] them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives.” *Id.* “[B]ased on an interpretation of the Bible, [the gym] w[ould] not hire, and w[ould] fire, individuals living with but not married to a person of the opposite sex; a young, single woman working without her father’s consent or a married woman working without her husband’s consent; a person whose commitment to a non-Christian religion is strong; and someone who is ‘antagonistic to the Bible,’ which according to Galatians 5:19-21 includes fornicators and homosexuals.” *Id.* at 847. The gym “justifie[d its] rigid policy by relying on [the owners’] religious belief that they are forbidden by God, as set forth in the Bible, to work with ‘unbelievers.’” *Id.* The

Minnesota Supreme Court denied the gym a free exercise exemption from state anti-discrimination laws and affirmed findings of substantial evidence of the statutory violations. *Id.* at 854.

Similarly, in *Paletz v. Adaya*, a hotel owner in Santa Monica, California, ordered the closing of a poolside event hosted by a Jewish group. No. B247184, 2014 WL 7402324 (Cal. Ct. App. 2014). After looking at a pamphlet describing the group and seeing attendees at the event wearing T-shirts bearing the group's name, the hotel owner told an employee that "I don't want any [f—ing] Jews in the pool," said that her family members would cut off her financing if they learned of the gathering, and directed hotel staff forcibly to remove the Jewish guests from the property. *Id.* at *2-4. A jury found that the hotel owner violated the California public-accommodations law and awarded damages. *See* Michael Cieply, *Jews Awarded Damages in California Hotel Case*, N.Y. Times, Aug. 15, 2012.

In *Khedr v. IHOP Restaurants, LLC*, a family was refused service at an International House of Pancakes ("IHOP") in Connecticut for being Muslim: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." 197 F. Supp. 3d 384, 385 (D. Conn. 2016). In front of the family's 12-year-old child, the IHOP manager told his staff "not to serve 'these people' any food." *Id.* The family sued under the Connecticut public-accommodations law, and the court

denied IHOP's motion to dismiss, concluding that the incident was, at the very least, "suggestive of discriminatory motive." *Id.* at 388.

In *Nappi v. Holland Christian Home Association*, a Catholic maintenance worker in New Jersey was repeatedly harassed by his supervisor and colleagues, who identified as Protestant and Reformed Christian. No. 11-cv-2832, 2015 WL 5023007 (D.N.J. Aug. 21, 2015). They called Catholicism a "'Mickey Mouse religion' and criticized Catholics for worshipping saints," encouraged the employee to leave his church, put religious literature in his locker, and "wanted to shoot [him]." *Id.* at *2. The supervisor terminated the plaintiff's employment, explaining that "he was being fired because, as a Roman Catholic, he was an 'outsider' who did not 'fit in.'" *Id.* at *3. The district court denied summary judgment to the business, concluding that the record evidence "clearly [gave] rise to an inference of discrimination" under Title VII. *Id.* at *8.

In *E.E.O.C. v. Townley Engineering & Manufacturing Co.*, an atheist was constructively discharged from his job at a mining-equipment manufacturer in California that held mandatory weekly meetings involving "prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters." 859 F.2d 610, 612 (9th Cir. 1988). The Ninth Circuit rejected the free-exercise defense of the company's owners "that the Bible and their covenant with God require[d] them to share the Gospel with all of their employees,"

concluding that “[p]rotecting an employee’s right to be free from forced observance of the religion of his employer is at the heart of Title VII’s prohibition against religious discrimination.” *Id.* at 620–21.

Finally, in *Huri v. Office of the Chief Judge of the Circuit Court*, a Muslim child care attendant who wore a hijab was harassed by her Christian supervisor in a county court in Illinois. 804 F.3d 826 (7th Cir. 2015). The supervisor called the employee “evil,” described herself, the chief judge, and another court employee as “good Christian[s],” denied the employee time off for an Islamic religious holiday, and engaged in “social shunning, implicit criticism of non-Christians, and uniquely bad treatment of” the employee and her daughter. *Id.* at 830, 834. The Seventh Circuit reversed the district court’s dismissal of the employee’s hostile-work-environment claims under Title VII and the Equal Protection Clause.

As these examples show, religious minorities still face significant discrimination, and courts have not hesitated to enforce anti-discrimination laws even when a business’s discriminatory practices are premised on the religious beliefs of the business owners. Rather, courts have both protected religious minorities and preserved their religious free exercise rights.

CSS, however, seeks to be the sole arbiter of whom to serve and whom to turn away based upon its religious criteria. Accepting CSS’s argument would only undercut the discrimination protections previously enforced by courts, open the

door to religious minorities being turned away from services because of their religion, and undermine the free exercise rights of us all.¹³

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Eastern District of Pennsylvania should be affirmed.

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¹³ As the Supreme Court has made clear, an accommodation for religious purposes, as CSS requests here, violates the Establishment Clause when it imposes “significant burdens” on third parties, which would clearly occur in this case. *Estate of Thornton v. Caldor*, 472 U.S. 708, 710 (1985); *accord Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 16 (1989).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(g), I certify that this brief contains 5,343 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it is in 14-point Times New Roman font.

Pursuant to Local Appellate Rule 31.1(c), I certify that the text of this electronic brief is identical to the text in the hard, paper copies of the brief.

Pursuant to Local Appellate Rule 31.1(c), I certify that a virus check was performed on the .pdf version of this brief using Symantec Endpoint Protection Version 14.0 and that no virus was detected.

Pursuant to Local Appellate Rule 28.8(d), I certify that I am a member of the bar of this Court.

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