IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2574

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

v.

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

BRIEF OF APPELLEES CITY OF PHILADELPHIA, DEPARMENT OF HUMAN SERVICES AND COMMISSION ON HUMAN RELATIONS

Appeal from the Order of Tucker, U.S.D.J., entered July 13, 2018, No. 18-2075, in the United States District Court for the Eastern District of Pennsylvania, denying Plaintiff's Motion for Preliminary Injunctive Relief

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Dated: September 27, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal from the denial of preliminary injunctive relief pursuant to 28 U.S.C. § 1292(a)(1).

COUNTERSTATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. Where Catholic Social Services (CSS) refuses to serve same-sex couples in violation of DHS non-discrimination requirements, and as a result, the City closed CSS intake and chose not to renew CSS' contract, did the district court correctly conclude that CSS was not likely to succeed on the merits of its Free Exercise; Free Speech; Establishment Clause; and Pennsylvania Religious Freedom Protection Act claims?

II. Did the district properly reject the CSS Foster Parents' claim for relief where they only claim entitlement to legal relief because of the City's alleged deprivation of CSS' rights; and where the district court exercised its discretion to conclude the Parents did not suffer irreparable harm because they can continue to serve as foster parents by working with another agency?

III. Did the district court abuse its discretion in concluding that CSS failed to meet the other elements necessary for preliminary injunctive relief because CSS failed to establish it suffered likely constitutional or legal harm, and harm to CSS' business interests is not irreparable; and because, as a matter of equity and public interest, CSS failed to establish foster children were harmed by the intake freeze or by the loss of one of 30 family foster care providers; and the City established that the City and its citizens would be

harmed if DHS were legally required to allow a contractor to refuse to work with same-sex couples because of the stigma that attaches to this refusal?

COUNTERSTATEMENT OF STANDARD OF REVIEW

When reviewing a district court's denial of a preliminary injunction, the Court of Appeals "'review[s] the [district] court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision . . . for an abuse of discretion.'" *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (citation omitted), *as amended* (June 26, 2017).

However, "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (citation omitted), the Court "'conduct[s] an independent examination of the record as a whole when a case presents a First Amendment claim,'" *Brown v. City of Pittsburgh*, 586 F.3d 263, 268–69 (3d Cir. 2009) (citation omitted). The Court "'review[s] the finding of facts by a [lower] court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" *Hurley*, 515 U.S. at 567. Thus, absent an abuse of discretion, the Court must still defer to the district court's determinations based on "'witnesses' credibility,'" *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 156–57 (3d Cir. 2002) (citation omitted).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence

of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). If both factors are met, the court considers the remaining factors and determines if all four factors, taken together, favor granting the preliminary injunction. *Reilly*, 858 F.3d at 179.

COUNTERSTATEMENT OF THE CASE

The City of Philadelphia maintains a robust set of statutory and contractual requirements prohibiting discrimination on the basis of sexual orientation, among other protected categories. After a newspaper report that two City foster care providers could not work with same sex couples because of their religious objections to same sex marriage, the City's Department of Human Services (DHS) met with Appellant Catholic Social Services' (CSS), one of the providers. Because CSS affirmed its inability to work with same sex couples, DHS told CSS that DHS could not enter into a new in-home foster care contract for the upcoming fiscal year, and DHS stopped placing foster children with CSS unless those children had a prior relationship with a child in a CSS home or with a CSS foster family. The other provider agreed to work same-sex couples, and DHS will continue contracting with that provider.

Two months after this decision, CSS moved for a temporary restraining order and preliminary injunction, claiming that the City's decision violated CSS religious and free speech rights. After a multi-day hearing, the district court found in the City's favor, rejecting CSS' claim that religious freedom and free speech guarantees compel the City to contract with CSS to provide government services subject to a constitutionally-compelled exemption from City non-discrimination requirements.

I. Philadelphia's Commitment to Non-discrimination.

Philadelphia was among the first cities to form an official human relations agency, the Philadelphia Commission on Human Relations (PCHR), to protect residents' civil rights. *See* Ordinance of the City of Philadelphia, March 12, 1948. The City's Fair Practices Ordinance (FPO) empowers PCHR to enforce the Ordinance, providing further protections against discrimination in housing, employment, and public accommodations. *See* Phila. Code § 9-1111. City Council found that discrimination in public accommodations "causes embarrassment and inconvenience to citizens and visitors of the City, creates breaches of the peace, and is otherwise detrimental to the welfare and economic growth of the City." *Id.* § 9-1101(d).

Philadelphia has included protections for the LGBTQ community for decades. The City amended the FPO to also prohibit discrimination on the basis of sexual orientation in 1982. *See* 1982 Ordinances at 1476. And, over a decade before Pennsylvania legalized same-sex marriage, the City enacted legislation regarding benefits for same-sex partners. *See* Phila. Code § 9-1126; *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1236-37 (Pa. 2004).

In 2010, the City amended its Home Rule Charter to require that all City contracts prohibit contractors from discriminating or permitting discrimination in

the performance of the contract "against any person because of race, color, religion, [or] sexual orientation." Phila. Home Rule Charter § 8-200(2)(d).

II. Foster Care in Philadelphia

DHS has protective custody of approximately 6,000 at-risk children who have been abused or neglected. 23 Pa. C.S. §§ 6361, 6373; Appx.0424 (Figueroa). DHS must act in these children's best interest, usually by placing them in family foster care — private homes with foster parents (sometimes called resource parents). Appx.0425 (Figueroa). A smaller portion of these at-risk children are in congregate care (also called group homes), which includes institutional placements and residential treatment facilities, often because of medical or behavior issues. Appx.0175-76 (Ali); Appx.0427 (Figueroa).

To assist in caring for Philadelphia's at-risk children, DHS contracts with private agencies. Community Umbrella Agencies ("CUAs") oversee the provision of services to at-risk children and foster families in defined geographical regions of the City, providing a case manager and services to children placed in family foster care. Appx.0167-69 (Ali). Some providers operate group homes. Some providers are responsible for recruiting, screening, training, and family foster care homes. Appx.0167 (Ali); Appx.0426 (Figueroa). DHS contracts with 30 agencies that provide family foster care. Appx.0167 (Ali).

CSS serves Philadelphia's at-risk children in all three ways: as a CUA; through congregate care; and through family foster care. Appx.0355-57 (Amato). CSS' CUA and congregate care work continue and are unaffected by this case, which concerns only CSS' provision of family foster care. Br.12 n.37.

DHS relies on providers to recruit foster families and also engages in its own recruitment efforts. Appx.1032-33 (Contract); Appx.0426 (Figueroa). Among other things, DHS focuses on locating LGBTQ-affirming households so the large number of older LGBTQ foster children can be placed in homes that would not pose challenges based on their identity. Appx.0427 (Figueroa). Recent recruitment efforts have resulted in the recent certification of over 200 new homes. Appx.0569 (Figueroa).

Prospective foster parents can contact one of the 30 providers for screening, training, and certification. Appx.0169 (Ali). DHS policy is that the prospective foster parent can choose the agency they approach and that the agency has to consider that prospective parent for certification. Appx.0204-05 (Ali). Providers determine whether a prospective foster parent can be certified by considering state-mandated factors. 23 Pa. C.S. § 6344(d); 55 Pa. Code §§ 3700.64, 3700.96. None of these factors require endorsement of a marital status or sexual orientation. *See* 55 Pa. Code § 3700.64; Appx.0365-66 (Amato). The focus is whether the prospective parent has the requisite ability to nurture and parent abused and neglected

children. *See* 55 Pa. Code § 3700.64. The process of reviewing and considering a prospective foster parent and his or her household for certification is sometimes referred to as a home study. Appx.0283-84 (Ali); Appx.0309-11 (Amato). The agency also provides at least six hours of training. *See* 55 Pa. Code § 3700.65. If an agency certifies a prospective foster parent, DHS also screens the parent and, if approved, issues a provider code so the parent can receive foster children and corresponding payments. *See* Appx.0171-72, 187-88 (Ali). The parent then continues to work with the agency that certified him or her. Appx.1166 ¶ 29 (Ali Decl.).

As one of DHS's family foster care providers, CSS works with over 100 families that it has trained and certified for DHS. Appx.0827 (Amato Decl.).

III. DHS Learns That CSS and Bethany Refuse to Serve Same-Sex Couples.

On March 9, 2018, a Philadelphia Inquirer reporter informed DHS that two providers — CSS and Bethany Christian — had policies refusing services to work with same-sex couples seeking to become foster parents. Appx.0432 (Figueroa); *see also* Appx.0984 (Inquirer article). DHS had no prior knowledge of this. Appx.1156 (Figueroa Decl.). DHS also learned that Bethany refused to serve a same-sex couple — saying that a Bethany training would be a "waste . . . of . . . time." Appx.0981-86.

DHS called CSS and Bethany regarding the report. Both confirmed the report, explaining that they would not work with same-sex couples because their re-

spective religious doctrines did not recognize same-sex marriages. Appx.0432-33 (Figueroa). DHS Commissioner Cynthia Figueroa then contacted other faith-based foster care providers, as well as one non-faith-based agency, to inquire whether they maintained similar policies. Appx.0482-83. None had such a policy. Appx.0433-34. Because CSS and Bethany claimed a religious reason for their policies, she did not have reason to believe any non-faith-based providers had similar policies. *Id.*

IV. DHS' Efforts to Address CSS' Refusal to Work with Same-Sex Couples.

A. DHS' Decision to Close Intake

Commissioner Figueroa was immediately concerned because CSS' policy "would put the [C]ity in a position of discriminating against one particular community," and "adding additional children to [CSS'] caseload could be problematic." Appx.0434-35. She was concerned that allowing CSS to continue operating with this policy sent "a very strong signal to [the LGBTQ] community that [its] rights were not protected," and "more importantly," she was concerned that it signaled to LGBTQ youth in DHS' care that "while we support you now, we won't support your rights as an adult." App.0483-84. DHS and CSS met to discuss the matter further. *Id.*[1]

[1] CSS repeatedly refers to a "must certify" policy as the reason DHS provided for its concern about CSS' refusal to serve same-sex couples. As an initial matter, the

At the meeting, DHS expressed concern that CSS would not evaluate same-sex couples. Appx.0324 (Amato). Mr. Amato reiterated that CSS "would not move forward with a home study for a same-sex couple." Appx.0328-29. CSS argued that its position was justified because CSS had provided foster care for 100 years. Appx.0584 (Figueroa). DHS Commissioner Cynthia Figueroa responded that "things have changed since 100 years ago," that "women didn't have the rights and African Americans didn't have the rights, and [that she] probably would not be sitting in the room if it was 100 years ago." Appx.0584. At another point in the meeting, Commissioner Figueroa remarked something like "it would be great if we followed the teachings of Pope Francis." Appx.0584.

When CSS stood firm in its refusal to work with same-sex couples, Commissioner Figueroa, concerned about CSS' ability to comply with the contract moving forward and about potential FPO violations, "decided that it was in the best interest [of children] to close intake" while discussions continued. Appx.0483-85 (Figueroa); *see also* Appx.0015, 0040, 0061 (Opinion). As she ex-

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City informed CSS it must be willing to certify "otherwise qualified" same-sex couples. Appx.0859-62 (May 7 Letter). Further, DHS witnesses discussed a policy that providers should not send applicants who seek to work with them away because the applicant has the right to choose any available provider with whom it would like to work. Appx.0205 (Ali). But CSS brought up that policy, not DHS. As noted above, the Commissioner and the Law Department cited concerns about compliance with City non-discrimination requirements, not the "must serve" policy.

plained, DHS had to act in the best interest of the children by making sure that additional children were not placed with CSS until CSS' ongoing ability to comply with DHS contracts was resolved. Appx.0483-85. DHS has previously closed intake in similar situations. Appx.1166-67 ¶¶33-36 (Ali Decl.); Appx.0434-35, 0484 (Figueroa). And contracts do not require DHS to make any placement referrals to providers. Appx.1088-91 (Contract).

On March 15, 2018, DHS closed intake for CSS and Bethany, although DHS grants exceptions where a child has siblings in a CSS home, or where a CSS foster family has a prior relationship with the child.[2] Appx.0434, 0491 (Figueroa); Appx.1157-58 (Figueroa Decl.); *see also* Appx.0067 (Opinion).

The district court credited Commissioner Figueroa's testimony, rejecting CSS' contention that the decision to close intake was punitive. Appx.0015. The district court also credited Commissioner Figueroa's testimony that she was solely responsible for this decision and the Mayor was not involved. Appx.0040-41 (Opinion); *see also* Appx.0586-87 (Figueroa). Relying upon Mr. Amato's testimony, the district court found that the City "explicitly stated a preference for con-

[2] As for Doe Foster Child #1 and DHS' intake freeze, the district court found that all parties are now aware DHS permits exceptions to the freeze, and therefore the situation cannot repeat itself. Appx.0011 (Opinion). Further, according to text messages exchanged between DHS and CSS, DHS offered to place the child with Doe Foster Mother #1, and CSS declined. Appx.0402-08 (Ali); Appx.1183 (Text Messages).

tinuing their relationship with CSS, despite CSS's religious nature, so long as CSS complies with its contract responsibilities, . . . show[ing] [Appellants'] strong desire to keep CSS as a foster agency." Appx.0018.

B. CSS' Refusal to Renew Its Family Foster Care Contract with DHS

After the City learned of CSS' policy refusing to serve same-sex couples, PCHR sent a letter to CSS requesting information regarding CSS' practices. Appx.0843-0845. CSS has not provided information in response to that letter.

In response to PCHR's letter, CSS' attorney wrote to the City on April 18, 2018, asserting that the intake closure was unlawful and that CSS was not violating its contract. Appx.0847-54. The Law Department responded on May 7, 2018, expressing the City's appreciation for CSS' services, and that the City "d[id] not wish to see our valuable relationship . . . come to an end;" nevertheless, the City "cannot allow discrimination against qualified couples." Appx.0859-862. With respect to the prior contract, the letter explained the FY2018 contract contained a non-discrimination requirement, but the City had not issued a default notice. The letter emphasized that while the expiring FY2018 contract[3] was clear that CSS must "comply with all applicable laws, including those relating to non-discrimination,"

[3] By law, unless specifically approved by City Council, City contracts are limited to one year. Phila. Home Rule Charter § 2-309. CSS' contract expired on June 30, 2018. Appx.1019.

"any further contracts with CSS w[ould] be explicit in this regard." Appx.0861; *see also* Appx.1175.

CSS did not respond to the letter and initiated its lawsuit on May 17, 2018.

V. DHS' Contracting with CSS and CSS' Policy to Refuse to Serve Same-Sex Couples.

DHS' foster care contracts are substantially similar for all 30 family foster care providers. *See* Appx.1154 (Figueroa Decl.); *cf.* Appx.0488 (Figueroa). The Scope of Services in the contract provides that CSS' staff is responsible for "recruiting and certifying," and the "specific issue" CSS must address is "to recruit, screen, train, and provide certified resource care homes for dependent children or youth." Appx.1032-1033. In consideration for its services, CSS agreed to compensation set at the amount of $19,430,991.23 payable in accordance with contract terms. Appx.1018-1020. Payments are made on a child-based per-diem basis and the contract states that the payments cover not only services to children and their families, but also "[o]ther professional services, including consulting and training services." Appx.1088.

In providing certification services under the contract, providers consider state-mandated factors to determine whether a prospective foster parent can be certified. 23 Pa. C.S. § 6344(d); 55 Pa. Code § 3700.64; Appx.1162 ¶ 13 (Ali Decl.). The CSS contract requires that the agency "obtain Certifications as required by law

and by DHS policy," including for "all prospective foster parent applicants [and] all prospective adoptive parent applicants." Appx.1078-79 § 3.31, 3.31(b).

James Amato, CSS' Secretary and Executive Vice-President, testified that in addition to the state law and contractual requirements, CSS has "a policy and procedure stated on recruitment that . . . marriage is required and that [a] clergy letter is required." Appx.0366. Mr. Amato stated that these were CSS' requirements not found in state law or the contract,[4] and this added requirement forced CSS to address a foster parent's marriage in a written home study. Appx.0365-366. CSS refuses to certify unmarried opposite-sex couples; it will certify a married opposite-sex couple, but will not consider a married same-sex couple at all. *Id.* CSS cites its added requirement that it address a same-sex marriage in the written home study as the reason it cannot consider same-sex couples for certification under its religious objection to same-sex marriage. Appx.0358-61 (Amato).

CSS' contract, like those of other foster care providers, obligated CSS to adhere to long-standing non-discrimination policies and laws of the City when per-

[4] After the City noted that the letter requirement violated Establishment Clause guarantees and constituted religious discrimination, CSS announced it would no longer enforce the pastoral letter requirement. Appx.1184-86 (June 25, 2018 Pls. Ltr.). CSS maintains the marriage requirement.

forming the services required. Appx.1071-72 § 3.21; 1086-87 § 4.1(k); 1114-15 § 15.1.[5]

The record reflects that DHS always understood that certifications are CSS' contractual responsibility and that CSS could not discriminate against a protected group. Appx.0426, 0551 (Figueroa). There is no evidence that DHS ever authorized providers to refuse to work with prospective parents because of their membership in any protected category, including sexual orientation. Appx.0551 (Figueroa). And prior to March 2018, DHS believed that each of its providers would consider every prospective parent who requested to work with that agency. Appx.0204-05 (Ali). For FY2019, DHS has clarified that the contract prohibits unequal treatment based on characteristics unrelated to the ability to care for a child, including race, sex, religion, marital status, and sexual orientation. Appx.0859-62 (May 7 Letter).

VI. Status of DHS' Relationships with Bethany and CSS.

Bethany subsequently reversed its policy, while maintaining its religious objection to same-sex marriage.[6] DHS then re-opened Bethany's intake and Bethany

[5] Under the FPO, a "public accommodation" includes any "provider" whose "services, facilities, privileges, advantages or accommodations are extended, offered[] or otherwise made available to the public." Phila. Code § 9-1102(1)(w) (Definitions). It further includes "all . . . services provided by any public agency or authority," and "the City, its departments, boards and commissions." *Id.*

renewed its contract for family foster care services, which requires service to all protected categories under the FPO. Appx.0486, 0491-92 (Figueroa); Appx.1191 n.2. DHS has offered the same full contract to CSS, but CSS refused to sign it and its intake remains closed. Appx.0357, 0375 (Amato); Appx.0859-62 (May 7 Letter); Appx.1175 (Janiszewski email).

CSS has had a contractual relationship with DHS for decades. Appx.0307 (Amato). DHS continues to contract with CSS for foster care-related services that are not affected by this dispute as CSS is a CUA and operates congregate care facilities. Appx.0191, 0283-84 (Ali); Appx.0303-04, 0370-72 (Amato); Appx.0429 (Figueroa); Br. 12 n.37. While CSS' family foster care program serves an estimated 120 children, CSS's congregate care program serves over twice as many children, and its CUA serves 800 children. Appx.0305, 0355-56 (Amato).

The concrete impact on CSS' family foster care services operation depends on ongoing negotiations of an interim contract (including cost reimbursement and possible bonuses for staff to stay), Appx.0489-91 (Figueroa); Appx.0375-79 (Amato), foster care placement with CSS by other Pennsylvania counties, Appx.0357

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[6] *See* Appx.1191 n.2 (citing Julia Terruso, *City resumes foster-care work with Bethany Christian Services after it agrees to work with same-sex couples* (June 28, 2018 12:46 PM), http://www.philly.com/philly/news/foster-care-lgbt-bethany-christian-services-same-sex-philly-lawsuit-catholic-social-services-20180628.html).

(Amato), and CSS' ability to transfer employees to perform its other foster care services.[7] DHS has not removed any children already placed with CSS foster families. *See* Appx.1158 (Figueroa Decl.). As the District Court noted, if CSS ceases to be a DHS provider, foster parents can transfer to another agency. Appx.0065.

VII. Impact of the Intake Closure on Foster Children

The district court credited Commissioner Figueroa's testimony on intake closures, concluding that "closure of CSS' intake of new referrals has had little or no effect on the operation of Philadelphia's foster care system." Appx.0012, 0565-6 (Figueroa). DHS' experience with intake closures including other active intake closures supports this as intake rates of children in Philadelphia have not changed. Appx.0486-87, 0561-62 (Figueroa). Child placements involve complex case-by-case determinations. "[Kids are] not widgets. It's not one for one." Appx.0572 (Figueroa). An open family does not mean that it would be an appropriate placement for any child. *Id.*

[7] CSS repeatedly has maintained that closure and employee termination were imminent, only to concede its workers are still employed. *Compare* Appx.0832 (Amato Decl.) (stating on June 4 that "[i]f the City continues refusing to refer children to CSS, . . . CSS will probably have to close its foster program and immediately lay off the staff involved in this program"), *and* Appellants' Emergency Motion at 13, No.18-2574 (stating that, as of July 16, "absent relief, Catholic will be forced to lay off staff within weeks"), *with* Second Suppl. Decl. of James Amato ¶ 3, *Fulton v. City of Phila.*, No. 18A118 (U.S. Aug. 13, 2018) (stating on July 31 that CSS "has been able to stave off layoffs").

VIII. Procedural History

On May 17, 2018, CSS and Sharonell Fulton, Cecelia Paul, and Toni Lynn Simms-Busch (the "Foster Parents Appellants") filed a Complaint against the City, DHS, and the PCHR ("City Appellees"). The Complaint asserted claims under the First Amendment's Free Exercise, Establishment, and Free Speech clauses, the Fourteenth Amendment's Due Process and Equal Protection clauses, the Pennsylvania Constitution, the Pennsylvania Religious Freedom Protection Act ("RFPA"), 71 P.S. § 2402 *et seq*., the Philadelphia Charter, breach of contract, and equitable estoppel.

Almost three weeks later (June 5), Appellants moved for a temporary restraining order and preliminary injunction compelling DHS to resume referrals to CSS. This motion asserted only the First Amendment and RFPA claims. Following a three-day evidentiary hearing, the District Court denied Appellants' motion, finding, *inter alia*, that CSS and its foster parents were not likely to succeed on the merits; they would not be irreparably harmed, and the balance of equities and public interest favored the City Appellees. Appx.0004-69.

Appellants appealed on July 13, 2018, Appx.0001, and then sought an injunction pending appeal, ECF No. 56; Appellants' Emergency Motion. Those motions were denied on July 24, 2018, and July 27, 2018, respectively. ECF No. 63; Order, No.18-2574.

This Court granted CSS' Motion to Expedite, but while the Motion was pending, Appellants filed an emergency application with Justice Alito seeking an injunction pending appeal or an immediate grant of a writ of certiorari. Justice Alito referred the application to the full Supreme Court, which denied it on August 30, 2018. No. 18A-118, 2018 WL 4139298 (U.S. Aug. 30, 2018).

SUMMARY OF ARGUMENT

CSS correctly observes, Br.30, that the City cannot — and it would not — regulate the private religious realm by requiring priests to marry same-sex couples. But in this case, CSS reached into the public sphere, voluntarily seeking to contract with the City to provide government services to foster children and their caregivers. The right to free exercise does not encompass the right to compel the City to enter into a contract allowing CSS to provide those services using religious criteria for who can serve as foster parents. We respect CSS' religious beliefs, but they conflict with the City's legal commitment and guiding principle to treat all families equally. The law permits the City to vindicate this neutral, generally applicable requirement to which the City has demonstrated deep commitment.

Contrary to CSS' assertion, this conflict is not hypothetical. CSS *actually* refused to sign a new contract that required it to treat all prospective foster parents equally. As DHS Commissioner Figueroa explained, allowing a contractor to discriminate in providing City services has a concrete effect, sending a "strong signal" to the community that the City is not protecting its right, and "more importantly," it signals to LGBTQ youth in DHS' care that "while we support you now, we won't support your rights as an adult." App.0483-84.

CSS' response is to deflect, arguing DHS was hostile to religion and distorting the record to allege exceptions. But all CSS can establish is that the two

providers who publicly indicated they refuse to serve same-sex couples objected on religious grounds to serving those couples. Where there is no evidence DHS ignored that a secular agency maintained a similar policy, CSS' case for targeting and selective enforcement fails at the outset.

CSS purports to cite numerous examples of purported "discretionary exemptions" that DHS has granted, allegedly undermining our case. But to the extent the record supports that any exemptions are granted, the district court properly rejected them as irrelevant because they are not exemptions from the non-discrimination requirement; CSS has no evidence DHS has ever knowingly permitted an agency to refuse to serve prospective foster parents based solely upon the applicant's membership in a protected group.

Finally, even if CSS had established that DHS grants such exemptions, the non-discrimination requirements satisfy strict scrutiny because the prevention of discrimination is a compelling interest, and the least restrictive means of enforcing that interest is to require compliance.

For the same reason that CSS failed to demonstrate the City was motivated by religious hostility, its Establishment Clause claim also fails. Additionally, permitting CSS to impose religious criteria in the selection and certification of foster parents exposes the City to an Establishment Clause claim.

And for the same reason that CSS fails to articulate a threshold free exercise right or burden, it also fails to articulate a likely RFPA violation. Alternatively, the district court properly determined that CSS' religious beliefs are not substantially burdened. State regulations do not require CSS to recognize a marriage in order to certify a foster parent, and lacking this family foster care contract, CSS can still fulfill its charitable mission because it continues to care for and provide services to foster children through other contracts. Finally, even if CSS were substantially burdened, for the same reason that non-discrimination requirements satisfy strict scrutiny, they satisfy RFPA's least restrictive means requirement.

The district court properly determined that CSS' compelled speech claim was likely to fail because it agreed to certify foster parents, and therefore the City can constitutionally place conditions on its process for doing so. For the same reason, the bulk of its retaliation claim fails because home studies are part of its obligations under the contract and therefore, they are not speech on a matter of public concern. Further, because, as explained above, the City did not act to punish CSS for its religious beliefs, the retaliation claim fails.

CSS foster parents have no cognizable claim because their claims derive from alleged violations of CSS' constitutional rights. In any event, the district court properly determined they suffered no irreparable harm because they can

maintain eligibility and keep children in their custody by transferring to another agency.

Finally, the district court properly determined that CSS suffered no irreparable harm, and that the equities balance in the City's favor. CSS suffered no constitutional harm, and commercial harm is not irreparable. The district court properly rejected CSS' assertion that foster children are harmed by DHS' intake freeze and the loss of one of thirty providers who provide in home foster care. Further, the City has an interest in protecting citizens from the stigma of being sent away by one of its social services providers.

ARGUMENT

I. As the District Court Correctly Held, CSS Likely Would Not Succeed on Its Free Exercise Claims.

The district court properly rejected the argument that the City likely violated the Free Exercise Clause because, *inter alia*, the non-discrimination requirements imposed by the City are neutral and generally applicable and easily survive rational basis review under *Employment Division v. Smith*, 494 U.S. 872, 878-82 (1990). In addition, the record does not warrant a conclusion that CSS was targeted because of its religious beliefs.[8]

[8] As explained *infra*, the Foster Parent Appellants cannot bring derivative constitutional claims based on action taken against CSS itself. Thus, the City refers to "CSS" unless an argument is specific to the Foster Parent Appellants.

A. There Is No Right to Enter into a Government Contract and then Demand to Change Its Terms on Religious Grounds.

CSS asserts that the City imposed an "obvious burden" on CSS' religious exercise by requiring that DHS' foster care providers not discriminate. *See* Br.25-26. This claim that non-discrimination requirements impose any burden on CSS' religious exercise would create a right under the Free Exercise Clause for a contractor to dictate the terms of a government contract. CSS does not and cannot provide legal support for this bold proposition. Save for limited exceptions, the government may place conditions on how government funds are spent, even when those conditions restrict First Amendment-protected expression. *See Rust v. Sullivan*, 500 U.S. 173, 198-99 (1991). And a party cannot claim the terms of a contract in and of themselves create a burden because if it "objects to a condition on the receipt of [government] funding, its recourse is to decline the funds." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. ("AOSI")*, 570 U.S. 205, 214 (2013).

Having voluntarily applied for a contract to perform government services which is paid for with government funds, CSS cannot then unilaterally alter non-discrimination requirements because it believes these terms conflict with its religious beliefs. CSS has no right to such a contract, and Philadelphia's non-discrimination requirements cannot be said to burden CSS' religious exercise. *See Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007).

Teen Ranch was a state-contracted agency caring for youth in state custody that incorporated religious programming in its services. *Id.* at 406. When the state issued a moratorium against further placements with Teen Ranch, Teen Ranch sued, claiming that the moratorium "violate[d] the Free Exercise Clause because it conditions receipt of a government benefit on Teen Ranch's surrender of its religious beliefs and practices and burdens the free exercise of Plaintiff's religious beliefs." *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 837 (W.D. Mich. 2005) (Bell, C.J.) (footnote omitted), *aff'd as supplemented sub nom. Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007). In affirming the district court's rejection of this claim, the Sixth Circuit rejected an analogy to cases holding that the government cannot deny a public benefit based on a worker's religious beliefs, concluding that "[u]nlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit." *Teen Ranch, Inc.*, 479 F.3d at 409 (quoting *Teen Ranch*, 389 F. Supp. 2d at 838); *see also Dumont v. Lyon*, No. 17-CV-13080, 2018 WL 4385667, at *28-*31 (E.D. Mich. Sept. 14, 2018) (denying motions to dismiss and stating that the court was "unconvinced" by the same free exercise argument CSS makes here).

CSS cites *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), but that case is easily distinguishable. That decision overturned an explicit state constitutional prohibition on grants to churches, which prevented

Missouri from considering Trinity Lutheran for a grant for playground materials open to public and private schools. This exclusion was based solely on the religious nature of the requesting organization. *Id.* at 2017-18, 2021. As *Dumont* properly recognized, this type of *per se* religious exclusion from a generally available secular benefit is entirely different from the public contracting situation before the court here. Distinguishing *Trinity*, *Dumont* explained that plaintiffs there, who challenged the state of Michigan's practice of allowing faith-based groups to reject same-sex couples as foster and adoptive parents, were "not seeking an order prohibiting the State from partnering with faith-based providers because they are religious. Plaintiffs seek an order prohibiting the State from partnering with faith-based providers that allegedly use the money they receive from the State under the adoption contract to employ religious criteria to exclude same-sex couples. . . ." *Dumont*, 2018 WL 4385667, at *28. *Trinity Lutheran* is distinguishable for the same reason here. DHS' contract does not exclude CSS from contracting because of CSS' religious nature. Indeed, DHS continues to contract with CSS and other religious entities to provide foster care services. Rather, the City has placed a general requirement upon all contractors — a non-discrimination requirement — with which CSS says it cannot comply for religious reasons. It would upend *Smith* for this Court to apply a judicially-mandated exemption from this neutral, generally applicable requirement and require the City to contract with CSS under such terms.

B. The District Court Correctly Found DHS' Actions Did Not Infringe on CSS' Rights Because DHS Acted in Response to Conduct and Not Because of CSS' Religious Belief.

The district court correctly found DHS' insistence upon compliance with its non-discrimination requirements was permissible, even in the face of CSS' religious objection, because these requirements are valid, neutral, and generally applicable requirements and there was no evidence that the City intended "'to infringe upon or restrict practices because of their religious motivation.'" Appx.0032 (quoting *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007)); *see supra* pp.7-8 (discussing the City's history of non-discrimination law). Indeed, the Supreme Court has long made clear that non-discrimination policies such as the City's, including those covering sexual orientation, are well within the government's authority to enact. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697 n.27 (2010) (addressing free exercise); *Hurley*, 515 U.S. at 572; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1727 (2018). As a result, the District Court rightly held that CSS's Free Exercise claims must fail. Appx.0027-28 (citing *Smith*, 494 U.S. at 878-82); Appx.0032-33.

CSS seeks to evade this holding by arguing that *Smith* does not apply because the real reason the City invoked non-discrimination principles here was to

punish CSS for its religious beliefs. Neither the record nor case law support CSS contentions.

1. There Is No Evidence That the City "Targeted" CSS Because of its Religious Beliefs.

The mere fact that CSS objects to non-discrimination requirements applicable to all contractors on religious grounds does not entitle it to an exemption. Br.31. Implicitly accepting this fact, CSS tries to contort the record to argue that animus for CSS' religious beliefs was the true motive here, rather than a desire that providers not discriminate against prospective foster parents on the basis of protected characteristics. Br.26-30.

This case is not *Masterpiece Cakeshop*. *Masterpiece* invoked a rarely-applied exception where religious hostility appeared to motivate purportedly neutral adjudicators to enforce non-discrimination laws. This case bears no resemblance. The record lends no support to CSS' assertion that DHS was motivated by CSS' religious beliefs, as opposed to being motivated to act by the City's longstanding commitment to equal treatment of all of its citizens, including same-sex couples.

a. CSS Cannot Establish Impermissible Religious Targeting Merely Because the Conduct of Two Religious Providers Was at Issue.

CSS tries to manufacture a case for religious targeting out of the mere fact that the two parties who publicly indicated they refused to serve same-sex couples

were "religious motivated." Br.31. DHS' mere knowledge of the religious nature of these objections is irrelevant where CSS lacks any evidence DHS turned a blind eye to secular providers with similar policies. *See United States v. Armstrong*, 517 U.S. 456, 458 (1996) (selective enforcement claims fail where defendant cannot prove similarly-situated persons of different race were not prosecuted). There is no evidence DHS was aware any other contractor refused to serve prospective foster parents on the basis of protected characteristics.

CSS argues that religious animus was evident because after initially discovering that CSS and Bethany maintained discriminatory policies, the Commissioner primarily asked religious providers whether they had similar policies; but the Commissioner logically explained that because CSS and Bethany indicated their objection to serving same-sex couples was religious in nature, she limited her inquiry accordingly. Appx.0013. In any event, CSS has no evidence that the City has not required other secular providers to comply with this policy.[9] *See also* Appx.0551 (Commissioner "would not allow one organization to discriminate in

[9] Further casting doubt on the notion that animus toward religious beliefs motivated the City, while Bethany never disavowed its beliefs, it agreed to serve same-sex couples, and yet the City still agreed to work with Bethany. Indeed, the City expressed a desire that CSS sign the same contract even after learning of its religious objections. Appx.0488 (Figueroa).

the way that I would not allow the other 28 to discriminate against other communities").

Left with nothing to suggest that DHS' neutral enforcement of non-discrimination requirements for *all* providers is motivated by religious animus, CSS distorts the record. First, CSS ignores that the district court rejected its assertion that the Commissioner closed CSS intake for punitive reasons; the district court credited her testimony that she closed intake based on her assessment of the best interests of DHS' children, in order to look more deeply into CSS' and Bethany's policies. Appx.0015.

Second, CSS questions a motivation DHS did not possess. CSS questions the existence of a "must certify"/"must serve" policy because DHS did not produce a written version of that policy; but DHS did not cite that policy as the basis for its objection to CSS' and Bethany's refusal to serve same-sex couples. CSS brought this policy into the case. *See, e.g.*, Appx.0097-98 (CSS opening argument); Appx.0042-44 (district court rejecting CSS attempt to cite any exceptions to this policy as not relevant).

The record is crystal clear that DHS was motivated to object to CSS' and Bethany's refusal to serve same couples because the policies of Bethany and CSS "put the City in the position of discriminating against one particular community." Appx.0434-35 (Figueroa); Appx.0483 (concern that "particular community" was

"being excluded from allowing to become foster parents") (Figueroa); Appx.0861 (May 7 Letter). As the Commissioner explained, permitting CSS' policy would send a "very strong signal to [the LGBTQ] community that their rights aren't protected and . . . to [LGBTQ foster] youth that while we support you now, we won't support your rights as an adult." Appx.0483-84. The City has a deep, longstanding commitment to equal treatment for LGBTQ citizens. *See supra* pp. 7-8.

CSS' assertion that DHS "admittedly added" protection for foster parents to the new contract is patently false. Br.31. Rather, the City told CSS that it "believed our current contract with CSS is quite clear that this is our right, but please be advised that any further contracts with CSS will be explicit in this regard." Appx.0861. Further, DHS understood the prior contract to prohibit discrimination against foster parents already. Appx.0483 (Figueroa); Appx.0861 (May 7 Letter); Phila. Home Rule Charter § 8-200(2)(d).[10]

[10] CSS also breathlessly alleges "coordinated" hostile City action "by every branch of City government," Br.26-27, but it failed to substantiate this allegation. The district court credited Commissioner Figueroa's testimony that the Mayor was not involved in this decision. Appx.0014, 0040-41; *see also* Appx.0587-91 (Figueroa). There is no evidence that City Council, which cannot direct executive branch providers to take action anyway, coordinated its resolution with any other City official. Appx.0838-39. Finally, CSS completely ignores that PCHR has the power to initiate investigations and it has not taken any substantive action against CSS. Phila. Home Rule Charter § 4-701.

In sum, nothing in the record supports CSS' contention that the City's non-discrimination policy were mere excuses to punish CSS for its religious beliefs, particularly where by CSS' own admission, its views on same-sex marriage are well-known, Br.1; and yet the City has contracted with CSS for years, and it continues to contract with CSS now. Br.12 n.37; Appx.0307 (Amato). Given the City's commitment to LGBTQ rights; its prior and continuing contractual relationship with CSS; and the lack of any evidence the City ignored similar conduct by secular providers, the district court appropriately declined to infer punitive or hostile motive.

b. Where CSS Lacks Evidence of Religious Targeting, *Masterpiece* Is Inapplicable.

Without any evidence to support its targeting claim, CSS has no basis to invoke *Masterpiece*. CSS is left with only stray comments it claims demonstrate hostility, and for many reasons, those comments standing alone are flatly insufficient. First, *Masterpiece* addressed a unique situation where adjudicators at an impartial quasi-judicial hearing made disparaging remarks about the religious nature of a party's objection to baking a cake for the wedding of a same-sex couple. 138 S.Ct. at 1729. It is unclear whether and how *Masterpiece* applies in the distinct situation of contracting parties advocating for their own positions during contract negotiations.

Further, the City is not aware of any case — including *Masterpiece* — in which a court has inferred impermissible hostility from mere comments by a decisionmaker. In both *Masterpiece* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, evidence of disparate treatment on the basis of religion was integral to those respective decisions. *See Masterpiece*, 138 S.Ct. at 1730-1732 (considering Commission's "disparate consideration of Phillips' case compared to the cases of the other bakers" where bakers who refused to write anti-gay messages on cakes were not penalized); *Lukumi*, 508 U.S. 520, 541-42 (1993) (considering extensive commentary hostile to Santeria as well as ordinance "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings"). As noted, there is no comparable evidence in this case that DHS permitted secular providers to refuse to serve same-sex couples.

Leaving aside that the record lacks evidence of disparate treatment, the comments about which CSS complains are completely different from those at issue in *Masterpiece*. *Masterpiece* focuses on "*contemporaneous* statements made by members of [a] decisionmaking body." *Id*. at 1731 (emphasis supplied) (citing *Lukumi*, 520 U.S. at 540). City Council was not a decisionmaker, and the district court credited the Commissioner's testimony that the decision was hers, not the Mayor's. Appx.0038-41; *see also* Appx.0587-91 (Figueroa). In any event, CSS

points to statements the Mayor made before he was even elected. Appx.0878, 0885 (Tweets). These are obviously not contemporaneous with the decision here.

Finally, the Commissioner's statements were completely different in character from the egregious, disparaging statements made by adjudicators in *Masterpiece*. *See* 138 S.Ct. at 1729-30 (describing adjudicator's statement that baker's religious justification was 'one of the most despicable pieces of rhetoric that people can use" to justify "hurting others" and invocation of the Holocaust and slavery as comparable examples where religious freedom raised). Commissioner Figueroa made no similar disparaging statements. In the context of a negotiation in which she sought to *keep* contracting with CSS, the Commissioner said, "it would be great if we listened to the teachings and words of our current Pope Francis." Appx.0585; *see also* Appx.0018 (crediting testimony that Commissioner strongly desired to keep CSS as foster agency). CSS is hard-pressed to construe mention of the teachings of the Church's religious leader as a disparaging, hostile comment toward the Church. The same goes for the Commissioner's statement that "things have changed since 100 years ago," "women didn't have the rights and African Americans didn't have the rights, and [she] probably would not be sitting in the room if it was 100 years ago." Appx.0584. She made this comment responding to CSS' argument that it had cared for foster children for 100 years. *Id.* Her comments were simple fact, not impermissible hostile disparagement. The FPO, Home

Rule Charter, and civil rights protections for LGBTQ individuals did not exist 100 years ago, and clearly they change the playing field.

c. *Masterpiece* Did Not Invalidate LGBTQ Non-discrimination Requirements

CSS improperly invokes *Masterpiece* in more ways than one. Engaging in extreme selective quotation, CSS egregiously asserts it stands for the broad proposition that because the Constitution "would protect a religious decision not to perform same sex weddings," therefore, "the same is true [in this case]." Br.30. Under *Masterpiece*, the non-controversial principle that government cannot dictate to priests whom they must marry is an "exception" that "must be confined," lest "a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." 138 S.Ct. at 1727. Thus, *Masterpiece* clearly permits government to enforce the City's neutral laws and policies even when they conflict with citizens' religious convictions.[11]

[11] *Masterpiece* declined to pass on the larger conflict between anti-discrimination laws and religion in part because at the time the baker refused to provide a cake for a same sex wedding, Colorado had not yet recognized the validity of same sex marriages. 138 S.Ct. at 1728. Thus, it was not "unreasonable" for the baker to decline to recognize the validity of the marriage ceremony at issue. *Id.*

2. CSS Adduced No Evidence That DHS Selectively Enforced or Granted Secular Exemptions to the Non-discrimination Requirements.

Lacking proof of religious hostility, CSS inappropriately analogizes to this Court's precedent holding that when government selectively enforces a neutral policy or law, or it grants secular exemptions not available when the grounds for that exemption are religious, *Smith*'s protection for neutral laws does not apply. *See, e.g.*, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-366 (3d Cir. 1999).

Because there is no evidence DHS has allowed secular providers to violate its non-discrimination requirements, CSS resorts to apples to oranges comparisons that the district properly recognized are flawed. Appx.0042-44 (Opinion). First, as explained above, the religious nature of the two providers identified by the *Inquirer* does not demonstrate selective enforcement, and neither does the religious motivation of their refusal to work with same-sex couples. Br.31. One cannot make out a case for selective enforcement where there is no evidence that DHS ever turned a blind eye to secular providers that engaged in similar conduct. CSS cites *Tenafly*, Br.30, but *Tenafly* supports DHS. The absence of evidence of prior citations is not what troubled the Court in *Tenafly*; rather, the Court was troubled because the borough had cited Orthodox Jews for hanging *lechis* on utility poles, while the borough had "*tacitly or expressly granted exemptions from the ordi-*

nance's unyielding language for various secular and religious — though never Orthodox Jewish — purposes." *Tenafly*, 309 F.3d at 167 (emphasis added). There is absolutely no evidence that DHS granted any exemptions to non-discrimination requirements in the past – or that it granted any for secular providers going forward. This should end the argument.

CSS attempts to blur this fatal distinction by arguing that DHS permits providers to "refer" foster parents to other providers for reasons related to the best interests of children, such as to improve proximity to the family, or to provide expertise in addressing specialized medical needs.[12] Br.17-18, 34-35. As the district court properly noted, even if these referrals were permitted, they would not be exemptions from non-discrimination requirements. Appx.0042-44. The cases CSS invokes apply when government exempts secular conduct "that undermines the purposes of [a] law," but then refuses to exempt religious conduct that undermines that stated policy or statute to the same degree, so its conduct is constitutionally suspect. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004); *Lighthouse*

[12] Even this argument contradicts the record evidence reflecting that foster parents have the right to choose the agency with which they want to work, so that while providers may provide *information* to prospective applicants about other providers for these reasons, the choice remains the foster parents' and the "referral" cannot justify a refusal to work with the applicants if they decide not to follow it. *See supra* pp. 9-10.

Institute for Evangelism v. City of Long Branch, 510 F.3d 253, 267-68 (3d Cir. 2007); *see also City of Newark*, 170 F.3d at 366-67.

For example, in *Blackhawk*, officials required a Lakota Indian to pay a permitting fee to keep wildlife required to practice his religion, but the law lifted the fee requirement for other similar situations, even though the Commonwealth claimed that it maintained the fee because it disapproved generally of keeping of wild animals in captivity. 381 F.3d at 211. And in *City of Newark*, Newark prohibited officers from wearing beards in order to promote uniformity. While Newark exempted officers with a skin condition from the ban, it refused to grant religious exceptions for Muslim officers on religious grounds even though both exceptions would undermine the city's interest in uniformity to the same degree. 170 F.3d at 366-67.

In this case, the "stated policy or statute" undermined by CSS's request that it be permitted not to serve same-sex foster couples is the City's non-discrimination requirements. *See also* Appx.0038 (district court). CSS has not cited any secular exception DHS has made to this requirement for another foster care provider. CSS' attempt to compare DHS' decisions to continue to place individual children in CSS homes for reasons such as sibling reunification or a bond with a

prior foster parent, in the best interests of *those children,* demonstrates CSS' complete misunderstanding of this Court's reasoning in this line of cases.[13]

Similarly, the fact that DHS sometimes must consider race or disability when making a *placement decision* (an entirely different aspect of the foster care process) does not undermine the City's position. Of course, the question of whether an individual's mental disability poses a health and safety threat must be considered. Accordingly, the federal government does not consider such consideration discriminatory even though HHS considers foster parents protected under Title II of the Americans With Disabilities Act.[14] Similarly, while the Multiethnic Placement Act of 1994, Pub. L.103-82 (1994), generally prohibits consideration of race and national origin in placement decisions, HHS has noted that providers may sometimes consider them as one factor in such decisions.[15] These considerations of race and disability to serve the best interests of a particular child have nothing to

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[13] CSS refers to intake exceptions as impermissible "individualized assessments," Br.37-38, but this claim fails for the same reason its exemption argument fails. Any "individualized assessments" CSS points to are not made under the City's non-discrimination requirements.

[14] *See* U.S. Dep't of Health & Human Servs. & U.S. Dep't of Justice, Protecting the Rights of Parents and Prospective Parents With Disabilities at 5 (August 2015), available at https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html.

[15] U.S. Dep't of Health & Human Servs., Consideration of Best Interest of Children at 17, available at https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/specialtopics/adoption/mepatraingppt.pdf (last visited Sept. 27, 2018).

do with what CSS is seeking here — permission to refuse even to consider whether gay and lesbian couples meet certification criteria solely because of their sexual orientation.

On a related note, CSS argues extensively that neither its previous contracts nor the FPO prohibit discrimination in the selection and certification of foster parents. Although they do, this argument is a red herring because the prior contract is not at issue here. The City made clear that it was not defaulting CSS on its prior contract, or in any way punishing it for prior conduct. Appx.0861 (May 7 Letter). Rather, now that the City was aware of this compliance issue, going forward, it was clarifying that non-discrimination requirements apply to working with prospective foster parents. *Id.*; Appx.1175 (Janiszewski email).[16]

In any event, CSS is incorrect about whether and how foster care is a public accommodation. CSS argues that it cannot be a public accommodation and therefore the FPO cannot apply to its performance of the contract. But the case it cites, *Abukhalaf v. Morrison Child & Family Services*, No. CV 08-345-HU, 2009 WL 4067274, at *2, *4 (D. Or. Nov. 20, 2009), *recommendation adopted on other*

[16] CSS' argument that because they have not discriminated, the dispute is hypothetical is a red herring for similar reasons. CSS in effect is arguing that because they have not yet discriminated, they have a right to a contract that does not include non-discrimination requirements. The City disputes the premise that the harm is hypothetical but, in any event, it is CSS' stated refusal to follow non-discrimination requirements that is at issue in this case.

grounds, id. at *1, involved a narrower public accommodations statute and the district judge declined to hold that a foster care agency is not a place of public accommodation. And in at least one case, a district court has held that a family excluded from participation in a county foster care program was protected by public accommodation provisions. *Doe v. County of Centre*, 60 F. Supp.2d 417 (M.D. Pa. 1999), *rev'd on other grounds*, 242 F.3d 437 (3d Cir. 2001).

Further, for the reasons discussed in this subsection, *supra*, the fact that limited, justified exceptions to non-discrimination requirements are sometimes made in the best interests of children does not mean, as ADA guidance recognizes, *see supra* note 14, that providers or the City are permitted to discriminate wholesale for any reason.

In short, none of the exceptions CSS cites as evidence that the City is targeting CSS because of its religious beliefs support that conclusion.

3. Even If Strict Scrutiny Did Apply, the City's Non-discrimination Requirements Serve Compelling Interests, and the Least Restrictive Means to Serve Those Interests Is to Insist Upon Their Compliance.

Even if for any reason strict scrutiny did apply in this case, the City's actions are justified by a compelling interest and were the least restrictive means of achieving that interest.

Non-discrimination requirements constitute a compelling interest. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1986). City Council has articulated

the compelling interest further, explaining that discrimination in places of public accommodation "causes embarrassment and inconvenience to citizens and visitors of the City, creates breaches of the peace, and is otherwise detrimental to the welfare and economic growth of the City." Phila. Code § 9-1101(d). And insistence on compliance is the least restrictive means of addressing such a law. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 593-97 (6th Cir. 2018) (rejecting federal Religious Freedom Restoration Act defense by religious funeral home regarding transgender employee, because compliance with non-discrimination law was the least restrictive way to further compelling government interest in fighting discrimination), *petition for cert. filed*, No.18-107 (U.S. July 24, 2018).

CSS' proposal to send prospective foster parents who do not comport with its religious beliefs to other providers cannot be considered the "least restrictive means." A religious entity cannot elect an accommodation that will harm third parties. *See Estate of Calder v. Thornton*, 472 U.S. 703, 709-10 (1985). Sending someone away based on a protected category under the FPO — a woman, a person who is not Christian, or a same-sex couple — is still contrary to the FPO, and therefore still contrary to the City's compelling interest in ensuring equal treatment. Nor does it negate the dignitary harm inflicted upon by such couples, who

may fear facing such treatment from other providers as well and decide not to foster after all.

C. The District Court Correctly Concluded that CSS Cannot Demonstrate Any Right to Relief Under the Establishment Clause.

CSS makes essentially the same allegations regarding the Establishment Clause as it does for its claims of "targeting" under the Free Exercise clause. Br.38-41. As explained above, *supra* Part I.B, the district court properly ruled that DHS acted based on CSS' refusal to follow non-discrimination requirements, and that DHS did not close intake to punish CSS for its beliefs.

Before this Court, for the first time, CSS argues that Commissioner Figueroa violated the Establishment Clause by "tell[ing] its leaders how to interpret the Pope's teachings." Br.38-41. This argument is waived.[17]

In any event, the record does not support this argument. The context of this remark gives no indication the Commissioner intended to impose a requirement on CSS to follow the Pope's teachings. Rather, as the district court held, DHS im-

[17] CSS did not make this argument before the district court. ECF 1 ¶¶ 122-127 (Complaint); ECF 13-2 at 24-25 (TRO brief); Appx.0676-99, 0735-47 (closing argument); ECF 46 ¶¶ 172-174 (proposed findings and conclusions). The district court should have had the opportunity to consider this argument; CSS cannot raise it for the first time on appeal. *See, e.g., United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013) (argument must depend on "same facts" to avoid waiver).

posed an entirely secular requirement that CSS must follow non-discrimination requirements, just like all other foster care providers.

Finally, this Court should not accept CSS' invitation to find an Establishment Clause violation where what CSS seeks — to impose religious criteria in certifying foster parents and to treat same-sex married couples less favorably than other couples — would likely cause the City to violate the Establishment Clause as well as the Equal Protection Clause.[18] *See Dumont*, 2018 WL 4385667, at *14-*23; *see also Obergefell*, 135 S. Ct. at 2606.

D. CSS Likely Would Not Succeed on Its RFPA Claim.

As a threshold matter, CSS' RFPA claim fails because CSS has no right to a contract under Pennsylvania law, just as CSS has no affirmative right to anything under the Constitution, let alone a First Amendment right to a contract. *See supra* Part I.A. There is no burden on CSS' religious belief, no coercion, and no compulsion, because CSS voluntarily reached into the public sphere to contract with DHS to provide family foster care, a government social service.

Having made that decision, CSS cannot now argue that DHS is somehow compelling it to violate its religious beliefs. *See, e.g., W. Va. State Bd. of Educ. v.*

[18] It does not matter if CSS is a state actor or not. Br.41 n.130. If DHS allowed its contractors to impose religious criteria and discriminate against same-sex married couples, DHS would be liable for that conduct. *See Dumont*, 2018 WL 4385667, at *24-*27.

Barnette, 319 U.S. 624, 631-32 (1943) (distinguishing "compelled" speech from speech of persons who voluntarily enroll in a program, because "those who take advantage of . . . opportunities may not on grounds of conscience refuse compliance with such conditions."). For this reason, CSS' citations to cases such as *Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015), and *Chosen 300 Ministries, Inc. v. City of Philadelphia*, No. 12-3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012), are inapposite. Br.46-47.

DHS has not required CSS to "violate its sincere religious beliefs about marriage." Br.47. DHS has not required CSS to do anything. If CSS chooses not to accept DHS's terms, it can walk away from the contract and continue to exercise and express its beliefs.

CSS has voluntarily contracted with DHS, so it cannot now claim a religious entitlement to City subsidization of that contractual activity. This Court should reject CSS' RFPA arguments for this reason alone.

1. The District Court Correctly Held that CSS Cannot Satisfy RFPA's Substantial Burden Requirement

Even if CSS could demonstrate that it has a right to a contract, CSS' RFPA claim still fails, because CSS cannot show a "substantial burden" under RFPA.

Contrary to CSS' assertion, Br.43, the district court correctly recognized that CSS's charitable activities, like serving as a foster and congregate care provider, and providing CUA services, are "religious exercise" under RFPA. Appx.0051.

But the district court's rejected CSS' assertion of substantial burden for different reasons. Appx.0051-53.

To state a violation of RFPA, CSS must demonstrate that a law or agency action imposes a "substantial burden" on its religious exercise. *See* 71 P.S. § 2403. A governmental action creates a substantial burden under RFPA when it: 1) significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs; 2) significantly curtails a person's ability to express adherence to the person's religious faith; 3) denies a person reasonable opportunity to engage in activities that are fundamental to a person's religion; or 4) compels conduct or expression which violates a specific tenet of a person's religious faith. *See* 71 P.S. § 2403. If this initial burden is not met, plaintiff has no RFPA claim.

This is not an easy standard to meet: RFPA imposes proof requirements that do not exist in the federal context. RFPA imposes a higher threshold of proof, or a "'substantiality'" standard, that the federal RFRA and RLUIPA do not have. *See Brown*, 586 F.3d at 285-86 (quoting *Combs v. Homer Ctr. Sch. Dist.*, 540 F.3d 231, 262 (3d Cir. 2008) (Scirica, J., concurring)). Therefore, a RFPA plaintiff must present clear and convincing evidence of a substantial burden on religious exercise. *See* 71 P.S. §§ 2403, 2405(f); *see Brown*, 586 F.3d at 285-86; *see also Combs*, 540 F.3d at 262-63 (Scirica, J., concurring).

Further, a court must conduct an objective inquiry to determine if a challenged practice poses any "actual or imminent infringement" of religious exercise under RFPA; a plaintiff's mere assertions and claims are insufficient. *See St. Elizabeth's Child Care Ctr. v. Dep't of Public Welfare*, 989 A.2d 52, 56-57 (Pa. Commw. 2010); *see also Combs*, 540 F.3d at 259 (RFPA requires a court-based inquiry into whether plaintiff demonstrates a substantial burden).

Here, an objective inquiry reveals that the source of the alleged "burden" is CSS' own policy, not the contract, and not state regulations. James Amato testified that it was CSS' own decisions about policy and procedure, and *not* state regulations or the DHS contract, that caused CSS to believe it cannot certify same-sex couples without "endorsing" their marital status. Appx.0365-66.[19]

As Amato admitted, state regulations do not require "endorsement" of marital status to evaluate and certify a foster parent. Appx.0365-66. The criteria are solely directed to evaluating the applicants' ability to nurture and parent a child. 55 Pa. Code §§ 3700.62-3700.70. While a foster care agency must consider the "existing family relationships" and how those relationships might affect a foster

[19] Amato also testified that when CSS refused to conduct a home study for a couple, including a same-sex married couple, CSS would send that couple to another foster care agency. Appx.0362. Therefore, CSS recognizes that these prospective foster parents can meet state requirements.

child, the regulations do *not* require any affirmative finding or endorsement of the marital status of a prospective couple. *See id.* § 3700.64(b)(1).[20]

Put another way, the "ability of an applicant to work in partnership" with a foster care agency under the actual requirements does not create any burden on CSS' religious exercise. *See id*. § 3700.64(b)(5). CSS decided to create its own extra-regulatory, extra-contractual policy, but that decision is not a substantial burden under RFPA.

CSS also cannot show a substantial burden because CSS can still fulfill its religious mission of serving at-risk children without a family foster care contract. *See Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough*, 920 A.2d 953, 960 (Pa. Commw. 2007). CSS still provides government services to children as a CUA, as a congregate care provider, and through family foster care contracts with other counties. Appx.0303-04 (Amato); Br.12 n.37; Appx.0064 (Opinion).

Finally, CSS' bare statements that its current foster parents are somehow barred from serving as foster parents do not establish a substantial burden, particu-

[20] CSS provides no citation for its argument that because state law requires consideration of family relationships, "Catholic cannot complete home studies without making affirmative findings on [a couple's marital status or endorse their relationship]." Br.50. As Mr. Amato testified, the marital requirement is CSS' *own* policy. Appx.0366.

larly where the record shows otherwise. Br.45-49. DHS is prepared to transfer CSS families to other providers and hopes that they do so if CSS decides to close its family foster care division. Appx.0175 (Ali); Appx.0553 (Figueroa); *see also* Appx.0065-66 (Opinion).

2. Even if CSS Could Show a Substantial Burden under RFPA, CSS' RFPA Claim Still Fails.

Even if CSS could show a substantial burden on its religious exercise, CSS still has no RFPA claim. This is so because compliance with non-discrimination requirements is the least restrictive means of advancing the City's compelling interest in eradicating discrimination. *See supra* Part I.B.3.

E. The District Court Correctly Determined that CSS Likely Would Not Succeed on Its First Amendment Compelled Speech and Retaliation Claims.

CSS' First Amendment retaliation and compelled speech claims fail for the same reason its Free Exercise and RFPA claims fail: selection, training, and certification of foster parents are part and parcel of the contractual duties CSS voluntarily assumed; and CSS failed to demonstrate that DHS was motivated by religious animus.

1. There Is No "Compelled Speech" Because Home Studies Are Part of the Contract, and CSS Can Always Choose Not to Contract.

If an entity's speech occurs within the bounds of what the government funds, that speech it *not* protected. *See AOSI*, 570 U.S. at 217. If the government tries to

impose conditions on speech that occurs outside the scope of that funded activity, then that requirement amounts to improper "compelled" speech. *See id.*

CSS' repeated assertion that it is "speaking" outside the contract and engaging in private speech when it performs home studies is wrong. Br.7, 53-55, 58-60. Performing home studies is integral to the family foster care services DHS has contacted with CSS to provide. A foster parent cannot care for children for CSS unless that foster parent has gone through a home study and been certified.[21] Further, although CSS tries to argue otherwise in its brief, CSS receives compensation for all its services regardless how the payments are calculated. Appx.0430, Appx.0090 (Figueroa).[22]

Ultimately, if CSS objects to what it sees as a contractual condition on its speech, "its recourse is to decline the funds." *AOSI*, 570 U.S. at 214. CSS' citations to inapplicable cases do not alter this basic principle. Br.52-53. *Janus v. AF-*

[21] CSS claims "home studies are not . . . even mentioned in[] the contract," Br.56, which is unsurprising since that term commonly applies to prospective adoptive — not foster — parents. Foster parent screening, training, and certification – all of which are explicitly, repeatedly mentioned in the contract, s*ee, e.g.*, Appx.1032, encompass home studies, and CSS recognizes as much because it uses the term with respect to foster parent screening. Appx.0309-10 (Mr. Amato discussing the home study process as part of the certification of a foster home, concluding "then the home is certified as a foster home and the home study is complete").

[22] CSS' claim that the City conceded that home studies are not expressly funded is incorrect — CSS cites to the City's restatement of *CSS'* position, Br.54 n.166, not the City conceding that position.

SCME, 138 S. Ct. 2448 (2018) nor *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), do not involve speech occurring as part of a government contract. Indeed, the statute under review in *Becerra* specifically exempted any entity that had a contract with the government. *See* 138 S. Ct. at 2369. The other cases CSS cites also do not involve contractual speech. *See Hurley*, 515 U.S. at 566 (private parade); *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (license plates); and *Frudden v. Pilling*, 742 F.3d 1199, 1201 (9th Cir. 2014) (school uniform policy).

Finally, CSS cannot rely on *AOSI* to try to create a "compelled" speech claim. There, the government sought to compel agencies who accepted HIV/AIDS prevention funds to adopt a policy statement against prostitution. *See* 570 U.S. at 217-18. Our contract seeks no policy statement from CSS on same-sex marriage. It simply asks CSS to evaluate any members of the public who request it, and to certify as foster parents any applicants who are qualified under the governing state law criteria.[23]

[23] As discussed *supra* part I.D., the speech CSS' puts at issue is not compelled speech because the regulations do not require it.

2. CSS Has No First Amendment Retaliation Claim Because the Reason for Closing Intake Was CSS' Inability to Comply with the Contract, Not Its Speech, and Because Evaluating Foster Parents is Not Speech on a Matter of Public Concern.

CSS argues that DHS retaliated against it because CSS' statement that it would turn away same-sex couples reflected a religious decision and was protected speech. Br.59.[24] The fact that CSS' unwillingness to abide by the terms of its contract became apparent through public statements does not "cloak it in First Amendment protection." *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011).

This effort also fails because just as DHS' actions do not support animus, *supra* Part I.B.1, they also do not support retaliation. There is no evidence that DHS acted to punish CSS for its beliefs, as opposed to acting to ensure that its contractors treat all prospective foster parents equally. DHS has maintained a longstanding contractual relationship with CSS; continues to contract with CSS for a range of foster care services that; and remains willing to offer CSS a full contract so long as CSS agrees to comply with non-discrimination requirements. Appx.0375-76 (Amato); Appx.0488 (Figueroa); Appx.1175 (Janiszewski email).

[24] CSS also mischaracterizes Commissioner Figueroa's testimony. Br.59. Commissioner Figueroa said she understood Catholic viewed their position as a religious one but that she based her decision on CSS' conduct under the contract — that is, their discrimination against a protected group. Appx.0549-50.

Further, CSS incorrectly asserts that it engages in protected speech when it evaluates prospective foster parents. Br.59. Evaluating prospective foster care parents is part of providing social services under the contract, not speech on a matter of public concern. *See, e.g.*, *Gorum v. Sessoms*, 561 F.3d 179, 187-88 (3d Cir. 2009) (professor's speech was pursuant to official duties, and not speech on a matter of public concern); *see also Comsys, Inc. v. Pacetti*, 893 F.3d 468, 471 (7th Cir. 2018) (listing cases).

F. The Foster Parent Appellants Do Not Have Independent First Amendment Claims Based on CSS' Dispute with DHS.

Appellants' Brief mistakenly assumes that the Foster Parent Appellants have claims independent of CSS' in this appeal. Br.34, 39, 45, 48-49. However, "a litigant may only assert his own constitutional rights or immunities," and "one cannot sue for the deprivation of another's civil rights." *O'Malley v. Brierley*, 477 F.2d 785, 789 (3d Cir. 1973) (citations omitted).

In *O'Malley*, clerics excluded from a prison could not bring free exercise claims, even though their exclusion may have violated *inmates'* free exercise rights. 477 F.2d at 795. Similarly, here the Foster Parent Appellants cannot assert derivative claims that their purported religious right to serve as foster parents has been impaired because DHS allegedly violated *CSS's* free exercise rights. Since the foster parents' claim is derivative of CSS's claim, it cannot stand.

II. There Is No Basis for Reversing the District Court's Factual Findings as to Irreparable Harm, the Equities, and the Public Interest.

A. The District Court Did Not Abuse Its Discretion in Concluding That Neither CSS Nor CSS Foster Parents Established Irreparable Harm.

The district court found that the CSS failed to demonstrate irreparable harm absent injunctive relief. CSS essentially repeats the same arguments to this Court, and these arguments still fall short.

First, as explained above, CSS is not likely to suffer any irreparable constitutional deprivation. Appx.0058. Second, as for CSS' repeated claims that it is about to close and lay off employees, CSS has not done so: only one (relatively small) portion of CSS' foster care services has been impacted, and CSS can mitigate this impact by agreeing to an interim contract with DHS. Moreover, any harm in the form of lost revenue under the contract can be quantified and compensated, should CSS prevail, through money damages and is not irreparable harm. *See Hohe v. Casey*, 868 F.2d 69, 73 (3d. Cir. 1989); Appx.0064-65.

The district court also did not abuse its discretion in rejecting the CSS Foster Parents' claims of irreparable harm. Appx.0065-66. The Foster Parents can continue to care for children by working with other agencies, and while the district court acknowledged that the Parents were upset about losing their affiliation with CSS, that alone was insufficient to establish irreparable harm. *Id.; see also*

Appx.0175 (Ali); Appx.1167 (Ali Decl.) (noting DHS welcomes Parents to transfer and process of transfer has been smooth during other intake closures).

B. The District Court Did Not Abuse Its Discretion in Concluding That the Equities and Public Interest Balanced in the City's Favor.

After concluding that CSS failed to demonstrate irreparable harm, the district court found that the balance of the equities favored DHS. Appx.0068. The district court did not abuse its discretion in rejecting CSS' assertion that foster children will be harmed. Appx.0066. The district court credited DHS' testimony and found that closure of intake to CSS did not impact child welfare, increase the number of children in congregate care, or otherwise change the availability of placements for children in DHS' custody. Appx.0016-17.[25] Further, although CSS asserts that children have experienced delays and difficulties in receiving placements that are in their best interests, and the parties disagree about Doe Foster Child #1, the district court rejected those assertions as moot because all parties now understand that DHS will grant exceptions where necessary. Appx.0016.

[25] CSS' claim that children in congregate care could be placed with CSS families is overly simplistic. The district court found Commissioner Figueroa's testimony credible on this point. Appx.0017 (Opinion) (quoting Commissioner Figueroa's testimony that "assuming that 'availability [at any one foster agency] [will] reduce the [use of] congregate care is an over [simplification] of the complication of our work'").

The district court also rejected CSS' assertion that no one would be harmed if CSS is permitted to discriminate against same-sex couples, finding that the City's interests in its non-discrimination requirements are manifold. Appx.0068-69. Particularly high among those interests is DHS's need to recruit a broad and diverse pool of foster parents for children in need of foster parents, and ensuring that government-contracted services are accessible to all qualified Philadelphians. *Id.* As Commissioner Figueroa explained, permitting CSS to refuse serve same-sex couples is contrary to the City's and the public's interest as it sends a "very strong signal to the [LGBTQ] community that their rights aren't protected, and . . . to [LBGTQ foster] youth that while we support you now, we won't support your rights as an adult." Appx.0483-84.

Although CSS claims that it would be only one out of 30 providers refusing service for same-sex couples, there is no way to predict how many others, if allowed to privilege their religious beliefs over the City non-discrimination provisions, might exclude applicants who do not conform to that agency's religious beliefs, nor the message such a policy might send to current foster youth. City residents should not have to risk facing the humiliation of discrimination and being told that they are "wast[ing] [their] time." Appx.0981-86 (Inquirer article); *see also* Phila. Code § 9-1101(1)(d) ("Discrimination in places of public accommodation causes embarrassment and inconvenience to citizens and visitors of the City, cre-

ates breaches of the peace, and is otherwise detrimental to the welfare and economic growth of the City.").

The Supreme Court has long recognized the stigma that comes with discrimination. *Masterpiece Cakeshop*, 138 S.Ct. at 1727; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) ("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 because of his race or color."). And the Supreme Court has never countenanced a system where some members of the public—such as opposite sex couples—can choose from any service provider but other members of the public—such as same-sex couples—have fewer options. *Obergefell*, 135 S.Ct. 2584 ; *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968). Neither should this Court.

CONCLUSION

For all the reasons set forth above, Appellees respectfully request that this Court affirm the district court's decision below.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to the Third Circuit Local Appellate Rule 46.1(e), I hereby certify that I am a member of the bar of this Court.

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CERTIFICATION OF COMPLIANCE.

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d) and 32(a)(7)(B) because this brief contains 12,806 words, excluding the parts of the brief exempted by Federal R. App. Proc. 32(f).

1. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.
2. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.
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CERTIFICATE OF SERVICE

I, Jane Lovitch Istvan, hereby certify that I electronically filed the foregoing **Brief for Appellees** on September 27, 2018 on the Court's electronic filing system, where it is available for printing and viewing.

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