

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

SHARONELL FULTON, et al.,

CASE NO. 18-2574

V.

CITY OF PHILADELPHIA,

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TRANSCRIPT OF APPEAL PANEL HEARING

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**APPEAL PANEL HEARING**

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23 JUDGE ANTHONY J. SCIRICA  
24 JUDGE MARJORIE O. RENDELL  
25

**APPEAL PANEL HEARING**

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1 JUDGE AMBRO: It's number 18-2574, Fulton v.  
2 City of Philadelphia. Ms. Windham, Ms. Istvan, and  
3 Ms. Cooper.

4 MS. WINDHAM: Good afternoon and may it please  
5 the Court. My name is Lori Windham. I represent the  
6 appellants, and I would like to reserve 10 minutes of  
7 my time for rebuttal. Thank you, Judge Ambro.

8 For a century, Catholic Social Services has  
9 served the children of Philadelphia, finding them  
10 loving families when they must be separated from their  
11 parents. Today, the City of Philadelphia claims the  
12 right to extinguish that ministry. Our laws and our  
13 constitution were designed to address the needs of a  
14 diverse pluralistic society whose members and their  
15 elected officials are not always going to agree with  
16 each other. Here, the constitution and state law --

17 JUDGE AMBRO: The existing contract between --  
18 this is not going to be like an en banc where you get  
19 five minutes uninterrupted. So --

20 MS. WINDHAM: Certainly.

21 JUDGE AMBRO: Besides that, I'm sure you'd  
22 like to have questions anyway. The existing contract  
23 is expired.

24 MS. WINDHAM: That's correct, Judge Ambro.

25 JUDGE AMBRO: So do we need to get into the

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1 details of the old contractual arrangement or not?

2 MS. WINDHAM: Judge, I think that what is  
3 relevant here is what relationship that Catholic is  
4 asking the Court to continue. This is a contract that  
5 has been in place for 50 years that has been  
6 automatically renewed for as long as anyone in this  
7 courtroom can probably remember. And so what we're  
8 asking the Court to do is to enter relief that would  
9 require the City to continue the existing contractual  
10 relationship on the same terms that it existed prior to  
11 March 15th of this year.

12 JUDGE SCIRICA: Did the FPO apply at that  
13 time.

14 MS. WINDHAM: No, Judge Scirica, it did not.  
15 The City has identified three different provisions or  
16 laws that it claims the Catholic has violated. One of  
17 those was Section 15.1 of the contract and the Fair  
18 Practices Ordinance, which is incorporated into that.  
19 Under the Fair Practices Ordinance, the only provision  
20 of that which anyone has claimed applies here is the  
21 public accommodations provision.

22 But foster care home studies are not a public  
23 accommodation. Under state law, foster care providers  
24 are required to undergo a series of subjective  
25 determinations to decide whether a family is

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1 appropriate to care for foster children. This is not  
2 the kind of determinations that you would go through in  
3 order to buy a bus pass, or a hotel room, or a  
4 restaurant meal.

5 JUDGE SCIRICA: But state law requires  
6 certification to qualify.

7 MS. WINDHAM: That's exactly right, Your  
8 Honor. State law requires the agency to issue a  
9 certification that approves or disapproves of a family  
10 to become a foster family, and that is a legal  
11 requirement for them to be able to have children placed  
12 in their home.

13 UNIDENTIFIED JUDGE: So can't we just look at  
14 this going forward as to whether the City can impose a  
15 new explicit nondiscrimination requirement in the  
16 contract that you would like to enter into.

17 MS. WINDHAM: I think that, that is one  
18 question to look at, Your Honor, but I think that the  
19 City's desire to create a new nondiscrimination  
20 requirement here is evidence of religious targeting.  
21 And you can see this if you look at the City's May 7th  
22 letter.

23 JUDGE AMBRO: You've got two competing or  
24 conflicting principles. One is nondiscrimination,  
25 which you see in a host of contracts, and ordinances,

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1 and laws versus somehow the way I express my religion  
2 is being hindered and how do we deal with it. It seems  
3 like over the years the City and Catholic Social  
4 Services has worked it out. I mean, when I look at  
5 this case I see doe foster child number one, which may  
6 have been the catalyst for the suit being -- that was  
7 brought here. They ultimately worked that out with  
8 respect to that particular individual.

9           You had Catholic Social Services in the past  
10 asking for a pastoral letter, and there was some  
11 pushback. And they said, okay, we'll abandon that. So  
12 it seems like people are trying to get together, and I  
13 don't know why we've hit this constitutional wall when  
14 it appears that in the past no one ever had to get  
15 there.

16           MS. WINDHAM: Judge Ambro, when we first  
17 started this case, we were hopeful that there would be  
18 some path forward for the parties to be able to work  
19 things out. Catholic Social Services doesn't want to  
20 be here. They don't want to be in federal court  
21 fighting with the City over whether they can continue  
22 to serve children. They want to be able to just  
23 continue that service and continue working with the  
24 City going forward.

25           Unfortunately, the City has dug in its heels,

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1 and has announced to Catholic Social Services that they  
2 cannot continue to provide foster care to Philadelphia  
3 children unless they are willing to make certifications  
4 that violate their faith, unless they are willing to  
5 comply with what the City now claims it's going to  
6 insert.

7 JUDGE AMBRO: Going back to Judge Scirica's  
8 question. You've got a proposed contract for  
9 certification that's required by the State, and I think  
10 the State also requires nondiscrimination. And what  
11 you're doing is you're carrying out the evaluation, the  
12 report that the contract requires. How is that a  
13 violation of Catholic Social Services' religious  
14 expression?

15 MS. WINDHAM: In a couple of ways, Your Honor.  
16 It is undisputed what the legal requirements are for  
17 that certification, what the legal effect of it is.

18 Number one, under 55 Pennsylvania Code  
19 3700.64, an agency shall consider existing family  
20 relationships, attitudes, and expectation regarding the  
21 applicants' own children, ability of the applicant to  
22 work in partnership with an agency among other  
23 considerations. And the outcome of that decision is a  
24 decision to certify and approve or disapprove a family  
25 to be foster parents.

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1 Catholic was also quite clear, testifying at  
2 the hearing, that they understand this certification to  
3 be an endorsement of the relationships in the home.  
4 And you can see this in the record at page 312,  
5 "Providing a written certification endorsing a same-sex  
6 marriage would violate the religious exercise of  
7 Catholic Social Services." On page 389, it is  
8 Catholic's sincere belief that a final home study  
9 includes a written endorsement of any relevant  
10 relationships of the foster parent.

11 JUDGE AMBRO: So, okay, that's -- that's the  
12 argument. But how is this endorsing same-sex marriage?  
13 I mean, you're just -- you're doing a report.

14 MS. WINDHAM: They're undertaking a subjective  
15 consideration of the relationships within the home.  
16 They are then providing that family with a  
17 certification saying, yes, we have approved this family  
18 to serve as foster parents. That's something that  
19 Catholic, because of its religious beliefs about  
20 marriage, cannot do.

21 I would also note, Your Honor --

22 JUDGE SCIRICA: My understanding is that a  
23 single gay person would be -- would not be turned away;  
24 is that correct?

25 MS. WINDHAM: That's correct, Your Honor.

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1 They're only required to consider the relationships of  
2 the adults in the home, and so if there's not another  
3 adult who is living in that home, there would be no  
4 reason to have to endorse or certify any other  
5 relationships.

6 JUDGE RENDELL: You say this is endorsing, and  
7 this you would -- you would be endorsing. But I'm  
8 missing the analytic path that -- that gets you to --  
9 on the constitutional action here. What -- where do  
10 you fit? Are you talking about free exercise? You  
11 talking about establishment? What are you talking  
12 about, and how do you get there?

13 MS. WINDHAM: That's a great question, Judge  
14 Rendell. I think the question of endorsement goes to  
15 two claims. It goes to the free exercise claim,  
16 explaining exactly what the religious exercise here is  
17 that is being restricted. It goes to the Pennsylvania  
18 RFPA claim explaining --

19 JUDGE RENDELL: Well, let's -- let's talk  
20 about free exercise. Under Smith, if there is a  
21 generally applicable neutral law -- and that's what  
22 this is -- how can you contend that there's a violation  
23 of free exercise?

24 MS. WINDHAM: Your Honor, this is not a  
25 neutral and generally applicable law. The City --

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1 JUDGE RENDELL: Isn't it being required of  
2 every contracting party.

3 MS. WINDHAM: And so your argument, as I  
4 understand, is that the -- are you referring to 15.1 of  
5 the contract and the Fair Practices Ordinance as a  
6 neutral and generally applicable law?

7 JUDGE RENDELL: Yeah. One that says you have  
8 to sign a nondiscrimination -- you have to agree to  
9 nondiscrimination. Yes.

10 MS. WINDHAM: And so the nondiscrimination  
11 provision the City is talking about only applies to  
12 public accommodations. Catholic is not a public  
13 accommodation.

14 JUDGE RENDELL: How are you not a public  
15 accommodation?

16 MS. WINDHAM: Because a home study  
17 certification is not a good or service that is  
18 generally available to the public. Its purpose is to  
19 be selective. Even if Catholic were a public  
20 accommodation --

21 JUDGE RENDELL: Well, then if someone is a  
22 hotel and the service is to just provide lodging that's  
23 very selective, is that not a public accommodation?

24 MS. WINDHAM: We certainly agree a hotel would  
25 be a public accommodation, but what State law --

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1 JUDGE RENDELL: Right. It's just a single  
2 focus. It's providing overnight accommodation. Why is  
3 that not the same as -- as your argument that you're  
4 limited?

5 MS. WINDHAM: Because what Catholic is being  
6 asked to do here is to engage -- and what all foster care  
7 agencies are being asked to do here -- is to engage in a  
8 selective process and to look at things that are --

9 JUDGE RENDELL: How does that not fit within  
10 the definition of public accommodation?

11 MS. WINDHAM: Because they are --

12 JUDGE RENDELL: Does it exempt selective  
13 processes?

14 MS. WINDHAM: It refers to things that are  
15 generally open and available to the public. Even if  
16 this were --

17 JUDGE RENDELL: All facilities of any services  
18 provided, all kinds of public service acts. I'm just  
19 trying to figure out which -- which component here is  
20 lacking.

21 MS. WINDHAM: Judge Rendell, even if this were  
22 a public accommodation, the City -- it is not neutral  
23 and generally applicable because the City is creating  
24 exceptions to it. It's permitting exceptions to it.  
25 The City says that it expects foster agencies to follow

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1 state law. What does state law tell you to do? It  
2 says you shall consider existing family relationships.  
3 You shall consider demonstrated stable, mental, and  
4 emotional adjustment, including perhaps a psychological  
5 evaluation. You must consider --

6 JUDGE RENDELL: Those are exemptions, or those  
7 are things that need to be considered?

8 MS. WINDHAM: Those are things that need to be  
9 considered, and so you have a situation where the City  
10 is suddenly saying now -- there's no evidence that they  
11 had previously considered this to be a public  
12 accommodation. They're suddenly saying --

13 JUDGE RENDELL: But that doesn't matter.  
14 They're all of a sudden requiring it of everyone. It  
15 doesn't matter that they didn't require it of anyone,  
16 does it?

17 MS. WINDHAM: Yes. Because it determines  
18 whether they have a neutral and generally applicable  
19 law and whether they're engaging in religious  
20 targeting. What the City is doing here is it's saying  
21 on one hand, well, we expect you not to consider  
22 familial status, marital status, disability, including  
23 mental disability. And on the other hand they're  
24 saying you must follow a state law which doesn't just  
25 allow you but requires you to consider marital status,

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1 familial status, and mental disability as a part of  
2 making these determinations. And so this law here is  
3 not neutral and generally applicable. Even if it were,  
4 the City would still have to --

5 JUDGE RENDELL: I don't know how that -- how  
6 that detracts from the neutrality and the general  
7 applicability, the fact that they are saying certain  
8 factors need to be considered.

9 JUDGE AMBRO: Because it applies to religious  
10 and secular alike; does it not?

11 MS. WINDHAM: It applies to -- if it applies  
12 at all, it applies to religious and secular alike. But  
13 what the City is doing is on one hand saying you can't  
14 look at these things in public accommodation, and on  
15 the other hand saying you have to follow a state law  
16 that requires you to look at these things, even if you  
17 are a public accommodation. And so this is not  
18 neutral, not generally applicable.

19 JUDGE SCIRICA: Before this came up as an  
20 issue over all these years, what happened in the past  
21 when there was a report done? I take it they never  
22 went into a same -- same-sex marriage home or what?

23 MS. WINDHAM: No, Your Honor. The evidence  
24 shows that there is no same sex couple who has ever  
25 approached Catholic Social Services to request a home

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1 study. And so there's no one who has even come  
2 knocking on their door seeking this service from them.  
3 Therefore, there is no one who has actually been harmed  
4 by the City continuing to work with Catholic Social  
5 Services to place children in loving homes.

6 Even if this Court were to think that there  
7 were a neutral and generally applicable law that  
8 applies here, the City is still compelling speech by  
9 reaching outside of the program that it is actually  
10 funding and attempting to compel Catholic Social  
11 Services --

12 JUDGE AMBRO: Let's go back to Judge Scirica's  
13 question then. You would still do a report if there  
14 were a LGBT person in the home; would you not?

15 MS. WINDHAM: If it were a single LGBT --

16 JUDGE AMBRO: Yes.

17 MS. WINDHAM: -- individual, yes, they would  
18 still issue the report because --

19 JUDGE AMBRO: But church has views on that.

20 MS. WINDHAM: But the church is not being  
21 asked by the state law here to issue an opinion on a  
22 person's sexual orientation or their relationships with  
23 people outside of their own home. They're merely being  
24 asked to issue a written certification and an  
25 endorsement for the relationships of the adults that

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1 are in the home, and this was something that was  
2 discussed for quite a bit at the hearing. And so this  
3 issue only comes up when you have a couple, who is in  
4 an unmarried relationship or same sex relationship, who  
5 comes in seeking a certification and an endorsement  
6 under state law.

7 JUDGE AMBRO: So what happens if you have a  
8 person who is gay, who wants to be a foster parent, has  
9 done so in the past and has done a good job, and that  
10 person is not married but is clearly living with a  
11 significant other? What do you do then?

12 MS. WINDHAM: In that case, Catholic would  
13 refer that couple to any one of the 29 other agencies  
14 who would happily serve them, just as they would with  
15 an opposite sex, unmarried couple.

16 JUDGE SCIRICA: What has been the City's  
17 response to that?

18 MS. WINDHAM: Your Honor, the City's response  
19 is what we have heard and what we will hear today. The  
20 City has not taken any action against Catholic or had  
21 any complaints that we're aware of against Catholic on  
22 this issue until this issue came up in March of this  
23 year.

24 JUDGE RENDELL: Did you propose, though, a  
25 change in the contract whereby all you would do would

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1 be referring those that you felt within your religious  
2 beliefs you couldn't address from a relationship  
3 standpoint? In other words, you say to them, listen,  
4 we'll sign this -- this contract, but it's understood  
5 that when someone comes to us, say same-sex marriage,  
6 we'll refer that out?

7 MS. WINDHAM: Your Honor, we believe that,  
8 that is the way the contract worked today, and so we  
9 have no objection to entering into a contract that  
10 would allow Catholic to continue to have that religious  
11 practice of making referrals.

12 JUDGE SCIRICA: So the City's interest is the  
13 stigmatization of LGBT individuals?

14 MS. WINDHAM: Yes, Your Honor. This is --  
15 this is the interest --

16 JUDGE SCIRICA: Is there any other response by  
17 the City with respect to what you just said?

18 MS. WINDHAM: With regard to why --

19 JUDGE SCIRICA: The reason why they -- does  
20 your response answer the City's concern that it's  
21 stigmatizing certain individuals by not -- by allowing  
22 you to make a referral out.

23 MS. WINDHAM: I believe it does, Your Honor,  
24 and the Supreme Court addressed this in Masterpiece,  
25 where it recognized that there were certain situations

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1 where -- for example, if a member of the clergy was  
2 unable to solemnize a same-sex marriage, this would be  
3 an exercise that gay persons could recognize and accept  
4 without serious diminishment of their own dignity and  
5 worth. And it recognized that you could have a  
6 situation where you would have too many such  
7 exceptions. You might have a long list of persons.

8 But here we don't have that. Here we know  
9 that 29 out of 30 agencies will provide these home  
10 study certifications, and so we're talking about one  
11 agency that the City is attempting to shut down simply  
12 because of its religious practice.

13 JUDGE SCIRICA: They haven't shut down the  
14 congregate care --

15 JUDGE AMBRO: Or the CUA.

16 JUDGE SCIRICA: -- or the CUA; is that right?

17 MS. WINDHAM: That's correct, Your Honor. I'm  
18 not aware of any case, and the City has not cited any  
19 that say that it's okay to burden one part of a  
20 person's religious exercise and extinguish one part of  
21 that exercise as long as you don't do it all at the  
22 same time. The Supreme Court in Holt noted that it was  
23 a substantial burden on Mr. Holt's religious exercise  
24 when he was prohibited from growing a half-inch beard,  
25 even though he could still engage in practicing his

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1 faith in other ways. I think it's particularly  
2 troubling here, given the evidence that we have of  
3 targeting on behalf of the City.

4 JUDGE RENDELL: Yeah. What about that  
5 evidence? Now, the district court made a finding that  
6 there was no targeting and no motivation, no anti-  
7 religious animus, if you will, and that's a finding of  
8 fact. So that's subject to clear error review when it  
9 comes to us. How do you satisfy that standard that it  
10 was clearly erroneous on the part of the district  
11 court?

12 MS. WINDHAM: Your Honor, under *Brown v. City*  
13 *of Pittsburgh* and the *Borough of Tenaflly* case. This  
14 Court considers factual findings by the district court  
15 in a free exercise case or first amendment case  
16 differently. It conducts an independent review of the  
17 factual record, and so --

18 JUDGE RENDELL: So is that a *de novo*, or abuse  
19 of discretion, or how?

20 MS. WINDHAM: What the statement says is an  
21 independent review of the -- of the factual record,  
22 which I would analogize to *de novo* review.

23 JUDGE RENDELL: So how should we look at it  
24 differently as far as you're concerned?

25 MS. WINDHAM: I believe --

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1 JUDGE RENDELL: What is it? What's the  
2 smoking gun here?

3 MS. WINDHAM: What's different about this case  
4 is that you have a whole series of actions which all a  
5 targeted Catholic's religious exercise. You have the  
6 Commissioner's statements that it's not 100 years ago,  
7 and Catholic needs to follow the teachings of Pope  
8 Francis. You then have the referral shut down in  
9 minutes later. You have PCHR, which ignored its own  
10 due process regulations in instituting an investigation  
11 of Catholic at the behest of the Mayor. You have the  
12 Mayor's public statements criticizing the archdiocese.  
13 You have the City Council issuing --

14 JUDGE RENDELL: So the Mayor's comments were  
15 temporally far removed from this action. How do you --  
16 how do you align them?

17 MS. WINDHAM: We do know that the PCHR  
18 acknowledged this investigation was coming at the  
19 request of the Mayor. But we do have something that is  
20 much more temporally close, which is the City Council  
21 resolution condemning discrimination under the guise of  
22 religious freedom was what they phrased it. It's very  
23 similar to the sort of statements that the Supreme  
24 Court found in Masterpiece, where it demonstrated that  
25 Masterpiece did not receive the neutral and respectful

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1 consideration to which it was entitled because it  
2 treated religious exercise as something insubstantial  
3 and even insincere.

4 JUDGE RENDELL: So what did the ordinance  
5 provide specifically that you're relying on here?

6 MS. WINDHAM: I'm sorry. Which ordinance are  
7 you referring to?

8 JUDGE RENDELL: You said there was a city  
9 ordinance that said -- that was hostile.

10 MS. WINDHAM: This was a resolution by the  
11 City Council --

12 JUDGE RENDELL: Right.

13 MS. WINDHAM: -- which directed DHS to conduct  
14 an investigation and also called upon them to terminate  
15 any contracts with such organizations with all  
16 deliberate speed. And we see that the City did just  
17 that, immediately ending referrals under the contract  
18 and now asking that it be permitted to terminate that  
19 contract altogether and no longer renew it.

20 We focused a lot on free exercise. But I do  
21 have just a moment, and I want to talk about compelled  
22 speech. The City is reaching outside the scope of the  
23 contract and the scope of the contracted for services  
24 and trying to compel Catholic to engage in speech which  
25 it understands and which state law says is an

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1 endorsement of relationships, an endorsement it cannot  
2 make. Even if this were purely factual information, we  
3 know under the Supreme Court's recent decision in *NIFLA*  
4 *v. Becerra* that this can still be compelled speech by  
5 the government.

6 JUDGE AMBRO: How is compelled? I mean, it's  
7 understood that the Catholic Social Services does not  
8 believe in condoned same-sex marriages. And why not do  
9 the evaluation, the report with in effect a caveat:  
10 we're doing this pursuant to our contract. We do not  
11 believe that this comports with the tenets of the way  
12 we understand Catholicism, period. You're not  
13 compelled to speech of any kind. Your reservations are  
14 completely stated openly, and in effect, that today is  
15 what Bethany Christian is doing.

16 MS. WINDHAM: Two points on that, Your Honor.  
17 With regard to Bethany Christian, I believe this gets a  
18 little bit into what the Supreme Court said in *Thomas*  
19 *v. Review Board*, where it is not the job of the government --

20 JUDGE AMBRO: That's -- that's five minutes.

21 MS. WINDHAM: -- to determine who best  
22 perceived the commands of their common faith. But I  
23 would also note that the solution that you're  
24 suggesting, where you just say, yes, we approve this;  
25 oh, by the way, we don't approve of same-sex marriages

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1 is essentially what the Supreme Court said was not  
2 acceptable in NIFLA. There you had prolife pregnancy  
3 centers who were required to have a government-mandated  
4 statement, and the government-mandated statement said  
5 that other services was available. Here's where you  
6 could access them.

7 NIFLA was free to then go and have a sign  
8 right next to that saying we think abortion is a bad  
9 idea. Don't do it. And yet the State was still  
10 requiring them to tell women where they could go to get  
11 an abortion, and the Supreme Court said, no. You are  
12 still compelling their speech --

13 JUDGE AMBRO: You're doing --

14 MS. WINDHAM: -- even if they --

15 JUDGE AMBRO: Here it's different. You're  
16 doing the report based on someone else's criteria. If  
17 you were doing this alone, this were solely under your  
18 egis, you would not do it, and you make it clear that  
19 if this was yours alone, you would not do it.

20 Or the flip to that is you've set conditions  
21 on us that we don't like, that are required for both a  
22 secular and the religious. We don't like it, and we're  
23 opting out. It's your choice.

24 MS. WINDHAM: In that case, Your Honor, I  
25 think that this still runs headlong into the Supreme

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1 Court's compelled speech precedents. This would be as  
2 if in the AOSI case, Alliance for Open Society  
3 International. The agencies had to adopt an anti-  
4 prostitution policy, and they could just say, okay, the  
5 government made us do it.

6 JUDGE AMBRO: But that was --

7 MS. WINDHAM: We don't really like it.

8 JUDGE AMBRO: That was being forced to do  
9 something that's against -- isn't that different than  
10 this. Actually you're not -- all you're doing is  
11 following the procedures others have selected for its  
12 criteria, and you're going along with that, even though  
13 if you were in charge, you wouldn't do it. How does --  
14 how does that fit with that particular case?

15 MS. WINDHAM: I think two parts on that, your  
16 honor. Number one, under the Pennsylvania code, this is  
17 not a checklist where you just say check, check, check,  
18 check, check. Okay. You fit the boxes. Here's your  
19 certification. This is actually subjective  
20 considerations that an agency has to engage in. They  
21 have to -- they must consider a number of different  
22 things, and there's no if this, then that statement in  
23 the Pennsylvania regulations.

24 JUDGE AMBRO: Well, they added a few things  
25 and -- like the pastoral letter. They said, okay,

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1 we'll back off doing the pastoral letter. You've  
2 objected to it. Isn't there -- I keep coming back to  
3 what Judge Tucker said almost at the outset. There  
4 seems -- this cries for some type of resolution done  
5 between Catholic Social Services and the City, and my  
6 guess is it's been done like this for a long time.

7 MS. WINDHAM: Your Honor, my understanding is  
8 that it has been done like this for a long time, and  
9 I'm not sure why the City has chosen to dig in its  
10 heels now; but it has. It has done so in a very public  
11 and very open way.

12 JUDGE AMBRO: The whole issue --

13 JUDGE RENDELL: If it were to exempt you, then  
14 it would be preferring religion. So as long as it's  
15 generally applicable, they're not -- they're not  
16 digging in their heels as much as they're applying it  
17 to everyone, and you happen to be in that group. If  
18 they were to exempt you, then they'd be establishing  
19 religion.

20 MS. WINDHAM: Certainly not, Your Honor,  
21 because this would then fall under the Supreme Court's  
22 precedents in Amos and in Cutter, where the Court has  
23 recognized that, in fact, it is permissible to  
24 accommodate religion, even beyond that, which is  
25 strictly required by the free exercise clause, and that

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1 governments can do that without violating the  
2 establishment clause, as this Court recognized in Real  
3 Alternatives. "Even when non-interference is not  
4 strictly required, the government has discretion to  
5 grant certain religious accommodations subject to  
6 constitutional limitation." And we've explained in our  
7 briefing why we believe that the accommodations that  
8 Catholic would receive here are not violating the  
9 constitution because they exist within a system of true  
10 private choice within which LGBT families have a free  
11 choice among 29 different providers, who they would be  
12 able to go to and be able to access these home study  
13 services.

14 JUDGE AMBRO: Is there a syllogism at play  
15 here? The City is going after us because we  
16 discriminate. We discriminate because of our religious  
17 beliefs. Therefore, the City is going after us because  
18 of our religious beliefs.

19 MS. WINDHAM: Your Honor, I'm sure that, that  
20 is what the City would say. What Catholic --

21 JUDGE AMBRO: What would you say? I mean,  
22 what is -- how do you play out this theme?

23 MS. WINDHAM: Your Honor, first of all, what I  
24 think you're asking here is that Catholic understands  
25 that its religious beliefs are not just something that

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1 sit alone and exist quietly within the church. There  
2 is something that they have to go out and live in  
3 public. That's why they're engaged in foster care in  
4 the first place because their faith requires them to,  
5 and this is why the individual foster parents, like  
6 Ms. Fulton and Ms. Simms-Busch are out there serving.  
7 They said it was a religious calling.

8 And so the City is putting Catholic to an  
9 impossible choice. It's saying if you want to go out  
10 and live out this part of your religious calling and  
11 your religious mission, you must do so at the price of  
12 making certifications that violate your religious  
13 faith.

14 JUDGE AMBRO: But what are the consequences if  
15 we go your way? What happens to the Smith case, going  
16 back to the very first question of Judge Rendell? You  
17 have a neutral law of general applicability. That's going  
18 to be upheld. What happens -- if we go your way, what  
19 happens to Smith?

20 MS. WINDHAM: Your Honor, we have explained at  
21 length why we believe this is not a neutral law of  
22 general application, and why this is also religious  
23 targeting. If you look at the Masterpiece case, what  
24 the Supreme Court said in that decision is that it was  
25 undisputed that Masterpiece Cakeshop was subject to the

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1 public accommodations laws of Colorado. That was not  
2 at issue in that case. And even so, the way the  
3 government had targeted that religious practice and  
4 that religious individual, the fact that it did not  
5 receive the neutral and respectful consideration to  
6 which he was entitled was still a violation.

7 JUDGE RENDELL: The very decision-making of  
8 the Commission reflected that hostility, the actual  
9 decision of the Commission in finding that it violated  
10 the law was totally hostile to religion, but we don't  
11 -- we don't have that here.

12 MS. WINDHAM: Your Honor, the decision-making  
13 has been from DHS, and there are statements from DHS  
14 disagreeing with how Catholic understands its religious  
15 obligations. We have the statements of City Council.  
16 We have indications from different parts of City  
17 government that Catholic was not receiving neutral and  
18 respectful consideration to which they were entitled  
19 under the Supreme Court's decision in Masterpiece.

20 JUDGE SCIRICA: So are you conceding general  
21 applicability and public accommodation in this matter?

22 MS. WINDHAM: Not at all, Your Honor. I'm  
23 simply making the point that even if this Court were  
24 not persuaded on the points of general applicability  
25 and public accommodations that, that would still not

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1 answer the question because under the Supreme Court's  
2 Masterpiece decision, when there is religious targeting  
3 involved, even when you have something that might be a  
4 general -- generally applicable law, there might still  
5 be violations of the free exercise clause, and we  
6 believe that's exactly what's happened here.

7 JUDGE AMBRO: What would happen if someone  
8 opened a hotel, and they said that it was part of their  
9 religious mission that only whites could be there  
10 because they believe in white supremacy; and so they  
11 have to operate the hotel to fulfill their religious  
12 calling, has to be whites only? Isn't -- what's the  
13 government's interest then?

14 MS. WINDHAM: The government's interest in --

15 JUDGE AMBRO: The government's interest being  
16 nondiscrimination. What would happen in that case?

17 MS. WINDHAM: In that case the government  
18 would win and for a couple of different reasons.

19 Number one, you have a group that's coming in and  
20 asking to violate something that is unquestionably a  
21 public accommodations law that applies to them.

22 Number two, the government has a compelling  
23 interest in eradicating racial discrimination under the  
24 Bob Jones' case. And so even in the unlikely event you  
25 got to compelling interest there, the government would

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1 win that case.

2 Here I think it's important to look at the  
3 history and understand the history. We're not talking  
4 about somebody who has come in and said we want to set  
5 up some new establishment in order to discriminate.  
6 We're talking about an organization that has served  
7 Philadelphia children for a century. We're talking  
8 about individual --

9 JUDGE AMBRO: We're saying there are certain  
10 people or certain groups that we will not serve in this  
11 capacity. Thank you. Maybe it's -- it's choosing. So  
12 I'm not saying pejoratively discrimination, but it is  
13 discriminating with a small D; is it not?

14 MS. WINDHAM: It is refusing to make  
15 certifications that violate their religious beliefs.  
16 They're not saying we can never work with LGBT foster  
17 parents, and in fact, they've said they welcome  
18 children regardless of their sexual orientation and are  
19 happy to serve them. They're simply asking that in  
20 this one small way they be permitted to follow what  
21 their faith requires and be allowed to make referrals  
22 to other agencies.

23 JUDGE AMBRO: So I come back to one of the  
24 questions I asked earlier stated another way. Isn't  
25 this a straightforward application of participation in

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1 a public program? You just don't have to participate  
2 if you don't agree.

3 MS. WINDHAM: There are a couple of different  
4 problems with that, Your Honor. Number one is the fact  
5 that the City now effectively occupies the field, and  
6 so this is not a case where Catholic -- this is not a  
7 case like the AOSI case where you could say we don't  
8 want that government grant. We're just going to go  
9 over here and keep doing our work without it. Without  
10 a contract with the City of Philadelphia, it is  
11 impossible --

12 JUDGE SCIRICA: The City and State occupy that  
13 now.

14 MS. WINDHAM: I'm sorry?

15 JUDGE SCIRICA: The City and the State occupy  
16 that now.

17 MS. WINDHAM: Yes, that's correct. The City  
18 and the State occupy the field. But without a contract  
19 with the City of Philadelphia, Catholic cannot provide  
20 foster care to the children of Philadelphia, so that's  
21 off the table.

22 Number two, if you look at the Supreme Court's  
23 decision in Trinity Lutheran, they were clear that even  
24 within the context of government grant program, the  
25 government cannot make -- cannot discriminate according

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1 to religion. And so -- the Supreme Court, in making  
2 that decision cited to the Associated Contractors of  
3 Jacksonville case, so acknowledging that this applies  
4 to government contracts as well. So the government is  
5 not getting a get out of the constitution free card  
6 simply because they have a contract.

7 JUDGE AMBRO: All right. We'll, hear from you  
8 back on rebuttal.

9 MS. WINDHAM: Thank you.

10 JUDGE AMBRO: And Ms. Istvan, are you going to  
11 be first?

12 MS. ISTVAN: Jane Istvan, and I represent the  
13 City defendants.

14 Judge Ambro, I would like to start out picking  
15 up on some of your points. I know you've expressed  
16 some concern that we should work this out, and I will  
17 say the trial court credited the fact that we do have a  
18 strong desire to continue the contract.

19 Everything in this record demonstrates that,  
20 but it seems to us that the only thing that Catholic  
21 will suggest is that they should be allowed to operate  
22 on this -- on this so called referral system. And  
23 respectfully, you suggested that, that might have been  
24 going on for a time, and respectfully, I'd like to push  
25 back on that a little bit and just say there's no

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1 evidence in the record that we knew that -- that  
2 Catholic was willing to turn away otherwise qualified  
3 same-sex foster couples until the Inquirer reporter --

4 JUDGE AMBRO: The Inquirer article.

5 MS. ISTVAN: And I'd also just like to point  
6 out that with respect to the pastoral letter, that's  
7 something that we didn't become aware of until the  
8 hearing -- until the hearing itself when there was some  
9 testimony on that point.

10 But I did want to say --

11 JUDGE AMBRO: All I was saying there is when  
12 -- when you objected to it, they did back off, as I  
13 understand.

14 MS. ISTVAN: Yes. Yes, Your Honor. They did  
15 write a letter to Judge Tucker and state that they  
16 would no longer enforce that requirement.

17 JUDGE AMBRO: Do we need to get into the  
18 details of the old contract?

19 MS. ISTVAN: It's our position that we don't.  
20 As we explained, we -- this case is about prospective  
21 relief. This case is about what we ask them to do  
22 going forward with the new contract, and as our May 7th  
23 letter demonstrated, what we told them is we obviously  
24 have a disagreement about what the old contract  
25 required. We believe that whenever you're a contractor

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1 with us and you sign a commitment that you won't  
2 discriminate, that, that means that when you're serving  
3 the public, you won't discriminate. Nevertheless, we  
4 have a disagreement.

5 But going forward, we need everyone to commit  
6 that they will treat all otherwise qualified foster --  
7 prospective foster parents equally and not discriminate  
8 against them on the basis of a protected  
9 characteristic.

10 JUDGE RENDELL: What about a referral system?  
11 Would that work? Say but if there is something you  
12 believe violates your religion, we'll permit you to  
13 referral the suitability of that couple to another  
14 entity?

15 MS. ISTVAN: No, Judge Rendell. That wouldn't  
16 work for several reasons, and we went over a couple in  
17 the brief. But I just want -- I guess the first thing  
18 I would want to explain is that it seems to be a  
19 suggestion that we need a mandated -- that there should  
20 be a mandated conscience clause. They seem to be  
21 invoking the notion of a conscience clause where, for  
22 example, a pharmacist can refuse to provide  
23 reproductive services to a client and refer that person  
24 to another pharmacist.

25 We submit that in the context of

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1 discrimination, it's a completely different animal. It  
2 would be like saying that if a Christian restaurant  
3 owner doesn't want to serve a Muslim, that, that's okay  
4 because that Muslim can walk down the street and 99.9  
5 percent of the restaurants in Philadelphia would serve  
6 them, and there would be basically no imposition on  
7 them. So it's our position that it simply doesn't  
8 work.

9           Second, we've also -- we also addressed in our  
10 brief the stigma point, and the stigma -- I just want  
11 to emphasize, the stigma isn't just to adults. As the  
12 Commissioner explained very eloquently during the  
13 hearing, it's a stigma that we have to be concerned  
14 about with respect to the LGBT youth in our care  
15 because it sends a message, we're okay with you now.  
16 We're protecting your rights now, but when you grow up,  
17 we're going to contract with someone who assesses that  
18 you're not good enough to have a family. And that was  
19 very concerning to the Commissioner because we have a  
20 mission to serve all youth.

21           JUDGE AMBRO: The City has entered into, what,  
22 29 other contracts for foster care; is that right?

23           MS. ISTVAN: Yes, Your Honor.

24           JUDGE AMBRO: Do all of them contain language  
25 regarding discrimination against same-sex couples being

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1 prohibited?

2 MS. ISTVAN: They all contain that the sexual  
3 orientation -- the sexual orientation provision. The  
4 clarification that we talked about is outside the  
5 record because the contracts all went out after the  
6 hearing. But the Commissioner did testify at page 617  
7 of the record that the -- that the new contracts were  
8 going to go out with this clarification.

9 But as I stated, it's our position that --  
10 that if you go back to the prior contract, that there's  
11 no reason why these providers shouldn't have considered  
12 themselves to be a public accommodation, and we're  
13 contracting with them to provide qualified foster  
14 parents for us. That they should assume that when  
15 they're selecting those foster parents, that they  
16 should not be turning people away solely on the basis  
17 of their protected characteristics.

18 JUDGE RENDELL: Seems to me one of the key  
19 findings here was the finding regarding targeting, and  
20 under Tenafly, we look at the record anew. We're not  
21 -- we're not confined to clear error. So the  
22 Commissioner's statements about -- about the Pope and  
23 hundred years and -- why wouldn't we not view that as  
24 hostility somewhat akin to what happened in  
25 Masterpiece?

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1 MS. ISTVAN: Judge Rendell, as we explain more  
2 thoroughly in the brief, and I'm happy to go over all  
3 those points now, it's -- it's something that neither  
4 in Lukumi nor in Masterpiece did the Court focus solely  
5 on comments and decide that was enough. They looked at  
6 those comments in the context of the particular case.  
7 And --

8 JUDGE RENDELL: Okay. We'll look at the  
9 comments in the context of the case.

10 MS. ISTVAN: Right. And so in those cases it  
11 was persuasive for the -- it was persuasive for the  
12 Court, not just that there were troubling comments, but  
13 that there was action on those comments because this is  
14 not about civility. This is not about being nice to  
15 each other. This is about determining whether the  
16 decision-maker is actually acting neutrally. And so in  
17 both of those cases it was determinative that there was  
18 evidence that when there was a secular incident that  
19 was similar to the religious exemption, that, for  
20 example, the Baker in Masterpiece saw, that the  
21 Colorado Civil Rights Commission said you're okay. And  
22 that was incredibly troubling to the Court.

23 And it was the same in Lukumi where the Court  
24 basically held that the statute at issue had been  
25 religiously gerrymandered such that basically the only

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1 type of animal slaughter that was prohibited was animal  
2 slaughter performed by members of the Santeria  
3 religion.

4 JUDGE RENDELL: So you're saying the targeting  
5 -- it's not comments alone. It's if the targeting  
6 causes the entity to act in a manner that actually  
7 targets in terms of the decision treating it  
8 differently. And here you're saying since the policy  
9 was across the board against everyone that targeting  
10 really doesn't -- the hostility isn't the same as in  
11 those cases?

12 MS. ISTVAN: Yes, Judge Rendell. And I can't  
13 emphasize enough that there's no evidence in this case  
14 that we've ever permitted a secular excuse for  
15 violating our -- for violating nondiscrimination  
16 requirements. And I'd also like to point out that just  
17 the factual context of this case is kind of the  
18 opposite of a situation that's hostile. We're looking  
19 at a situation where we've had a long-time relationship  
20 with Catholic Social Services in spite of their well-  
21 known views on same-sex marriage and yet that  
22 relationship has still been fruitful.

23 And in fact, we continue to contract with them  
24 with respect to the more lucrative aspects of their  
25 contracts with us. And so to infer that somehow there

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1 was something hostile going on just doesn't make sense  
2 in light of the record.

3 JUDGE SCIRICA: And this issue does not come  
4 up in the congregate care area?

5 MS. ISTVAN: No. It doesn't Judge Scirica.  
6 Those contracts moved forward. I believe that's in the  
7 record, but I know that they did move forward.

8 And I also just wanted to point out just a  
9 couple more things --

10 JUDGE SCIRICA: One other thing.

11 MS. ISTVAN: I'm sorry.

12 JUDGE SCIRICA: If you were affirmed in this  
13 and we honor preliminary injunction here --

14 MS. ISTVAN: Yes.

15 JUDGE SCIRICA: -- do you intend then to go  
16 back to the district court?

17 MS. ISTVAN: Sure. I mean, we're the  
18 defendants. So we have to -- we're guided by however  
19 -- however Catholic Social Services wants to proceed if  
20 we go back.

21 JUDGE AMBRO: In connection with the comments  
22 that were made by Commissioner Figueroa, what your  
23 response to you should act more like Pope Francis?  
24 It's almost like the Jesuit side and the more  
25 conservative side. And in Tenafly we had a bit of the

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1 same thing, you know, with the same religion but very  
2 different groups with different views.

3 MS. ISTVAN: Yes. And I'm glad that you  
4 brought us back to that, Judge Ambro, because the other  
5 thing I was going to point out is that -- is that her  
6 comments were completely different in character from  
7 what you see in cases like Lukumi, Masterpiece, and  
8 even Tenafly, I think, where you have -- where you have  
9 some -- where you have just denigration and disrespect  
10 for the religion itself and questioning of the  
11 justification. None of that was present here. It's a  
12 completely different circumstance.

13 And furthermore, it's important to take note  
14 of the fact that this occurred in the context of  
15 contractual negotiations. It wasn't a neutral  
16 adjudication. And while certainly our City officials  
17 shouldn't be acting in a biased manner, it was a  
18 situation that was much less formal, and it was a  
19 situation, obviously, where you're trying to persuade  
20 someone. And that's the -- I think that's the context  
21 in which you have to look at that comment. It's trying  
22 to persuade them that it would be okay to come around  
23 to our position.

24 I did want to swing back for a moment,  
25 actually. I had a third point on referrals because I

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1 know that it came up in your conversations with  
2 Ms. Windham about how there's 29 other providers and --  
3 and people can be served. And I know that CSS has  
4 claimed in their briefs that we're claiming it's  
5 somewhat speculative that we will have a situation if  
6 they're permitted to take a religious exemption,  
7 whereby others would take the same religious exemption.  
8 But I would submit that it's not at all speculative,  
9 and there's a couple things in the record on that.

10 First of all, the pastoral letter, which  
11 demonstrates that Catholic has already attempted to  
12 operate in such a manner by which it only serves  
13 believers. And furthermore, the interveners noted a  
14 couple situations, as did the amici, where  
15 we have Christian providers in other parts of the  
16 country that have determined that they can only serve  
17 Christians.

18 CSS wants to analogize this to a private  
19 choice type of situation where we have different  
20 providers serving different kinds of people. But  
21 again, we submit that, that's -- that's permitting  
22 discrimination, and we simply don't have to allow that.

23 JUDGE SCIRICA: We haven't heard anything  
24 about the Pennsylvania Act. Anything comment you would  
25 like to make on that?

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1 MS. ISTVAN: I'm sorry, Judge Scirica. About  
2 the regulations?

3 JUDGE SCIRICA: Yes.

4 JUDGE AMBRO: Yeah, the RFPA.

5 MS. ISTVAN: Oh, the Religious Freedom  
6 Protection Act.

7 JUDGE AMBRO: Right.

8 MS. ISTVAN: I know Ms. Windham -- there was a  
9 little bit of commentary about -- about the fact that  
10 they're entitled to a contract and that it  
11 substantially burdens their religious exercise because  
12 they otherwise can't do this work because we occupy the  
13 field. And I submit that, that's just a completely  
14 novel, unprecedented approach to free exercise and to  
15 religious freedom jurisprudence. Religious freedom  
16 jurisprudence looks at the extent to which we're  
17 interfering with your private exercise of religion.

18 Nothing about the free exercise clause  
19 entitles you -- says that you have an entitlement for  
20 the government to give you something affirmative in  
21 order to -- to exercise your religious rights, and it's  
22 our position that, that would certainly be the case  
23 here.

24 In addition, on the RFPA claim, we also don't  
25 --

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1 JUDGE AMBRO: Let's go back to the RPA.

2 MS. ISTVAN: Yes, Your Honor.

3 JUDGE AMBRO: I mean, I think the argument  
4 being made is they're being put to a Hobson's choice.  
5 They have to refrain from conduct that's mandated by  
6 sincerely held religious beliefs, or engage in conduct  
7 or expression that violates the tenets of their  
8 faith.

9 MS. ISTVAN: But as you pointed out yourself,  
10 Judge Ambro, this is in the context of a contract. No  
11 one is forcing them to do this. They could simply walk  
12 away from the contract, or they can persuade us that  
13 we're wrong.

14 JUDGE RENDELL: It's not public benefit.

15 MS. ISTVAN: Exactly, exactly, Judge Rendell.

16 JUDGE RENDELL: How about compelled speech?  
17 You want to address their view that this is compelling  
18 speech?

19 MS. ISTVAN: Sure, absolutely. I've never  
20 quite understood their argument because -- and  
21 Ms. Windham was talking about Becerra. Becerra is not  
22 a case about a contract, and it's clear in the  
23 situation of a contract, going back to the AOSI case  
24 that if your speech is in the context of the contours  
25 of the contract that you're executing for the

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1 government, that we can impose conditions on that.

2 It's not unconstitutional.

3           And here we're talking about a contract by  
4 which they've agreed to provide us with qualified  
5 foster parents to take care of the children who are in  
6 our custody. In order for them to get those foster  
7 parents qualified, they need to write that piece of  
8 paper, the home study or however you want to  
9 characterize it, and turn it into the State in order to  
10 get these parents certified. So the execution of that  
11 piece of paper is within -- 100 percent within the  
12 terms of the contract, so we just don't see how they  
13 avoid case law like that.

14           In addition -- I mean, we touched on this a  
15 little bit in our RFPA argument too -- it's also hard  
16 to see how it's a burden for them and where the speech  
17 comes in regarding same-sex marriage where, as  
18 Mr. Amato admitted himself, the commonwealth doesn't  
19 require you to certify that people are married  
20 when you write that piece of paper and turn it in  
21 and get someone qualified. We're not asking them  
22 to not write op-eds in the paper. We're not asking  
23 them to give up their views. We're not asking them to  
24 write a policy statement as occurred in the AOSI case.  
25 We're simply asking them to file this piece of paper to

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1 get these people qualified. And where they don't --  
2 it's essentially a self-imposed burden in terms of --  
3 in terms of endorsing marriage where the State itself  
4 doesn't require that.

5 JUDGE AMBRO: Thank you.

6 MS. ISTVAN: Thank you.

7 JUDGE AMBRO: Now we'll hear from Ms. Cooper.

8 MS. COOPER: Good afternoon. May it please  
9 the Court. I'm Leslie Cooper with the American Civil  
10 Liberties Union representing the interveners, Support  
11 Center for Child Advocates and Philadelphia Family  
12 Pride.

13 CCS here is making an extraordinary claim,  
14 unsupported by any case law --

15 JUDGE AMBRO: Let me ask you just something I  
16 haven't asked either side. Analytically, which test do  
17 we go about? Do we -- do we resurrect, I suppose,  
18 Lemon, or do we just -- is it the endorsement test or  
19 what?

20 MS. COOPER: For our establishment clause  
21 position? Well, I think, as an initial matter, the  
22 Court doesn't need to reach the establishment clause  
23 argument that interveners have made because there is no  
24 basis for the free exercise or free speech or RFPA  
25 claims that were made. But if we want to turn to the

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1 establishment clause, I think this Court has continued  
2 to apply the Lemon test over the years, sometimes talks  
3 about endorsement, sometimes talks about the Lemon 3  
4 three prong test --

5 JUDGE AMBRO: And there's an argument that --  
6 I don't know if it's Lynch v. Donnelly or whatever is.  
7 It really just takes the second part of the Lemon test,  
8 the endorsement and just that's -- that's the law.

9 MS. COOPER: Well, and I think either way --

10 JUDGE AMBRO: So it's never been technically  
11 overruled.

12 MS. COOPER: I'm sorry?

13 JUDGE AMBRO: Lemon's never really been  
14 overruled.

15 MS. COOPER: That's right. That's right. I  
16 think that that's -- that's the way I read it. And I  
17 think that, no matter how you configure it -- again, I  
18 don't think the court needs to reach this question, but  
19 allowing the use of religious eligibility criteria in a  
20 public program, a government service, violates the  
21 establishment clause under any of those configurations.  
22 The government itself could not have religious  
23 eligibility criteria for foster families, couldn't say  
24 no gay couples because of religious objections, no  
25 Jews, no Christians --

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1 JUDGE AMBRO: Well, whatever argument is  
2 done --

3 MS. COOPER: Excuse me?

4 JUDGE AMBRO: What's being done here is  
5 forcing them to, in effect, endorse something that they  
6 don't believe in.

7 MS. COOPER: Well, nobody is being forced to  
8 endorse anything. There's no right under the free  
9 exercise clause or any other constitutional provision  
10 to a government contract to perform a government  
11 service, and to do so in according with your religious  
12 beliefs and override the policy decisions of the  
13 government that's hiring you to perform that government  
14 service.

15 JUDGE AMBRO: Well, that was a -- countered  
16 some of my questions to the other side. That was the  
17 tone of some of my questions to the other side.

18 MS. COOPER: I think so. But I do think it's  
19 important to think about the implications of their  
20 argument if accepted here. If, in fact, the right to  
21 free exercise entitles someone to a government contract  
22 to perform government services on terms that violate  
23 the government's policies just because the organization  
24 or the entity has a religious objection to complying  
25 with those policies, the consequences would be endless

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1 and staggering.

2 The government would have to abandon, not just  
3 sexual orientation nondiscrimination requirements, but  
4 any nondiscrimination requirements that any agency felt  
5 intruded on their religious beliefs. In fact, it was  
6 precisely concern about discrimination against people  
7 because of their faith, especially religious  
8 minorities, that animated a strong outpouring of amicus  
9 support for the City on the part of a very broad  
10 spectrum of faith leaders and organizations. And --

11 JUDGE RENDELL: Well, if they were going to  
12 abandon the discrimination clause -- the anti-  
13 discrimination clause, they'd have to do it across the  
14 board, wouldn't they? I mean, if they exempted CSS,  
15 then that would be a form of establishment, would it  
16 not?

17 MS. COOPER: I think if they were to say that  
18 CSS could use its religious criteria -- and in this  
19 case, it happens to be a religious-based -- religiously  
20 motivated exclusion of same-sex couples -- they've  
21 abandoned their other -- or at least some of their  
22 other religious criteria. Right. The City, if it were  
23 to allow that, it would have to allow any agency that  
24 has any religious objection to any class of people --  
25 whether Jews, Muslims, non-Christians, people who are

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1 in interracial relationships.

2 And I would say I don't even see how they could  
3 cabin it to nondiscrimination law. It seems if you  
4 have a free exercise right to opt out of a government  
5 contract requirement because it doesn't match your  
6 religious beliefs, I don't see why that wouldn't apply  
7 to any contract requirements. So, for example, here  
8 taking the child welfare context that this case arose  
9 in, if there are family reunification services that  
10 agencies provide, that would mean an agency could say,  
11 I'm not going to provide family reunification services  
12 for that child because I have a religious objection to  
13 their family of origin.

14 And we can't even really cabin it to the child  
15 welfare system. If there is an entitlement under the  
16 free exercise clause to dictate the terms of a  
17 government contract if you're a faith-based  
18 organization, that would seem that there'd be no line  
19 to draw to limit that to the circumstances of this  
20 case. We -- interveners have been talking about these  
21 extensive implications since the district court, and  
22 CSS still has not said whether it believes that  
23 government contractors with religious objections to  
24 complying with other nondiscrimination requirements  
25 should get the same -- or any other requirement --

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1 should get the same treatment it seeks for itself: a  
2 right to opt out.

3           They have offered no basis to cabin the legal  
4 argument to the circumstances of the case. The only  
5 thing they've said about that, in their reply brief, I  
6 believe was that "We've identified various harms, but  
7 they have not occurred, despite the fact that many  
8 states have RFPAs and laws specifically allowing child  
9 welfare providers to discriminate based on religious  
10 beliefs."

11           Well, no court anywhere in this country has  
12 ever held that any RFAA authorizes faith-based agencies  
13 to opt out of government contract requirements to  
14 provide government services. We will not see the  
15 impact of such ruling -- or such a rule of law on the  
16 ground unless their extraordinary interpretation of the  
17 right to free exercise of religion were accepted by a  
18 court.

19           And to be sure, in states that have authorized  
20 religiously motivated discrimination by  
21 state-contracted child-placing agencies, as we discuss  
22 in our brief, a number of those agencies are not just  
23 limiting eligibility to heterosexual couples; they are  
24 limiting eligibility to people of their own faith,  
25 Christians or a certain form of Christians.

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1           So the implications -- there's really no way  
2 to give the relief to CSS that it's seeking without  
3 opening a door to allowing any kind of government  
4 contractor to opt out of any government contract  
5 requirement in the provision of a public service. And  
6 that's what makes the case, I think, so extreme in this  
7 context, that we're talking about the City providing  
8 child welfare services to wards of the City, children  
9 the City has an obligation to care for because the City  
10 has removed them from their families because they  
11 couldn't remain safely there.

12           The City has made the reasoned determination  
13 that it's good for these children to have all good  
14 families that can care for them, take care of them.  
15 And they have a need for families to take care of them.  
16 There is nothing about the free exercise clause that  
17 requires the City to be forced to abandon that very  
18 critical child welfare policy judgement and allow  
19 agencies to turn away qualified families.

20           There's nothing in the free exercise clause or  
21 Pennsylvania RFPA that gives anyone a right to a  
22 taxpayer-funded contract to provide that government  
23 service. And the Supreme Court has made clear, in  
24 cases like Rust, and Locke v. Davey, that there's just  
25 no right to government funding of a constitutionally

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1 protected activity.

2 And the only cases that have addressed claims,  
3 anything like the one CSS is making here, are the Sixth  
4 Circuit decision in Teen Ranch and more recently, a  
5 federal district court decision in Dumont, in Michigan,  
6 where those courts clearly rejected the idea that  
7 faith-based agencies can opt out of government contract  
8 requirements or are entitled to a contract that meets  
9 their religious standards.

10 And I want to say just a few comments about  
11 the CSS argument that it's -- you know, you can't  
12 provide foster care without a City contract; therefore,  
13 their ministry is effectively being extinguished is the  
14 way they put it. I think this is a remarkable argument  
15 because I think they're saying, if an organization says  
16 we have a religious belief that we need to provide a  
17 particular service that is only -- one the government  
18 provides, that we have to be given the right to do  
19 that, even if we're unwilling to follow the policy  
20 decisions of the government and violate those policy --  
21 the government policies just to accommodate our  
22 religious beliefs. If somebody had a religious belief  
23 that they need to provide firefighting or police  
24 services, I just don't think there would be a right to  
25 provide that services in violation of the police

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1 department's policies or the fire department's  
2 policies.

3 And again, when we're talking about wards of  
4 the state, the City cannot be required -- and the free  
5 exercise clause certainly does not require that the  
6 City has to surrender child welfare policy judgements  
7 it has made about how to properly care for wards of the  
8 City to accommodate an agency's religious beliefs that  
9 it wants to provide care for them.

10 I do want to talk a little bit about the claim  
11 of religious targeting, because it felt like, in CSS'  
12 argument, that perhaps they were accepting that absent  
13 a claim of anti-religious targeting, their claim would  
14 not survive, that there is just no free exercise right  
15 freestanding to get a government contract that lets you  
16 provide government services how your religion would do  
17 so.

18 The targeting -- I think the district court  
19 found, based on a very clear record, that it makes no  
20 sense to say, as CSS claims, that the City decided to  
21 close intake, and decided not to offer a new contract,  
22 in order to punish CSS for its religious beliefs about  
23 same-sex marriage. It makes no sense because the City  
24 has long known about CSS' religious beliefs about  
25 marriage, and that never stopped the City from

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1 partnering with CSS, and they continue to provide  
2 something to the tune of \$17 million of contract child  
3 welfare services with CSS to this day.

4 The City did not close foster care intake to  
5 CSS when it learned of CSS' religious beliefs. It  
6 closed intake when it learned that CSS is unwilling to  
7 comply with its child welfare policy of not turning  
8 away families based on any protective characteristics.

9 JUDGE AMBRO: Anything to sum up?

10 MS. COOPER: Excuse me?

11 JUDGE AMBRO: Anything to sum up?

12 MS. COOPER: I want to say one small thing  
13 about something made on the establishment clause. And  
14 again, I don't think there is any reason for the Court  
15 to reach that. But the private-choice argument that  
16 the other side has articulated -- you know, this is  
17 nothing like Zelman or the vouchers cases involving  
18 private choice. This is the opposite of private choice  
19 because this is government services for children, who  
20 have no choice in the matter. They don't get to raise  
21 their hand and say, I want to make sure that -- I want  
22 -- that all the decisions are made based on our  
23 interests, not the agency's religious beliefs.

24 But even if you focus on the prospective  
25 families, unlike in Zelman and the other cases about

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1 private choice that they cited, you can't say here  
2 there's no harm because families have private choice.  
3 Here, it's the opposite. They don't have private  
4 choice. Same-sex couples can't choose to go to any  
5 agency. And even if these agencies were all fungible,  
6 right, that would be a harm, that some set of people  
7 get a choice of 30 agencies; another class of people  
8 gets fewer. Imagine if Christians get 30; Jews,  
9 Muslims, everyone else gets some fewer amount,  
10 etcetera. That would be a harm in and of itself, even  
11 if they were fungible.

12 But they're not fungible, as CSS is the first  
13 to point out. They have different services they offer  
14 families. They have different expertise with respect  
15 to the care of populations of children. So that means  
16 that if -- you know, for example, medically needy  
17 children -- if a family headed by a same-sex couple  
18 would like to care for a medically needy child, and if  
19 the City were to accede to CSS' demands and allow any  
20 agency that wants to discriminate, to do so, that  
21 family may no longer be able to go to the agency that  
22 would make sense for the circumstances. That means  
23 fewer families, potentially, for children.

24 So the City -- it sort of pivots to the City's  
25 very compelling interests here. There's no reason to

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1 get to strict scrutiny, but even if the Court needed to  
2 for any reason, the compelling interest in eradicating  
3 discrimination -- Supreme Court recognized in Masterpiece  
4 -- that that harm of discrimination is no less when the  
5 discrimination is based on sexual orientation. And the  
6 children having the City's compelling interest in  
7 making sure that families are not turned away --

8 JUDGE AMBRO: Okay.

9 MS. COOPER: -- for reasons unrelated --

10 JUDGE AMBRO: Assuming that is a compelling  
11 interest, is this the most narrow to attack it?

12 MS. COOPER: Absolutely, because the -- it --  
13 what -- the idea of referring to other agencies or  
14 pointing out, as CSS does, that there are other  
15 agencies that don't discriminate, even assuming the  
16 number of agencies that don't discriminate were to  
17 remain the same if the City were to authorize  
18 discrimination -- and we have no idea what that would  
19 look like -- but even so, the -- to say go to another  
20 agency -- I think that Ms. Istvan, you know, addressed  
21 that well -- it was -- it's never been an answer in our  
22 tradition -- legal tradition to say that discrimination  
23 is okay, as long as you can be -- you know, there are  
24 other venues that won't discriminate against you.

25 And by referring politely, it doesn't make a

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1 difference. If a restaurant owner who discriminated  
2 against African Americans politely said, "I can't serve  
3 you, but there are restaurants down the block that  
4 would," the humiliation and degradation that come --

5 JUDGE AMBRO: But the question is: Is this  
6 really a public accommodation?

7 MS. COOPER: Well, I think it doesn't matter  
8 if this is a public accommodation. I think it is,  
9 under the terms of the public accommodation ordinance  
10 in the City of Philadelphia. I don't see how you could  
11 say it's not. And the argument that it's not a public  
12 accommodation because race and disability can be  
13 considered in making individual placement decisions --  
14 you know, that falls apart because that is not -- that  
15 doesn't go to the interest in protecting against  
16 discrimination. Those are considerations that go to  
17 making best-interest determinations for each child.

18 In fact, the Americans with Disabilities Act  
19 public accommodation provision applies to foster care  
20 services. And the Middle District of Pennsylvania in Doe  
21 v. County of Centre recognized that that applies to the  
22 foster care system. But it doesn't matter if it's a  
23 public accommodation. Even if the CSS -- they say they  
24 didn't understand that provision to apply to it, the  
25 City clearly always did, and has clarified their

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1 contracts to that effect. But even if there were never  
2 a provision, once the City learned that there were two  
3 agencies, now just one, who were unwilling to accept a  
4 class of families, prospective foster families, based  
5 on a characteristic that has nothing to do with the  
6 ability to care for a child, they were not required to  
7 continue to contract with that agency and let them turn  
8 away good families.

9 If they had learned an agency was turning away  
10 Republicans or Catholics or interracial couples, I  
11 don't think anybody would question that this was -- or  
12 assume this was anti-religious targeting to say, hey,  
13 wait a minute. We hired you to find families for  
14 children who desperately need them. If you're  
15 unwilling to accept all qualified families we -- I'm  
16 sorry, we can't continue to contract with you.

17 JUDGE AMBRO: Thank you very much.

18 MS. COOPER: Thank you.

19 JUDGE AMBRO: Ms. Windham?

20 MS. WINDHAM: Prior to this case arising, the  
21 standard practice was that referrals happened all the  
22 time. Ms. Simms-Bush and Mr. Amato testified to that  
23 at the hearing. Deputy Commissioner Ali acknowledged  
24 that in some circumstances, such as medical or  
25 specialized behavioral health, that referrals were, in

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1 fact, appropriate. And so the City, on its own  
2 website, told foster families to find the agency that  
3 is the best fit for you because agencies can have  
4 different requirements. You can see that at appendix,  
5 page 1017.

6 So the City has never had a policy that  
7 referrals are somehow unimportant or not prohibited.  
8 It has told families to find the agency that's the best  
9 fit for you.

10 JUDGE AMBRO: Let's go back to an area that  
11 you talked about, and you got a number of questions,  
12 especially from Judge Rendell. How is the City  
13 requiring Catholic Social Services to change its views  
14 on gay marriage in order to receive a contract? Isn't  
15 it really saying that you can't discrimination in the  
16 performance of carrying out that contract?

17 MS. WINDHAM: Your Honor, the City  
18 acknowledged at the hearing -- Commissioner Figueroa  
19 testified that the City has nothing to do with home  
20 studies. This is at the appendix, page 532 to 33.

21 JUDGE AMBRO: But how is Commissioner Figueroa  
22 or anyone in the City asking CSS to change its views on  
23 gay marriage?

24 MS. WINDHAM: What -- what the City is asking  
25 Catholic to do is to take an action and make a written

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1 certification, which is inconsistent with Catholic's  
2 religious beliefs. I'm not aware of any precedent out  
3 there that says it's okay for the government to  
4 restrict your religious exercise and burden your  
5 religious exercise pursuant to a non-neutral, non-  
6 generally applicable law as long as you say, okay, it's  
7 just because the government made me do it.

8 JUDGE AMBRO: But the flip of that, is there  
9 anything more simple, direct, plain vanilla than you  
10 shall not discriminate in the performance of carrying out  
11 a contract?

12 MS. WINDHAM: Your Honor, that's not what the  
13 contract says. The contract says with regard to race,  
14 national origin, and religion, you shall not  
15 discriminate. You can see this in 15.1 of the  
16 contract.

17 JUDGE AMBRO: And also sexual orientation.

18 MS. WINDHAM: No, Your Honor. With regard to  
19 sexual orientation, disability, and a whole host of  
20 other protected classes, it says that you must abide by  
21 the Fair Practices Ordinance, and we  
22 get into the question of public accommodation.

23 JUDGE AMBRO: What does the FPO say?

24 MS. WINDHAM: I'm sorry?

25 JUDGE AMBRO: And what does the FPO say, Fair

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1 Practices Ordinance.

2 MS. WINDHAM: The Fair Practices Ordinance  
3 says that if you are public accommodation, then you may  
4 not discriminate in the public accommodation on -- on  
5 sexual orientation or other protected classes.

6 JUDGE AMBRO: Does it make any difference if  
7 this is or is not a public accommodation?

8 MS. WINDHAM: Your Honor, I believe --

9 JUDGE AMBRO: Because we're going forward, and  
10 my understanding is the next 29 contracts are going to  
11 have -- have a nondiscrimination provision in them; is  
12 that correct?

13 MS. WINDHAM: That's what the City has said.  
14 With regard to whatever the City wants to insert in the  
15 contract, now, they have made clear -- and you can see  
16 this in the May 7th letter, page 860 of the appendix --  
17 that they are changing the language across the board in  
18 order to make it impossible for Catholic to continue  
19 contracting with the City. This is a poison pill that  
20 is put into the contract to ensure that a particular  
21 religious exercise by a particular religious group is  
22 impermissible.

23 JUDGE AMBRO: Nondiscrimination is a poison  
24 pill is what you're saying?

25 MS. WINDHAM: I am saying that the way the

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1 City has gone about this here, they have made it clear  
2 that the reason for changing their contracts is to  
3 target and prohibit a particular religious exercise.

4 JUDGE AMBRO: Well, it hasn't stopped Bethany  
5 Christian.

6 MS. WINDHAM: And Bethany Christian was  
7 willing to change its practice in regard to City  
8 pressure. That says nothing about the religious  
9 practices and the religious beliefs of Catholic and  
10 whether Catholic can then -- would be violating its own  
11 faith by changing its ways, by creating this policy in  
12 order to appease the City.

13 What the City is talking about here with  
14 regard to Commissioner Figueroa -- and I would  
15 emphasize it's not just Commissioner Figueroa's  
16 statements we're talking about. But what the City is  
17 talking about here is a situation where a City official  
18 calls a religious group into her office, calls some  
19 leaders from the religious group into their office;  
20 tells her you're really getting it wrong. You don't  
21 understand how to interpret your faith. Let me tell  
22 you how. And then when they refuse, when they get it  
23 wrong, backing that up with penalties.

24 JUDGE AMBRO: This was a meeting, right; this  
25 was not a public hearing, right?

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1 MS. WINDHAM: This was a meeting and not a  
2 public hearing.

3 JUDGE RENDELL: But then, if she had targeted  
4 them for different treatment, that would be one thing.  
5 But there was no targeting here for different  
6 treatment. It was abide by -- we want you to abide by  
7 what everybody else is abiding by, and is trying to  
8 persuade them to indeed fall in line with the generally  
9 applicable law as compared to other cases where the  
10 conduct -- the speech has led them to target an act in  
11 a way that targets religion.

12 MS. WINDHAM: The government is expressly  
13 changing its contracts and adding these provisions to  
14 specifically prohibit Catholic's religious practice.

15 JUDGE RENDELL: Well, it's to apply  
16 nondiscrimination provisions to everybody.

17 MS. WINDHAM: Which acknowledges that they  
18 didn't apply to everyone before. That there was some  
19 sort of gap, and now they're trying to cover that over.  
20 They're doing that in a way that's targeting.

21 JUDGE RENDELL: But are you saying now that,  
22 in light of the civil rights movement and other  
23 movements in society, that when a city determines that  
24 new policies are needed to address changing situations,  
25 that -- that they can't do that?

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1 MS. WINDHAM: Not at all, Your Honor.

2 JUDGE RENDELL: This wasn't to address  
3 religion. It was to address different relationships  
4 and different marital customs, which, you know, we've  
5 come to -- come to recognize.

6 MS. WINDHAM: What the City is doing here is  
7 specifically addressing a particular religious  
8 practice.

9 JUDGE RENDELL: Really?

10 MS. WINDHAM: The arguments that I'm hearing  
11 --

12 JUDGE RENDELL: Really?

13 MS. WINDHAM: Yes, Your Honor. Because  
14 they're changing their contract to specifically  
15 prohibit Catholic's religious practice.

16 JUDGE RENDELL: But not just vis-à-vis you,  
17 vis-à-vis everyone.

18 MS. WINDHAM: Yes. And I'm not aware --

19 JUDGE RENDELL: That's not a religious  
20 practice. It has to do with a type of a marital or  
21 cohabiting relationship; does it not?

22 MS. WINDHAM: And yet they're changing it  
23 across the board in order to make it impossible for  
24 Catholic to continue its religious practice.

25 JUDGE RENDELL: What is -- what is it that

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1 says they're doing it in order to prevent Catholic from  
2 having a service? What is it that says they're  
3 changing in order to do that?

4 MS. WINDHAM: The City said in their May 7th  
5 letter to Catholic Social Services -- they argued that  
6 this was something that was impermissible under the  
7 contract, but they said any future contracts will be  
8 explicit in this regard. They're changing the contract  
9 in order to address and to prohibit a particular  
10 religious exercise.

11 With regard to Masterpiece, I heard the  
12 argument here that -- that it was determinative that  
13 there -- the determinations, they were not neutral and  
14 generally applicable. It was not, in fact,  
15 determinative. The Supreme Court rested its  
16 determination there on religious targeting.

17 What the government --

18 JUDGE AMBRO: Go ahead, Tony.

19 JUDGE SCIRICA: Yeah. I have a question, and  
20 you can tell me if I'm wrong. But I thought the City  
21 had viewed sexual orientation as a protected class for  
22 nondiscrimination purposes since 1982 and has required  
23 all City contracts since 2010 to prohibit sexual  
24 orientation discrimination. Am I right on the timing  
25 of that?

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1 MS. WINDHAM: So they have -- they have added  
2 sexual orientation discrimination to their public Fair  
3 Practices Ordinance in 1982. In 2010 they added a City  
4 charter provision in 8-200 regarding sexual orientation  
5 discrimination. That provision actually does not apply  
6 here. You can see that on page 1057 of the record  
7 saying that this is a professional -- a professional  
8 services contract, not subject to the lowest  
9 responsible bidder requirements of Section 8-200 of the  
10 charter.

11 JUDGE RENDELL: So following on Judge Scirica  
12 looking at the dates, how can you say that they're  
13 changing the contract now in order to prevent Catholic  
14 if it's been changed and in effect for years?

15 MS. WINDHAM: Because the City has  
16 acknowledged that it is -- the City said we're changing  
17 the contract. The City said any future contracts will  
18 be explicit in this regard and with regard to the prior  
19 contract. They are trying to enforce it that burdens  
20 Catholic's religious exercise.

21 JUDGE AMBRO: Sounds like the policy before  
22 they hadn't completely gone through, making sure that,  
23 that policy was implemented in every contract, and now  
24 they're going to make sure that's done.

25 MS. WINDHAM: And they are doing that in

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1 respond to a particular practice and to target a  
2 particular religious exercise.

3 With regard -- I want to turn here for a  
4 moment to the RFPA argument, which was discussed some.  
5 In a similar federal statute the Supreme Court said  
6 this is the cry of bureaucrats everywhere. If I have  
7 to make an exception for you, I have to make an  
8 exception for everybody, therefore, no exceptions.

9 The Supreme Court ruled against that 8 to 0 in  
10 the Gonzales v. UDV case. And so the Supreme Court has  
11 acknowledged that laws like RFPA -- that laws like RFPA  
12 can protect religious exercise and that the importance  
13 of those laws is a case by case determination of  
14 weighing the burdens on religious exercise and then the  
15 government's supposed compelling interests.

16 JUDGE RENDELL: But in Pennsylvania, the view  
17 of what religious activity actually constitutes  
18 religious exercise is extremely narrow; is it not?

19 MS. WINDHAM: It's a little bit higher than  
20 under federal law, but we're talking about a situation  
21 where a particular religious ministry would have to be  
22 entirely shut down. We're talking about a situation  
23 where foster parents who testified that they would be  
24 devastated, and they would struggle to continue to  
25 carry out their religious calling.

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1 JUDGE RENDELL: But if daycare is not a  
2 fundamental exercise to the Catholic faith, it probably  
3 wouldn't pass muster, would it? I mean, really.

4 MS. WINDHAM: Your Honor, the Supreme Court in  
5 Smith has said that it does not engage in centrality or  
6 fundamental considerations of which --

7 JUDGE RENDELL: No.

8 MS. WINDHAM: -- religious exercise --

9 JUDGE RENDELL: (Indiscernible) Supreme Court.

10 MS. WINDHAM: Under Pennsylvania law, I  
11 believe that this would qualify as -- as a religious  
12 exercise. If the Court were to rule that this were not  
13 fundamental, I believe that, that is contrary to both  
14 the facts of this case, showing Catholic's 100 years of  
15 serving foster children in Philadelphia, showing the  
16 sacrifices and the work done by the foster parents,  
17 something that even the district court acknowledged.

18 JUDGE SCIRICA: All of that is very  
19 commendable, and we understand that. But I thought the  
20 Pennsylvania Supreme Court talked about daycare  
21 services and said they were not fundamental to -- to  
22 the religious doctrine. Why would that -- if I'm right  
23 about that, why -- why wouldn't that apply here?

24 MS. WINDHAM: The Ridley Park Methodist case  
25 is actually very interesting in comparison to here.

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1 What happened in that case was the church was renting  
2 out space to a secular daycare, and it tried to get a  
3 zoning exemption, found out it couldn't, and then  
4 transformed the secular daycare into a religious  
5 daycare and said now this is our religious exercise.  
6 And the Pennsylvania -- I forget if it was the Supreme  
7 Court or the appeals court said, no, that does not  
8 qualify. That stands in stark contrast to the century  
9 of service we have here, and I think it also answers  
10 some of the concerns that the City has raised with  
11 regard to RFPA.

12 This is not a situation where somebody has  
13 walked in the door and said I want a contract; here is  
14 my list of demands. This is a situation where a  
15 longstanding service to the children of Philadelphia is  
16 about to be shut off over an unnecessary concern and  
17 over unnecessary religious targeting, when that simply  
18 could continue.

19 Government contracts are not a get-out-of-the-  
20 Constitution-free card. The Supreme Court recognized  
21 this with Trinity Lutheran, a grant program. It  
22 recognized this in Umbehr. This Court  
23 recognized this in the Allied Contractors of Eastern  
24 Pennsylvania case, and this Court is going to be  
25 considering that again tomorrow when the City of

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1 Philadelphia is arguing that the government cannot  
2 impose unconstitutional conditions, even on a  
3 government grant program.

4 And so even in that context, the Court must  
5 consider and the City must consider what its  
6 obligations are under the free exercise clause, under  
7 RFPA, under the establishment clause, and under the  
8 free speech clause.

9 With regard to free speech, the City has said  
10 that this is under the contract, but at the hearing,  
11 Commissioner Figueroa said we had nothing  
12 to do with home studies. Before the Supreme Court in  
13 their brief there, the City conceded that  
14 certifications and home studies are not expressly  
15 funded under the contract because CSS' compensation is  
16 based on the number of children in its care rather than  
17 on the number of home studies performed. And three  
18 justices of the Supreme Court thought that we had an  
19 indisputably clear right to relief and would have given  
20 us relief on that point -- or on that motion.

21 The City also has no minimum number of home  
22 studies that has to be performed in the contract. They  
23 do not put guidelines in the contract of how home  
24 studies are to be performed. This is carried out under  
25 state law.

**APPEAL PANEL HEARING**

1           And so the City's attempt now to change its  
2 program to subsume the conduct that they want to reach  
3 out and prohibit is a violation of AOSI where the  
4 Supreme Court recognized that you cannot change the  
5 definition of a particular program or manipulate it to  
6 subsume the challenged condition.

7           JUDGE AMBRO: It's still carried out under  
8 state law no matter what, right?

9           MS. WINDHAM: I'm sorry?

10          JUDGE AMBRO: It's still carried out, the  
11 report, under -- under state law criteria; is that  
12 correct?

13          MS. WINDHAM: It is carried out under --  
14 under, yes, criteria that are laid out in Pennsylvania  
15 state law.

16          JUDGE AMBRO: Anything you want to do to sum  
17 up?

18          MS. WINDHAM: Yes, Your Honor. We've heard a  
19 lot today about exactly what precedent that this could  
20 set, and I do want to finish by asking the Court what  
21 precedent it does want to set. Whether it wants to set  
22 a precedent that accepting the interveners' arguments,  
23 it would be impossible for states nationwide to be able  
24 to contract with religious agencies, even if they want  
25 to do so, if those agencies have religious

**APPEAL PANEL HEARING**

1 requirements.

2 Whether this Court wants to set a precedent  
3 saying it's okay for government officials to tell faith  
4 groups how to interpret their faith and then to  
5 penalize them when they get it wrong, to say it's okay  
6 for the executive to tweet out whatever he wants and  
7 then penalize religious organizations and call for an  
8 investigation, ignoring due process procedures, and  
9 that, that's okay.

10 Whether it's okay for the legislative branch  
11 to target particular religious groups and call for  
12 penalties on them and then for the agencies to carry  
13 that out. That is what is at stake in this case.

14 And for those reasons and all those foregoing,  
15 we ask that this Court reverse the decision below and  
16 enter an order directing the district court to grant  
17 the preliminary injunction.

18 JUDGE AMBRO: All right. Thank you.

19 MS. WINDHAM: Thank you.

20 JUDGE AMBRO: Thank you to all counsel.

21 Extremely well presented, briefs and argument. You're  
22 all to be congratulated. It's a privilege to have you  
23 here.

24 I would ask that if you would get together and  
25 have a transcript prepared of the oral argument and to

**APPEAL PANEL HEARING**

1 split it evenly 50/50, that side and that side.

2 And again, thank you for being with us today.

3 MS. ISTVAN: Thank you, Your Honor.

4 (HEARING CONCLUDED)

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**APPEAL PANEL HEARING**

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CERTIFICATE OF TRANSCRIPTIONIST

I certify that the foregoing is a true and accurate transcript of the digital recording provided to me in this matter.

I do further certify that I am neither a relative, nor employee, nor attorney of any of the parties to this action, and that I am not financially interested in the action.



Julie Thompson, CET-1036

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Docket No. 18-2574

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SHARONELL FULTON, et al., Appellants,  
v.  
THE CITY OF PHILADELPHIA, et al., Appellees

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Certification of Accuracy

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In my capacity as Liaison Counsel, I hereby certify on behalf of all counsel  
in this matter that the attached transcript is complete and accurate.

By: /s/ Jane Lovitch Istvan

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