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.)

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

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CORPORATE DISCLOSURE STATEMENT

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

/s/ Mark Rienzi
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INTRODUCTION

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

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

[1] Appx.0006. All "Appx." citations are to the Joint Appendix.

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

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

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

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

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

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[2] Appx.0325; Appx.0583-84; *see also* Appx.0151.
[3] Appx.0324, 0584.
[4] Appx.0143; Appx.0999.

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

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

JURISDICTIONAL STATEMENT

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

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

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

STATEMENT OF THE ISSUES

This appeal presents four main issues:

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

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

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

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[5] Appx.0004-05.

Issue #4. Whether the District Court abused its discretion in ruling against Appellants on the remaining preliminary injunction factors.[6]

STATEMENT OF RELATED CASES

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

STATEMENT OF THE CASE

A. Catholic Social Services.

Catholic is a non-profit under the auspices of the Archdiocese of Philadelphia.[7] It provides care for foster children as a "religious ministry."[8] Catholic views this ministry as part of Jesus' call to care for the orphaned and widowed.[9] Catholic's faith is infused in all aspects of its ministry.[10]

Catholic's foster care program traces its roots back to 1917.[11] At this time, the City was not involved in the provision of foster care. Instead,

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[6] Each issue was initially raised in Appellants' Memorandum of Law in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ECF 13-2, and ruled upon in the opinion and order, Appx.0004-0069.
[7] Appx.0282; Appx.0303-05, 0310; Appx.0827, ¶ 3.
[8] Appx.0305.
[9] Appx.0305.
[10] Appx.0303-05; Appx.1032.
[11] Appx.0303-05.

"the religious sisters who ran Catholic Children's Bureau had a deep network of relationships around the city with parishes and community groups."[12] These sisters would find homes for at-risk children whose parents were unable to care for them.[13]

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

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[12] Appx.0306.
[13] Appx.0306-07.
[14] Appx.0308-09.
[15] Appx.0308, 0389.
[16] Appx.0490, 0618.
[17] Appx.0309, 0313-14.

B. Catholic's foster families.

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

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

[18] Appx.0991, ¶4.
[19] Appx.0991, ¶4.
[20] Appx.0130-0133.

City.[21] Mrs. Paul works with Catholic because of its commitment to children and their shared beliefs.[22] She "cannot imagine starting from scratch and fostering children without" Catholic's support.[23]

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

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

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[21] Appx.0142-45.
[22] Appx.0144.
[23] Appx.0996; *see* Appx.0146.
[24] Appx.0148-49.
[25] Appx.0149-52.
[26] Appx.0148.
[27] Appx.0118-19, 0131-32.

Community Umbrella Organization ("CUA") because of their high turnover.[28] Ms. Simms-Busch further testified to feeling "backed into a corner" by the City's decision to force Catholic out of foster care in Philadelphia.[29]

C. Foster care in Philadelphia.

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

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

[28] Appx.0130-35.
[29] Appx.0136.
[30] 55 Pa. Code §§ 3700.64, 3700.69.
[31] Appx.0171-72.
[32] Appx.0171-72.

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

D. Catholic's contract with the City.

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

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[33] Appx.0178.
[34] Appx.0425, 0515-16.
[35] Appx.0171-72, 0178, 0424, 0515-17.
[36] Resp. in Opp'n to Emergency Appl. for Inj. Pending Appellate Review or, in the Alternative, Pet. for Writ of Certiorari & Inj. Pending Resolution (hereinafter "Resp. in Opp'n"), at 26, *Fulton v. City of Phila.*, No. 18A118 (U.S. Aug. 13, 2018); *see also* Appx.0490; Appx.0618.

for foster children, supports those families, and is paid a fixed daily rate for each child placed in a certified home.[37]

The contract also highlights Catholic's religious character. For example, the contract includes Catholic's mission statement: "Catholic Social Services of the Archdiocese of Philadelphia continues the work of Jesus by affirming, assisting and advocating for individuals, families, and communities."[38] It similarly makes clear that Catholic "is an independent contractor and shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City."[39] Nor shall Catholic "in any way represent" otherwise.[40]

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

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[37] Appx.0024; Appx.1029-30. Catholic's prior contracts also covered St. Joseph & St. Vincent Homes and St. Gabriel's System, which are congregate care facilities run by the Archdiocese for youth currently unable to be placed in foster care homes. These services are unaffected by this litigation.
[38] Appx.1032.
[39] Appx.1103, 0534.
[40] Appx.1103.

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

E. Catholic's policy regarding marriage.

As part of the Catholic Church, Catholic operates in accordance with its sincere belief "that a marriage is a sacred bond between a man and a woman."[43] Catholic cannot take any actions which it views as an endorsement of same-sex relationships. "[T]o provide a written certification endorsing a same-sex marriage" as part of the foster parent certification process would "violate the religious exercise of Catholic Social Services."[44]

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[41] Appx.1114.
[42] Appx.1115.
[43] Appx.0310-12, 0482.
[44] Appx.0312.

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

F. The investigation and termination.

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

[45] Appx.0321.
[46] Appx.0312.
[47] Appx.0497.
[48] Appx.0432-33; *see also* Appx.0323.

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

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

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

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[49] Appx.0582-83.
[50] Appx.0582-83.
[51] Appx.0324,0999.
[52] Appx.0324,0583-84.
[53] Appx.0325,0583-84.
[54] Appx.0585-0586.
[55] Appx.0586.

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

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

G. The City's justification.

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

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[56] Appx.0878, 0885 (available at http://bit.do/es4xH); Appx.0876-82.
[57] A shutdown means that no children can be placed in the homes of families certified and supported by that foster agency. Appx.0485-86, 0830.
[58] Appx.0491.
[59] Appx.0838.

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

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

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[60] Appx.1072-73.
[61] Appx.0286-87, 0527-28, 0549.
[62] Appx.0198 ("Q: This is referring to a rejection of a referral *from DHS*, correct? A: Yes.") (emphasis added); Appx.0127-28.
[63] Appx.0433 ("I called a number of faith-based institutions that same day[.]"); Appx.0582.
[64] Appx.0302, 0321, 0117-19, 0126.

Ms. Simms-Busch further testified that, based on her experience as a social worker at another agency, "referrals are made all the time."[65]

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

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

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[65] Appx.0127.
[66]Appx.0126-28, Appx.0174-75, 0200, 0208-09, 0316, 0318, 0502, 0911-0912; *see also* Appx.0092-95.
[67] Appx.0320-21; Appx.1140.
[68] Appx.0200, 0208-10.
[69] Appx.0288-89, 0327-28, 0513-14, 0517, 0525.

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

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

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

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[70] Appx.0513-14.
[71] Appx.0514-18.
[72] Appx.1141-43; Appx.0569-70.
[73] *Id;* 11 P.S. § 2633(4).
[74] Appx.0830.
[75] Appx.0344.

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

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

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

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[76] *Id.*; Appx.0142-44.
[77] Appx.0145.
[78] Appx.0831-32.
[79] Appx.0329-31.
[80] Appx.0226.
[81] Appx.0223-27.
[82] Appx.1002-08.

term home.[83] The City later relented and allowed the placement—only after Catholic brought the matter to the District Court's attention.[84]

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

Other agencies have informed Catholic that they received placements of children in circumstances where Catholic would have been the "preferred placement."[86] Thus, because of DHS's actions, Catholic may never learn of the harm or the missed opportunity to care for a child in need.[87]

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

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[83] *Id.*
[84] Appx.0405-07.
[85] Appx.0223-27, 0295-97, 0612.
[86] Appx.0832.
[87] Appx.0384.
[88] Appx.1149-51.

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

I. Procedural history.

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

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[89] Appx.1149-50, 0346-47.
[90] Appx.0346-47.
[91] *Id.*
[92] Appx.0291-92.
[93] Appx.1009-14.

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

STANDARD OF REVIEW

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

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

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

SUMMARY OF THE ARGUMENT

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

ARGUMENT

I. Appellants are entitled to an injunction.

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

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

To demonstrate a likelihood of success, Appellants need to show "a reasonable chance, or probability, of winning," but a "'likelihood' does not mean more likely than not." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc). "[T]he strength of the plaintiff's showing with respect to one [factor] may affect what will suffice with respect to another." *Marxe v. Jackson*, 833 F.2d 1121, 1128 (3d Cir. 1987). Appellants have demonstrated a reasonable probability of success on the merits.

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

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

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

1. The City targeted Catholic.

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

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

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

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

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[95] Appx.0838-39. The Council's reference to the "guise" of religious freedom is evidence of targeting. *See Masterpiece*, 138 S. Ct at 1729 ("clear and impermissible hostility" where government dismissed religious freedom as "rhetoric").
[96] Appx.1009-10. The Commission only has power to investigate complaints, *see* Phila. Code § 9-1112; but no one has complained. Appx.0497.
[97] Appx.1009; Appx.0585-86.
[98] Appx.0324-25, 0583-84.
[99] Appx.1011-12.

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

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

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

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[100] Appx.0582 ("Q. When you did that investigation, you only contacted faith-based agencies, correct? A. That's correct.").
[101] Appx.0582-83.
[102] Appx.0034, 0039-41. Bethany has since agreed to certify same-sex couples. Appx.1191.

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

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

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

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[103] Appx.0028.
[104] Appx.1017; *see* Appx.0501-02.

same-sex weddings. Even though marriage requires a government license and government-sanctioned officiant, a religious entity's decision to only perform opposite-sex marriages "would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. The same is true here, particularly where there is no danger of a "long list" of exceptions creating "community-wide stigma," *id.*, because literally every other agency in the City will certify same-sex couples.

2. The City's actions are not neutral.

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

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

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

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

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[105] Appx.0286-89; Appx.0327-28; Appx.0512-14, 516-18, 0525, 0582-83.
[106] Appx.0127, 0191-93, 0202-03.
[107] Appx.1013.
[108] Appx.0513-14.
[109] Appx.0288-89, 512-17, 0522-23, 0525.

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

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

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[110] Phila. Code § 9-1102(w).

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

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

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

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[112] Appx.0032.
[113] Appx.0126-28, 0286-89, 0327-28, 0512-14, 516-18, 0522-23, 0525, 0527-28, 0582-83.

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

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

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

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

[114] Appx.1013, 0144-45.

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

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

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

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[115] Appx.0126-29, 0318-21.
[116] Appx.0321.
[117] Appx.0286-88, 0526-28, 0549.
[118] Appx.0198, 1012. This is the same contract provision permitting exceptions in the Commissioner's "sole discretion."
[119] Appx.0287-88, 0526-28.

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

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

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

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[120] Appx.0515-17.
[121] Appx.0187 (referring to "the 3700 regulations").
[122] 55 Pa. Code § 3700.64.

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

4. The City used a system of discretionary exemptions.

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

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[123] Phila. Code §§ 9-1102(d), 9-1106.

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

allows exceptions in the Commissioner's "sole discretion."[125] But the City said that it "has no intention of granting an exception" to Catholic.[126]

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

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

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

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[125] Appx.1012; Appx.1071-72.
[126] Appx.1012.
[127] Appx.0612.

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

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

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

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[128] Appx.0144.

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

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

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

[129] Appx.0993.

Because of the City's open violation of these principles, its actions are invalid, and an injunction is required.[130]

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

The Pennsylvania Religious Freedom Protection Act was enacted to ensure Pennsylvanians greater protection for religious exercise than the Free Exercise Clause. *See Brown*, 586 F.3d at 287 ("the purpose of the RFPA was to restore, under the auspices of state law, the free exercise jurisprudence that held sway under *Sherbert v. Verner*, 374 U.S. 398 (1963)").[131]

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

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

[131] *See also* Appx.0593 (acknowledging obligations under RFPA).

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

1. Appellants are exercising religion.

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

[132] Appx.0305.
[133] Appx.1032.
[134] *See, e.g.,* Appx.0303-07, 0309, 0312; Appx.1032.

would "violate the religious exercise of Catholic Social Services" to "provide a written certification endorsing a same-sex marriage."[135] This satisfies the first part of the RFPA test.

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

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

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[135] Appx.0312.

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

[137] Appx.0305.

[138] *See, e.g.,* Appx.0303-07, 0309, 0312; Appx.1032.

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

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

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[139] Appx.1032-33.

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

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

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

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

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[141] Appx.1032-33, 1043.
[142] Appx.0148; Appx.0131; Appx.0144.
[143] Appx.0148.
[144] Appx.0144.
[145] Appx.0131-32, 0140.

2. Appellants' religious exercise is substantially burdened.

The City's actions substantially burden Appellants' religious exercise. RFPA defines a substantial burden as a government action which:

> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs. (2) Significantly curtails a person's ability to express adherence to the person's religious faith. (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion. (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

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

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

[146] 71 P.S. § 2403.

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

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

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

[147] *See* Appx.1011-12.
[148] 71 P.S. § 2403.

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

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

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

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[149] 71 P.S. § 2403.
[150] Appx.1011-12.
[151] 71 P.S. § 2403.
[152] Appx.0135-36; Appx.0150-52; Appx.0146-47.

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

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

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[153] Appx.0136; Appx.0146-47.
[154] 71 P.S. § 2403; *see* Appx.0144-45.
[155] Appx.0052.
[156] *See* Appx.0051-53.

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

Nor did the District Court cite Catholic's undisputed testimony: it is Catholic's "sincere belief" that the home study is a "written endorsement" of the foster parents' relationship.[158] Accordingly, "to provide a written certification endorsing a same-sex marriage" as part of the foster parent certification process would "violate the religious exercise of Catholic Social Services."[159] The City (and the District Court) may not agree with Catholic's evaluation of the moral implications of such decisions, but "it is not within the judicial function and judicial competence to inquire" whether Catholic "correctly perceived the commands" of its faith. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981). Given both Catholic's religious beliefs and state law, the District Court's conclusion cannot be sustained.

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[157] City's Proposed Findings of Fact & Conclusions of Law 20, ECF 45.
[158] Appx.0389, 0549.
[159] Appx.0312.

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

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

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

[161] Appx.0048, 0051.

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

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

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

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

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

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

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

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[162] Pa. Code § 3700.69.
[163] *Id*. (emphasis added).
[164] City's Proposed Findings of Fact & Conclusions of Law 20, ECF 45.
[165] *Id*.

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

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

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

studies performed."[166] The City also admits that it has "nothing to do" with home studies and that agencies can have "different requirements."[167] The contract does not require Catholic to perform a certain number of home studies or regulate how they are performed.[168] In fact, the requirement that "foster family homes . . . shall have current, full Certificates of Approval and/or licensure" is located under "Requisite Licensure and Qualifications"—it is not located under the "Services" portion of the contract.[169] The contract further states that Catholic "is an independent contractor and shall not in any way or for any purpose be deemed or intended to be an employee or agent of the City."[170] Catholic's home studies and foster care certifications are thus private speech, not contracted services.[171]

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[166] Resp. in Opp'n at 26; *see also* Appx.0490.
[167] Appx.1017.
[168] *See* Appx.1033.
[169] Appx.1084-85.
[170] Appx.0534, 1103.
[171] For this reason, *Keeton v. Anderson-Wiley*, 664 F.3d 865, 883 (11th Cir. 2011), is easily distinguishable. There, a counseling student sought to "impose" her values on her clients in violation of her profession's ethics policy, a policy that her school was "required to adopt in order to offer" an accredited counseling program. *Id.* at 869, 873-74. Here, Catholic does not seek to impose its views on anyone, nor has the City pointed to any

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

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

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

[172] Resp. to Mot. for Stay Pending Appeal, No. 18-2574 (July 23, 2018), at 18; Appx.1033.

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

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

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

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

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

on a retaliation claim, a plaintiff must prove '(1) that he engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation.'" *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010) (citation omitted) (upholding preliminary injunction).

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

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

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

to deter a person of ordinary firmness from exercising her rights. *Miller*, 598 F.3d at 152 (retaliation is government action "sufficient to deter a person of ordinary firmness from exercising his constitutional rights") (citation omitted).

Third, the City admits that its adverse actions were motivated by Catholic's protected activity. The Commission's March 16th letter specifically referenced the earlier *Philadelphia Inquirer* article (highlighting Catholic's religious beliefs) as the impetus for the agency's actions ("Based on the information provided in the [March 13, 2018 *Philadelphia Inquirer*] article . . . .").[175] And the City was explicit in its May 7th letter that both Catholic's speech and its refusal to speak were the reason for the adverse actions: it stated that the cessation of referrals was warranted because "you have clearly reaffirmed that CSS intends" to provide foster care consistent with its religious beliefs.[176] More incriminating still, Commissioner Figueroa testified that the City took action against Catholic because of its "religious decision" not to certify same-sex couples.[177]

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[175] Appx.0843-44.
[176] Appx.0859-60.
[177] Appx.0178-79, 0549-50.

Catholic's protected activity is thus why the City suspended further foster care referrals without cause and in violation of its contract, coerced fellow foster agencies to stop referring children to Catholic, threatened not to renew Catholic's contract, passed a City Council resolution aimed at investigating faith-based agencies like Catholic because of their religious beliefs about marriage, and threatened to subpoena Catholic even though no complaint had been filed against it.

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

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

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

No compelling interest. A compelling interest is an interest "of the highest order," of the type that would justify the most serious government infringements upon constitutional rights. *Lukumi*, 508 U.S. at 546. The

burden is on "the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt*, 135 S. Ct. at 863 (citation omitted).

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

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[178] Appx.0034.
[179] Appx.0285.
[180] Appx.0521-22, 0582-83.
[181] Appx.0512-17.
[182] Appx.1017.
[183] Appx.0532-33.
[184] 55 Pa. Code § 3700.64.

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

Nor is the City furthering any compelling interest in a diverse pool of foster parents. Commissioner Figueroa conceded that, if the City prevails in this action, the result will be that the City has the exact same number of foster agencies available to certify LGBT couples.[187] Indeed, the current referral freeze has already decreased the number of available foster homes, so that 35 places are available and unfilled.[188]

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[185] Appx.0843-44; Phila. Code § 9-1106; Appx.1114-15.
[186] The District Court made much of the fact that the FPO was included in Catholic's contract. But the City knows how to write an express non-discrimination provision—the contract contains a flat ban on discrimination based upon race, color, religion, or national origin. Appx.1114-15. But the City chose to rely upon the FPO for the remaining non-discrimination terms. *Id.* Moreover, the contract contains a number of boilerplate provisions that by their terms do not apply to foster care, such as professional liability insurance for nursing homes, prohibitions on investment in Northern Ireland, and compliance with law governing prisons. Appx.1062, 1105, 1119.
[187] Appx.0496-97.
[188] Appx.0344.

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

The mere speculative possibility of harm will not suffice to carry the government's constitutional burden. In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court made clear that the government cannot demonstrate a compelling interest in enforcing a policy where it relies on, at best, "ambiguous proof." 564 U.S. 786, 799-800 (2011). The harm the City alleges—that gay foster parents will be discouraged from fostering—is purely hypothetical.

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

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[189] Appx.0645.
[190] Appx.0663-65.
[191] Appx.0344.

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

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

II. The harm to Appellants is irreparable.

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

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[192]Appx.0126-28, 0208-09, 0218, 0318-19, 0502; Appx.0318.
[193] Appx.0183-84.

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

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

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[194] Appx.0372, 0377-80, 0381.
[195] Appx.0138, 0347.

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

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

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[196] Appx.0991-93, 0995-96, 0998-1000.
[197] Appx.0135-36.
[198] Appx.0995-96, 0146-47.
[199] Appx.0145.

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

III. The balance of harms favors Appellants.

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

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

[200] Appx.0832, ¶ 17; *see also* Letter to the Court 2, ECF 49.

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

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

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

[201] Appx.0668-69.

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

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

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

IV. An injunction is in the public interest.

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

[202] Appx.0496-97.

calculus is simple. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012). But even apart from that, there is no question allowing Catholic to continue serving children is in the public interest.

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

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[203] Appx.0339.

[204] Appx.0569-70.

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

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

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

CONCLUSION

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

[206] Appx.0573.

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Respectfully submitted,

/s/ Mark Rienzi

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CERTIFICATE OF BAR MEMBERSHIP

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

Dated: August 27, 2018

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

I hereby certify that the following statements are true:

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

Executed this 27th day of August 2018.

/s/ Mark Rienzi
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CERTIFICATE OF SERVICE

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

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