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

AMICUS BRIEF OF LIFE LEGAL DEFENSE FOUNDATION, LIVINGWELL MEDICAL CLINIC, INC., AND FREE SPEECH ADVOCATES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THE PRESENT CASE TRANSCENDS ITS PARTICULAR CONTEXT 3

II. THE RATIONALES OFFERED BY THE COURT BELOW THREATEN THE VIABILITY OF PROTECTION FOR CONSCIENTIOUS OBJECTION TO ABORTION 7

A. Coercion to violate one's conscience is one of the worst violations of Free Exercise 7

B. The Third Circuit gave short shrift to CSS's conscience rights 10

1. Complete intolerance of diverse approaches 10

2. Using the charge of discrimination as a universal cudgel 12

a. Disregard of levels of scrutiny . 13

b. Equating diversity with discrimination 14

c. Restricting speech in the name of eliminating discrimination . . 15

3. Government involvement transforms human relations into "public services" 16

4. Beliefs okay, acting on beliefs penalized 18

C. This Court Should Overrule *Christian Legal Society v. Martinez* 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page**

ACLU of Northern California v. Burwell, No. 3:16-cv-3539 (N.D. Cal. complaint filed June 24, 2016) 5

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 4, 14

Bucklew v. Precythe, 139 S. Ct. 1112 (2019) 9

Christian Legal Society v. Martinez, 561 U.S. 661 (2010) 19-20

City of Cleburne v. Cleburne Living Center, 473 US. 432 (1985) 13

Employment Division v. Smith, 494 U.S. 872 (1990) 8, 9

Hill v. Colorado, 530 U.S. 703 (2000) 21

Lawrence v. Texas, 539 U.S. 558 (2003) 4

Livingwell Med. Clinic, Inc. v. Becerra, 138 S. Ct. 2701 (2018) 2

Livingwell Medical Clinic, Inc. et al v. Harris, 4:15-cv-04939-JSW (N.D. Cal. amended complaint filed Nov. 2, 2015) 2

Maher v. Roe, 432 U.S. 464 (1977) 5

Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018) 11, 12

McDaniel v. Paty, 435 U.S. 618 (1978) 9

Missouri v. Jenkins, 515 U.S. 70 (1995) 13

National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) 2, 9

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) . . 4, 18

O'Hare Trucking Serv. v. City of Northlake, 518 U.S. 712 (1996) 8

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 4

Roe v. Wade, 410 U.S. 113 (1973) 4

Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017) 9

Wooley v. Maynard, 430 U.S. 705 (1977) 9

Constitutional provisions, statutes, regulations, and ordinances

Church Amendments, 42 U.S.C. § 300a-7 *et seq.* . . 6

Coats-Snowe Amendment, 42 U.S.C. § 238n(a) . . . 6

Fair Practices Ordinance, Chapter 9-1100, Phila. Code, Sec. 9.1106(1)(a)(.2) 15

79 Fed. Reg. 77768 (Dec. 24, 2014) 6

Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A 6

Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18113, 18081, 18023(b)(1)(A) & (b)(4)), 14406(1) 6

U.S. Const. amend. I . . . . . 2, *passim*

U.S. Const. amend. XIV 5

Weldon Amendment, Departments of Defense and Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Div. B., sec. 507(d), Pub. L. No. 115-245, 132 Stat. 2981 at 3118 . . 6

Other Authorities

Daniel 3 7

Alexandra DeSanctis, "The Equality Act Could Mandate Abortion Funding," *National Review* (May 17, 2019) 6

Comments on Interim Final Rule on Unaccompanied Children from the United States Conference of Catholic Bishops, *et al.* (Feb. 20, 2015) 6

Congregation for the Doctrine of the Faith, "Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons" 7

"Fugitive Slave Acts," *History.com* (Dec. 2, 2009) . 8

2 Maccabees 7 7

Gerard McCarthy, "The disturbing origins of the Irish Famine term 'take the soup,'" *Irish Central* (Feb. 20, 2020) https://www.irishcentral.com/roots/history/irish-famine-take-soup 8

"3 Connecticut female athletes file federal discrimination complaint over transgender competition," *CBSNews.com* (June 19, 2019) 13

Mark Yapching, "Religious groups say new DC laws violate their constitutional freedoms," *Christianity Today* (Feb. 10, 2015) 6

INTEREST OF AMICI[1]

While this cases arises in the specific context of foster care and same sex couples, the legal standard this Court embraces will have obvious repercussions for a host of conscience situations, particularly regarding abortion.

Life Legal Defense Foundation (LLDF) is a California nonprofit 501(c)(3) public interest legal and educational organization that works to assist and support those who advocate in defense of life. LLDF is particularly concerned that the Third Circuit's decision in this case will facilitate government coercion of those who refuse to be complicit in the taking of human life through abortion.

LivingWell Medical Clinic, Inc. (LivingWell), located in Grass Valley, California, is a faith-based nonprofit corporation, licensed by the California Department of Public Health as a Free Clinic. The primary purpose of LivingWell is to offer pregnancy-related services to its clients free of charge and consistent with its religious values and mission. LivingWell helps women with unplanned pregnancies meet and accept the stresses and challenges that come with an unplanned pregnancy. It does this by presenting all the facts necessary to determine the best course of action for each individual. LivingWell addresses every area of concern regarding the pregnancy – from physical to emotional, economic to

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[1]The parties in this case have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

social, practical to spiritual, lifestyle to future hopes. Based on its religious tenets and principles, LivingWell has never referred, nor will it ever refer, for abortion. LivingWell's Statement of Principles provides it "never advises, provides, or refers for abortion or abortifacients."

LivingWell brought suit against the State of California in 2015 over the state's requirement that LivingWell advertise the availability of state subsidized abortions. In addition to alleging a violation of the First Amendment rights to free speech, LivingWell alleged that the California law violated its rights under the First Amendment's Free Exercise Clause. *See* Amended Complaint, *Livingwell Medical Clinic, Inc. et al v. Harris*, 4:15-cv-04939-JSW (N.D. Cal. Nov. 2, 2015). After this Court's decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), this Court granted LivingWell's petition for a writ of certiorari and vacated the Ninth Circuit ruling against LivingWell. *Livingwell Med. Clinic, Inc. v. Becerra*, 138 S. Ct. 2701 (2018).

Free Speech Advocates (FSA) is a legal defense project that exists to secure the First Amendment rights to engage in religious witness, peaceful sidewalk counseling, and protest of or conscientious objection to the destruction of innocent human life. FSA has appeared as amicus in this Court in previous cases addressing abortion, euthanasia, and freedom of conscience. FSA is deeply concerned about the threat to conscience posed by a state's attempt to coerce a private religious agency to become complicit in something the agency finds morally and religiously objectionable.

SUMMARY OF ARGUMENT

The Third Circuit's decision approves of a city forcing private actors to act contrary to their moral and religious scruples if they want to serve needy persons. Such a rule, aggravated by the Third Circuit's flawed reasoning, jeopardizes the free exercise of religion in a host of contexts, including abortion. This Court should reverse.

ARGUMENT

The decision of the court below is a dagger pointed at the heart of the conscience rights of pro-life individuals and organizations – those who regard human abortion as unjust, immoral, destructive, and/or sinful. This amicus brief aims to illustrate why that is so, and why it is therefore essential that this Court reverse the Third Circuit.

I. THE PRESENT CASE TRANSCENDS ITS PARTICULAR CONTEXT.

"If you want to serve this vulnerable population, you have to agree to violate your religious principles (though you can still believe them in your heart)." That is the logic of the decision below, and of respondents' arguments. And this logic goes beyond the controversy over the placement of at-risk children with same sex couples directly to the controversy over abortion, assisted suicide, sex-change surgeries, and a variety of other controversial issues. Consequently, this Court should keep firmly in mind the implications of this case for those persons and entities with conscientious objections to other controverted practices, such as

human abortion.

As an initial matter, it is helpful to note that the constitutional context of the current case, namely fallout from this Court's decisions concerning homosexual relationships and same-sex marriage, largely matches that of of the abortion controversy.

First, the exaltation of abortion from historically condemned and unlawful to assertedly constitutionally protected flowed from this Court's divided and hotly contested rulings. *See Roe v. Wade*, 410 U.S. 113 (1973*)*; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Compare Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Second, this Court, even while rejecting the legal arguments of those opposed to the Court's rulings, recognized emphatically that there are decent, even admirable reasons for opposition to the practices afforded constitutional stature by this Court. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it"); *Casey*, 505 U.S. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality"); *compare Obergefell*, 135 S. Ct. at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here"). It follows that the viewpoint of conscientious objectors in these contexts "does not remotely qualify" as "invidiously discriminatory" or for

"derogatory association with racism." *Bray*, 506 U.S. at 274.[2]

Given the broad constitutional parallelism of the abortion controversy and the controversy over same-sex marriage and parenting, any rationale courts adopt to justify forcing private agencies to violate their conscientious objections to same-sex parenting – e.g., implicitly endorsing the equation of same-sex unions with marriage – may lend itself to justifying a similar coercion of anti-abortion entites or individuals to violate their conscience regarding abortion. In short, pro-life persons and entities have every reason to fear that a loss to Catholic Social Services (CSS) here will be a loss for them as well.[3]

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[2]Moreover, this Court's erection of a barrier to state *prohibition* of certain activities does not imply that government is obligated, much less permitted, to *impose* such activities – by compelling participation, cooperation, endorsement, or complicity – upon an unwilling populace. To the contrary, as this Court held in the abortion context, a "right" to be free from "unduly burdensome interference . . . implies no limitation on the authority of a State to make a value judgment favoring [an alternative course], and to implement that judgment by the allocation of public funds." *Maher v. Roe*, 432 U.S. 464, 474 (1977) (rejecting Equal Protection challenge to denial of funding for abortion in contexts where childbirth is funded).

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

Id. at 475.

[3]Abortion supporters have already sought to exclude pro-life agencies from government funding and contracts, either as a matter of law or of policy. *E.g., ACLU of Northern California v. Burwell*, No. 3:16-cv-3539 (N.D. Cal. complaint filed June 24, 2016) (suit seeking to compel federal government to exclude from refugee program grants any entity that refuses to refer for

Protection of the conscience of those who object to abortion, however, has thus far been a standard feature of the legal landscape, reflecting the broad societal consensus that individuals should not be made to participate in actions they believe to be grievously wrong.[4] This Court should reject the arguments that respondents and the courts below offered to justify the city's penalizing of CSS for its conscientious objection to conduct which the Catholic Church teaches to be

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abortion); 79 Fed. Reg. 77768 (Dec. 24, 2014) (interim final rule that would disqualify as primary grantees any entity that would not provide information and access to abortion). *See* Comments on Interim Final Rule on Unaccompanied Children from the United States Conference of Catholic Bishops, *et al.* (Feb. 20, 2015), *available at* https://tinyurl.com/USCCB CommentsIFR. And recent legislative proposals have linked abortion and LGBT agenda items. *See, e.g.,* Alexandra DeSanctis, "The Equality Act Could Mandate Abortion Funding," *National Review* (May 17, 2019) ("As some of the bill's own advocates admit, the Equality Act could be read to mandate taxpayer funding for abortions and to nullify conscience protections for medical providers who object to performing abortion procedures"); Mark Yapching, "Religious groups say new DC laws violate their constitutional freedoms," *Christianity Today* (Feb. 10, 2015) (DC simultaneously adopted bills restricting religious entities' ability to act regarding their views on the "sanctity of human life" and "human sexuality").

[4]At the federal level, for example, there are (1) the Church Amendments (42 U.S.C. § 300a-7 *et seq.*); (2) the Coats-Snowe Amendment (42 U.S.C. § 238n(a)); (3) the Weldon Amendment (*see, e.g.,* Departments of Defense and Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019, Div. B., sec. 507(d), Pub. L. No. 115-245, 132 Stat. 2981 at 3118); and (4) conscience protection provisions in the Patient Protection and Affordable Care Act (i.e., 42 U.S.C. § 18113; 42 U.S.C. § 14406(1); 26 U.S.C. § 5000A; 42 U.S.C. §18081; 42 U.S.C. §§ 18023(b)(1)(A) and (b)(4)).

harmful and unjust to children.[5]

II. THE RATIONALES OFFERED BY THE COURT BELOW THREATEN THE VIABILITY OF PROTECTION FOR CONSCIENTIOUS OBJECTION TO ABORTION.

A. Coercion to violate one's conscience is one of the worst violations of Free Exercise.

Being coerced to do something objectionable is one of the worst violations of conscience and thus a paradigmatic instance of abridging the free exercise of religion. Jewish martyrs died horrible deaths rather than consume the pork their tormentors sought to force them to eat. 2 Maccabees 7. Others faced incineration in a furnace rather than bow down before a golden idol. Daniel 3. The Fugitive Slave Act of 1850, by "compell[ing] citizens" in free states "to assist in the capture of runaways," greatly increased the tensions

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[5] *See* Congregation for the Doctrine of the Faith, "Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons," No. 7, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html:

> [T]he absence of sexual complementarity in these unions creates obstacles in the normal development of children who would be placed in the care of such persons. They would be deprived of the experience of either fatherhood or motherhood. Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development. This is gravely immoral . . .

and divisions in the United States preceding the Civil War. "Fugitive Slave Acts," *History.com* (Dec. 2, 2009).

Of course, coercion need not come via forcible imposition. The starving Irish Catholics "only" were told that, to receive soup to sustain their lives, they had to submit to instruction contrary to their Faith. Gerard McCarthy, "The disturbing origins of the Irish Famine term 'take the soup,'" *Irish Central* (Feb. 20, 2020), https://tinyurl.com/TakeSoup.

A claim of *uniform* coercion cannot possibly be a sufficient defense to such fundamental violation of religious conscience. Regardless of whether *Employment Division v. Smith*, 494 U.S. 872 (1990), makes sense regarding criminal prohibitions of behavior that is *malum in se*, it cannot seriously be the case, in the Land of Liberty, that the government can override religious conscience simply by imposing a "neutral and generally applicable" requirement, for example, to eat a monthly portion of pork (for health reasons, of course!), or to work on Sundays (for the economy!).

Moreover, coercion of religious conscience need not be *global* to be offensive and unconstitutional. No individual "has to" become a physician, but it is nevertheless a violation of conscience to require all those who do seek to become physicians to do at least one abortion while in training. *Cf. O'Hare Trucking Serv. v. City of Northlake*, 518 U.S. 712, 716-17 (1996) ("The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman 'may have a constitutional right to talk politics . . . he has no constitutional right

to be a policeman'") (citation omitted).

The U.S. Constitution protects against such coercion of conscience. The government violates the First Amendment when it extracts from private parties statements – express or *de facto* – of points of view on ideologically contested issues, *Wooley v. Maynard*, 430 U.S. 705 (1977), or requires them to deliver to third parties, by word or action, a message incompatible with their own beliefs, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018). The Free Exercise Clause particularly bars the government from requiring individuals or entities to lay aside religious practice as the price of full citizenship. *E.g.*, *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating law that barred individual from being a constitutional delegate so long as he remained a minister); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) ("the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution").

Second-class citizenship cannot be the price of living life in accord with one's religious beliefs, absent some historically recognized overriding government interest.

Of course, this does not mean a vigorous Free Exercise Clause would unleash "anarchy," *Smith*, 494 U.S. at 888. As with all sound constitutional analysis, judicial assessment of Free Exercise claims must consider the contemporaneous historical understanding of the text, *e.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) ("we first examine the original and historical understanding"), and in particular regarding what counts as an "evil" that may be targeted or, conversely, a "compelling interest" that could justify government suppression of a religious

practice. Connecting the right to its historical scope both respects the constitutional text and provides a stable basis for adjudication of Free Exercise Claims. Meanwhile, recourse to history fends off at least two serious interpretive dangers: (1) the government's invention of new "compelling interests" (e.g., reducing population by limiting families to one child) that could lead to evisceration of the right to religious freedom, and (2) treating historically recognized evils (such as ritual child sacrifice) as constitutionally protected.

B. The Third Circuit gave short shrift to CSS's conscience rights.

The decision below contradicts the constitutional norms discussed above by embracing several flawed premises.

1. Complete intolerance of diverse approaches

The city decided that CSS's beliefs about parenting are incompatible with city policy, and thus under no circumstances should CSS be allowed to act on those beliefs when placing needy children. The Third Circuit more than agreed:

> Even if CSS could establish both of the gatekeeping factors — likelihood of success on the merits and irreparable harm — neither the balance of the equities nor the public interest would favor issuing an injunction here.

Pet. App. 50a. Let that sink in for a minute. Even if CSS has shown both that it was *likely to prevail on the merits* and that it was currently suffering *irreparable*

harm, the Third Circuit would *still* rule against CSS. It is difficult to describe this as anything other than unmitigated hostility to CSS and its beliefs. *Cf. Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) (condemning hostile treatment of religious objector by government decisionmaker).

Recall that this is not a case where the government is merely setting the internal rules for its own program. *No placement program for at risk children is allowed* in Philadelphia aside from those who possess a city contract (and thus are subject to the city's terms). Pet. App. 256a; City BIO 31. CSS's failure to submit to the city's ground rules will result in the closure of CSS operations serving children in need of safe and caring homes. The city sets the rules for all foster care; there is no private opt-out alternative, and respondents do not suggest otherwise. In short, there is zero tolerance for a Catholic approach to caring for at-risk children unable to live with a parent. Pet. App. 48a-49a ("The government's interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing — to zero — the number of establishments that do.")

The problem is even worse here, where the city's asserted government interest is several steps removed from the program's goal of caring for needy children. CSS does not discriminate against any children. Pet. App. 158a. The city's disqualification rule is not aimed at benefitting at-risk children – who, under the city's rule, will in fact suffer the loss of a fostering agency and thus the loss of additional opportunities to be placed and for additional parents to be recruited to foster. Rather, the disqualification rule is aimed at

protecting the presumed feelings of adults who, as the Third Circuit acknowledged, likely would not have gone to CSS anyway. Pet. App. 49a. Meanwhile, the feelings of those potential foster parents who want to go through a religiously traditional agency (like, analogously, those OB/GYN patients who want a pro-life physician) count for naught.

CSS further documents in its brief the animosity of the respondent city. Pet. Br. 24-25. The Third Circuit's attempt to whitewash this record was telling. The Third Circuit invoked a "grey zone" for "remark[s] that *could* express contempt for religion" but, then again, might not, Pet. App. 32a (emphasis added). But this approach is unavailing. The Third Circuit ignored the fact that in *Masterpiece Cakeshop*, while this Court acknowledged that, theoretically, some of the statements of government agents might be susceptible to less sinister interpretations, this Court nevertheless classified these very same statements as marking the point where "[t]he hostility surfaced," 138 S. Ct. at 1729.

For opponents of abortion, the danger is obvious. The coercive, exclusionary state can always assert: "We're not hostile to your religion. We just think denying abortions is a discriminatory practice. You can keep your opinions, but you have to *act* in accordance with ours."

2. *Using the charge of discrimination as a universal cudgel*

Discrimination is a powerful charge. But it is also a malleable assertion. This Court has therefore taken great care to classify different grades of discrimination, and to separate the real from the

tendentious. The Third Circuit and its defenders do no such thing.

a. Disregard of levels of scrutiny

This Court's precedents carefully distinguish between those types of discrimination that trigger strict scrutiny, such as race discrimination, and those that do not, such as discrimination based on age or disability. *Compare Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) ("we must subject all racial classification to the strictest of scrutiny"), *with City of Cleburne v. Cleburne Living Center*, 473 US. 432, 441-42 (1985) (age and mental disability discrimination does not trigger strict scrutiny). The decision below, by contrast, features no such nuance, instead invoking discrimination *simpliciter*. Pet App. 47a ("It is black-letter law that 'eradicating discrimination' is a compelling interest"); *id.* at 51a ("Deterring discrimination . . . is a paramount public interest"). The lower court's failure to distinguish types of "discrimination" put the weight of our nation's commitment to atone for centuries of maltreatment of racial minorities at the service of whatever newly-minted victim class the state decides to favor this decade. *See e.g.*, "3 Connecticut female athletes file federal discrimination complaint over transgender competition," *CBSNews.com* (June 19, 2019) (track titles in women's events won by students born male; "The Connecticut Interscholastic Athletic Conference, which governs high school sports in the state, says its policy follows a state anti-discrimination law requiring students to be treated in school according to the gender with which they identify . . . as opposed to their sex . . . at birth").

Abortion opponents have already faced, and thus far successfully fended off, the charge that opposing abortion equals invidious sex-based discrimination, *Bray*. The Third Circuit's sloppy endorsement of the discrimination accusation here, however, threatens to bring the charge back again by enabling any assertion of discrimination, regardless of the context, to trigger compelling government interests in excluding pro-life persons and providers. *See also supra* note 3 (abortion agenda injected into nondiscrimination measures).

b. Equating diversity with discrimination

Ironically, *the city itself is discriminating* when it targets for legal shunning those whose actions reflect traditional religious beliefs. That the charge of discrimination can be hurled in both directions illustrates how unhelpful this charge is to the legal analysis. The Third Circuit wholly disregarded this conundrum, ruling in essence that the city may discriminate in the name of nondiscrimination. That is, rather than allow for a diverse menu of options for parents seeking to foster children through an agency most compatible with their values, the city is to *exclude* one set of providers – those with traditional religious beliefs.

Again, the danger to abortion opponents is plain: governmental bodies that wish to disqualify pro-life grantees or contractors from public programs can similarly claim that discriminatorily narrowing the field of providers by eliminating pro-lifers is, in reality, a means of combating discrimination against those who might seek abortion.

c. Restricting speech in the name of eliminating discrimination

The Third Circuit stated that CSS need not "officially proclaim[] its support for same-sex marriage." The City "simply insists that CSS abide by public rules of non-discrimination in the performance of its public function under any foster-care contract." Pet. App. 42a. However, hidden within the City's "simple" demand is a gag on CSS's speech concerning its beliefs on traditional marriage and same-sex relationships. The City's contract with CSS contained a provision requiring compliance with Chapter 9-1100 of the Philadelphia Code, i.e., the Fair Practices Ordinance (FPO). Pet. App. 149a-150a. The FPO, in turn, makes it a crime for any person or entity subject to its provisions to "[p]ublish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that . . . the patronage of any such [member of a protected class] is unwelcome, objectionable or not acceptable, desired or solicited." Sec. 9.1106(1)(a)(.2)

Whatever the exact mechanism by which the City chose to enforce its non-discrimination policy against CSS, such policy undoubtedly would encompass a prohibition on CSS or any other foster agency publicly expressing in any form or forum the belief that, e.g., children fare better with a mother and father, or that same-sex couples provide a less stable home life for children, much less that same-sex relationships are contrary to Catholic moral teaching.

It is undisputed that the City cancelled its contract with CSS not because CSS ever *had* refused to work with any same-sex couple, but because CSS *would not promise* that CSS would not refuse, in the admittedly

highly unlikely event that any same-sex couple insisted that CSS was the best fit for that couple's needs. The Third Circuit admits that this case is not about what CSS has done or is likely to do; rather "the mere existence of CSS's discriminatory policy is enough to offend the City's compelling interest in anti-discrimination." Pet App. 49a.

When the "anti-discrimination" guns are rolled out, free speech must retreat.

Again, the danger to pro-life health care professionals is clear. Indeed, wherever abortion advocates succeed in tarring opposition to abortion as discriminatory, there will be no refuge even in areas of practice where one is highly unlikely to encounter a woman considering abortion. The government will insist on the 21st century equivalent of loyalty oaths as a condition of employment or professional practice.

3. Government involvement transforms human relations into "public services"

The court below relied repeatedly on the proposition that foster care is "essentially a *public* service," Pet. App. 42a (emphasis added), indeed "without question a vital public service," *id.* at 51a – meaning, not a service to the public, but a *government* function. The court reached this conclusion despite the fact that CSS – a *private* agency – was caring for at-risk children long before the city decided to monopolize the field. *Id.* at 12a.[6] By treating care for these children as solely a

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[6]See Pet. App. 254a:

Q. How did it work? How did you find children and care for them? Can you walk us through that a little bit?

government service or function, the court below made the imposition of government's preferred ideology seem more palatable. But this expansion of the scope of "public service" knows few, if any, limits. If caring for children is a public service, what is not? Surely education is nowadays largely undertaken by government agencies. Does that mean the government could insist that private schools toe the government line on its pet policies (e.g., employee insurance coverage for abortion, referring pregnant minors for abortion or sex change operations, etc.)? If caring for children is a public service, then attending to the needs of expectant minors or other persons in need can easily be classified the same way, making it that much easier to subject private care providers to the government's political edicts about what such care must entail (such as access to abortion on request). *See supra* note 3.

Moreover, if caring for at-risk minors is a government function, then what about health care? Were the government to monopolize the health care system (single-payer), what would prevent an Administration favoring the abortion lobby from insisting that all doctors, nurses, and other health workers either perform or refer for abortions

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A. Well, the religious sisters who ran Catholic Children's Bureau had a deep network of relationships around the city with parishes and community groups. And when it became known that a child was at risk, they would do a home evaluation. If the child needed to be removed – in those times, many times the parents would agree to that, because they are called voluntary placement. The child would be removed, placed in a foster home and we would track them and the child's progress in that home.

notwithstanding any religious objections?

4. Beliefs okay, acting on beliefs penalized

The bottom line for the Third Circuit was, CSS can *believe* what it wants; it just can't *act* on those beliefs without paying a steep price. Or as the court below put it in more sophisticated language,

> CSS is not being excluded due to its religious beliefs. Indeed, the City has . . . merely insisted that, if CSS wants to continue providing foster care, it must abide by the City's non-discrimination policy in doing so.

Pet. App. 39a. But, to paraphrase the Chief Justice, while it is "gracious[]" that the city "suggests that religious believers may continue to 'advocate' and 'teach' their views of marriage, . . . [t]he First Amendment guarantees . . . the freedom to '*exercise*' religion." *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting) (emphasis in original).

Under the Third Circuit's approach, governments can say, when setting forth conditions for charitable activities:

- You can believe abortion is murder; you just have to do them when the government says so.
- You can believe assisted suicide unjustly takes life and denies equal dignity to sick or disabled persons, you just have to provide lethal prescriptions.
- You can believe that female genital mutilation, whether for cultural reasons or for sex-change purposes, is an atrocity and a human rights violation, you just have to fund those procedures for

your employees.

- You can believe that "God created them male and female," you just have to let biological males who claim to be female play on your school's girls' teams, and you cannot do anything about such males appearing on your opponent's "girls' team" or in the girls' bathroom and locker facilities.

In such a world, conscientious objection becomes empty verbiage, drained of meaning by bureaucratic mandates.

C. This Court Should Overrule *Christian Legal Society v. Martinez.*

One decision of this Court – invoked by both lower courts in this case, Pet. App. 24a, 81a-83a, 90a-92a & n.23, but curiously not cited in either brief in opposition to certiorari – would appear to undermine this Court's otherwise unswerving recognition of the constitutional norms discussed above: *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) (*CLS*). This Court should forthrightly repudiate that decision.

In *CLS*, a government entity imposed the requirement that, as a condition of the benefits available to student clubs, every club must adopt a policy of indifferentism regarding religion and sexual behavior. *Id.* at 669-73. In other words, student groups were relegated to second-class status unless they in effect professed that a member's religious beliefs were irrelevant to the identity and effectiveness of a religious club, and that one's departure from traditional Christian sexual norms – and the consequent scandal – was irrelevant to the mission integrity of a Christian group.

The university imposed the policy requirement in *CLS* upon the entire relevant universe – all students attending the state law school – as a condition of a standard, generally available benefit – forming a recognized club. Furthermore, the requirement was not directly linked to the program at issue: a policy on religion or sexual behavior generally has nothing to do with student club activities (e.g., playing chess), and where such a policy might be relevant, it could as easily be completely counterproductive, indeed nonsensical – e.g., forcing a Jewish club to allow Muslim or Christian officers.

To the extent that *CLS* says a government body can extract a pledge of submission to a currently regnant ideology or else impose second-class status upon the population it governs, the *CLS* decision is deeply and fundamentally inconsistent with liberty in general and free speech in particular, and should be overruled. Because *CLS* is so profoundly at odds with broader, preexisting First Amendment principles – principles *CLS* did not purport to overturn – this Court should disavow *CLS* and its pernicious holding.

This Court's practice has been to ignore *CLS* ever since the *CLS* decision was issued. Shepard's reveals no subsequent decision of this Court relying upon or even citing the majority's rationale in *CLS*. The case appears to be, like *Hill v. Colorado*, 530 U.S. 703 (2000), an embarrassing anomaly left on the books but no longer operative. Unfortunately – as the present case illustrates – the lower courts do not enjoy this Court's power (or even necessarily the inclination) to disregard such aberrant precedents, which is why this Court itself needs to overrule *CLS* for the sake of clarity and consistency in the law.

CONCLUSION

Today the chopping block features those with scruples about same-sex fostering. Tomorrow's feature is the opponents of abortion. And after that?

This Court should reverse the judgment of the Third Circuit.

Respectfully submitted,

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