No. 18-2574

United States Court of Appeals for the Third Circuit

SHARONELL FULTON, ET AL.,

Plaintiffs-Appellants,

V.

CITY OF PHILADELPHIA, ET AL.,

Defendants-Appellees.

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

Emergency Motion of Sharonell Fulton, Cecilia Paul, Toni-Lynn Simms-Busch, and Catholic Social Services for Fed. R. App. P. 8 Injunction Pending Appeal

NICHOLAS M. CENTRELLA
Conrad O'Brien PC
1500 Market Street, Suite 3900
Philadelphia, PA 19102-2100
(215) 864-8098
ncentrella@conradobrien.com

MARK L. RIENZI
LORI H. WINDHAM
STEPHANIE BARCLAY
NICHOLAS R. REAVES
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketlaw.org

Counsel for Plaintiffs-Appellants

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 18-2574

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

v.

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

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Catholic Social Services makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: N/A

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

N/A

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s Mark Rienzi
(Signature of Counsel or Party)

Dated: 7/16/2018

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EMERGENCY MOTION FOR ENTRY OF AN INJUNCTION PENDING APPEAL UNDER FED. R. APP. P. 8

Appellants Sharonell Fulton, Toni Simms-Busch, Cecelia Paul, and Catholic Social Services ("Catholic") (collectively, "Appellants") respectfully move for an emergency injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8. On July 13, 2018, the District Court denied Appellant's motion for a temporary restraining order and preliminary injunction.

Appellants immediately moved for an injunction pending appeal before the District Court, which has not yet ruled. Given the immediacy of the harm and the ongoing violation of the First Amendment, Appellants believe that awaiting a ruling on that motion would be "impracticable." *See* Fed. R. App. P. 8(a); *see also Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (not requiring the filing of a motion for injunction in the district court due to the "immediacy of the problem and the district court's legal error concerning the First Amendment").

Absent an injunction ordering Appellees (together, "the City") to maintain the status quo that has prevailed for 50 years, Catholic's

foster care program will close within months, harming foster children and families.

Accordingly, Appellants request an order by August 2, enjoining the City to:

- Continue operating and resume normal operations under Catholic's July 1, 2017 Contract, including making foster care referrals to families certified by Catholic; and
- refrain from conditioning foster care referrals or future contracts on Catholic providing written certifications in home studies that violate Catholic's religious beliefs, or from otherwise penalizing Appellants during this appeal.

Appellants have also notified the City of this motion.

INTRODUCTION

Philadelphia is shutting down Catholic's foster care program, which the District Court found "has benefitted Philadelphia's children in immeasurable ways." Appx.1. Without an injunction from this Court, Catholic's program will be forced to close, award-winning foster families like Appellant Mrs. Paul's will have their homes sit empty, and children

will be kept from loving homes or removed from current homes, all before Appellants can litigate their case.

The City has excluded Catholic and its families from foster care because the City disagrees with the Catholic Church's views about same-sex marriage. Same-sex unions have been recognized in Philadelphia for two decades, and the City is unaware of a single person who has been hurt by Catholic's views. But the City is closing Catholic's program over a hypothetical question: whether the Catholic Church *could* endorse same-sex unions in writing, *if* a same-sex couple approached a Catholic agency seeking its written opinion on their family relationships.

Philadelphia cannot demand that religious groups parrot the City's views as a pre-condition to serving foster children. And it cannot retaliate against Catholic's views by shutting Catholic down. On these grounds alone, the City's inquisition is impermissible under the Free Exercise and Speech clauses of the First Amendment.

Worse yet, the City engaged in unabashed religious targeting. The City admittedly investigated only *religious* foster agencies. Then it punished Catholic for violating supposed policies it has never

announced, much less applied, to secular agencies. The Mayor, City Council, Human Relations Commission, and Department of Human Services (DHS) all targeted Catholic. The City told Catholic to change its religious practices because it is "not 100 years ago" and "times have changed."

All this would be flagrantly unconstitutional *even if* the City could point to someone who had been harmed by Catholic. But it cannot. The prior "live-and-let-live" status quo—in which same-sex couples are free to become foster parents with dozens of willing agencies and Catholic is free to provide foster services without violating its faith—is not acceptable to the City. Rather than permit respectful disagreement on deeply important issues, the City moved to eliminate Catholic's foster program unless Catholic embraced the City's views on same-sex marriage. That is anathema to our pluralistic democracy and forbidden by the First Amendment.

This Court's intervention is necessary to ensure that Catholic's foster program lasts long enough to litigate this case and continue serving children in need.

FACTUAL BACKGROUND

Catholic's foster program. For over a century, the Catholic Church has been caring for foster children in Philadelphia, long before the City's involvement in foster care.[1] Beginning in the mid-twentieth-century, however, the City began requiring foster agencies to contract with the City.[2] Today, "you would be breaking the law if you tried to provide foster-care services without a contract."[3] Catholic has always provided foster care services as a "religious ministry"[4] consistent with its religious beliefs, and its contract makes clear that it operates according to its religious mission.[5]

Home studies and certifications. Foster agencies work with foster families approved by that agency after a home study and written certification. "[T]he home study is a written evaluation" of the

[1] Appx.222-225, 227. All documents cited in the Appendix were either attached to declarations submitted to the District Court or were admitted as evidence during the preliminary injunction hearing.
[2] Appx.226-27.
[3] Appx.227.
[4] Appx.222-24, Appx.228-29; Appx.66.
[5] Appx.197-98; Appx.111; Appx.113.

"relationships" in the potential foster home.[6] State law mandates that the foster agency "shall consider" and evaluate "existing family relationships" and the "[a]bility of the applicant to work in partnership" with an agency, which results in a "decision to approve, disapprove or provisionally approve the foster family." 55 Pa. Code §§ 3700.64, 3700.69. Catholic has certified and supported many foster parents, including the individual Appellants—each of whom serves because of their religious beliefs.[7]

The City has "nothing to do" with home studies and certifications. Until March 2018, the City's contract requirements did not interfere with Catholic's religious exercise of providing "foster care services consistent with [its] religious beliefs."[8] The City has renewed Catholic's contract annually for decades, and frequently operates under the prior year's contract for several months post-expiration.[9] The contract emphasizes Catholic's independence: Catholic "shall not in any

[6] Appx.229-30.
[7] Appx.189, Appx.192; Appx.183-85; Appx.176-77; Appx.182.
[8] Appx.257.
[9] Appx.246-47; Appx.309; Appx.145-49.

way or for any purpose be deemed or intended to be an employee or agent of the City."[10]

In particular, the City admits it has "nothing to do"[11] with home studies—a process that occurs under State law and for which the contract provides no payment.[12] The City instead tells prospective foster parents that agencies can have "different requirements" and that they should seek out the agency that is "the best fit" for them.[13]

Referrals. Foster agencies routinely refer potential applicants to other agencies for a variety of reasons. "[R]eferrals were done all the time,"[14] and are permitted for geographic proximity, medical expertise, behavioral expertise,[15] specialization in pregnant youth,[16] and language needs.[17] Some agencies "specialize in servicing kin care" (foster placements with extended family or friends) and advertise that they

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[10] Appx.118.
[11] Appx.285-86.
[12] Appx.257; Appx.285-86.
[13] Appx.109
[14] Appx.221; Appx.235; Appx.169-71; Appx.172-173.
[15] Appx.233; Appx.172-74; Appx.195-96; Appx.201-02.
[16] Appx.165-66.
[17] Appx.200; *see also* Appx.202-05.

exclusively serve that population.[18] The City acknowledged that agencies sometimes refer rather than perform a home study.[19]

The hypothetical religious dispute. No same-sex couple has ever approached Catholic seeking its written endorsement to become foster parents.[20] Nor is there any evidence that Catholic's religious beliefs stopped, or even discouraged, *anyone* from becoming a foster parent.[21] But in March, DHS Commissioner Figueroa called "faith-based institutions . . . to ask them their position regarding serving same-sex couples."[22] Figueroa contacted only one non-religious organization, since she was friends with its CEO.[23] She still has not called any other non-religious agencies to inquire about their practices or tell them to conform to the policies being applied to Catholic.[24]

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[18] Appx.234-35; Appx.127.
[19] Appx.200-02.
[20] Appx.231.
[21] Appx.268.
[22] Appx.258-59; *see also* Appx.236.
[23] Appx.297-98.
[24] Appx.297-98.

Catholic's religious beliefs include the belief "that a marriage is a sacred bond between a man and a woman."[25] "[T]o provide a written certification endorsing a same-sex marriage" would "violate the religious exercise of Catholic Social Services."[26] Catholic believes that the written certification pursuant to a home study is an "endorsement."[27] Were a same-sex couple to approach Catholic seeking foster parent certification, Catholic would refer the couple to one of 29 nearby agencies, just as agencies refer couples elsewhere for myriad secular reasons.

The DHS headquarters meeting and adverse actions. Figueroa summoned Catholic's senior management to DHS headquarters.[28] The issue had the attention of the Mayor,[29] who has previously said he "could care less about the people at the Archdiocese," called Archbishop

[25] App. 222-24; Appx.229-31; Appx.236; Appx.262.
[26] Appx.231.
[27] Appx.257.
[28] Appx.237; Appx.298.
[29] Appx.300-01.

Chaput's actions "not Christian," and exhorted Pope Francis "to kick some ass here!"[30]

At DHS headquarters, Figueroa told Catholic it should follow the City's understanding of "the teachings of Pope Francis," *not* Archbishop Chaput.[31] When Amato noted that Catholic had been serving foster children for over 100 years, Figueroa told him "times have changed," "attitudes have changed," and it is "not 100 years ago."[32]

Minutes after the meeting, the City called to say that it was shutting down foster care intake for Catholic because of its "religious decision."[33] The City also closed Bethany Christian's intake for the same reason.[34] Under an intake shutdown, no children can be placed in the homes of families certified and supported by that foster agency.[35]

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[30] Appx.157-64 (available at https://www.phillymag.com/citified/2015/07/09/jim-kenney-catholic -archdiocese-charles-chaput/); Appx.150-56.
[31] Appx.237; Appx.298-99.
[32] Appx.238; Appx.298-99.
[33] Appx.288-89.
[34] Appx.266.
[35] Appx.263-64; Appx.69 (¶13).

DHS was not alone: HRC opened an inquiry into Catholic's practices, and City Council passed a resolution concerning "discrimination that occurs under the guise of religious freedom."[36]

The claimed violations. The City claimed Catholic violated two policies: (1) an unwritten policy that agencies must provide home studies to every applicant and (2) the public accommodations portion of the City's Fair Practices Ordinance ("FPO").

But witnesses had never heard of a policy requiring foster care agencies to perform every home study, or that referrals were inappropriate. No DHS official could identify any written version of this policy.[37] The City claimed this was in the contract, but later admitted that the identified provision (3.21) does not apply to situations where a prospective foster parent approaches Catholic independently.[38] Even the City's website states that foster agencies *can* have "different requirements."[39]

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[36] Appx.136-140; Appx.101.
[37] Appx.214-15; Appx.283-84, 288.
[38] Appx.199.
[39] Appx.109; Appx.116-17.

Nor could any witness provide any example of a situation in which—prior to this litigation—foster care was considered a public accommodation.[40] Figueroa could not recall training staff or even discussing public accommodation laws in the foster care context, nor could she recall doing "anything [as Commissioner] to make sure that people at DHS follow the Fair Practices Ordinance when doing foster care work."[41] The City acknowledged that it sometimes considers race and disability when making foster care placement decisions.[42]

Consequences of intake freeze. The City's actions have consequences for both the individual Appellants and Catholic.

First, Philadelphia has a shortage of foster homes and admits it needs to get 250 children out of group homes[43] and into the most "most family-like setting" possible, as required by state law.[44] But under the referral freeze, those children cannot be placed with Catholic's

[40] Appx.216-17; Tr., Appx.240-41; Appx.273-74, 277, 282.
[41] Appx.273-74.
[42] Appx.274-79.
[43] Appx.232; Appx.293-95.
[44] 11 Pa. Stat. Ann. § 2633(4).

families.[45] Catholic has over two dozen empty homes ready for children, including that of Mrs. Paul, a former pediatric nurse who has fostered 133 children and whom the City named a foster parent of the year.[46]

Second, due to the intake freeze, reuniting children with siblings or prior foster parents is no longer easy.[47] The City now says it will perform "individualized assessments" and grant case-by-case exceptions to its freeze, but this has not been communicated to lower-level DHS staff, requires intervention by DHS leadership, and permits children to fall through the cracks.[48] Only after Catholic sought a TRO did the City allow an autistic child to be placed with his former foster mother; similar situations continue to occur.[49]

Third, absent relief, Catholic will be forced to lay off staff within weeks and close its foster program within months.[50] Catholic has

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[45] Appx.69.
[46] Appx.245; Appx.183-85.
[47] Appx.243-44.
[48] Appx.305-08.
[49] Appx.79-82; Appx.94-100.
[50] Appx.247-248. While the City has ostensibly offered to allow Catholic to continue, that offer requires Catholic to either violate its religious beliefs or wind down. Appx.76-77; Appx.265-66.

already begun the termination process.[51] Losing experienced staff "would take years" to recover from, if at all.[52]

If Catholic closes, its foster parents must transfer or lose their current foster children, which the City admits can harm children.[53] And the individual Appellants and their children will lose support.

ARGUMENT

I. An injunction pending appeal is necessary.

Injunctions pending appeal turn on (1) likelihood of success; (2) irreparable harm; (3) balance of harms; and (4) public interest. *In re Revel AC, Inc.*, 802 F.3d 558, 565 (3d Cir. 2015). Appellants need "a reasonable chance, or probability, of winning" but the likelihood "need not be 'more likely than not.'" *Id.* at 568-69 (citation omitted). This Court also recognizes "a constitutional duty to conduct an independent examination of the record as a whole when a case presents a First Amendment claim." *Brown v. City of Pittsburgh*, 586 F.3d 263, 269 (3d Cir. 2009). Injunctions are designed to "maintain the status quo,

[51] Appx.245; Appx.79-82.
[52] Appx.248.
[53] Appx.290.

defined as the last peaceable, noncontested status of the parties." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).[54]

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

A. Appellants are likely to succeed on their claims under the Free Exercise Clause.

The City's attempt to force Catholic to provide written endorsements imposes an obvious burden on Catholic's religious exercise: if it wants to provide foster care, Catholic must violate its faith.[55] The City has violated the Free Exercise Clause in four different ways. First, through outright discrimination, which is unconstitutional *even without* resorting to strict scrutiny. *See Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). *Cf. Whole*

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[54] Appellants raised, and the District Court decided, additional claims not discussed in this motion. Appellants plan to brief those claims on appeal.

[55] "[P]ut[ting] [Appellants] to this choice" between religious exercise and penalties "easily satisfie[s]" the substantial burden test. *Holt v. Hobbs,* 135 S. Ct. 853, 862-63 (2015). The same is true of the burdens on foster parents, which the District Court agreed would be "difficult, uncertain, and emotionally challenging." Appx.60. Mrs. Paul's religious exercise of providing foster care is currently prevented altogether. Appx.185-86.

Woman's Health v. Smith, No. 18-50484, 2018 WL 3421096, at *11 (5th Cir. July 15, 2018) ("This looks like an act of intimidation.").

Further, the City's actions are subject to strict scrutiny for three independent reasons: they (1) are "not neutral," (2) "not of general application," and (3) involve "individualized, discretionary exemptions." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Blackhawk v. Pennsylvania* 381 F.3d 202, 209-10 (3d Cir. 2004) (Alito, J.). Any one would necessitate strict scrutiny; here, all three are present.

1. The City's actions target Catholic in violation of the Free Exercise Clause.

Government actions based on "impermissible hostility toward . . . sincere religious beliefs" are *per se* unconstitutional. *Masterpiece*, 138 S. Ct. at 1729. Catholic has been the target of coordinated actions by every branch of City government: City Council passed a resolution targeting "discrimination that occurs under the guise of religious freedom"[56]; the

[56] Appx.136-140. The Council's reference to the "guise" of religious freedom is evidence of targeting. *See Masterpiece*, 138 S. Ct at 1729 ("clear and impermissible hostility" where government dismissed religious freedom as "rhetoric").

Human Relations Commission opened an extra-jurisdictional inquiry and threatened subpoenas;[57] the Mayor prompted inquiries by the Commission and DHS[58]; DHS's commissioner summoned Catholic's leadership to headquarters, accused them of not following "the teachings of Pope Francis," and told them it was "not 100 years ago."[59]

The City then told Catholic that future contracts would "explicit[ly]" require written certifications for same-sex couples, and that the City "has no intention of granting an exception" to Catholic.[60] Furthermore, the City targeted its investigation to religious entities, has never enforced the alleged policies against secular agencies, informed secular agencies of the policies, or even inquired as to whether secular agencies obey them.[61] These targeted and disparaging actions "pass[] judgment upon or presuppose[] the illegitimacy of religious beliefs and practices" in violation of the First Amendment. *Masterpiece,* 138 S. Ct. at 1731; *Trinity Lutheran*, 137 S. Ct at 2019. The Court need go no further.

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[57] Appx.101. The Commission only has power to investigate complaints, *see* Phila. Code § 9-1112; but no one has complained. Appx.268-69.
[58] Appx.101; Appx.300-01.
[59] Appx.237-38; Appx.298-99.
[60] Appx.104.
[61] Appx.297-98

The District Court found no targeting because Bethany was also penalized.[62] But discriminating against *two* religious agencies rather than one hardly cures a Free Exercise violation. *See, e.g., Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (state program violated Free Exercise Clause by singling out two universities, one Christian and one Buddhist).

The District Court did not apply *Masterpiece* or *Trinity Lutheran*, instead citing an "absence of caselaw,"[63] and looking to *CLS v. Martinez*, and *Teen Ranch v. Udow*. But *Martinez* is a free speech case about the government's ability to regulate a "limited public forum" with an "all comers" policy, 561 U.S. 661, 683 (2010); *Teen Ranch* is largely an Establishment case that "boil[s] down to the single issue" of whether teens sent to the ranch had "true private choice," 389 F. Supp. 2d 827, 834-35 (W.D. Mich. 2005), *aff'd as supplemented*, 479 F.3d 403 (6th Cir. 2007). Neither case controls here, where the government targeted religious groups, seeks to foreclose religious conduct that it does not pay for, lacks any actual "all comers" policy, and prospective parents have a

[62] Appx.29, 34.
[63] Appx.23.

true private choice among 30 providers. Neither case controls over the Supreme Court's much more recent religious targeting precedents.

The Court's reliance on *Martinez* is also incompatible with *Masterpiece*'s observation that the Constitution would protect a religious decision not to perform same-sex weddings. Even though marriage is both a civil and religious act and requires a government license and government-sanctioned officiant, a decision to only perform some marriages "would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. The same is true of the Catholic Church's religious decisions regarding marriage and parenting, particularly where there is no danger of a "long list" of refusers creating "community-wide stigma," *id.*, because literally every other agency in the City provides the service.

2. The City's actions must face strict scrutiny under the Free Exercise Clause.

The City's actions are subject to strict scrutiny for three reasons.

Not neutral. The City targeted only religious agencies for investigation, applying standards that have never been applied to

secular agencies. In *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, this Court invalidated a city's "invocation of [an] often-dormant Ordinance" to prohibit conduct undertaken for religious reasons, even though it had permitted widespread violations of the ordinance. 309 F.3d 144, 153, 168 (3d Cir. 2002). Here, the City selectively enforced its "must certify" policy and the FPO against Catholic, while never applying those principles to the City's or non-religious agencies' foster work.[64]

The City admitted that it investigated only *religious* foster agencies, with a single exception: Figueroa phoned a friend.[65] The City still has not bothered to *ask* whether other secular agencies accept all applicants.[66] To compound this problem, the City is selectively enforcing its newly minted "must certify" policy, continuing to allow other agencies to decline to perform home studies for a range of secular reasons. *See supra* p. 7-8. The City's decision to shut down Catholic—

[64] Appx.215-17; Appx.240-41; Appx.273-74, 277, 282, 297-98.
[65] Appx.297 ("Q. When you did that investigation, you only contacted faith-based agencies, correct? A. That's correct.")
[66] Appx.297-98.

while not even investigating secular agencies—is textbook selective enforcement.

Worse, the City is penalizing foster parents like Mrs. Paul merely for their religious affiliation with Catholic.[67] Placements with *existing* foster parents are not implicated by the City's interests in *future* home studies. This punitive action unlawfully "proscribe[s] more religious conduct than is necessary to achieve the[] stated ends." *Lukumi,* 508 U.S. at 538.

The District Court found the City's actions neutral because the policies were not "drafted or enacted" to target religion.[68] But the "problem is not the adoption of an anti-discrimination policy; it is the implementation of the policy permitting secular exemptions but not religious ones and failing to apply the policy in an even-handed" manner. *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012). Both the "must certify" policy and the FPO's application to foster care were invented post hoc for religious agencies and have not been applied to

[67] Appx.185.
[68] Appx.27.

anyone else, ever.[69] And the City plans to condition future contracts on a requirement that agencies certify same-sex couples—a requirement admittedly added to prevent a particular religious practice.[70]

Not generally applicable. The City's actions also trigger strict scrutiny because they are not generally applicable. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999); *Blackhawk,* 381 F.3d at 209-10. The City permits agencies to make referrals for a host of secular reasons, but not for religious reasons. *Supra* at 7-8. This undermines any claimed interest the City has. Such actions "trigger strict scrutiny because at least some of the [secular] exemptions available . . . undermine the interests" the City claims to be pursuing. *Id.* at 211. Indeed, the exceptions here are so sweeping that they prove the City's interests are illusory.

The District Court held the FPO generally applicable because it applies regardless of religious motivation, and that the exemptions did not undermine the FPO. Appx.28-29, 39. First, *any* exemption undermines the purpose of the "must certify" policy, since its purpose is

[69] Appx.272-74, 297-98; Appx.215-17; Appx.240–41; Appx.172-73.
[70] Appx.105.

uniformity. Second, evidence showed that agencies refer prospective foster parents elsewhere for many reasons. Third, state law requires agencies to decline to certify couples for reasons that conflict with the FPO.

The FPO prohibits discrimination on the basis of "race"; "marital status"; "familial status"; or "disability," which includes "mental impairment."[71] But state law governing home studies *requires* subjective consideration of factors including "stable mental and emotional adjustment," possibly including a "psychological evaluation"; a family's "[s]upportive community ties"; certifications approving "[e]xisting family relationships, attitudes and expectations"; and the "[a]bility of the applicant to work in partnership with" the foster care agency.[72] Foster care home studies and certifications are not a "service . . . extended, offered [] or otherwise made available to the public,"[73]—their purpose is to be selective. None of these assessments would be remotely permissible reasons for denying someone a train ticket, a cup

[71] Phila. Code §§ 9-1102(d), 9-1106.
[72] 55 Pa. Code § 3700.64.
[73] Phila. Code § 9-1102(w).

of coffee, or any other actual public accommodation. Indeed, the City admitted to considering *race* and *disability* when making foster care placements.[74]

Thus the FPO is not even applicable—much less "*generally* applicable"—to foster care.

Discretionary exemptions. When a law gives the government discretion to grant case-by-case exemptions based on "the reasons for the relevant conduct," such a "waiver mechanism . . . create[s] a regime of individualized, discretionary exemptions that triggers strict scrutiny." *Blackhawk,* 381 F.3d at 207, 209-10. Here, the contract provision on which the City relies allows exceptions in the Commissioner's "sole discretion."[75] City officials also grant case-by-case exemptions to its intake freeze—based on "individualized assessments"—but not for Catholic's religious exercise.[76] These discretionary exemptions trigger strict scrutiny.

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[74] Appx.274-79.
[75] Appx.104; Appx.116-117.
[76] Appx.305; Appx.104

Finally, the City cannot rely upon its contract to escape the First Amendment; courts frequently apply the First Amendment to contractors, grantees, and even employees. *See, e.g., Trinity Lutheran*, 137 S. Ct. at 2018 (grantee); *Fraternal Order*, 170 F.3d at 365 (employee); *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 684 (1996) (independent contractor whose annually renewed contract was terminated); *Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006) (same).

3. The City's actions cannot pass strict scrutiny.

No compelling interest. A compelling interest is an interest "of the highest order." *Lukumi*, 508 U.S. at 546. The District Court never held that the City has a compelling interest, finding instead that the interests were only "legitimate."[77] Finding a compelling interest would be impossible, given Deputy Commissioner Ali's concession that the City's interest in requiring home studies is "no stronger or no weaker than enforcing any other policy,"[78] the City's failure to notify agencies about (much less enforce) the policy,[79] its failure to apply FPO

[77] Appx.29.
[78] Appx.213.
[79] Appx.280-81, Appx.297-98.

standards to its own or anyone else's foster care practices,[80] the City's own suggestion that agencies can have "different requirements," and controlling state law.[81] The City's actions contravene its interest in caring for children: Mrs. Paul's home and dozens of others remain empty despite the fact that 250 children currently in congregate care could move into family homes.[82] The City can have no compelling interest in contravening state law and keeping children from loving homes.

Failure to use least restrictive means. The City's chosen means—stopping placements with even existing foster families—does not further its alleged interests. The City is punishing current foster families over a dispute about hypothetical future home studies.

Further, the longstanding status quo was a tested, workable, less restrictive alternative. Allowing religious referrals the way the City allows secular referrals maximizes the number of (1) foster parents, (2) foster agencies, and (3) foster children placed in loving homes.

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[80] Appx.272-77.
[81] Appx.270, 287.
[82] Appx.128.

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

B. Appellants are likely to prevail on their Free Speech claims.

The City seeks to impose an unconstitutional condition—forced speech—on Catholic's ability to provide foster care services. The City's restriction is not limited to funding, as Catholic cannot provide foster care services to Philadelphia children *at all* without a City contract.[83] Catholic is thus unlike the libraries in *United States v. American Library Ass'n, Inc.,* 539 U.S. 194, 212, (2003) (plurality opinion) who were "free to [offer unfiltered access] without federal assistance."

Even in the funding context, however, the First Amendment circumscribes the government's ability to leverage funding to control speech. *See AOSI v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-5 (2013) (government cannot "leverage funding to regulate speech"

[83] Appx.227.

outside of the funded program).

Here, despite admitting that it has "nothing to do" with home studies (which are governed by State law and not paid for by the City), the City insists on controlling Catholic's speech. In particular, Catholic must "certify" or "approve" same-sex couples, providing "written endorsements" of such couples, regardless of Catholic's actual views.[84] Catholic is not free to disagree with the City's views on same-sex marriage and parenting: it *must* adopt the City's preferred view, in writing, or it will lose its foster program.

But the First Amendment protects speakers when governments seek to "compel[] them to voice ideas with which they disagree." *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018). It is "always demeaning" when speakers are "coerced into betraying their convictions," and forced "to endorse ideas they find objectionable." *Id.* Such laws are treated as "content-based" because they necessarily "alter[] the content" of the speaker's message. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (citation omitted).

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[84] Appx.211, Appx.250-51, Appx.271, Appx.291-92, Appx.229-30,Appx.242, Appx.76.