No. 19-123

IN THE

Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,

Respondents.

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

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QUESTION PRESENTED

Whether the First Amendment requires the City of Philadelphia to enter into a contract that allows a private agency—contrary to the terms that apply to all contractors—to discriminate based on sexual orientation while certifying foster families pursuant to state-mandated criteria.

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STATEMENT OF THE CASE

This matter arises on an appeal from the denial of a preliminary injunction. While petitioner Catholic Social Services (CSS) offers its own version of the facts, the district court made detailed findings after a three-day evidentiary hearing that directly contradict CSS's account. Such findings must be accepted unless clearly erroneous, *see, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2736, 2739 (2015), and acquire even more force where, as here, the court of appeals "found them supported by the weight of the evidence," *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (describing the "two courts" rule).

A. Philadelphia's Foster Care System

1. For nearly 100 years, state and local governments have assumed responsibility for protecting and caring for abused and neglected children. Part of that system involves removing children from their own families when deemed necessary for their protection. JA 79, 695-96. The government then becomes legally responsible for these children's care until they are able to return home or are adopted by relatives or other families. Pet. App. 56a, JA 694-95. Governmental agencies carry out this responsibility through public child welfare programs, which, among other things, find foster families to care for children in the government's custody.

2. Like many other cities and states, Philadelphia enters into taxpayer-funded contracts with private agencies to provide a range of services for children in foster care. JA 684-85, 694. These include contracts with "[f]oster family care agenc[ies]," 55 Pa. Code §

3700.4, to "recruit, screen, train, and certify" foster families ("foster family certification"), Pet. App. 56a-58a, 75a-76a; JA 516; 23 Pa. Cons. Stat. § 6344. Pursuant to state law, contracted foster family care agencies are delegated governmental authority to "inspect and approve foster families." 55 Pa. Code § 3700.61. Each contract for foster family certification is for a term of one year. Pet. App. 13a, 57a.

State law dictates the criteria for evaluating prospective foster families. 23 Pa. Cons. Stat. § 6344; 55 Pa. Code §§ 3700.64, 3700.69. Agencies must assess each prospective foster parent's "ability to provide care, nurturing and supervision to children," mental and emotional stability, and supportive community ties. 55 Pa. Code § 3700.64(a); JA 98-99. In determining whether an applicant meets these requirements, state regulations direct that agencies "shall consider" a variety of criteria, including "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships, especially as they might affect a foster child." 55 Pa. Code § 3700.64(b).

Certifications under 55 Pa. Code § 3700.61 do not require the agency to endorse or approve any applicant's relationship or marriage. In fact, applicants do not need to be married. *See* 55 Pa. Code § 3700.62 (specifying "Foster parent requirements"); *id.* § 3700.64 (specifying considerations relevant to the "Assessment of foster parent capability").

Families certified as satisfying the government's criteria may obtain foster care licenses from the Commonwealth of Pennsylvania. Pet. App. 58a. Once a license is issued, children may be placed in a family's

care. After a placement, the agency that certified the family provides continuing support for the family. Pet. App. 137a.

3. For many years preceding this litigation, every foster family certification contract the City entered into included a provision requiring contractors to comply with the Philadelphia Fair Practices Ordinance (FPO). That ordinance prohibits discrimination in "public accommodations" on the basis of certain characteristics including race, sex, religion, disability, gender identity, and (since 1982) sexual orientation. Pet. App. 59a-60a. Foster care services are public accommodations. Pet. App. 77a-78a (construing municipal law in this manner); *see also Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149-50 (2017) (noting the "great deference" due to lower courts' interpretations of local law).

The City has never granted an exemption or otherwise permitted an agency performing contracted-for foster family certification services to violate its anti-discrimination requirement, or turn away qualified families for any other reason. Pet. App. 100a-101a; JA 147. Contracting agencies may sometimes *inform* families of other agencies that may be better suited to their needs, such as when another agency is licensed to certify families to care for children with special medical needs. JA 118. But the City has never allowed any agency to *turn away* qualified families seeking certification, much less on the basis of protected characteristics. Pet. App. 101a.

B. The City's Contract With Catholic Social Services

1. The City has long contracted with CSS to provide a range of services to youth in the City's foster care system. In addition to the certification of foster families at issue here, CSS operates a Community Umbrella Agency that provides case management services for children in foster care.[1] It also runs congregate care facilities for children in the City's custody, including group homes and other residential facilities. JA 88. The Fiscal Year (FY) 2018 contract provided that CSS would be paid $19.4 million in taxpayer funds for these services. Pet. App. 60a; JA 505.[2]

The City has been aware for decades of CSS's religious beliefs. JA 165. This never stopped the City from contracting with CSS because the City believed that CSS was operating in accordance with the contract terms, including the anti-discrimination provision. *See* JA 687.

2. In 2018, the City learned from a news reporter that CSS and another contractor (Bethany Christian Services) were unwilling to certify prospective foster

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[1] Case management services involve "assessing the child's safety through visitation, completing a case plan for the child's needs, ensuring the child receives all behavioral health, medical, and educational services . . . and intervening when necessary." JA 696.

[2] CSS separately operates an adoption program, in which it assists birth families who choose to place their infants for adoption. *See* Catholic Social Services: Adoption, at https://perma.cc/6ZK3-NUAV. This program operates without any involvement of the City and is not at issue here.

families headed by same-sex couples. Pet. App. 14a. When the Commissioner of Human Services, Cynthia Figueroa, phoned to inquire about this report, officials at both agencies confirmed it was true. CSS stated that it "would not certify same-sex couples because it was against the [Catholic] Church's views on marriage." *Id.* Bethany made a "similar statement." JA 273.

After being informed that denying certifications on this basis was prohibited, Bethany agreed to comply with the City's anti-discrimination requirement. The City then renewed Bethany's contract for foster family certification. Pet. App. 103a. But CSS was unwilling to comply with the City's anti-discrimination requirement.

In an effort to resolve the impasse, Commissioner Figueroa met with the Secretary and Executive Vice President of CSS, James Amato. She explained that excluding same-sex couples violated the contract's requirement to comply with the FPO. JA 185. Hoping to persuade CSS to continue its foster family certification work in compliance with the anti-discrimination requirement, Figueroa also appealed to their shared faith. She remarked, "[I]t would be great if we could follow the teachings of Pope Francis." Pet. App. 33a. CSS, however, declined to comply with the anti-discrimination requirement. JA 185.

Given the parties' disagreement, the City's Department of Human Services (DHS) put an "intake freeze" on placing children with families certified by

CSS.[3] Because DHS seeks stability in agency care of children, it did not want to send new children to families supported by an agency with which it might have to discontinue its contract for failure to comply with the contract's terms. JA 274-275. At the same time, DHS offered to enter into a limited services contract with CSS to continue to support CSS-certified families that currently had children placed in their care. JA 284-86. And to ensure that all foster families that had been certified by CSS could continue fostering additional children, the City offered to assist these families with transitioning to other agencies, as the City has done whenever other agencies have stopped participating in the program. Pet. App. 170a.

The intake freeze has not affected the operation of the City's foster care system. It has not resulted in an increase in the number of children in congregate care. Nor has it increased the number of children staying in a DHS facility for children for whom foster families have not yet been located. Pet. App. 66a; JA 173, 349. Furthermore, the City has not frozen or canceled any other part of its annual contract with CSS. CSS continues to provide congregate care and case management services for children in the City's custody, for which the City pays CSS approximately $17 million annually. Pet. App. 16a, 36a, 39a, 187a; JA 505.

[3] The City allowed exceptions to the intake freeze when placement with a CSS-certified family was in the best interest of a child—e.g., where CSS families had a prior relationship with, or were caring for the siblings of, a child in need of placement. Pet. App. 17a; JA 705.

C. Proceedings To Date

1. Shortly before CSS's FY2018 contract was set to expire, the City reiterated its insistence that all agencies providing foster family certification services abide by the anti-discrimination requirement. Because CSS disputed that the FPO covered foster care, the City also informed CSS that future contracts with foster family care agencies would include additional language explicitly reaffirming that contractors may not discriminate against prospective foster parents based on sexual orientation or other protected characteristics. Pet. App. 18a, 170a.

In response, CSS filed this lawsuit against the City.[4] Respondents Support Center for Child Advocates (which advocates on behalf of children in foster care) and Philadelphia Family Pride (a membership organization that includes LGBTQ+ foster parents and prospective foster parents) intervened as defendants. Dist. Ct. Doc. 69.

CSS claims that it has a constitutional right, based on free exercise of religion and free speech, to a government contract to perform foster family certification services while categorically refusing to certify same-sex couples who meet statutorily-mandated certification criteria. Pet. App. 79a. CSS seeks only declaratory and injunctive relief.

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[4] Three individuals who previously worked with CSS as foster parents are plaintiffs as well. Because it is questionable "whether the individual plaintiffs have standing," Pet. App. 19a & n.4, and they do nothing more than join in CSS's claims, we refer to the plaintiffs simply as "CSS."

2. CSS moved for a preliminary injunction requiring the City to allow it to discriminate based on sexual orientation while certifying foster families. Pet. App. 19a-20a. While this motion was pending, the City learned that CSS had been imposing an additional non-statutory certification restriction on prospective foster families. CSS would not certify families unless they provided a clergy letter attesting that they were observant in a religion. Pet. App. 55a, JA 215-16. After the City objected, CSS informed the district court that it would suspend that requirement "in order to eliminate any potential issue regarding how the parties would operate under a preliminary injunction." JA 715.

After a three-day evidentiary hearing, Pet. App. 53a-54a, the district court denied CSS's motion, finding that it had failed to establish a likelihood of success on its claims or satisfy any of the other preliminary injunction factors. Pet. App. 52a-132a.

a. With respect to CSS's free exercise claim, the district court concluded that the City's anti-discrimination requirement is a neutral and generally applicable rule under *Employment Division v. Smith*, 494 U.S. 872 (1990), and therefore need only satisfy rational basis review. Pet. App. 80a-88a. The court found that the City's foster care contracts prohibited discrimination based on sexual orientation and other characteristics protected by the FPO well before CSS's refusal to certify same-sex couples came to DHS's attention. Pet. App. 78a-79a. After hearing live testimony from Commissioner Figueroa, the court also found that her decision to freeze intake was not motivated by hostility to CSS's religious beliefs. Pet.

App. 98a-99a. And contrary to CSS's contention (Petr. Br. 13) that the City has permitted other agencies to discriminate based on protected status, the district court found that "[t]here is no evidence in the record to show that DHS has granted any secular exemption" to its anti-discrimination requirement. Pet. App. 100a. Nor would the City "permit any foster agency under contract, faith-based or not, to turn away potential foster parents" because of protected characteristics. Pet. App. 88a.

The district court also held that that the City's anti-discrimination requirement furthers several legitimate governmental objectives. These include "ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need," and "that when [the City] employ[s] contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified." Pet. App. 89a-90a.

b. The district court held that CSS was unlikely to succeed on its compelled speech claim because "CSS's speech, to the extent any is required under the [City's contracts], constitutes governmental speech." Pet. App. 116a. The contract does not require CSS to "chang[e] its activities, views, [or] opinions," and "CSS may continue to refuse its private services to same sex couples outside the confines of" performing its contracted government services. Pet. App. 118a.

3. On appeal, the Third Circuit noted that the FY2018 contract had expired, thus rendering the controversy regarding that contract "moot." Pet. App. 25a. The court of appeals also expressed doubt about whether CSS could be granted the "highly unusual"

remedy of "an injunction forcing the City to renew a public services contract with a particular private party." Pet. App. 25a-26a n.8. But the court did not reach that question because it unanimously held that CSS was unlikely to succeed on its constitutional claims and did not satisfy any of the other preliminary injunction factors.

Like the district court, the Third Circuit concluded that the City's anti-discrimination requirement is valid under *Smith* because it is a neutral and generally applicable rule. Pet. App. 32a-38a. "That CSS's conduct springs from sincerely held and strongly felt religious beliefs," the court explained, "does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs." Pet. App. 37a.

The Third Circuit also held (in the context of rejecting CSS's claim under the Pennsylvania Religious Freedom Protection Act) that even if strict scrutiny applied here, "the City's actions are the least restrictive means of furthering a compelling government interest." Pet. App. 47a. "It is black-letter law," the court of appeals observed, "that 'eradicating discrimination' is a compelling interest," and "mandating compliance is the least restrictive means of pursuing that interest." *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Finally, the Third Circuit rejected CSS's free speech claim on the ground that "the ostensibly compelled speech occurs in the context of CSS's performance of a public service pursuant to a contract with the government." Pet. App. 40a. Under *Rust v. Sulli-*

van, 500 U.S. 173 (1991), the court observed, "the government is free to fund only those programs that comport with its own view[s]." Pet. App. 41a.

4. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

For reasons independent of *Employment Division v. Smith*, 494 U.S. 872 (1990), the Third Circuit correctly held that CSS has not demonstrated a likelihood of success on the merits of its First Amendment claims.

I. Where the government is managing its own program, it has much broader leeway to establish rules than when it regulates private conduct or provides a benefit to the general public. *Rust v. Sullivan*, 500 U.S. 173 (1991) (speech); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (free exercise). The government cannot single out religion for disfavored treatment or otherwise impose discriminatory terms. And it may not seek to control what its employees or contractors do *outside* the program. But the government otherwise has broad latitude to set the terms of its own program, whether they are implemented by its own employees or by private contractors. Anyone who objects to the terms of a government contract is free not to enter into the contract in the first place.

II. These principles resolve this case. The City's anti-discrimination requirement does not violate CSS's speech rights because, even assuming it regulates speech at all, it does so only within the confines of the government program. For similar reasons, the anti-discrimination requirement does not violate the

Free Exercise Clause. It is neutral and generally applicable, and regulates only what contractors do when performing a delegated government function—the certification of foster families to care for children in the City's custody. And it leaves CSS free to act as it wants outside the program.

It is immaterial that CSS historically provided various services to children in need before the Commonwealth and the City undertook the responsibility to take custody of children deemed unsafe at home and to place them with foster families. Nor does it matter that the City has (as CSS puts it) "monopolized" the process of certifying foster families as legally qualified to care for children in its custody. To the contrary, the fact that this task has become an exclusive government function only underscores the propriety of the City's broad leeway to set its terms.

CSS also protests that the City's anti-discrimination requirement was motivated by hostility toward CSS's religious beliefs and does not apply equally to all government contractors. But the district court and court of appeals found that CSS's contentions are belied by the record. The anti-discrimination requirement applies to all contractors, religious or secular. And the City has never permitted any exemptions for any reason.

The courts below also correctly found that the requirement was not motivated by hostility towards religion. The City has long had a policy prohibiting foster family care agencies from discriminating against prospective families based on sexual orientation, and its decision to freeze intake from CSS was based on CSS's unwillingness to comply with that policy, not

disapproval of CSS's religious beliefs. Indeed, the City continues to contract with another foster family care agency that has a religious objection to same-sex marriage but is willing to comply with the anti-discrimination requirement. And it continues to contract with CSS itself for substantial other services for children in foster care, for which CSS is compensated approximately $17 million annually.

III. At any rate, the anti-discrimination requirement would easily satisfy any type of scrutiny. The requirement imposes no substantial burden on CSS. It does not require CSS to endorse any same-sex marriages, but merely to certify that families meet *Pennsylvania's* statutory criteria. Nor is the City preventing CSS from pursuing its religious ministry of helping children in need. CSS continues to receive millions of City dollars to provide care to children in foster care, and remains free to use its own resources to provide further services to children in foster care, to recruit foster families, and to operate its private adoption program. In any event, the anti-discrimination requirement is narrowly tailored to further the City's compelling interests in ensuring that government programs treat all residents equally and in maximizing the number of qualified families available for children in need of foster care.

ARGUMENT

CSS claims that the most "straightforward" way to decide this case is to apply the free exercise framework in "the *Sherbert/Yoder* line of cases." Petr. Br. 37, 50. CSS, however, ignores the fact that this case involves a distinctive form of governmental conduct. In contrast to cases like *Wisconsin v. Yoder*, 406 U.S.

205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963)—which addressed direct regulation of private conduct or the provision of benefits to the public at large—this case involves *a government contract to carry out a delegated government function*. Where the government manages its own business, this Court made clear, even before *Employment Division v. Smith*, 494 U.S. 872 (1990), that the test enunciated in *Sherbert* and *Yoder* does not govern. Instead, the First Amendment generally allows the government to impose conditions on those carrying out its programs as long as they do not discriminate against religion or inhibit its contractors' religious exercise or speech outside the scope of the government's program.

That principle resolves this case. But even if the Court were to apply the *Sherbert/Yoder* framework to the City's anti-discrimination requirement, the requirement would satisfy that framework too.

I. The Government Has Broad Leeway To Impose Conditions On Contractors Carrying Out Government Programs.

"[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy,* 367 U.S. 886, 896 (1961)).

A. The Free Speech Clause

1. The government's power when exercising its managerial authority over those it hires to carry out

its own governmental programs is most thoroughly developed in case law involving free speech claims. In that context, this Court has long recognized that the First Amendment "does not invest [government employees] with [the] right to perform their jobs however they see fit." *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). Where the government employs individuals to achieve the "particular tasks" it is "charged by law with doing," it may impose restrictions on those employees that could not be imposed on the public at large. *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994).

The reason is simple: "Government employers, like private employers, need a significant degree of control over their employees." *Garcetti*, 547 U.S. at 418. Otherwise, "there would be little chance for the efficient provision of public services." *Id.* Without broad authority to "speak for itself"—free from the strictures that apply when the government regulates private activity—"[i]t is not easy to imagine how government could function." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

2. The government retains its power to control how its own programs are carried out when it hires contractors rather than civil servants to do so. Accordingly, there is no "difference of constitutional magnitude" between government employees and government contractors when evaluating free speech claims in this context. *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 684 (1996) (citation omitted).

For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court considered a government program for providing family-planning services. Instead of

providing the services directly, the government paid "public or nonprofit private entities to assist in the establishment and operation" of the program. *Id.* at 178 (quoting statute). When, as a condition of those grants and contracts, the government prohibited recipients from discussing abortion within the program, several funding recipients sued.

The Court held that the condition did not contravene the First Amendment. Just as in the sphere of public employment, the government may impose conditions on contractors carrying out a government program to ensure that "federal funds will be used only to further the purposes of [the payments]." *Rust,* 500 U.S. at 198. The government may not impose conditions that restrict speech "*outside* the scope of the federally funded program." *Id.* at 197 (emphasis added). But *inside* the program, a funding recipient generally is obligated to comply with the conditions of the program. *Id.* at 193. "[I]f a party objects to a condition on the receipt of [government] funding" to carry out a government program, it may simply "decline the funds." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,* 570 U.S. 205, 214 (2013) ("*AOSI*").

B. The Free Exercise Clause

As with speech, so with religion: When the government hires employees or contractors to provide a government function, the Free Exercise Clause does not give them the right to alter how the government program operates. The government cannot impose restrictions beyond the program or discriminate against religion, but otherwise it has a free hand.

1. In two pre-*Smith* cases whose holdings CSS and the Solicitor General ignore, the Court made clear that the Free Exercise Clause does not prevent the government from taking religion-neutral measures to manage its own affairs, even where they have the effect of burdening someone's religion.

Bowen v. Roy, 476 U.S. 693, 700 (1986), considered whether the government's use of Social Security numbers within its own aid-distribution program violated a father's free exercise rights by "harm[ing] his daughter's spirit." *Id.* at 699. The Court did not question the father's belief that using a social security number would inflict spiritual harm. But it held that the *Sherbert/Yoder* test "is not appropriate in this setting." *Id.* at 707 (plurality opinion). As the Court explained, "the Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 699.[5]

In *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), the Court applied *Roy* to a government program of harvesting lumber and building a road on national forest land. *Id.* at 450. Despite acknowledging that the government's activity could "virtually destroy" a Native American tribe's "ability to practice their religion" on that land, the

[5] Two of the Justices in the majority observed that the plaintiffs might legitimately have "an independent religious objection to their being forced to cooperate actively with the Government by themselves providing their daughter's social security number on benefit applications." *Roy*, 476 U.S. at 714 (Blackmun, J., concurring in part). CSS makes no claim that it was forced to contract with the government.

Court again expressly rejected the argument that the *Sherbert/Yoder* test applied. *Id.* at 451. When dealing with "the incidental effects of government programs which may make it more difficult to practice certain religions," the Court concluded that the "Constitution simply does not provide a principle that could justify upholding [their] legal claims." *Id.* at 450-52 (quotation omitted).

The reasoning supporting *Roy* and *Lyng* mirrors the free-speech principles just discussed. The "government simply could not operate if it were required," when operating its own programs, "to satisfy every citizen's religious needs and desires." *Lyng*, 485 U.S. at 452. A "broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens," while "[o]thers will find the very same activities deeply offensive." *Lyng*, 485 U.S. at 452. "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours." *Id.*

"[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Lyng*, 485 U.S. at 451 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)). More generally, the Court has explained that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right." *Rust*, 500

U.S. at 193 (quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983) (alteration omitted)).

2. Just as with respect to speech, nothing about this analysis changes when the government seeks to manage the activity of contractors acting on its behalf. In *NASA v. Nelson*, 562 U.S. 134 (2012), the Court made clear that there is nothing unique about the Free Speech Clause when it comes to the government's power to insist that contractors follow certain rules. There, government contractors challenging a background check argued they had a greater constitutional right to "informational privacy" than the government's own employees. The Court squarely rejected the argument, holding that the government has the same "freer hand" to control contractors that it has to control employees and otherwise manage "its internal affairs." *Id*. at 147, 153.

So, too, with the Free Exercise Clause. There is no reason why it would have made any difference in *Lyng* if the government had hired members from the Yurok tribe to pave the road. If the tribe members had refused to build the road through the national forest, the Free Exercise Clause would not have required the government to keep those workers in its employ or reroute the road. *See Lyng*, 476 U.S. at 451-52.

This analysis is consistent with our nation's historical tradition. CSS references academic articles asserting that religious exemptions from "laws" were historically accepted and sometimes required. Petr. Br. 46 (citing Stephanie Barclay, *The Historical Origins of Judicial Religious Exemptions*, Notre Dame L. Rev. (forthcoming 2020) (manuscript) (https://bit.ly/

3b0btbv); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990)). But neither article cites a single example of a religious exemption *in the context of individuals providing a government service*.

This omission is telling. Since the Founding, federal, state, and local governments have contracted with religious individuals and organizations to carry out government programs.[6] Yet until recently, religious organizations have consistently asked only to participate on the same terms as secular organizations—not for special exemptions. To take but one example: In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court considered a government program for funding "educational services relating to family life and problems associated with adolescent premarital sexual relations." *Id.* at 594 (quoting 42 U.S.C. § 300z-1(a)(4)). Turning back an Establishment Clause challenge to the program's inclusion of religious organizations among its grantees, the Court took it for granted that the government could require *all* organizations accepting such funds to avoid "inculcat[ing] the views of a[ny] particular religious faith" with regard to premarital sex and the like. *Id.* at 621. It is hard to see, under CSS's argument here, how the government could have imposed such restrictions.

If those who exercise delegated governmental authority were entitled—absent satisfaction of strict

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[6] *See, e.g.*, Edward Queen, *History, Hysteria, and Hype: Government Contracting with Faith-Based Social Service Agencies*, 2017 Religions 8, 22, at 2-6 (2017), at https://perma.cc/255K-PUST.

scrutiny—to free-exercise exemptions from program requirements that applied to everyone else, the consequences would be unacceptable. Foster family care agencies could turn away a broad range of qualified families beyond same-sex couples, including families that failed to adhere to a particular faith.[7] Indeed, until the City learned of it and objected, CSS had been requiring families seeking certification to provide a clergy letter attesting that they were observant in a religion, a requirement found nowhere in the statutory terms governing certification. Pet. App. 55a; JA 215-16. (CSS has suspended the practice, JA 715, but it has not disavowed it.)

Furthermore, if CSS prevails here, other agencies might maintain that their religious beliefs give them the right to refuse to certify interracial couples. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and

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[7] *See*, *e.g.*, Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, Jewish Telegraph Agency (Feb. 5, 2019), https://perma.cc/BW4R-2HRR; *Bills supporting religion-based rejection turning parents away from adoption agencies*, USA Today, June 10, 2019 (state-contracted foster care agency refused to accept Catholic family); *see also* Br. of Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies as Amici Curiae in Support of Respondents.

marriage."). Or a Christian Scientist agency could refuse to certify families who would seek medical treatment for children in their care.[8]

The implications would also extend far beyond foster care to a vast array of other government programs, including homeless shelters, after-school programs, meal programs, and prisons. *See* Amicus Br. of Massachusetts, et al., as Amici Curiae in Support of Respondents (Br. of Massachusetts); Br. of Local Governments and Mayors as Amici Curiae in Support of Respondents. If the government had to satisfy strict scrutiny regarding every aspect of those programs that contractors object to on religious grounds, it is hard to see how public-private partnerships could function. *See id.* This Court reasoned in *Smith* that "an individual's obligation to obey . . . a law" cannot be "contingent upon the law's coincidence with his religious beliefs." 494 U.S. at 885. That concern is even more pronounced with respect to government contracting.

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[8] Under CSS's view, foster care agencies also could separate children from siblings based on the agencies' religious objections to a family's sexual orientation. *See*, *e.g.*, Michigan Dep't of Health and Human Servs., Special Investigation Report 2018C0223029 (2018), at https://perma.cc/S75Y-U3AA (state-contracted agency separated a child from his siblings because it believed that placing him with the same-sex couple caring for his siblings violated Catholic teaching); *see also* Br. of Amici Curiae Family Equality and National PFLAG in Support of Respondents (Br. of Family Equality) (recounting stories of children in foster care who were denied the opportunity to be adopted and remained in foster care because of discrimination against families who sought to adopt them).

II. The City's Anti-Discrimination Requirement Is A Permissible Condition On Carrying Out The Government's Foster Family Certification Process.

The City's requirement that agencies refrain from discriminating on the basis of sexual orientation is a permissible condition on how government contractors must carry out the government's foster family certification process. Foster family certifications are part of a government program, and the City's anti-discrimination requirement applies only within the confines of that program. Furthermore, the requirement does not discriminate based on religion; it applies to *all* foster family care agencies, religious and secular alike. If CSS objects to conducting certifications consistent with the City's requirement, it is free to "decline the [City's] funds." *AOSI*, 570 U.S. at 214.

CSS advances several objections to these straightforward postulates, but none withstands scrutiny.

A. Foster Family Certification Is Part Of A Government Program.

1. CSS certifies foster families as part of a "contractual relationship[]" created to help the government run *its own* program. Pet. App. 19a (quoting letter from CSS). Children in foster care are in the "custody" of the City, having been removed from their families by the City. Petr. Br. 5-6. State law obligates the City to care for these children, including "find[ing] a suitable home" for each child. Petr. Br. 6; *see also, e.g.*, 55 Pa. Code § 3700.62 *et seq.*; Pet. App. 56a. And the City hires contractors—as governmental "deleg[ees]," 55 Pa. Code § 3700.61—to "recruit,

screen, train, and certify" prospective foster parents, pursuant to statutorily mandated criteria. Pet. App. 75a-76a.

CSS nonetheless suggests that getting a government contract and taxpayer funds to provide foster family certifications is a government "benefit"—and thus that the City's anti-discrimination requirement should be evaluated according to constitutional principles that govern benefits regimes. Petr. Br. 5-6, 32-33; *see also* CLS Amicus Br. 24 (same). This is mistaken. A governmental benefit subsidizes private activity, such as "[w]hen the government chooses to offer scholarships, unemployment benefits, or other affirmative assistance to its citizens." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2276-77 (Gorsuch, J., concurring); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). Philadelphia's foster family certification contracts are not benefits generally available to the public at large. They are enforceable agreements to take on the task of executing delegated governmental functions.[9]

2. CSS complains that the City has a "monopoly" over foster care certifications. Petr. Br. 31. That is, to perform the service at issue, CSS "*must* contract with

[9] This case does not implicate how CSS or other religious entities provide private adoption services. *See New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 2020 WL 4118201, at *15 (2d Cir. July 21, 2020) (reversing order dismissing free exercise claim by private adoption agency and distinguishing *Fulton* on the grounds that the agency does not provide services "pursuant to any government contract, nor does it receive any government funding").

the City." Petr. Br. 5-6 (emphasis added). But this reality only underscores that certifying foster families is a government function, not a generally available governmental benefit. In *Lyng*, for instance, the government unquestionably had a monopoly over the land at issue. But the religious group's insistence that it needed to use the land for religious purposes "d[id] not divest the Government of its right" to determine what transpired on "*its* land." *Lyng*, 485 U.S. at 453 (emphasis in original). So too here. That CSS says that helping children in foster care is important to its religious ministry does not divest the City of its authority to enforce the rules of its own program.

No other system would make sense. The government holds exclusive control over a wide variety of public functions. It has a monopoly, for instance, on requiring juvenile rehabilitation and imprisoning people for crimes. If CSS were correct, a religious organization contracting with the government to provide juvenile diversion services could demand that the government allow it to turn away or baptize non-Christians, or require Bible study. *Cf. Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007) (holding that religious organization contracting with government to care for children in state custody could not insist upon providing them religious instruction). Multitudes of similar scenarios are easy to envision.

3. Nor does it matter that CSS provided care for children outside of their families "long before" the City was given the authority to take custody over children deemed to be in unsafe circumstances. Petr. Br. 4, 51-52; *see also* Cert. Reply 9. The Court has never allowed private parties to dictate government

policies because activity within the same sphere was once conducted by private parties. Once again, *Lyng* is instructive. The Court there upheld the government's plan to repurpose land that, for centuries before it became a national forest, had been under tribal control and had "traditionally been used for religious purposes." *Lyng*, 485 U.S. at 442. And in *Rust*, the Court upheld federal requirements for a public health program, though that program had supplanted one part of "a historically private social service system." Br. of United States Catholic Conference in Support of Respondent at 6, *Rust v. Sullivan*, 500 U.S. 173 (1991).

In short, when a government institutes a government program, it is not constrained by the views of the private parties that provided similar services in the past. A variety of core governmental services—including the military, police, and libraries—were once privately operated. But when governmental agencies undertook to provide them as public services, they did not need to run the programs in accordance with the religious (or any other) beliefs of organizations that previously provided those kinds of services. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (military).

B. The Contractual Requirement Operates Exclusively Within The Government Program.

CSS seeks to portray the City's anti-discrimination requirement as restricting its conduct outside of the foster care program. Not so.

1. Contrary to CSS's assertion that the City "does not fund home studies" of prospective foster parents, Petr. Br. 33, the district court found that home studies are "services that CSS agreed to provide under the Services Contract." Pet. App. 76a.

It is true that CSS's FY2018 contract did not have a specific line item funding home studies. But home studies were unquestionably part of CSS's obligations under the contract, for which CSS was paid a lump sum. JA 506. The contract required CSS to "screen" and "certify" families and "ensure," as part of the certification process, that "resource homes" meet required criteria. JA 512, 515, 520-22; *see also* 55 Pa. Code § 3700.69(a) (requiring contractor to "visit and inspect" the foster family as part of the evaluation process). The only way to perform those duties is to conduct home studies. Indeed, CSS would not have been able to conduct home studies (that is, enter and examine private homes, and demand personal information of their inhabitants) if state law did not "delegate" to it the authority to "inspect and approve foster families." 55 Pa. Code § 3700.61.

CSS likewise misleadingly asserts that the DHS Commissioner agreed that the City has "nothing to do with home studies." Petr. Br. 31 (quoting Pet. App. 302a). The Commissioner simply agreed that the *Commonwealth*, not the City, *licenses* agencies to do home studies. Pet. App. 303a. She made clear that the

home studies themselves are conducted pursuant to the "contract with the City." *Id.*[10]

2. The anti-discrimination requirement is limited to a foster family care agency's activities while "performing th[e foster care] Contract." JA 654. The standard contract leaves CSS free to decline to serve same-sex couples in its private activities. The anti-discrimination requirement simply forbids CSS from refusing to certify qualified families *for the government's foster care program* on the basis of protected characteristics irrelevant to their ability to care for children. In other words, the requirement governs only the recipient's *conduct in the funded program*, not what "the *recipient*" does outside the program. *Rust*, 500 U.S. at 197.

C. The Anti-Discrimination Requirement Does Not Discriminate Based On Religion.

CSS and the Solicitor General also maintain that the City's anti-discrimination requirement discriminates against CSS's religious beliefs. On their account, the City maintains hostility towards CSS's religious beliefs and is treating CSS differently from secular contractors, which they say are allowed to discriminate in certain ways against prospective foster

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[10] CSS suggests that the City's $1.7 million allotment for foster care services in its last contract with CSS may not have covered every last nickel of CSS's expenses. Petr. Br. 5. But the government need not be the exclusive source of funding to impose conditions on contractors carrying out its programs. In *Rust*, for example, "[t]he organizations received funds from a variety of sources other than the Federal Government," but they still could not speak about abortion when performing services that the government funded. *AOSI*, 570 U.S. at 216 (describing *Rust*).

families. But, after a three-day hearing with live testimony, the district court rejected the assertions CSS and the Solicitor General advance here as unfounded. Pet. App. 93a-101a.

Because this case arises from the denial of a preliminary injunction, "the [lower] courts were not required to accept all CSS's allegations as true or to draw all reasonable inferences in its favor." *New Hope Family Servs.*, 2020 WL 4118201, at *15. Rather, the district court must make findings of fact, and those facts are reviewed on appeal deferentially for clear error. *Glossip v. Gross*, 135 S. Ct. 2726, 2736, 2739 (2015); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018) (finding regarding discriminatory intent is a fact subject to clear error standard). Under this standard, an appellate court may not overturn a finding "simply because [it is] convinced that [it] would have decided the case differently." *Glossip*, 135 S. Ct. at 2739 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)); *see also June Medical Servs. LLC v. Russo*, 140 S. Ct. 2103, 2121 (2020) (plurality opinion); *id*. at 2141 (Roberts, C.J., concurring in the judgment). And where, as here, the court of appeals found the district court's findings "supported by the weight of the evidence," those findings govern "absen[t] . . . a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

CSS and the Solicitor General do not even attempt to satisfy this burden; nor could they given the substantial evidence supporting the district court's find-

ings that the anti-discrimination requirement is neutral as to religion and applies to all contractors, secular or religious.

1. *Neutrality*

When the government objects to conduct "because it is undertaken for religious reasons," it does not act neutrally toward religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). But if the government would have terminated or refused to enter a contract "regardless of" whether a contractor's objectionable conduct was religiously motivated, the government has "a valid defense" to a lack-of-neutrality argument. *Umbehr*, 518 U.S. at 685; *see also* Pet. App. 37a. Such is the case here.

a. *Alleged Religious Targeting*. To prove religious targeting, it is not enough for a challenger to show that a government contracting requirement has a *disparate impact* on religiously motivated practice. Consistent with precedent under the Equal Protection and Free Speech Clauses, the challenger must establish that the government has prohibited the practice "because of"—not merely in spite of—its religious motivation. *Lukumi*, 508 U.S. at 533; *see also Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 696 (2010) (free speech); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-73 (1979) (equal protection).

The facts of *Lukumi* illustrate this principle. The municipality there did not prohibit "cruelty to animals" across the board. *Lukumi*, 508 U.S. at 538. Instead, it selectively prohibited "[k]illings *for religious reasons*." *Id.* at 537 (emphasis added). The ordinances

thus "had as their object the suppression of religion." *Id.* at 542.

Here, by contrast, the district court found "no evidence" that the City adopted the anti-discrimination requirement to restrict practices "because of their religious motivation." Pet. App. 85a (citation omitted). It further found that the City has not allowed any foster family care agency—"faith-based or not"—to discriminate against prospective foster parents based on their sexual orientation or other characteristics protected by the Fair Practices Ordinance (FPO). Pet. App. 88a. And the court held that the FPO—which long predated the parties' dispute—specifically applied to foster family certification. Pet. App. 86a. Thus, if CSS had discriminated for "secular[, as opposed to] religious reasons," the City would have reacted exactly the same way. Pet. App. 87a.

The Solicitor General makes much of the fact that when the City learned of CSS's discriminatory policy, its investigation focused on other religious agencies. U.S. Br. 29. But this hardly reveals religious targeting. CSS and Bethany told the City that their policies were rooted in religious belief, Pet. App. 14a, JA 273, and the City had no reason to believe any agency was discriminating for any other reason. Pet. App. 33a. It made sense to focus its fact-gathering on religious agencies.

b. *Alleged Hostility*. CSS also claims that the City's anti-discrimination requirement is not neutral towards religion because, in the spring of 2018, city officials purportedly "express[ed] hostility towards CSS's religious beliefs." Petr. Br. 24. Again, the district court found to the contrary, Pet. App. 94a-99a.

Those findings are well-supported by the record—and certainly are not obviously erroneous.

City officials have repeatedly said "that they respect[] CSS's beliefs as sincere and deeply held." Pet. App. 32a. Indeed, the City has long known of CSS's religious views, but terminated its foster family certification contract only when it learned that CSS insisted upon discriminating in certifications. Even then, the City has continued to partner with CSS in other aspects of the City's foster care program—providing case management services and operating groups homes for youth in the foster care system—and continues to pay it more than $17 million annually for that work. Pet. App. 16a, 36a, 50a. And the City has continued its foster family certification contract with Bethany, which also has a religious objection to marriages of same-sex couples, but has agreed not to discriminate. Pet. App. 14a, 103a.

These facts stand in sharp contrast to *Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). There, the Court concluded that "an adjudicatory body deciding a particular case" not only made statements "disparag[ing]" religion but also had taken *actions* that treated secular claims differently from analogous religious claims. *Id.* at 1729-30.

CSS makes much of Commissioner Figueroa's remark, during her discussion with a CSS official, that "it would be great if we could follow the teachings of Pope Francis." Petr. Br. 11, 24. But this attempt "to reach common ground with [CSS in 2018] by appealing to an authority within their shared religious tradition," Pet. App. 33a, was an effort to *preserve* the

working relationship with CSS, not to penalize CSS for its religious beliefs, *id.* at 33a, 39a. In any event, a "stray remark[]" does not establish discriminatory intent when unaccompanied by any other evidence of invidious motivation for the decision at issue. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in the judgment).[11]

Finally, CSS's hostility argument provides no basis for the purely prospective relief it seeks. Contracts to perform foster family certifications are awarded on an annual basis, Pet. App. 25a, so all that matters here is whether the 2018 events to which CSS points demonstrate religious hostility in the City's *current* refusal to make an exception to its anti-discrimination rule for CSS. *See Perez*, 138 S. Ct. at 2324-26 (clear error for court to assume discriminatory intent behind state legislation carried over to a new state law doing the same thing two years later). CSS offers no reason to believe they do. *See, e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 874 (2005) (appellate courts reviewing requests for preliminary injunctions should be alert to changed circumstances that affect availability of relief requested).

2. *General Applicability*

The anti-discrimination requirement is also generally applicable to all foster family certification contractors. The district court found that the City does

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[11] CSS also refers to statements by the Mayor and City Council. But the district court found that "DHS made its own decision to close intake," Pet. App. 97a, and specifically that the evidence did not show that the mayor was involved in the decision, Pet. App. 96a-97a.

not permit *any* agency to discriminate in certifying families based on characteristics protected by the FPO. Pet. App. 88a.

a. The general applicability requirement serves to prevent the "inequality [that] results when a [government] decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43. State action therefore operates in a "selective manner" that triggers strict scrutiny when it "impose[s] burdens only on conduct motivated by religious belief," while "fail[ing] to prohibit nonreligious conduct that endangers" asserted governmental interests to "a similar or greater degree." *Id.*

That is not the case here. The district court found that the City "would not permit any foster agency under contract, *faith-based or not*, to turn away potential foster parents" because of their sexual orientation (or any other protected characteristics under the FPO). Pet. App. 88a (emphasis added). Accordingly, the anti-discrimination requirement simply places CSS "on an equal footing" with all other agencies, secular or religious, seeking to contract with the City. *Trinity Lutheran*, 137 S. Ct. at 2022.

CSS nonetheless asserts that the City relaxes its anti-discrimination rule for other contracting agencies. It claims that the City allows secular agencies to "refer families elsewhere," and asserts that that is all it seeks to do here. Petr. Br. 28. But, as the district court found, this contention trades on imprecision in the word "refer." Pet. App. 101a. Just as commercial establishments may generally tell prospective customers that another store or restaurant specializes in

what the customer is looking for, the City allows contracting agencies to inform prospective foster parents about other agencies that might be better suited for them (for reasons such as another agency having the required license to certify families to care for medically needy children). *Id.* But in such scenarios, the choice of which foster family care agency to work with must remain with the family. JA 113, 121-23. As the district court found, "nowhere is there evidence in the record that DHS permits agencies to *refuse* to provide their services" based on sexual orientation or any other protected characteristic. Pet. App. 88a, 101a (emphasis added).

CSS insists that governing law, in fact, allows contractors to "decline to certify a foster family" on the basis of the prospective parents' "marital status, familial status, and disability," which are protected characteristics under the FPO. Petr. Br. 28. It does not. Considerations such as family relationships and disability are relevant only insofar as they affect a family's ability to satisfy the statutory criteria for being foster families—that is, the ability "to provide care, nurturing and supervision to children"; a "stable mental and emotional adjustment"; and "[s]upportive community ties." 55 Pa. Code § 3700.64. CSS makes no argument that sexual orientation is ever relevant under these criteria—much less that it categorically disqualifies same-sex couples from satisfying them.[12]

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[12] There is no basis for CSS's suggestion that agencies may decline to serve families because of "a parent's race." Petr. Br. 8, 28 (referencing Native American children and families). The federal Indian Child Welfare Act imposes requirements on the

b. CSS and the Solicitor General next maintain that the City's anti-discrimination requirement "cannot be generally applicable because [it is] subject to individualized exemptions." Petr. Br. 25; *see also* U.S. Br. 21-22. It makes no difference, under their theory, whether any exemption has ever been granted. According to the Solicitor General, any rule whose application depends "in any given case . . . on a government official's discretionary decision" to enforce it is automatically subject to strict scrutiny. U.S. Br. 22; Petr. Br. 26. This argument, once again, distorts the record and in any event rests on a faulty legal theory.

There is no evidence that the City's standard foster care contract allows individualized exemptions from the anti-discrimination requirement for *any* reason. CSS points to Section 3.21, but that provision permits exemptions only from the specific rule set forth in that section. It does *not* allow discretionary waivers of specific prohibitions *elsewhere in the contract* against turning people away based on protected characteristics. The FPO is not mentioned in Section 3.21, but in an entirely separate provision. *See* Pet.

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placement of Native American children. But the record shows that there are no agencies in Philadelphia that specialize in placing Native American children. JA 123-24.

The Solicitor General notes that some agencies focus outreach efforts on foster families of particular ethnicities. U.S. Br. 23. Similarly, CSS has said that there are agencies that "specialize" in LGBT-parent families, Pet. App. 263a, but the only agency they point to is in New Jersey, not Philadelphia. Pet. App. 138a, 143a (referencing Crossroads Programs, at https://perma.cc/D9LM-PRTJ). As discussed above, the record is clear that the City requires all agencies to serve all families that seek to work with them.

App. 35a, J.A. 582, 653. Nor is there any evidence that the Section 3.21 exemption provision has been applied to permit any sort of discrimination, or ever been utilized at all.

CSS also mentions the City's "Waiver/Exemption Committee" within the City's Law Department. Petr. Br. 26. But this is not a system for making individualized exemptions. The Committee represents nothing more than a mechanism for securing legal opinions regarding when the law allows or requires the City to grant an exemption from one of its own otherwise binding rules.

In any event, the Solicitor General's legal theory cannot be right. *Smith* teaches that "an across-the-board criminal prohibition" is a quintessential "generally applicable law." 494 U.S. at 878, 884. Yet no legal regime is more shot-through with "broad discretion" than the criminal law. *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *see also McCleskey v. Kemp,* 481 U.S. 279, 297 (1987) (noting that discretion is "essential to the criminal justice process"). Prosecutors and police officers constantly make individualized discretionary determinations as to whether to enforce criminal laws. Prosecutorial discretion rests on a broad range of qualitative factors, including "the Government's enforcement priorities," available resources, the animating purpose of the law at issue, and the specific facts of cases. *Armstrong*, 517 U.S. at 465. And police officer discretion is at least as broad.

The same is true with respect to government contracting requirements. Contracting with parties to carry out government programs, just like managing employees, "by [its] nature involve[s] discretionary

decisionmaking based on a vast array of subjective, individualized assessments." *Engquist*, 553 U.S. at 603. The mere possibility of exemptions does not, by itself, demonstrate discrimination against religion. A discretionary outlet indicates a lack of general applicability only if the decisionmaker sometimes makes the "impermissible value judgment" that "secular motivations" for engaging in the conduct at issue "are more important than religious motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

CSS and the Solicitor General respond by propounding *Sherbert*. *Sherbert*, however, is not a case about the government managing its own programs. The Court, in fact, has expressly limited it to the "unemployment compensation" context. *Smith*, 494 U.S. at 883. Additionally, the benefit there was generally available to all citizens and required government officials to assess whether each individual's decision to refuse available work was for "good cause." *Sherbert*, 374 U.S. at 408. That standard discriminated in practice among religions because it exempted those "conscientiously opposed to Sunday work," but not Saturday work. *Id*. at 406. No "religious discrimination," *id*., like that is present here. Thus, even if Section 3.21 or the waiver/exemption committee could somehow be viewed as creating a mechanism for individualized exemptions, that by itself would not trigger strict scrutiny.

c. Unable to show a lack of general applicability with respect to the anti-discrimination rule that governs foster parent *certification*, CSS and the Solicitor

General argue that alleged exceptions to anti-discrimination principles in the realm of child *placements* render the City's regime governing foster family certifications not generally applicable. Petr. Br. 28; U.S. Br. 23. This argument comes up short as well.

The Free Exercise Clause does not require strict scrutiny when a state law "exempts or treats more leniently only dissimilar activities." *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). And where, as here, the government is managing its own affairs—rather than establishing rules for the public to follow in their private affairs—it has a "much freer hand" to weigh competing interests and to determine whether activities are "dissimilar." *Nelson*, 562 U.S. at 148. "Deference is therefore due to the government's reasonable assessments of its interests as contractor." *Umbehr*, 518 U.S. at 678. When the government rationally prioritizes competing governmental interests in distinct settings, that does not trigger strict scrutiny.

That is all that is going on here. Child placement determinations implicate a government interest that is not present in the family certification process. When placing a child with a particular foster family, the Commonwealth mandates consideration of the "best interest" of the child. 55 Pa. Code § 3130.67(b)(7)(i); *see also* 11 Pa. Cons. Stat. § 2633(4), (18) and (19). This assessment involves "find[ing] the best fit for each child, taking the whole of that child's life and circumstances into account." Pet. App. 36a.

The FPO must be read in the child placement setting in harmony with that mandate. *See, e.g.*, *Nutter*

v. Dougherty, 938 A.2d 401, 404 (Pa. 2007) (state law "acts to preempt any local law that contradicts or contravenes" it). Thus, regardless of whether considering characteristics such as race or religion in child-placement decisions could be viewed as implicating the FPO when read in a vacuum, the "best interests of the child" standard may render the *consideration* of such characteristics relevant in selecting a family for some children. *Cf.* U.S. Dep't of Health and Human Servs., *Administration for Children, Youth and Families, Program Instruction on Multiethnic Placement Act* (1995) (federal law whose purposes include "prevent[ing] discrimination in the placement of children on the basis of race, color, or national origin" allows agencies to "consider the cultural, ethnic, or racial background of a child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of such background as one of a number of factors used to determine the best interests of a child").[13]

The state-law directive that all placements must be determined based on the "best interests of the child" does not obtain in the family certification process.

d. As a final gambit, the Solicitor General says that the City allows some secular agencies "to work 'only' with certain children identified by protected characteristics." U.S. Br. 24 (quoting Pet. App. 296a). But that is false. The City does not allow foster care contractors to discriminate against children based on protected characteristics. The testimony the Solicitor

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[13] https://perma.cc/5NB5-4XJE.

General cites explains that the City permits only specialized providers that meet additional licensing requirements to certify families to care for children with significant medical or behavioral health issues. *See also* Pet. App. 241a-243a. Recognizing that some children present special needs does not in any way contravene the City's interests in its anti-discrimination requirement.

* * *

All told, there is no evidence here of "unequal treatment" or the imposition of any "special disabilit[y] on the basis of religious . . . status." *Trinity Lutheran*, 137 S. Ct. at 2019-21. CSS is merely being asked to follow the same government contracting rule that applies to all other agencies that perform foster family certification services—a rule grounded in secular, not religious concerns. This demonstrates that the Free Exercise Clause is *satisfied*, not that strict scrutiny is required.

III. Even If Some Form Of Heightened Scrutiny Applied, The City's Anti-Discrimination Requirement Would Satisfy It.

Even if the *Sherbert/Yoder* line of cases governed here, CSS would not be entitled to a preliminary injunction. The City's anti-discrimination requirement does not impose a substantial burden on CSS. And even if it did, it would satisfy the most rigorous scrutiny. Pet. App. 47a.

A. The City's Anti-Discrimination Requirement Does Not Impose A Substantial Burden On CSS's Religious Exercise.

As a threshold matter, the *Sherbert*/*Yoder* line of cases required plaintiffs to show that the government has placed "a substantial burden" on the practice of religion. *Hernandez v. Comm'r*, 490 U.S. 680, 682 (1989); *see also, e.g., Sherbert*, 374 U.S. at 403. CSS can make no such showing.

1. To begin, the Court "must be careful" to determine whether CSS's religious beliefs about marriage are truly being impinged here. *Yoder*, 406 U.S. at 215. They are not.

CSS says that it "*understands* the home studies as an endorsement of the relationships of those living in the home." Petr. Br. 8-9 (emphasis added). But the question does not turn on CSS's subjective "understanding"; the question is what state law objectively requires. *See Yoder*, 406 U.S. at 216. And certifications under 55 Pa. Code § 3700.61 merely require foster care contractors to apply the *government's* criteria to determine whether an applicant is qualified.

CSS notes that the Commonwealth's law speaks of contractors' "approv[ing] the foster family." Petr. Br. 7-8. But all an approval means is that the family is in "compliance with the requirements of [55 Pa. Code] §§ 3700.62-3700.67." 55 Pa. Code § 3700.69. And those requirements include consideration of "family relationships" only to the extent they "might affect a foster child." 55 Pa. Code § 3700.64(b)(1). For example, an abusive relationship between family members

could affect a child. Agencies are not required to endorse or approve an applicant's marriage itself; indeed, applicants need not even be married.

CSS certainly has the right to hold its own religious beliefs about marriage, and "to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Petr. Br. 32 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015)). But nothing about certifying whether a prospective foster family satisfies *the Commonwealth's* criteria for participating in a government program requires CSS to make any statement, or take any action, contrary to those beliefs. CSS is free to continue making clear that it sincerely believes same-sex couples should not be able to marry, and nothing in the City's contract affects its ability to deny services to same-sex couples when not carrying out a government program. *Cf. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006) ("Nothing about recruiting suggests that law schools agree with any speech by [military] recruiters . . . [or] restricts what the law schools may say about the military's policies.").

2. Moreover, CSS has never said that its religion specifically compels it to certify prospective foster parents for Commonwealth licensure. Instead, CSS says that it is religiously called to care for "abused and neglected children." Petr. Br. 3-4. But it can and does continue to do just that.

Through its ongoing contract with the City, CSS can and does serve children in need as a congregate care provider and by providing case management services. Those programs constitute the overwhelming

majority of contracted services CSS provides to youth in the City's foster care system. Of the 1500 children CSS says it served during 2017-18, Pet. App. 253a, less than 10% were served by its foster family certification program. *Id.* 252a.

In addition, CSS may continue to operate its private adoption program, and may use its own funding to provide material support and services to children in foster care and foster families, as well as to recruit foster parents. The *only* thing CSS cannot do is choose to take on the delegated governmental responsibility of being a gatekeeper for who can be certified as foster parents while violating the terms of the contract and deviating from the statutes that govern that task.

B. The Anti-Discrimination Requirement Is The Least Restrictive Means Of Furthering The City's Compelling Interests.

The Third Circuit rejected CSS's claim under the Pennsylvania Religious Freedom Protection Act (a state RFRA analogue) this way: "[E]ven if we were to assume there is a substantial burden here, CSS is not likely to prevail on its RFPA claim because the City's actions are the least restrictive means of furthering a compelling government interest." Pet. App. 47a. The same is true under federal law: Even if some form of "strict scrutiny" applied, the City's anti-discrimination rule would be a valid means of furthering two independent compelling government interests.[14]

[14] At different times and in different settings, the Court has articulated various forms of "strict" or heighted scrutiny applicable to substantial burdens on the free exercise of religion. In

1. *Eliminating Discrimination Based On Sexual Orientation*

a. It is black-letter law that "eradicating discrimination" is a compelling government interest. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *accord Bob Jones University*, 461 U.S. at 604. Discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625; *see also, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964).

Discrimination based on sexual orientation is no exception. As with other protected characteristics, "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop*, 138 S. Ct. at 1727. The government thus has a vital interest in protecting gay people from "stigma inconsistent with the history and dynamics of

pre-*Smith* cases such as *Sherbert* and *Yoder*, the Court applied a balancing test that required a compelling interest but did not impose a "least restrictive means requirement." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 n.3 (2014). Instead, the Court simply inquired whether accommodating the asserted religious belief would "unduly interfere with fulfillment of the governmental interest." *United States v. Lee*, 455 U.S. 252, 259 (1982). In cases involving religious targeting, by contrast, the Court has insisted that state action be "narrowly tailored" in pursuit of compelling interests. *Lukumi*, 508 U.S. at 546. These variations are immaterial here; under any version of scrutiny, the City's actions are valid.

civil rights laws that ensure equal access to goods, services, and public accommodations." *Id.*[15] If this interest were not compelling (and *Smith* were overruled or deemed inapplicable), then all manner of commercial establishments—not just "expressive" businesses, but restaurants, hotels, common carriers, and more—could raise free exercise objections to public accommodation laws requiring equal treatment of same-sex couples. *Cf. Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam).

The anti-discrimination interest here is all the more vital in the context of a government program, where any discrimination carries the imprimatur of the state—and thus sends the message that those discriminated against are second-class citizens *in the eyes of their own government*. Perhaps the first principle of democratic government is that the government should treat all of the people equally. This principle is reflected throughout our history and laws, including on the engraving on this Court's edifice that proclaims "Equal Justice Under Law."

The Solicitor General acknowledges there is a "governmental interest in preventing discrimination on the basis of protected traits." U.S. Br. 26. But he

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[15] Even if the strength of the government's interest in combatting discrimination based on protected characteristics depended on the particular characteristic at issue, there would be no doubt that the City has a compelling interest in prohibiting discrimination based on sexual orientation. In *Roberts*, the Court recognized a compelling interest in prohibiting sex discrimination. 468 U.S. at 623. And in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Court recognized that sexual orientation discrimination is a form of sex discrimination.

says that interest "cannot be regarded as compelling under the circumstances of this case" because the City's enforcement of that interest is "underinclusive in practice." *Id.* As discussed above, this is wrong. The district court found that the City imposes its anti-discrimination requirement on all contracted foster family care agencies performing certifications, without exception. *See supra* at 33-37. Even if the Solicitor General were correct that the City's child-placement policy demonstrated some underinclusivity, this would not prevent the City from "reasonably conclud[ing]" certifications (and outright denials of service, as opposed to holistic consideration of protected traits in a nondiscriminatory manner) are "categorically different." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449-50 (2015).

b. The City's demand that all foster family care agencies adhere to its anti-discrimination requirement is the least restrictive means of furthering its compelling interest in preventing discrimination. The best way to eliminate discrimination on the basis of sexual orientation in the administration of government programs is to prohibit it—which is exactly what the City does. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 733 ("prohibitions on racial discrimination are precisely tailored to achieve th[e] critical goal" of "providing an equal opportunity").

CSS asserts that the City could still advance its anti-discrimination interest while allowing CSS to send LGBTQ couples to other agencies willing to work with them. Petr. Br. 36. This misunderstands what it means to have a government interest in eradicating discrimination. "Discrimination is not simply dollars

and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring). Discrimination "denigrates the dignity of the excluded" and "reinvokes a history of exclusion." *J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994). Accordingly, discrimination by a service provider (say, a restaurant or theater) has never been thought tolerable so long as the provider is willing to send the would-be patron to another establishment that does not discriminate. In other words, allowing some establishments to discriminate so long as other similar establishments choose not to does not advance the government's anti-discrimination interest in a "tailored" way; it simply defeats the interest.

The analysis in the government contracting context is no different. If the City contracted out the management of one of its 30 parks to a contractor that had a religious objection to allowing African Americans, Jews, or LGBT people, it would be no answer to say that there are 29 other parks those who are excluded can use. And the existence of other foster family care agencies that do not discriminate would not prevent the stigma and humiliation of having any one of the City's own gatekeepers for foster family certification turn away couples on the basis of their sexual orientation.[16]

[16] Indeed, CSS's discriminatory policy would harm not only potential foster parents; the stigmatic harm would extend to the

2. *Ensuring That Children In Foster Care Have Access To All Qualified Families*

a. Ensuring that children in governmental custody have access to all qualified families is likewise a compelling government interest. Approximately 5,000 children are in family foster care in Philadelphia. JA 685. Ensuring that each of the children can be placed in a home that is best suited to their needs is a government interest of the highest order. This Court has repeatedly emphasized the government's "urgent interest in the welfare of the child." *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *see also, e.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (recognizing "compelling interest in protecting the physical and psychological well-being of minors").

b. By prohibiting agencies from turning away qualified foster parents on the basis of a protected characteristic, the City's anti-discrimination policy is narrowly tailored to its interest in ensuring the largest possible pool of qualified families available to children. More families means more options for advancing the "best interests" of children in foster care. JA 267-68. For these reasons, professional child welfare standards oppose discrimination against prospective foster families. *See* Br. of Voice for Adoption, et al., as Amici Curiae in Support of Respondents (Br. of Voice for Adoption).

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children in the City's care. As Commissioner Figueroa pointed out, permitting CSS's policy would send a "very strong signal to . . . [LGBTQ foster] youth that while we support you now, we won't support your rights as an adult." JA 280-81.

If the City were to authorize agencies to discriminate for religious reasons, Bethany, which had a policy of excluding same-sex couples until the City advised that it would not permit such conduct by its contractors (Pet. App. 14a, 103a), might well return to its prior policy. CSS might revive its policy of requiring a clergy letter certifying religious observance. *See supra* at 21. And it is unknown how many other agencies under contract with the City (or agencies that might seek contracts with the City) would, if given the option, exclude same-sex couples—or implement other religion-based exclusions.

CSS responds that the same-sex couples it (and possibly other agencies) refuses to serve can seek certification elsewhere. Petr. Br. 36. There is no basis to assume families will do so—particularly after experiencing the sting of discrimination by one of the City's official partners. *See* Br. of Family Equality (discussing families who were deterred from fostering because of discrimination). Nor is there a basis to assume all families interested in fostering will step forward to do so if it now comes with the risk of facing government-sanctioned discrimination. *See* Br. of Voice for Adoption; Br. of Family Equality; Br. of Amici Curiae Scholars Who Study LGB Populations in Support of Respondents.

Lastly, CSS and its amici maintain that enforcing the City's anti-discrimination requirement actually undermines the interests of children in foster care because some agencies will leave the field. But the district court found that closing intake with CSS had no

impact on the City's ability to find families for children. Pet. App. 66a.[17] And there is no shortage of agencies willing to provide foster care services. *See* Br. of Massachusetts (recounting that when some agencies in other jurisdictions chose to discontinue public child welfare services due to their unwillingness to comply with anti-discrimination requirements, other agencies—both faith-based and secular—took over providing services). There *is*, however, a shortage of foster parents. And the ruling CSS seeks would permit agencies to turn away qualified families.

* * *

For all of these reasons, the City's anti-discrimination requirement satisfies any level of scrutiny. But if the Court holds that heightened scrutiny applies and it harbors any doubt that the City's anti-discrimination requirement satisfies that test, the appropriate course would be to remand to the lower courts so the parties can further develop the record in light of the changed regime. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("Because our decision today [that strict instead of intermediate scrutiny applies] alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced.").

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[17] CSS says that 12 of its families have no children in their homes because of the intake freeze. Petr. Br. 12. But the City has offered to assist with transitioning CSS foster families to other agencies as it has done whenever other agencies have closed for any reason. Pet. App. 170a; *see also supra* at 6.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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