No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CITY RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petition presents three questions:

1. Can free-exercise plaintiffs succeed only by proving a particular type of discrimination claim—namely, that the government would allow the same conduct by someone with different religious views—or must courts consider other evidence that a law is not neutral and generally applicable?

2. Should *Employment Division v. Smith* be revisited?

3. Does the government violate the First Amendment by conditioning a religious agency's ability to voluntarily contract with the government to perform a public function on that agency's compliance with key program requirements that allegedly contradict the agency's religious beliefs?

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INTRODUCTION

The City of Philadelphia contracts with private agencies to help it fulfill its obligations to care for abused and neglected children—including, among other things, the recruiting, screening, and certification of eligible foster parents. Private foster-care agencies that choose to contract with the City are paid with taxpayer funds to perform this public function. This case concerns just one obligation of Catholic Social Services in just one of its contracts with the City: the obligation to give a fair look to every prospective foster parent who walks in the door.

For many years, the City's standard foster-care contracts have prohibited discrimination based on characteristics enumerated in the Philadelphia Fair Practices Ordinance, including race and sexual orientation. The City has never allowed contractors to turn away potential foster parents based on a protected characteristic. Although this longstanding policy applies to *all* City contractors—and although the City has long contracted with Catholic Social Services, and continues to do so for a range of other child-welfare services—CSS contends that the City's decision to enforce this policy against it reflects religious hostility. On that basis, CSS seeks a "highly unusual" remedy: "an injunction forcing the City to renew a public services contract with a particular private party," free of the nondiscrimination policy. Pet. App. 25a n.8.

The Third Circuit affirmed the district court's denial of this requested preliminary injunction. It concluded that CSS had "failed to make a persuasive showing that the City targeted it for its religious beliefs, or is motivated by ill will against its religion, rather than sincere opposition to discrimination on the basis of sexual orientation." Pet. App. 12a. And it recognized that courts may find "ostensibly neutral government action unconstitutional because it

was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct." Pet. App. 26a (citing *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). "These cases," the court observed, hold "that the government may not conceal an impermissible attack on religion behind a cloak of neutrality and general application." *Id.* "Thus, a challenger under the Free Exercise Clause must show that it was treated differently because of its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Id.*

Seizing on this last sentence and plucking it out of context, CSS tries to portray the Third Circuit's decision as announcing a new rule that a plaintiff may prevail *only* by making "one specific showing: that the government would allow the same conduct by someone who 'held different . . . views.'" Pet. 19. But this attempt is belied by the decision itself, which considered in detail all the factors that CSS says would be excluded under this supposed new rule: the history of the challenged government policy, CSS's allegation that the City's Department of Human Services allowed secular but not religious exemptions, and CSS's allegation that DHS maintained a practice of individualized exemptions. Pet. App. 32a-39a. Considering all this, the court below found that "City officials repeatedly emphasized that they respected CSS's beliefs as sincere and deeply held," and that there was no credible indication that the policy had been "gerrymandered" nor any evidence of "religious persecution or bias." Pet. App. 32a, 36a, 51a.

CSS's claimed split rests on its mischaracterization of the decision below. There is no split. No court has adopted CSS's imagined rule. And even if there were such a split, it would make no difference: The decision below already considered all the factors CSS identifies and concluded that they do not change the outcome. The parties and the court all agreed on the relevant legal rules. What CSS really seeks is factbound error correction of the Third Circuit's application of those rules.

But this case is a particularly unsuitable vehicle for such a fact-intensive inquiry. It arises from a spare and obsolete record developed over just two weeks, with no discovery, before the 2018 contract expired. The Third Circuit held that the controversy over that contract "is now moot," Pet. App. 25a, and CSS does not contend otherwise in this Court. The record tells us nothing about the parties' subsequent contract negotiations, the City's formulation of a new standard contract, or its announcement of a new committee to resolve religious objections of the kind made by CSS. Because CSS chose not go back to the district court to develop a record, the claims and defenses here would turn on contested facts that this Court would have to adjudicate in the first instance.

CSS also urges review of two concededly splitless issues. The Court should not grant certiorari to reconsider *Employment Division v. Smith*, 494 U.S. 872 (1990). This case would be an especially problematic vehicle in which to do so: It arises in the context of a government contract dispute with serious countervailing Establishment Clause implications. Nor should this Court grant consider CSS's unconstitutional-conditions theory. The City's ability to impose conditions on the receipt of City funds for City services—here, conditions on *who* may receive those public services—is well established under this Court's cases.

STATEMENT

A. Factual and legal background

Philadelphia's obligations to abused and neglected children. Pennsylvania law requires local agencies—including the City of Philadelphia, through its Department of Human Services (DHS)—to accept and assume custodial responsibility for children who have been abused or neglected. 23 Pa. Cons. Stat. § 6344(d); 55 Pa. Code § 3700.62 *et seq*. It also charges these agencies with advancing the well-being of children within their care, consistent with the best interest of each child. The Commonwealth of Pennsylvania, DHS, and a number of private foster-care agencies each play a role in the City's foster-care system.

The City has protective custody of roughly five thousand children who cannot live with their legal parents. Many of these children are placed in homes with foster parents, though some are also in "congregate care," such as group homes, institutional placements, or residential-treatment facilities. The City also provides foster care to this population partly by using taxpayer funds to contract with private community-umbrella agencies and private foster-care agencies, each of which must be licensed by Pennsylvania and is subject to child-welfare laws and regulations. *See* 23 Pa. Cons. Stat. § 6344.

The City's Department of Human Services has long contracted with Catholic Social Services (CSS)—and other religious organizations—to provide public child-welfare services. To this day, the Department works closely with CSS to provide a range of services and values its ongoing relationship with CSS. CSS serves Philadelphia's at-risk children through congregate care, as a community-umbrella agency, and through private foster care. This case concerns only CSS's obligations as a family

foster-care agency. When this litigation began, the City was paying CSS to perform that role—which encompasses, among other things, identifying and recruiting potential foster parents, as well as training and certifying them on a continuing basis. This relationship, like the City's relationships with other private foster-care agencies performing the same function, was structured through one-year contracts renewable on an annual basis. Agencies certify their continuing compliance with applicable state regulations and other terms set by the City.

Catholic Social Services' now-expired contract with the City of Philadelphia. When a prospective foster parent walks into a private foster-care agency to apply to be a foster parent, the City contract requires the agency to evaluate and assess that person for certification. The contract between the Department and CSS for FY 2018—which was substantially similar to the City's FY 2018 contracts with all other private foster-care agencies—included a provision obligating CSS "to recruit, screen, train, and provide certified resource care homes" for dependent children or youth, consistent with state law. CA3 J.A. 1033. The contract further required that CSS "obtain Certifications as required by law and by DHS policy," including for "all prospective foster parent applicants [and] all prospective adoptive parent applicants." *Id.* at 1078-79.

The Department expects each agency with whom it contracts to evaluate and assess for certification each and every prospective foster parent that wishes to work with it. To that end, its contract with CSS, like its contracts with other agencies, expressly prohibited discrimination on certain specified grounds and required compliance with the City's Fair Practices Ordinance. This ordinance precludes discrimination based, among other things, on race and sexual orientation. DHS has *never* authorized

providers to refuse to certify, let alone refuse to establish fostering relationships with, prospective parents because of their membership in any protected category, including sexual orientation. And long before this dispute arose, DHS believed that each of its foster-care providers would consider every prospective parent who requested to work with that agency.[1]

The City has good reason for applying its general ban on discrimination in this context. Excluding qualified parents based solely on their sexual orientation, DHS Commissioner Cynthia Figueroa has explained, would do a disservice to children in the foster system, unnecessarily limit the pool of available parents, and send "a very strong signal to [the LGBTQ] community that [its] rights are not protected." CA3 J.A. at 483-84. In addition, the Department's significant LGBTQ youth population would receive the message that while "[we] support you now, we won't support your rights as an adult." *Id.* at 484. In light of these and other concerns, which are reflected in many dimensions of the City's public policy, DHS does not want to discriminate "against one particular community" by "excluding" its members from becoming foster parents. *Id.* at 434, 668. Accordingly, the Department has never allowed any foster-care agency to engage in the blanket exclusion of prospective foster parents based solely on protected traits when performing a public function on behalf of the City under contract.

Catholic Social Services' policy on same-sex couples. On March 9, 2018, the Department learned from a

[1] The City adopted the Fair Practices Ordinance in 1963 and amended it in 1982 to prohibit discrimination based on sexual orientation. Today the ordinance prohibits discrimination on the basis of, among other things, race, religion, sexual orientation, gender identity, and marital status. *See* Phila. Code § 9-1100 *et seq*.

Philadelphia Inquirer reporter that two of the Department's contractor foster-care agencies—Catholic Social Services and Bethany Christian Services—had policies of categorically refusing service to same-sex couples seeking to become foster parents. This was the first that DHS had heard about such policies.

Commissioner Figueroa was immediately concerned that CSS and Bethany were at risk of violating their City contracts with DHS, and contacted the City's Law Department.[2] She also called both CSS and Bethany to determine the accuracy of the *Inquirer* report and learned from both that they refused, on religious grounds, to consider same-sex couples for certification as foster parents. Commissioner Figueroa also called other foster-care agencies to inquire about their practices, focusing on religious agencies because she understood the particular objections at issue to arise from religious belief, but also calling at least one agency that was not religiously affiliated to determine its policy. None of the other agencies she contacted had a similar policy.

Commissioner Figueroa consulted with the City's lawyers, who told her that CSS's policy would, in practice, violate the City's Fair Practices Ordinance and the services provision of their contract with the Department. Because this raised a serious legal issue that could affect CSS's ability to enter into the upcoming year's contract, DHS and CSS convened a meeting. There, CSS Secretary James Amato stated that, for religious reasons, CSS "would not move forward with a home study for a same-sex couple." Pet. App. 271a. He added that CSS had provided services to the City for over one hundred years.

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[2] After the *Inquirer* article was published, the City Council passed a resolution related to the article's claims. Pet. App. 146a-147a. The Council does not play a role in DHS contracting.

Commissioner Figueroa responded by emphasizing that this history was not conclusive: She observed that times had changed over the course of that relationship, that women and African-Americans did not have the same rights when it started, and that she herself would likely not have been in her position a century earlier. *Id.* at 305a. Commissioner Figueroa—herself a lifelong Catholic—also said something like, "it would be great if we followed the teachings of Pope Francis." *Id.* at 306a.

Ultimately, CSS made clear that it would not comply with its contractual requirement to evaluate and consider certifying same-sex couples. CSS would therefore be unable to renew its contract for providing those services. As a result, Commissioner Figueroa decided to stop placing new children with CSS while discussions over the status of the contract continued. This decision was consistent with the parties' contract, which does not require the City to make any placement referrals with particular providers. It was also consistent with Commissioner Figueroa's past practice, which has been to close intake to an agency whenever it is at risk of no longer providing services, regardless of the reason, to minimize the number of children's placements that might need to be changed or transferred if the relationship ends. Commissioner Figueroa's intake closure went into effect on March 15, 2018, though the City allowed exceptions where a child had siblings in a CSS home or where a CSS foster family had a prior relationship with the child. The district court credited Commissioner Figueroa's testimony that DHS was solely responsible for this decision. *Id.* at 97a.

The intake freeze had limited consequences. It did not affect children already placed with CSS. Nor did it affect the overwhelming majority of DHS's contractual relationships with CSS—namely, CSS's congregate-care and

community-umbrella-agency services, which remain fully active to this day under a new, multimillion-dollar contract. As the City's Law Department made clear in a letter to CSS, the City has "respect [for CSS's] sincere religious beliefs" and does not "want to see [its] valuable relationship with CSS . . . come to an end." Pet. App. 169a-171a. It hoped that CSS might agree to comply with the City's Fair Practices Ordinance so the parties could enter into a new contract. *Id.* In the meantime, the City emphasized its willingness to enter into an interim maintenance contract "to continue to supervise the foster children in its care properly with the least amount of disruption for them." *Id.* at 171a.

B. This case

Proceedings in the district court. In May 2018, just weeks before its contract was set to expire, CSS sued the City, DHS, and the Philadelphia Commission on Human Rights and moved for a temporary restraining order and preliminary injunction shortly thereafter. CSS asked the court to require the City to continue its contractual relationship with CSS in spite of CSS's policy to turn away same-sex couples, or else require it to enter into a new contract on CSS's terms. Following hearings in June 2018, the district court denied CSS's motion. It first found that the FY 2018 contract (which had by then expired) explicitly incorporated the Philadelphia Fair Practices Ordinance and that CSS's foster services qualified as public accommodations under City law. Pet. App. 73a-79a. On this basis, it found that CSS's policy would, in practice, have violated its contract with the City. *See id.*

Next, the district court held that the City may include a neutral, generally applicable nondiscrimination clause in contracts with foster-care providers accepting public money to render City services to City residents. *Id.* at 79a-

88a. It noted the City's many neutral, legitimate reasons for seeking compliance with that clause. These include ensuring contractors adhere to terms they have agreed to; ensuring that all qualified Philadelphians have access to governmental services provided by contractors and paid for by their taxes; and ensuring that "the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers." *Id.* at 88a-93a.

Finally, the district court concluded the City had not targeted CSS on the basis of hostility to its religious beliefs. After a thorough examination of the history and implementation of the challenged policy, the court found no evidence that any involved City official had acted with improper motive. *Id.* at 94a-101a.[3] Nor had DHS elsewhere allowed exceptions from the challenged policy: "There is no evidence in the record to show that DHS has granted any secular exemption to the requirement that its foster care agencies provide their services to all comers." *Id.* at 100a.

Following the denial of its motion for preliminary relief, CSS unsuccessfully sought emergency injunctive relief in the Third Circuit and this Court.

Proceedings on appeal. The Third Circuit unanimously affirmed. Because the contractual dispute was moot, the court was left to consider only "whether [DHS] may insist on the inclusion of new, explicit language forbidding discrimination on the ground of sexual

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[3] CSS also attempted to prove improper motive through statements made by the Mayor, including before he took office. Pet. App. 94a-98a & n.26. Considering this evidence, the district court found the Mayor's comments irrelevant because "there was insufficient evidence at the preliminary injunction phase to show that the Mayor had any influence in DHS's decisions in this case." *Id.* at 94a.

orientation as a condition of contract renewal, or whether it must offer CSS a new contract that allows it to continue engaging in its current course of conduct." *Id.*

The Third Circuit held that, taking all the evidence into account, CSS had failed at the preliminary injunction stage "to make a persuasive showing that the City targeted it for its religious beliefs, or is motivated by ill will against its religion, rather than sincere opposition to discrimination on the basis of sexual orientation." *Id.* at 12a. To the contrary, the record showed "[t]he City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation." *Id.* at 32a.

To explain this conclusion, the court devoted ten full paragraphs of its opinion to a comprehensive review of all of the evidence put forth by CSS as evidence of alleged religious discrimination. *Id.* at 32a-38a. Finding CSS's reliance on a single ambiguous statement by the City Council to be unpersuasive, the court concluded that City officials had in fact "repeatedly emphasized that they respected CSS's beliefs as sincere and deeply held." *Id.* at 32a. It agreed with the district court that "nothing" in the record indicated that the Mayor played a direct "or even a significant" role in the process. *Id.* at 34a. And the court was likewise unpersuaded that Commissioner Figueroa's conduct evinced either targeting or ill will. It explained that her decision to call mostly religious agencies following the *Inquirer* article made sense where "[s]he had little reason to think that nonreligious agencies might have a similar policy." *Id.* at 33a. And her reference to Pope Francis's teachings in negotiations with CSS was made in "an effort to reach common ground with Amato by appealing to an authority within their shared religious tradition" and did not offend the First Amendment. *Id.*

Nor did CSS prove it was treated differently on the basis of religion. The court saw no evidence to support CSS's contention that the City was enforcing its longstanding Fair Practices Ordinance "disingenuously or as a pretext for persecuting CSS." *Id.* at 34a. CSS's only basis for this claim is its unsupported allegation that City policy allowed agencies to refer away prospective parents in some circumstances. Both the district court and Third Circuit determined that CSS introduced insufficient evidence to support this contention. *Id.* at 35a. Even if such referrals occur, the panel noted that DHS could, consistent with such referrals and its actions in this case, "insist that, while agencies are free to inform applicants if they believe a different agency would be a better fit, they must leave the ultimate decision up to the applicants." *Id.*

This left CSS's argument that because the City may, for secular reasons, consider certain protected traits (such as race or disability) in placing children with already-approved foster parents, it should allow CSS to turn away same-sex prospective foster parents for religious reasons. In evaluating this argument—which rested on CSS's assertion that the City allowed exemptions from its non-discrimination policy for secular but not religious reasons—the court noted "many differences between CSS's behavior and the City's consideration of race or disability when placing a foster child." *Id.* at 36a. "Most significantly," the court noted, "unlike CSS, [DHS] never refuses to work with individuals because of their membership in a protected class. Instead it seeks to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Id.*

With no indication that the policy had been "gerrymandered," no "history of ignoring widespread secular violations," and no "animosity against religion," CSS presented

"insufficient evidence" of any Free Exercise Clause violation at the preliminary-injunction stage. *Id.* The evidence instead demonstrated that the City had long worked with CSS while fully aware of its religious character and its views on marriage; had continued to work closely with CSS and Bethany Christian on many other foster-care and related programs; and had expressed "a constant desire to renew its relationship with CSS as a foster care agency if it will comply with the City's non-discrimination policies protecting same-sex couples." *Id.* at 36a-37a.

The Third Circuit also rejected CSS's claim that it has been impermissibly compelled to speak in violation of the First Amendment because it allegedly "has been required to adopt the City's views about same-sex marriage and to affirm these views in its evaluations of prospective foster parents." *Id.* at 41a. Among other things, "[t]he problem with this argument is that the ostensibly compelled speech occurs in the context of CSS's performance of a public service pursuant to a contract with the government." *Id.* at 40a. At bottom, while the City "would violate [the First Amendment] if it refused to contract with CSS unless it officially proclaimed its support for same-sex marriage," the City may require that CSS "abide by public rules of non-discrimination in the performance of its public function under any foster-care contract." *Id.* at 42a.

Finally, aside from the merits, the court concluded that CSS had failed to satisfy the other preliminary-injunction factors and pointedly noted that this "alone defeats the request for a preliminary injunction." *Id.* at 50a. With respect to irreparable harm, the panel noted CSS had failed to demonstrate "that it is more likely than not" to "go out of business." *Id.* It noted that CSS's "[group-home] and Community Umbrella Agency functions are unaffected, it has other foster care contracts with

neighboring counties, and even as to its foster care services in Philadelphia CSS cites only to Amato's self-professed 'guess' that it would have to cease those operations within months." *Id.* Balancing the equities and considering the public interest, the court determined that neither factor favored issuing an injunction: "Placing vulnerable children with foster families is without question a vital public service, no doubt why there are 29 other foster care agencies, including Bethany Christian, that provide this service. Deterring discrimination in that effort is a paramount public interest." *Id.* at 50a-51a.

C. The interim contract and the City's new exemption-review procedures

The Department's FY 2018 contract with CSS expired of its own accord on June 30, 2018. Before and after the contract expired, the City offered CSS a choice between two different foster-care contracts: (1) a full contract, under which DHS would reopen intake and CSS would be required to evaluate and certify prospective foster families in accordance with the City's longstanding non-discrimination provisions; or (2) an interim contract providing funds for ongoing care of those children currently placed in CSS foster homes. CSS decided to accept an interim contract.

CSS's other, multimillion-dollar contracts with the City—such as those for group-home and case-management services—were renewed, and CSS continues to play a valued and integral role in helping the City care for children in its custody. There is no evidence that the closure of foster-care intake for CSS has had any negative impact on the City's capacity to care for children in its custody. Since March 2018, when the City closed intake for CSS, the total number of children in DHS care generally has dropped by almost 1,000 children. There is

no indication that the City's capacity to place children in foster care has diminished because one of its 30 providers is no longer taking on new foster children. The number of children in group homes has dropped by almost 200 since March 2018. In addition, the City has remained eager and able to assist any CSS foster parents seeking new placements in their homes by matching them with another agency with open intake.

Earlier this year, the City announced that it would "formalize and streamline" the City Law Department's review of "complex constitutional and statutory issues that may arise from formal requests for waivers of, or exemptions from, City contracting requirements."[4] From now on, when such requests are brought to the attention of the Law Department by City agencies, active or threatened litigation, or parties with City contracts, a newly constituted Waiver/Exemption Committee will carefully address waiver and exemption requests in light of "complex constitutional issues, such as equal protection, due process, religious liberty, or other First Amendment concerns." *Id.*

As noted above, Commissioner Figueroa appropriately involved expert legal counsel in the City's Law Department in this matter from the outset, as soon as she learned of CSS's policy. The new procedures now in place seek to ensure that, in the future, any request for a religious exemption of the sort at issue here would be directed to the Waiver/Exemption Committee and handled through the procedures that it establishes.

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[4] *See* City of Philadelphia Law Department, *Waiver/Exemption Committee* (April 2, 2019), https://perma.cc/WT8Z-R3V4; Linda Huss, *New Privacy Review and Waiver/Exemption Committees*, City of Philadelphia (Apr. 3, 2019), https://perma.cc/ C3PQ-K6SY.

REASONS FOR DENYING THE PETITION

I. There is no circuit split over the type of evidence that may be considered in Free Exercise Clause claims.

The petition's lead argument for certiorari attacks a rule of its own invention—a rule to which no circuit adheres. Pet. 20-22. Neither the Ninth Circuit nor the Third Circuit has ever held that a free-exercise plaintiff can prevail only by making "one specific showing: that the government would allow the same conduct by someone who 'held different religious views.'" Pet. 19.

A. To the contrary, as a review of the decision below confirms, the Third Circuit—like this Court and every other circuit—allows free-exercise plaintiffs to prove their claims in precisely the way that CSS sought to do so: "by showing that the government issues individualized exemptions, that the law exempts secular conduct that undermines the government's interest, or that [the] law's history indicates non-neutrality." *Id.* This is clear both from the legal standard articulated by the Third Circuit and from its application of that standard to the facts of this case.

Starting with the legal standard, it has long been established in the Third Circuit that a decision "to provide [secular] exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365 (1999) (Alito, J.) (invalidating a police department's grooming policy that allowed medical but not religious exemptions). By the same token, the Third Circuit has long made clear that "where government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation

of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165-66 (3d Cir. 2002) (Ambro, J.) (invalidating a facially neutral ordinance because it had been ignored for secular activity but enforced against Orthodox Jews).

The decision below recounted and reaffirmed *Fraternal Order* and *Tenafly*. It also discussed *Lukumi* and *Masterpiece* at length, highlighting that both decisions considered the full history of the challenged action in assessing potential free-exercise violations. *See* Pet. App. 26a (observing that, in *Lukumi*, "the history of the law's adoption made plain" that "this was no earnest piece of animal welfare legislation but rather an attempt to suppress the practice of Santeria"); *id.* (describing *Masterpiece* and noting that it involved "similar demonstrations of religious animosity and differing treatment of religious conduct"). More generally, the Third Circuit recognized that "courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct." *Id.* (citing *Masterpiece* and *Lukumi*).

Surveying these decisions, the decision below described them as unified by a common thread: "religiously motivated conduct was treated worse than otherwise similar conduct with secular motives." *Id.* at 31a. It was in this context, and with this background, that the court observed that free-exercise plaintiffs must show that they were treated "more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Id.* at 26a.

CSS seeks to manufacture a circuit split by taking that one line out of context, treating it as a stand-alone legal test, and asserting that it precludes consideration of any other evidence. But every premise of that argument is faulty, as the Third Circuit itself explicitly and repeatedly made clear. Each one of the considerations that CSS accuses the panel of deeming irrelevant to free-exercise analysis was affirmatively embraced by the panel and described as a means of proving a free-exercise violation.

Any conceivable doubt on that score is resolved by the court's own application of law to fact. Over ten paragraphs, the panel meticulously probed the history of the challenged government action, CSS's allegation that the Department allowed secular but not religious exemptions, and CSS's allegation that the Department maintained a practice of individualized exemptions. Pet. App. 32a-38a. The panel did not state that any of these considerations were irrelevant. In fact, it did the opposite. And in the end, it held that the City's policy "has not been gerrymandered as in *Lukumi*, and there is no history of ignoring widespread secular violations as in *Tenafly* or the kind of animosity against religion found in *Masterpiece*." *Id.* at 36a.

B. The rule of law applied by the Third Circuit is also consistent with the law of the Ninth Circuit. In *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), the Ninth Circuit upheld a Washington State rule requiring the timely delivery of all prescription medications—including emergency contraceptives—by licensed pharmacies. There, too, the court held that facially neutral laws might be implemented in a manner that targets and burdens religious belief, *id.* at 1076-77; that the history of a challenged policy is central to a free exercise inquiry, *id.* at 1078-79; that it is impermissible to selectively exempt

secular but not religious conduct that undermines the government's interest, *id.* at 1079-80; and that a scheme of discretionary individualized exemptions can offend the First Amendment, *id.* at 1081-82. Ultimately, however, the court concluded that the challenged rule survived review under each of these constitutional requirements.

This Court denied review. *See Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433 (2016). In dissenting from the denial of certiorari, Justice Alito (joined by two other justices) did not take issue with the rule of law applied by the Ninth Circuit there—only with how the court had applied the law to the record in that case. In his view, "the Court of Appeals failed to accord the District Court's findings appropriate deference," "improperly substituted its own view of the evidence for that of the District Court," and "overlooked" a particular aspect of the state regulatory scheme challenged there. 136 S. Ct. 2433, 2437-39 & n.3 (2016) (Alito, J., dissenting from the denial of certiorari). There was no suggestion that the Ninth Circuit's opinion did what CSS claims it did—namely, split with multiple appellate decisions predating that opinion on a fundamental rule of constitutional law.

There is thus no sound basis for concluding, as the petition does (at 19), that *Stormans* rejects the relevance of individualized exemptions, history, or exemptions for secular but not religious conduct. And even if *Stormans* did say as much—which it does not—that would not make CSS's petition worthy of review, because the decision below does not do so. Quite the opposite: the rule of law applied by the Third Circuit fully and properly protects free-exercise claimants, in keeping with the rule in every other circuit.

II. Even if there were a split over what evidence to consider, this case would be a hopelessly flawed vehicle to address it.

A. Even if the circuit split alleged by CSS were real, it would not affect the outcome of this case. This is not a case where the Court need speculate about whether the alleged split is outcome determinative; the court below has already explained in exacting detail why it is not. According to CSS, the Third Circuit held that it could prevail only by showing "that the government would allow the same conduct by someone who 'held different religious views.'" Pet. 19. CSS maintains that it was disallowed from seeking to prove its claims "by showing that the government issues individualized exemptions, that the law exempts secular conduct that undermines the government's interest, or that [the] law's history indicates non-neutrality." *Id.* But the very factors CSS steadfastly insists were ignored were in fact analyzed by the court below—just not in CSS's favor. Pet. App. 32a-39a.[5]

B. Aside from the fact that the question is not outcome determinative here, this case is also an especially unsuitable vehicle to address it because the parties and the court below all agree on the answer: free-exercise claims may be proven in the ways identified by CSS. As a result, what CSS really takes issue with is the Third Circuit's application of the rule of law set forth in *Smith*, *Lukumi*, and *Masterpiece*. And what it really seeks from this Court is the factbound correction of that fact-intensive application

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[5] Indeed, *none* of CSS's questions presented are outcome determinative because they all bear only on a single preliminary-injunction factor: likelihood of success on the merits. The panel below concluded that CSS had not met the other factors, and squarely held that "*this alone* defeats the request for a preliminary injunction." Pet. App. at 50a (emphasis added).

of the law to the facts. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). CSS makes this request, moreover, in an interlocutory posture, with a spare and obsolete factual record and a shifting factual context that render this case even further flawed as a vehicle.

Even for the period for which a record exists, it is no model of completeness. CSS moved for preliminary relief on June 5, 2018, weeks before the expiration of its contract with the City. There was no discovery, and the only extant record was developed over just two weeks. Following an evidentiary hearing on the preliminary-injunction motion, the district court ruled a few weeks later. No court has found any facts in this case since then. In its decision below, the Third Circuit repeatedly emphasized the limited state of the record, concluding that CSS had not made a sufficient record regarding secular exemptions, Pet. App. 35a, while noting that CSS "is of course able to introduce additional evidence as this case proceeds," *id.* at 51a. CSS did not do so before coming to this Court.

The lack of factual clarity has only increased over the past year. The parties have engaged in multiple rounds of contract negotiations since the FY 2018 contract expired. The City has formulated a new standard contract, which includes an updated and more detailed nondiscrimination provision, for all foster-care service providers. And the City has publicly announced the creation of a Waiver/Exemption Committee, which will establish more regular procedures and participate in resolving religious objections of the kind made by CSS. None of this is in the record—there are no facts about any of these important developments in the record as CSS presents it to the Court.

The state of the record matters here. The Third Circuit correctly held that the City's conduct was entirely neutral with respect to religion. But if CSS were to attack that finding here, the City could further contend that any hint of alleged anti-religious taint has been cured. *See McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 874 (2005) (rejecting the view that governments' "past actions forever taint any effort on their part to deal with the subject matter"). The City might also observe that the creation of the Waiver/Exemption Committee eliminates CSS's entitlement to prospective injunctive relief, to the extent that claim arises from alleged improprieties in the City's decision-making process in mid-2018, before the FY 2018 contract expired and more than a year before the Committee was created. These are only two of many arguments that would turn on facts this Court would have to adjudicate in the first instance. CSS could have gone back to the district court to develop a record on these and other ongoing issues before seeking certiorari. It did not do so.

Nor has any court found facts bearing on the other preliminary-injunction factors as they currently stand—factors that the Third Circuit below identified as a distinct bar to relief. In the emergency application that it filed on July 31, 2018, CSS represented to this Court that it "has already been forced to begin the wind-down process and will likely be forced to close before its Third Circuit Appeal is complete." Application at 18, *Fulton v. City of Philadelphia*, No. 18-A-118 (July 31, 2018). Now, more than one year later and following completion of the Third Circuit appeal, CSS represents that it still cares for about 60 children and retains three employees who work on foster care. Pet. 17-18. CSS makes no representations about the millions of dollars the City contracted to pay CSS under its three remaining contracts (the maintenance

foster-care contract, the group-home contract, and the community-umbrella contract). Nor does it make any representations about the total effect of the intake closure, which affects only 10% of its contracted foster-care work with DHS. Certainly, there is no record evidence that children in the City's foster-care system are now suffering in any way as a result of the intake freeze, given the City's broad network of providers and abiding commitment to caring for all children in its custody. The City disputes CSS's incomplete and incorrect factual representations—and were this Court to grant review, it would have to adjudicate this factual dispute, too, in the first instance.

III. The City did not act with religious hostility in enforcing its generally applicable and longstanding nondiscrimination policy.

The decision below is correct. As the Third Circuit explained at length, Commissioner's Figueroa's statements during her conversation with Amato were not suggestive of religious targeting. Pet. App. 33a. To the contrary, her remarks—and her ongoing course of conduct—confirm a desire for strong relations with CSS. *Id.* at 36a-37a. And for the reasons explained below, the other evidence cited by CSS as evidence of hostility to its religious beliefs is irrelevant, obsolete, or reflective of a valid, secular desire to enforce contractual policies. To be clear: The City respects and values CSS's religious freedom, and its rights to hold whatever beliefs it holds about same-sex marriage. But the City is lawfully permitted to include nondiscrimination requirements in its City-funded contracts for City services, and it did so here for legitimate secular reasons.

CSS contends that the City has adopted an impermissible scheme of exemptions from its nondiscrimination policy. Pet. 25. That is mistaken. The relevant policy here is the City's requirement that agencies not categorically

exclude prospective foster parents based on protected traits. CSS identifies no other instance in which an agency was allowed to engage in such conduct. Because nobody has ever done this before, the City could not have (and has not) ever allowed any exemptions, and as a matter of logic it cannot be true that the City has privileged secular over religious motives in deciding which exemptions to grant.

CSS seeks to dodge that straightforward conclusion by asserting that agencies can discriminate based on protected traits in deciding where particular children should be placed. But any "exemptions" would not be exemptions from the relevant policy. Nor would they undermine or implicate the purposes of the nondiscrimination policy. The City prohibits agencies from considering protected traits in deciding whether to serve prospective parents to avoid the exclusion of qualified parents on grounds unrelated to the best interests of children, and to signal to children in the foster-care system that the City respects their rights. Allowing agencies to consider mental health, ethnicity, and family relationships—within the confines of making a judgment about advancing the best interests of a specific child in a specific placement—is consistent with the goals of that policy. Pet. App. 36a.

Put differently, allowing agencies to holistically consider protected traits to secure the best interests of a particular child while matching them to a new family is completely different than categorically excluding members of a particular group from even attempting to certify as foster parents. Treating these different practices differently reflects a neutral judgment, not hostility to religion.

For the same reason, CSS errs in suggesting—over the district court's findings of fact to the contrary, Pet. App. 100a—that the City allows secular but not religious exemptions to its nondiscrimination policy through

tolerating a practice of "referrals." Pet. 25. There is no evidence that any agency has ever been allowed to deny services to prospective parents based on protected traits. Agencies may advise prospective parents that another agency would make more sense for them, but the final decision is up to the parents, not the agency. Agency recommendations that seek to advance the interests of prospective parents or foster children are not exemptions to a policy that bars agencies from refusing to serve qualified parents.

Accordingly, the Third Circuit correctly concluded that there is no evidence of religious hostility or targeting and that the City has acted lawfully in proposing a contract to CSS that includes a nondiscrimination provision.

Finally, even apart from the fact that the question presented is splitless, not outcome determinative, and riddled with vehicle issues here, the Court should deny review because it evokes a broader set of cultural issues that merit further percolation. Barely a year ago, the Court observed that "the outcome of cases" involving the balance between LGBT rights and religious freedom "must await further elaboration in the courts." *Masterpiece*, 138 S. Ct. at 1732. That process has only just begun; there are currently only nine published federal appellate cases that even cite *Masterpiece*, and none that applies its teachings in a remotely analogous factual context. The wiser path is to allow these issues to mature in American life and law before the Court returns to them in a fraught constitutional setting.

IV. This is not a suitable vehicle for revisiting *Employment Division v. Smith*.

Unable to satisfy the traditional criteria for certiorari, CSS pivots from arguing that certiorari is warranted because the decision below "directly conflicts" with *Smith*

to arguing that it is warranted because "*Smith* should be revisited." Pet. 29-34. But CSS barely attempts to show the kind of special justification that might provide a basis for overturning precedent, and it makes no effort at all to show why *this case* should be the vehicle for considering that question. It does not even assert that the question is cleanly teed up or that the facts of this case present the right context for exploring it.

A. For starters, this case would be a poor vehicle in which to address *Smith* because CSS's claim arises in the context of a government contract dispute. Substantial authority supports the City's prerogative to impose generally applicable conditions—including nondiscrimination conditions—on those who voluntarily undertake to contract with the City to perform a taxpayer-funded public function. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 570 U.S. 205, 213-14 (2013); *Locke v. Davey*, 540 U.S. 712 (2004). That context separates this case from a classic *Smith* case and would greatly complicate any effort to reconsider *Smith* on these facts. The petition makes no effort to overcome this hurdle.[6]

In addition, there are countervailing Establishment Clause concerns here that would further complicate any effort to revisit *Smith* on these facts. CSS seeks an unusual injunction that would require the City to vest a core City function in a religious entity that has committed to exercising that City responsibility—with City money—on the basis of religious law. While the City may contract with religious and secular agencies for the provision of services,

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[6] Other pending petitions likewise ask this Court to revisit or overrule *Smith* but, by contrast, do not present the question in the context of a government contract to perform a public function. *See Ricks v. Idaho Contractors Bd.*, No. 19-66 (docketed July 12, 2019); *Augustine Sch. v. Taylor*, No. 18-1151 (docketed Mar. 6, 2019).

it may not empower a religious entity to impose religious tests or enforce religious criteria on applicants for City programs. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) ("[T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.'"). "[T]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Id.* at 127. The pairing of a government-contracting dimension with a cross-cutting Establishment Clause limitation makes this case a particularly unsuitable vehicle for addressing the status of *Smith*.

B. In any event, *Smith* is not outcome determinative here. Even under the pre-*Smith* standard, and even setting aside any Establishment Clause issue, the City's prerogative to set neutral terms for voluntary contracts involving City funds and City programs—not to mention core governmental functions—would have survived First Amendment scrutiny. *See, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988); *Bowen v. Roy*, 476 U.S. 693, 699-70 (1986). CSS does not cite any pre-*Smith* case invalidating a governmental contract term under the Free Exercise Clause, let alone on grounds even remotely similar to those at issue here. And even if strict scrutiny would have applied in a pre-*Smith* world—which is not the case—the City's program survives such review. The City has a compelling, legitimate interest in prohibiting discrimination in its foster-care services program, and the inclusion of a nondiscrimination clause in its contracts is a narrowly tailored means of achieving that objective. *See, e.g.*, *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 623 (1984); *United States v. Lee*, 455 U.S. 252, 261 (1982).[7]

C. Finally, the Court should deny review of this question because the standard for overcoming *stare decisis* has not been remotely satisfied, and CSS has hardly even attempted to do so. To be sure, several justices have recently hinted at an interest in revisiting *Smith*. *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Justice Alito concerning the denial of certiorari, joined by Justices Thomas, Gorsuch, and Kavanaugh). But "[o]verruling precedent is never a small matter." *Kimble v. Marvel Ent., LLC,* 135 S. Ct. 2401, 2409 (2015). "[E]ven in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (citation omitted). That is particularly true where a party asks this Court "to overrule not a single case, but a long line of precedents—each one reaffirming the rest" and, in this instance, going back several decades. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). Here, none of the traditional *stare decisis* factors support overturning or modifying *Smith*.

V. The decision below correctly applied this Court's unconstitutional-conditions precedents.

In addition to its claim of religious hostility, CSS also asks this Court to grant review to consider its novel unconstitutional-conditions theory. Pet. 34-38. It contends that the City has violated its First Amendment rights by

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[7] Several states have submitted an amicus brief nominally in support of CSS. Br. of Texas, et al. But their brief does not actually support CSS's position. It argues not that the Free Exercise Clause *requires* a modified contract here, but rather that the Establishment Clause does not *prohibit* it. *Id.* at 3. That is not a question CSS presents in its petition. The states' apparent unwillingness to support CSS's free-exercise claim speaks volumes.

requiring that all who voluntarily contract with the City—to provide City services to City residents with City funds—comply with contractual requirements defining the key terms of the relevant City program (namely, which City residents must be served). CSS does not allege a circuit split on this question, and the only court of appeals decision to address a similar question in an analogous context is fully consistent with the decision below. *See Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 410 (6th Cir. 2007) (rejecting free-speech claim of religious organization that voluntarily contracted with the government to provide taxpayer-funded residential-treatment programs for troubled teenagers).

The Third Circuit's decision is correct and further review is unwarranted. As the court noted, the City does not seek to control or influence contractors' speech or operations beyond the confines of their implementation of the City's program. Indeed, "the City is willing to work with organizations that do not approve of gay marriage, as its continued relationship with Bethany Christian, its continued relationship with CSS, … and its willingness to resume working with CSS as a foster care agency attest." Pet. App. 42a. The City "simply insists that CSS abide by public rules of non-discrimination in the performance of its public function under any foster-care contract." *Id.* So any "speech here only occurs because CSS has chosen to partner with the government to help provide what is essentially a public service." *Id.* As a result, "the condition pertains to the program receiving government money," *id.,* and is therefore permissible under this Court's cases, *see Agency for Int'l Dev.,* 570 U.S. 205; *Rust v. Sullivan*, 500 U.S. 173 (1991).

CSS objects that if it "declines the contract, it will be completely excluded from Philadelphia's foster care

system." Pet. 36. As an initial matter, this assertion is not accurate; CSS continues to play a valued role in caring for foster children in Philadelphia through its ongoing relationship with the City. Moreover, it is *always* true that failure to comply with contract terms governing a public program can lead to exclusion from the program—and it has never been the case that religious entities, or entities with deeply held secular views, are constitutionally entitled to enter into government contracts and then defy any terms to which they object. If CSS's sweeping constitutional claims were accepted, they would cause mayhem in government contracting.

In suggesting otherwise, CSS erroneously relies on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), where Missouri awarded grants to resurface playgrounds but refused to fund any church or religious organization. *Id.* at 2017. Trinity Lutheran, whose playground was open to children of all religions, was thus excluded from receiving public funds "simply because of what it is—a church." *Id.* at 2023. The Court invalidated the policy on the ground that it disqualified otherwise eligible recipients from receiving "a public benefit solely because of their religious character." *Id.* at 2021. But here, the City does no such thing. It has not defunded religious groups; to the contrary, it still funds CSS in many other programs serving abused and neglected children, and continues to fund other religious groups for this very foster-care program. Rather, the City stopped paying one contractor to perform a particular public service—the evaluation and certification of prospective foster parents—because of that contractor's refusal to perform a key term in its contract governing *who* may receive that service, without reference to whether that contractor's refusal is based on secular or religious reasons.

CSS also asserts that its rights are being violated because it is not otherwise able "to engage in the protected activity." Pet. 37. That is incorrect. CSS remains free to express whatever message it wishes about same-sex marriage and to engage in religious practice consistent with that belief. At bottom, CSS seems to suggest that the "protected activity" is providing taxpayer-funded foster-care services. In other words, CSS implies that it has a constitutional right to engage in foster-care services, and that the Commonwealth of Pennsylvania and the City have violated that right by making foster-care services a governmental function and attaching terms to contracts with private entities who wish to help administer that governmental function. But absent its contract with the City, CSS has no preexisting right to determine the fate of Philadelphia's abused and neglected children, whose care is entrusted by law to the government—even if doing so is consistent with or steeped in its religious ministry.

The care of abused and neglected children in Pennsylvania is a public function. If CSS wishes to voluntarily contract with the City to assist in the discharge of that public function, the City does not burden CSS's First Amendment rights by requiring it to comply with key requirements bearing directly and exclusively on the administration of the City's programs—including the City's rules for who receives these taxpayer-funded public services.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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