No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,
v.
CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF FOR CITY RESPONDENTS

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QUESTIONS PRESENTED

I. Whether the Free Exercise Clause bars the City of Philadelphia from including in all of its contracts with foster family care agencies a provision that requires such agencies to refrain from discrimination when performing government services and exercising delegated government power.

II. Whether the City "compels" speech by requiring foster family care agencies to refrain from discrimination when carrying out their contractual responsibilities.

III. Whether *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), should be overruled.

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INTRODUCTION

The City of Philadelphia is entrusted by state law with the responsibility to care for more than 5,000 children in its legal custody. To help it carry out that core government function, the City's Department of Human Services (DHS) contracts with private foster family care agencies, which exercise the "delegate[d]" state power of determining whether individuals satisfy the state-law requirements for becoming foster parents. 55 Pa. Code § 3700.61. Each contract contains the same non-discrimination requirement, which prohibits an agency from discriminating on the basis of any protected characteristic, including sexual orientation, when performing its duties for the City.

Catholic Social Services (CSS) has long been a point of light in the City's foster-care system. For decades, it has performed its contractual duties with

distinction, helping DHS identify and approve hundreds of families to care for the City's foster children. To this day, DHS continues to contract with CSS to provide a number of services to children in foster care, including managing group homes and directly providing social services to foster children. Year after year, DHS has offered CSS a contract to recruit and certify foster parents subject to the same non-discrimination requirement as every other agency.

But, for the past two years, CSS has refused those offers. Instead, it has insisted that the Constitution entitles it to be offered a government contract that omits the standard non-discrimination requirement, and permits it to wield delegated government power and perform government services—and receive millions of dollars in government funding—while disregarding a contractual obligation that every other foster family care agency must follow.

The Constitution does not grant CSS the right to dictate the terms on which it carries out the government's work. Whatever CSS's rights when *regulated* by the government, it is not entitled to *perform services* for the government however it sees fit. As this Court has time and again recognized, government "could not function" if its contractors could insist upon carrying out their duties according to their personal beliefs. *NASA* v. *Nelson*, 562 U.S. 134, 149 (2011). And the government does not "prohibit[] the free exercise [of religion]" by setting rules governing how an entity performs contractual duties it voluntarily undertook. U.S. Const. amend. I.

The Court of Appeals correctly determined that the City acted within the broad scope of its managerial

authority here. Contrary to petitioners' repeated portrayal (*e.g.*, Br. 1-2, 9, 12), DHS has not "penalize[d]" CSS or "exclude[d] [it] from foster care." CSS continues to assist foster children through its other social services contracts, is free to assist and support foster parents in its private capacity, and may accept the City's offer to perform certifications for the City without abandoning its religious beliefs or in any way altering its conduct as a private citizen.

Nor has DHS targeted CSS based on its religious beliefs. As the District Court found, DHS has never made an exception to its non-discrimination requirement for anyone; indeed, it lacks the authority to do so. Likewise, the record contains no evidence that the contract's facially non-discriminatory, neutrally applied requirement was based on animus toward CSS—an entity that DHS continues to contract with and has repeatedly attempted to rehire in full. CSS and its *amici* suggest otherwise only by rejecting the factual findings of two courts below, distorting the record, and focusing on a question—the propriety of DHS's freeze on referrals in March 2018—that has long since become moot.

CSS may resume certifying foster parents for the City at any time. The City "strong[ly] desire[s]" that it will do so. Pet. App. 68a. But the Constitution does not entitle CSS to perform those services on the City's behalf, with City funds, pursuant to a City contract, in a manner that the City has determined would be harmful to its residents and the thousands of children it has a duty to protect. Because the Third Circuit correctly so held, its judgment should be affirmed.

STATEMENT

A. The City's Foster-Care System

1. Every State has a responsibility to care for those children who, due to abuse or neglect, cannot safely remain in their homes. Pennsylvania has assigned "local authorities" the lead role in fulfilling that task. 62 Pa. Stat. § 2301(a). Under Pennsylvania law, a designated agency in every county—in the case of Philadelphia, the Department of Human Services—must take "legal custody" of children whom courts have ordered removed from their homes. 42 Pa. Cons. Stat. § 6351(a)(2)(iii); *see* 55 Pa. Code § 3130.12. Those agencies must "provide [for the] care" of foster children, 62 Pa. Stat. § 2305, and place each one in a home or facility that is "consistent with the best interest and special needs of the child," 55 Pa. Code § 3130.67(b)(7)(i); *see* 11 Pa. Stat. § 2633(4), (18)-(19).

The process of placing a foster child begins as soon as the child enters the City's custody. DHS starts by evaluating the child to determine the "level of care" that he or she requires. JA 77, 266. Some children have specialized medical or behavioral health needs, and must be placed with a specially trained or licensed caregiver or in a group facility (known as "congregate care"). JA 77, 115-119. Children who do not have special needs can be placed in general foster care. JA 77.

After determining the applicable level of care, DHS makes a "referral" indicating that it seeks a placement for the child. JA 79-80. Private contractors then attempt to place that child with a foster family that can provide the requisite care. JA 83-85. DHS reviews each proposed placement to ensure it is in

"the best interest * * * of the child"; if not, DHS may veto the placement. 55 Pa. Code § 3130.67(b)(7)(i); *see* JA 83-85. After placement, DHS monitors each child to ensure that she is properly cared for and receives the safety and support that every child deserves. JA 81-82.

2. To assist it in fulfilling these responsibilities, DHS has long contracted with private entities. JA 694. Some entities contract with DHS to serve as "Community Umbrella Agencies" (CUAs), which provide social services to foster children. JA 81-83, 696. Others operate congregate-care facilities, which provide group housing for children in the City's care. JA 221-222.

Most pertinent here, more than 20 entities have contracted with DHS to serve as foster family care agencies, or FFCAs. JA 80, 82-83; *see* DHS, Foster Care Licensing Agencies, https://tinyurl.com/y5cw59tk (last updated Apr. 11, 2019) (listing FFCAs). FFCAs are responsible for conducting "home studies" to assess whether individuals satisfy the state-law criteria to serve as foster parents, and issuing "certifications" when parents meet those requirements. JA 82, 515, 695. FFCAs also accept referrals from DHS to place children with foster parents they have certified. JA 83-85, 581-582.

When an FFCA inspects and certifies foster parents, it exercises a share of delegated government power. *See* JA 322. State law vests Pennsylvania with the "authority * * * to inspect and approve foster families," and "delegates" that power to "an approved FFCA." 55 Pa. Code § 3700.61. In exercising that power, an FFCA must apply specified state-law criteria: It must assess an applicant's "ability * * * to

provide care, nurturing and supervision to children," "mental and emotional adjustment," and "[s]upportive community ties." *Id.* § 3700.64(a); *see* 23 Pa. Cons. Stat. § 6344(d)(2). If an applicant is dissatisfied with an agency's certification decision, she may appeal the decision to a state agency and then to state court, where it is reviewed in the same manner as the decision of a state administrative agency. 55 Pa. Code § 3700.72(a)-(b); *see* 2 Pa. Cons. Stat. §§ 501-508, 701-704.

DHS requires every FFCA to refrain from discrimination when carrying out its contractual duties. Pet. App. 88a. In 2018, when this dispute arose, each FFCA contract provided that FFCAs must follow the City's Fair Practices Ordinance, JA 653, which prohibits "deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on" any protected characteristic, including "sexual orientation." Phila. Code § 9-1106(1). The contract further stated that, "in performing this Contract, Provider shall not discriminate *** against individuals in *** public accommodations practices *** on the basis of *** sexual orientation." JA 653-654. DHS has never made an exception to these requirements. Pet. App. 100a-101a.

B. Catholic Social Services

1. Catholic Social Services (CSS) is a private nonprofit organization that contracts with DHS to serve foster children in several ways. CSS has a contract to operate a CUA. JA 164, 271. It manages two congregate-care facilities. JA 221-222. And in Fiscal Year (FY) 2018—as in many prior years—CSS contracted to serve as an FFCA. JA 270-271, 504.

In its FY 2018 contract, CSS agreed to "recruit, screen, train, and provide certified resource care homes" for the City. JA 514-515; *see* JA 512 n.1. It also agreed to follow the City's standard non-discrimination requirement. JA 653-654. In exchange for these and other services CSS provided on behalf of the City's children, DHS agreed to pay CSS $19.4 million. JA 505-506. Of that total, less than $2 million was compensation for CSS's work as an FFCA. Pet. App. 187a.

2. In March 2018, a reporter informed then-DHS Commissioner Cynthia Figueroa that two faith-based FFCAs, CSS and Bethany Christian Services, refused to conduct home studies or provide certifications for same-sex couples. *Id.* at 61a-62a. Commissioner Figueroa contacted CSS and Bethany, which confirmed that the report was correct. *Id.* at 62a-63a; JA 273. Commissioner Figueroa then contacted some of the City's other faith-based FFCAs, as well as one non-faith-based agency, to inquire whether they too had such a policy; all stated that they did not. Pet. App. 61a-62a; *see* JA 274, 280, 364.

After consulting with the City's Law Department, DHS concluded that CSS's and Bethany's policies violated the contract's non-discrimination requirement and the Fair Practices Ordinance. JA 298, 688. Commissioner Figueroa was concerned that CSS's policy would prevent it from entering a new FFCA contract for FY 2019, thereby disrupting the placement of foster children in its care. JA 281-282, 688-689. She thus invited CSS's representatives to a meeting "to find a mutually agreeable resolution" to the issue. Pet. App. 33a. During that meeting, Commissioner Figueroa, who is herself Catholic,

attempted to "reach common ground" by "appealing to an authority within their shared religious tradition." *Id.*; *see* JA 397. She remarked: "[I]t would be great if we followed the teachings of Pope Francis." JA 366.

This meeting failed to resolve the impasse. Accordingly, as is its normal practice when there is doubt about whether an FFCA will renew its contract, DHS halted referrals to CSS for the remainder of its contractual term. JA 274-275, 281-282. DHS continued, however, to pay CSS under the contract, and made referrals to CSS when in the best interests of children. JA 283; *see* Pet. App. 15a-17a. This referral freeze had no effect on the operation of CSS's congregate-care facilities or its CUA contract. Pet. App. 16a.

3. On June 30, 2018, CSS's FY 2018 FFCA contract expired by its terms. Pet. App. 54a; JA 506. Since then, DHS has repeatedly indicated its "strong desire to keep CSS as a foster care agency." Pet. App. 68a. It has continued to contract with CSS to serve as a CUA and a congregate-care provider. *Id.* at 36a. And it has repeatedly offered CSS contracts to resume services as an FFCA on the same terms as every other agency.

In FY 2019, DHS offered CSS a choice between "the same" contract that it offered every other FFCA and a "maintenance contract" to provide foster-care services for families it was already supporting. JA 284-285, 705-706; *see* Pet. App. 67a-68a. Every other FFCA—including Bethany—entered into a full contract. *See* JA 287; Pet. App. 21a. CSS declined to do so, and instead chose the maintenance contract. JA 224-229; SA 6-19.

In FY 2020, DHS again offered CSS the choice between a maintenance contract and a full FFCA contract. SA 20-24. In light of CSS's insistence that the non-discrimination requirement in its prior contract was insufficiently clear, *see* Pet. App. 163a, 170a, DHS revised the non-discrimination provision in each of its FY 2020 FFCA contracts to provide: "[I]n connection with providing any service or fulfilling any duty under this Contract, Provider shall not discriminate or permit discrimination against any individual on the basis of" any protected characteristic, including "sexual orientation." SA 31; *see* DHS, *Section 15.1: Foster Care Contract*, https://tinyurl.com/y4dt2www (last visited Aug. 13, 2020). CSS again refused the full contract, and opted to enter a maintenance contract instead. SA 27-39.

C. Procedural History

1. CSS filed this suit in May 2018, while its FY 2018 contract was still in force. Pet. App. 54a. CSS claimed that DHS's decision to halt referrals under its FY 2018 contract violated the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, and the Pennsylvania Religious Freedom Protection Act. *See id.* It sought a preliminary injunction ordering DHS to continue to make referrals to CSS without requiring it to comply with the non-discrimination requirement. *Id.*

The District Court conducted a three-day evidentiary hearing. During that hearing, City officials testified at length about the City's foster-care system and the events giving rise to this suit. JA 73-161, 259-400. CSS's Secretary and Executive Vice President, James Amato, testified about CSS's operations

and the nature of its religious objection. JA 162-240. Amato also revealed that CSS had a policy of refusing to certify applicants who did not obtain a "letter from a pastor" demonstrating a "commitment to their faith." JA 215. After DHS indicated that this policy, too, violated CSS's contract, CSS stated that it would discontinue the practice "to eliminate any potential issue regarding how the parties would operate under a preliminary injunction." JA 715.

Following this evidentiary hearing, the District Court denied a preliminary injunction. Pet. App. 131a-132a. It found that DHS does "not permit any foster agency under contract, faith-based or not, to turn away potential foster parents" based on protected characteristics. *Id.* at 87a-88a; *see id.* at 100a-101a. It also found that DHS did not "target[ ]" CSS because of its religious beliefs. *Id.* at 93a-101a. This Court denied CSS's application for an injunction pending appeal. *Fulton* v. *City of Philadelphia*, 139 S. Ct. 49 (2018) (mem).

2. The Third Circuit unanimously affirmed. Pet. App. 12a. It found that, because the FY 2018 contract had expired, the only live question remaining is whether DHS is acting unlawfully by offering CSS a contract containing "explicit language forbidding discrimination on the ground of sexual orientation." *Id.* at 25a. The Third Circuit held that it is not. The court found no evidence that DHS "treated [CSS] differently because of its religious beliefs," *id.* at 32a-35a, or that DHS permitted analogous forms of discrimination by other FFCAs or by DHS itself, *id.* at 34a-36a. The court also found that enforcement of the non-discrimination requirement satisfies strict

scrutiny under the Pennsylvania Religious Freedom Protection Act. *Id.* at 44a-49a.

SUMMARY OF ARGUMENT

I. CSS lacks a constitutional right to demand that DHS offer it a contract that omits the same non-discrimination requirement every other FFCA must follow when performing services for the City. That conclusion is supported both by the government's broad authority when managing its own contractors, and by the principle that neutral laws of general application do not generally "prohibit[] the free exercise" of religion. U.S. Const. amend. I.

A. The government has "significantly greater leeway" when directing its employees and contractors than when regulating private individuals in its capacity as "sovereign." *Engquist* v. *Ore. Dep't of Agric.*, 553 U.S. 591, 599 (2008). That "extra power" stems both from the reality that government "could not function" if its agents had a constitutional right to perform their jobs as they see fit, and from the attenuated burden the government imposes on individual rights when it instructs its employees and contractors how to perform their official duties. *Id.* at 598-599 (citations omitted).

These considerations apply with full force to the Free Exercise Clause. Mechanically transplanting the Court's ordinary free-exercise framework to the managerial context would severely intrude on the flexibility the government requires to manage its workforce, and would contravene the settled principle that the Free Exercise Clause does not entitle individuals to control the government's "internal affairs." *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986). Although principles of neutrality and general ap-

plicability still constrain the government in its capacity as manager, the Court should afford the government greater leeway to draw distinctions in the managerial context, and be especially hesitant to infer anti-religious animus from stray remarks of government officials.

B. The non-discrimination requirement falls squarely within the scope of the government's managerial authority. It restricts how CSS carries out a core contractual responsibility and delegated government power—certifying foster parents—and does not affect how CSS speaks or acts in its capacity "as a citizen." *Garcetti* v. *Ceballos*, 547 U.S. 410, 422-423 (2006).

C. The non-discrimination requirement is also generally applicable and neutral. It is generally applicable because every FFCA contract contains an identical non-discrimination requirement, which applies the same way regardless of whether the discrimination is motivated by religious beliefs. DHS lacks authority to make exceptions to this requirement. And, as the District Court found, it has never done so. Petitioners' argument to the contrary rests on a misreading of the record and analogies to plainly inapposite circumstances.

The non-discrimination requirement is "neutral," as well. Its text and operation evince no trace of religious hostility. Even if extrinsic statements alone could establish that a policy was non-neutral, the record here does not support such a conclusion. Petitioners incorrectly infer animus from the statements of persons who played no role in the decisionmaking process and from events far removed from the relevant decisions.

D. CSS's free-exercise claim also fails for an independent reason: the non-discrimination requirement does not require CSS to engage in any conduct contrary to its stated religious beliefs. CSS's religious objection rests on its "understanding" that state law requires it to endorse a couple's relationship when certifying them as qualified foster parents. But state law contains no such requirement, and CSS's erroneous interpretation of state law warrants no deference.

II. CSS's free speech claim is also without merit. The non-discrimination requirement regulates how CSS performs its contractual duties for the government; it does not obligate CSS to make statements about the validity of same-sex relationships; and it is directed at conduct, not speech.

III. Finally, the Court should decline petitioners' invitation to reconsider *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). This case would be an extremely poor vehicle to reconsider *Smith*, given that it arises in the government contracting context, and because the non-discrimination requirement satisfies strict scrutiny in any event. Further, petitioners have not come close to making the showing necessary to justify overturning Justice Scalia's landmark decision in *Smith*, which has firm support in the Constitution's original meaning and has served as the predicate for three decades of precedents and legislative enactments.

The judgment should be affirmed.

ARGUMENT

This case comes before the Court on appeal of the denial of CSS's motion for a preliminary injunction. That procedural posture constrains the scope of this Court's review in two important ways.

First, the District Court made extensive factual findings that are entitled to deference on appeal. Before resolving petitioners' motion for a preliminary injunction, the District Court held a three-day evidentiary hearing. The court then made detailed findings of fact, which were upheld by the Third Circuit. *See* Pet. App. 32a-39a, 56a-68a, 93a-103a. Much of petitioners' brief consists of attempts to relitigate those factual conclusions. But the District Court's findings "are reviewable only for clear error," *U.S. Bank Nat'l Assn.* v. *Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018), meaning that they may not be disturbed unless the Court is "left with the definite and firm conviction that a mistake has been committed," *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). And because those findings were upheld on appeal, it is this Court's practice to defer to them absent "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Second, the only live question in this case is the constitutionality of the City's current nondiscrimination requirement. When petitioners filed this suit in March 2018, their principal claim was that DHS's freeze of referrals under their FY 2018 contract was unconstitutional. Pet. App. 54a. That contract, however, has long since expired. *Id.* at 25a. And petitioners' motion for a preliminary injunction seeks only forward-looking relief. *See* Mot. for Pre-

lim. Inj., D. Ct. Dkt. 13. Accordingly, any dispute over the referral freeze under the FY 2018 contract is moot. Pet. App. 25a. The only question that remains live is whether DHS may include a provision in its *current* FFCA contract that requires CSS—like every other FFCA—not to discriminate on the basis of protected characteristics when performing its contractual responsibilities.

That question has a straightforward answer: CSS lacks a constitutional right to demand that it be granted a government contract to perform a government function using government funds without complying with the same contractual obligation that every other FFCA must follow.

I. THE CITY'S CONTRACT COMPORTS WITH THE FREE EXERCISE CLAUSE.

A. The Free Exercise Clause Grants The Government Greater Authority To Set Rules Of Conduct For Government Contractors Than For The Public At Large.

1. This Court has "long held the view" that "the government *** has far broader powers" when "acting as proprietor, to manage its internal operation," than when acting "as sovereign." *Engquist*, 553 U.S. at 598 (internal quotation marks, brackets, and citations omitted). "This distinction has been particularly clear in [the Court's] review of state action in the context of public employment," *id.*, and when it reviews rules governing "contractor[s]" who "perform *** duties" on the government's behalf, *Nelson*, 562 U.S. at 150 (internal quotation marks omitted).

The government's "extra power" when acting in its managerial capacity stems from the "balance" of the competing interests at stake. *Engquist*, 553 U.S. at 598-600 (citation omitted). On one hand, the government's interest "in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion). If "every employment decision became a constitutional matter," government "could not function." *Connick* v. *Myers*, 461 U.S. 138, 143 (1983).

On the other hand, a person's "private interest[s]" when she acts on behalf of the government are more attenuated than when she acts as citizen. *Cafeteria & Rest. Workers Union, Loc. 473, AFL-CIO* v. *McElroy*, 367 U.S. 886, 896 (1961). Employees and contractors "do not lose their constitutional rights when they accept their positions." *Engquist*, 553 U.S. at 600. But neither do they gain the right "to perform their jobs however they see fit." *Garcetti*, 547 U.S. at 422. A prospective employee who objects to her job responsibilities is free to "get any other job," *Cafeteria & Rest. Workers*, 367 U.S. at 896, just as a prospective contractor who objects to the terms of a government contract is free to "decline the funds," *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("*AOSI*").

In light of these competing interests, the Court does not mechanically transplant constitutional rules that apply to the government as sovereign to the government as manager. *See Engquist*, 553 U.S. at 598-600. Rather, across a variety of doctrines, the Court has sought to "strik[e] [an] appropriate bal-

ance" between "the asserted employee right" and "the requirements of the government as employer." *Id.* at 600.

The Court's free speech cases are "particularly instructive." *Id.* at 599. Under the framework set forth in *Pickering* v. *Board of Education of Township High School District 205*, 391 U.S. 563 (1968), this Court has held that government employees and contractors cannot claim a First Amendment right to speak as they wish when "performing their official duties." *Garcetti*, 547 U.S. at 423; *see Bd. of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 678 (1996) (holding that *Pickering* applies to "independent contractors" as well as "employees"). Nor may contractors challenge speech restrictions within "the limits of [a] government spending program." *AOSI*, 570 U.S. at 214-215. That speech is the government's speech, and the government "is entitled to say what it wishes." *Garcetti*, 547 U.S. at 422 (citation omitted). A restriction on a contractor's or employee's speech implicates the First Amendment only when the government attempts to regulate that person in his capacity "as a citizen," *id.* at 423-424, or tries to limit his speech "outside the contours" of the government program, *AOSI*, 570 U.S. at 214-215.

2. Similar considerations are instructive in applying the Free Exercise Clause. That Clause provides that "Congress shall make no law * * * prohibiting the free exercise [of religion]." U.S. Const. amend. I. At its core, the Free Exercise Clause bars the government "from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978) (plurality opinion). The government may not impose disabilities based on religious beliefs

or status, nor exclude religious observers from public benefits otherwise available to all. *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019-21 (2017).

In contrast, the Free Exercise Clause generally permits the government to enact "neutral and * * * general[ly] applicab[le]" regulations on conduct that have "the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531, 542 (1993). Neutral rules of conduct that incidentally burden religious practice do not typically "prohibit[ ]" the free exercise of religion, just as rules that incidentally burden speech do not usually "abridg[e]" the freedom of speech. U.S. Const. amend. I; *see Smith*, 494 U.S. at 878-879. And entitling religious objectors to exemptions from generally applicable rules would make every person "a law unto himself," impairing the ability of government to carry out its functions. *Smith*, 494 U.S. at 885 (quoting *Reynolds* v. *United States*, 98 U.S. 145, 166-167 (1878)).

These principles apply with heightened force when the government acts as manager. In cases predating *Smith*, the Court held that the Free Exercise Clause does not generally give individuals a right to object to how the government "conduct[s] its own internal affairs." *Bowen*, 476 U.S. at 699. "The crucial word in the constitutional text," the Court explained, "is 'prohibit' "; for "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (citation omitted). Thus, in *Bowen*, the Court held

that an individual could not challenge the government's "use of a Social Security number for his daughter," notwithstanding that he sincerely believed this practice "robb[ed]" his daughter of her "spirit." 476 U.S. at 696-697, 699-701. Similarly, in *Lyng*, the Court held that an Indian tribe could not object to the government's authorization of logging and road-building on government land, even though this practice was likely to "have devastating effects on traditional Indian religious practices." 485 U.S. at 451. By the same token, employees and contractors generally do not suffer a cognizable burden on their religious exercise when the government conducts the quintessentially "internal affair[]" of telling its own agents how to do their jobs. *Nelson*, 562 U.S. at 153; *see W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943) (persons who "voluntarily enroll" in a government program "may not on ground of conscience refuse [its] conditions").

At the same time, the government's interest in regulating conduct is at its apex when directing its employees and contractors how to carry out government work. Innumerable tasks that government employees and contractors are hired to perform will be "deeply offensive" to the "sincerely held religious beliefs" of some—from the tactics that law enforcement officers employ to the food that contractors serve in government cafeterias. *Lyng*, 485 U.S. at 452. Mechanically transplanting *Smith* to the managerial context would severely impair these and countless other government functions, and deprive governments of the breathing room they need to manage their workforces "effectively and efficiently." *Engquist*, 553 U.S. at 598 (citation omitted).

Take "general applicability." When reviewing the government's actions as sovereign, the Court determines whether a law is generally applicable by assessing whether it applies equally to religiously motivated conduct and "similar" non-religious conduct. *Lukumi*, 508 U.S. at 543. But when acting as manager, the government frequently must make "subjective" and "individualized" decisions based on "a wide array of factors that are difficult to articulate and quantify." *Engquist*, 553 U.S. at 604. An essential part of the government's prerogatives as manager is determining how to reconcile these competing interests, often in ways that require treating "similarly situated individuals differently." *Id.* Subjecting every managerial decision to the same "general applicability" inquiry that constrains the government as sovereign would severely impinge its discretion and sap the flexibility that government requires to function.

Transplanting "neutrality" analysis to the contracting context without accounting for the government's managerial needs would also pose serious problems. In the sovereign context, this Court has applied an "equal protection mode of analysis" to determine whether the government acts with the object of suppressing religious belief, *Lukumi*, 508 U.S. at 534, 540, and has rejected "even 'subtle departures from neutrality,'" *Masterpiece Cakeshop Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). But as this Court has elsewhere explained, ordinary equal protection principles cannot sensibly be applied to the managerial context, where differential treatment of similar employees is "par for the course." *Engquist*, 553 U.S. at 604. And inquiring into the government's motives for individual em-

ployment and contracting decisions would present considerable challenges, as such decisions typically lack a formal record and are made on a continuous basis by a variety of different officials. Enabling disgruntled employees and contractors to bring free-exercise claims based on any "subtle" suggestion of religious hostility, *Masterpiece*, 138 S. Ct. at 1731, would cause many passing remarks to "plant the seed of a constitutional case," and invite "intrusive oversight by the judiciary" of the government's managerial responsibilities, *Connick*, 461 U.S. at 146, 149.

Granting employees and contractors exemptions for religiously motivated conduct also presents unique difficulties. Permitting government workers to perform their jobs as their religious beliefs dictate often runs up against the government's own obligation to treat citizens equally with regard to religion. *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *see Berry* v. *Dep't of Soc. Servs.*, 447 F.3d 642, 646 (9th Cir. 2006). A government contractor who refuses to serve individuals of whom her religion disapproves, or who insists upon incorporating religious criteria into government decisionmaking, risks placing the government itself in the role of divvying up rights and responsibilities based on private individuals' conformity with religious beliefs, potentially violating both the Establishment Clause and the Free Exercise Clause itself.

3. In light of these considerations, a different "balance" is appropriate when applying the Free Exercise Clause to the government as manager rather than to the government as sovereign. *Engquist*, 553 U.S. at 600. Indeed, the Court's precedents already point

toward that conclusion. Whenever the Court has considered free-exercise claims that involve the government acting in its managerial role, it has applied a more deferential approach than when considering the government as regulator or distributor of public benefits. *See Goldman* v. *Weinberger*, 475 U.S. 503, 506-508 (1986) (granting "great deference" to government in free-exercise challenge to military regulation); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348-349 (1987) (applying a "reasonableness" test in adjudicating free-exercise challenge to prison rule); *see also Lyng*, 485 U.S. at 451-453; *Bowen*, 476 U.S. at 699.

A similarly deferential approach is appropriate in the contracting and employment context. When the government sets rules of conduct for contractors and employees acting in their official capacities—rather than as private citizens acting outside the scope of their duties—the government generally does not impinge their rights under the Free Exercise Clause, just as similar rules of speech or conduct do not impinge their rights under parallel clauses of the First Amendment. *See Garcetti*, 547 U.S. at 423 (Free Speech Clause); *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 389 (2011) (Petition Clause). As in other contexts, the government may not set rules that selectively burden contractors because of their religious beliefs or that are based on religious hostility. *See Lukumi*, 508 U.S. at 533-534, 540. But application of the principles of general applicability and neutrality must take into account the "realities

of the [contracting] context." *Engquist*, 553 U.S. at 600.[1]

With respect to general applicability, the Court should afford the government broad discretion in determining whether conduct injures its interests to "a similar or greater degree" than the practice at issue. *Lukumi*, 508 U.S. at 543. Because of the subjective and individualized nature of contracting decisions, the Court should not demand that any exception automatically be extended to contractors with a religious objection. It should generally be sufficient that the government has identified a legitimate managerial interest in distinguishing between two related circumstances, and that the distinctions it has drawn are reasonably related to that interest. *See Waters*, 511 U.S. at 673 (plurality opinion) (explaining that the Court has "consistently given greater deference to government predictions of harm" in the managerial context).

As for neutrality, the Court should require an especially clear showing of animus before holding that a contracting rule is based on "hostility to religion." *Masterpiece*, 138 S. Ct. at 1732. "[S]tray remarks in the workplace" should not be sufficient to give rise to a constitutional claim of religious targeting. *Price*

[1] Every circuit to consider the question has held that a more deferential standard governs free-exercise claims arising in the managerial context than in the sovereign context. *See, e.g.*, *Shahar* v. *Bowers*, 114 F.3d 1097, 1111 n.27 (11th Cir. 1997) (en banc) (applying *Pickering* framework to Free Exercise Clause); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366 n.7 (3d Cir. 1999) (Alito, J.) ("assum[ing]" that claims were subject to intermediate rather than strict scrutiny because of "the public employment context").

Waterhouse v. *Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in the judgment). Employees and contractors should generally be required to substantiate claims of animus by pointing to objective indicia of religious hostility in the "text" or "operation" of the challenged policy itself. *Lukumi*, 508 U.S. at 533-535.

B. The Non-Discrimination Requirement Restricts CSS's Conduct Exclusively In Its Capacity As A Government Contractor.

1. The non-discrimination requirement to which petitioners object falls squarely within the scope of the City's managerial authority. That requirement appears in a contract "to render * * * Services" for the City as an "independent contractor," in exchange for millions of dollars in government funds. JA 505-506, 634. And it provides that an FFCA "shall not discriminate" when "providing any service or fulfilling any duty under this Contract." SA 31; *see* JA 654. By its terms, this requirement limits how a contractor performs its "service[s]" for the government, and nothing else.

Furthermore, as the District Court found, "certification and home studies are services that CSS was hired to provide under the Services Contract." Pet. App. 76a. The FFCA contract states that "[t]he specific Issue to be addressed by the Provider is to recruit, screen, train, and provide certified resource care homes for dependent children or youth," JA 514-515, and that "Provider Staff is responsible for recruiting and certifying foster * * * homes," JA 512 n.1. Indeed, inspecting and certifying foster parents are "delegate[d]" government powers that CSS could

not perform in the City without a contract. 55 Pa. Code § 3700.61; *see* JA 322. An FFCA carries out these responsibilities not "as a citizen," but as a contractor performing services for the government. *Garcetti*, 547 U.S. at 423.

In addition, DHS has several compelling reasons, "relevant to the objectives" of its foster-care program, for requiring FFCAs to refrain from discrimination when carrying out their contracts. *AOSI*, 570 U.S. at 214. That requirement ensures that prospective foster parents and foster children are treated equally, not "as social outcasts or as inferior in dignity and worth" because of their sexual orientation or other protected characteristics. *Masterpiece*, 138 S. Ct. at 1727; *see* JA 268, 280-281. It also maximizes the number of qualified, willing foster parents available to care for the City's children. *See* JA 268. And it guarantees that FFCAs—potential "state actor[s]" employing government power to confer legal benefits on City residents, *West* v. *Atkins*, 487 U.S. 42, 49, 56 (1988)—do not use their legal authority to treat same-sex marriages as inferior to opposite-sex marriages or otherwise discriminate, potentially subjecting the City itself to liability. *See Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015); Pet. App. 170a.

Conversely, permitting exceptions to the nondiscrimination requirement would severely undermine the City's managerial interests. If CSS could insist on declining to serve same-sex couples on religious grounds, it could also presumably revive its policy of refusing to certify foster parents who lack a "commitment to their faith." JA 215. Other agencies could assert religious objections to serving persons who act in ways they deem sinful or who are married

to persons of a different race. *See, e.g.*, *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage."). Just as the government would be within its rights in insisting that its employees not engage in discrimination when working for the government, it is within the government's managerial authority to insist that its contractors not do so, either.

2. Petitioners nonetheless portray the nondiscrimination requirement as an exercise of the government's sovereign power to "prohibit[]" or "penalize" private conduct. *E.g.* Br. 1-2, 22-23. Petitioners offer several rationales for that characterization, but none holds water.

Petitioners claim that, contrary to the District Court's finding, inspecting and certifying foster families are not part of the "[s]ervices" an FFCA is hired to perform. *Id.* at 8. That is incorrect. Although the words "certification" and "recruitment" do not appear in a subsection of the contract entitled "Services," *id.*, the very same document (itself entitled "Scope of Service") states that an FFCA and its staff are "responsible for recruiting and certifying foster and kinship homes," JA 512 n.1; *see* JA 514-515. Likewise, government witnesses repeatedly testified that FFCAs are "responsible for the certification of * * * foster parents." JA 82; *see* JA 113, 271. And the contract states, without qualification, that FFCAs are paid "for *the Services* * * * being provided

under this Contract," which include home studies and certifications. JA 506 (emphasis added).[2]

Petitioners also suggest that, by requiring CSS to refrain from discrimination when performing its FFCA contract, DHS has "exclude[d] CSS from foster care." Br. 9. That too is inaccurate. The non-discrimination requirement has no effect on CSS's ability to assist foster families and foster children in its private capacity; CSS may continue to recruit individuals to serve as foster parents, hold trainings for foster parents, and provide assistance to foster children. *See id.* at 4-6. CSS may also continue to contract with DHS to serve as a CUA or a congregate-care provider, as it has in fact done. Pet. App. 36a. All that CSS may not do is wield delegated government power pursuant to a government contract while refusing to comply with the City's standard non-discrimination requirement.

Finally, petitioners observe that CSS has long aided foster children as part of its religious ministry. *Id.* at 3-4, 22. But the longevity of CSS's religious practices cannot divest the government of authority to dictate how contractors carry out foster-care services on its behalf, any more than Indians' "traditional" religious practices can deprive the government of "its right to use * * * *its* land." *Lyng*, 485 U.S. at 451, 453. And while the City does not ques-

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[2] Contrary to petitioners' claim, the City did not "acknowledge[] it 'ha[s] nothing to do with home studies.'" Br. 8 (quoting Pet. App. 302a-303a; JA 320-322). The City's witness testified that "[t]he City pays for the contract for [FFCAs] to deliver [home studies]," and FFCAs "can't do the work unless they have a contract with the City." JA 322; *see* JA 82, 113.

tion the deep religious meaning CSS attaches to its foster-care work, the Free Exercise Clause does not grant anyone a right to insist that "the Government * * * behave in ways that the individual believes will further his or her spiritual development." *Bowen*, 476 U.S. at 699-700. As a private citizen, CSS may serve foster families as its faith dictates. But when it voluntarily chooses to perform services for the government, it lacks a right to insist upon exercising government authority and spending government funds in a manner the City has deemed contrary to the interests of its residents and the children in its care.

C. The Non-Discrimination Requirement Is Generally Applicable And Neutral.

Because CSS challenges a rule of conduct that governs exclusively how it performs its job as a government contractor, its free-exercise claim is subject to the deferential standard applicable in the managerial context. Both courts below concluded that the contract's non-discrimination requirement is generally applicable and neutral. Pet. App. 32a-36a, 87a-101a. That conclusion would be correct even if this case arose in the context of the government acting as sovereign, and it is doubly correct given the broad discretion the government enjoys as manager of contractors performing services on its behalf. *See Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 670, 697 n.27 (2010) (upholding a similar non-discrimination policy under *Smith*).

1. The non-discrimination requirement is generally applicable.

To determine whether a rule is "generally applicable," this Court asks whether it is applied equally to

religiously motivated conduct and to secular conduct that injures the government's interest to "a similar or greater degree." *Lukumi*, 508 U.S. at 543-544. A rule transgresses the Free Exercise Clause if it subjects religious observers to "unequal treatment" and is "substantial[ly]" "underinclusive" of its objectives. *Id.* at 542-543 (citation omitted). A rule is constitutional, by contrast, if it "exempts or treats more leniently only dissimilar activities." *South Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

The non-discrimination requirement is generally applicable. It categorically prohibits discrimination, whether for religious or non-religious reasons. Pet. App. 88a; SA 31. It is included in every FFCA contract, for secular and religious agencies alike. Pet. App. 88a; JA 284-285. And as both the District Court and the Third Circuit found, there is "no evidence in the record to show that DHS has granted any secular exemption to the requirement that its foster care agencies provide their services to all comers." Pet. App. 36a, 100a-101a. Petitioners attack these findings on two grounds, but neither has merit.

a. Petitioners' principal argument is that, contrary to the lower courts' findings, DHS actually does allow other agencies to engage in discrimination against prospective foster parents or foster children. Yet none of the examples petitioners point to entails discrimination at all, let alone injures the City's interests to a "similar or greater degree" than CSS's categorical policy of refusing to certify same-sex couples. *Lukumi*, 508 U.S. at 543.

First, petitioners assert that DHS permits other FFCAs to deny service to foster parents and "refer[ ]" them to another agency. Br. 28. DHS officials, however, repeatedly refuted that claim: They testified that agencies may provide *information* about their services—for instance, by informing prospective foster parents that they are not licensed to serve special-needs children—but that it must always be "the foster parents' choice" whether to work with a given agency. JA 113; *see* JA 114-117, 122-123, 126, 295-296, 317. Petitioners' citations to the contrary (Br. 8) consist of the self-serving statements of witnesses who used the term "refer" in imprecise ways, and whose hearsay reports of other agencies' practices the lower courts properly declined to credit. Pet. App. 35a, 101a; *cf.* JA 46-47, 176-177.

Second, the Solicitor General claims that DHS allows agencies to "focus their outreach only on foster families of particular ethnicities." U.S. Br. 23. That too is misleading. The DHS Commissioner testified, unequivocally, that agencies may target their recruiting efforts in particular communities only if they serve "all members of the City of Philadelphia." JA 301-302. That practice is not "discrimination": Historically black colleges do not discriminate, for instance, by establishing programs to "disproportionately appeal to" black students, provided they are "open to all on a race-neutral basis." *United States* v. *Fordice*, 505 U.S. 717, 749 (1992) (Thomas, J., concurring); *see* Phila. Code § 9-1102(1)(e) (defining "[d]iscrimination" as a difference "in the *treatment* of a person on the basis of" a protected characteristic (emphasis added)). And DHS has reasonably concluded that encouraging outreach toward historically underserved communities en-

hances rather than undermines its goals of maximizing the pool of foster parents and making its foster-care system more inclusive.

Third, petitioners charge that DHS condones violations of the non-discrimination requirement by "requir[ing] private agencies to consider marital status, familial status, and disability" in making certification decisions. Br. 28. Not so. For one thing, the statutes petitioners reference are the *state-law* prerequisites for certifying foster parents. *See id.* at 7-8 (citing 55 Pa. Code § 3700.64). DHS neither imposed those requirements nor has any authority to exempt FFCAs from them. *See Nutter* v. *Dougherty*, 938 A.2d 401, 404 (Pa. 2007) (state law "preempt[s] any local law that contradicts or contravenes" it). For another, those requirements do not permit discrimination based on any protected characteristic; they allow consideration of "existing family relationships" and a person's lack of "stable mental or emotional adjustment" only to the extent they affect a person's ability to care for a child. 55 Pa. Code § 3700.64(a)(2), (b)(1). And, in any event, allowing FFCAs to comply with the child-protective requirements of state law in making certification decisions—the very job that FFCAs are hired to perform—does not plausibly (let alone "substantial[ly]") injure the City's interests in ensuring equal treatment of its residents and providing certified foster parents for its children. *Lukumi*, 508 U.S. at 543.

Fourth, petitioners contend that some FFCAs are allowed to "special[ize]" in serving "Native American children or special needs children." Br. 8. No FFCAs in Philadelphia specialize in serving Native Ameri-

cans; petitioners' witness was simply mistaken in claiming otherwise. JA 124; DHS, Foster Care Licensing Agencies, https://tinyurl.com/y5cw59tk (listing FFCAs); *cf.* JA 176-177. It is true that *federal law* establishes a specialized scheme for placing Native American children. *See* 25 U.S.C. §§ 1902 *et seq*. But if an FFCA attempted to operate within that scheme, DHS would plainly confront different considerations than when an FFCA refuses to comply with the City's standard non-discrimination requirement.

Petitioners also misstate the record regarding special-needs children. State law requires FFCAs to obtain a separate license to serve children with specialized medical or behavioral health needs. JA 115-116, 118, 300. Allowing agencies with such licenses to focus on serving those children is not "discrimination"; on the contrary, it ensures that special-needs children are afforded equal opportunities for a safe and nurturing home. *See* Phila. Code § 9-1106(1). And it is absurd to suggest that this practice, designed to protect the City's most vulnerable children, injures the City's interests to "a similar or greater degree" than allowing FFCAs to automatically reject an entire category of foster parents who could help serve those children. *Lukumi*, 508 U.S. at 543.[3]

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[3] The Solicitor General cites a public guidance noting that agencies have "slightly different requirements, specialties, and training programs." Pet. App. 197a; *see* U.S. Br. 23. The DHS Commissioner gave unrebutted testimony, however, that the "different requirements" to which this guidance refers are restricted exclusively to "requirements *** relat[ing] to medical and specialized behavioral health." JA 296.

Fifth, petitioners claim that DHS discriminates on the basis of "disability and even race" when reviewing foster placements. Br. 28. As an initial matter, this argument shifts the focus to a different step of the foster-care process than the one at issue in this case. When an FFCA recruits and certifies prospective foster parents for the City, its role is to expand the pool of qualified foster parents as broadly as possible. *See* JA 268. When DHS reviews foster placements, in contrast, its legal obligation is to protect "the best interest and special needs of the child." 55 Pa. Code § 3130.67(b)(7)(i); *see* 11 Pa. Stat. § 2633(4), (18)-(19). Because these different steps of the foster-care process implicate markedly different governmental interests, DHS operates at the zenith of its managerial authority in drawing reasonable distinctions between them. *See supra* p. 23.

DHS has more than adequate reasons for the practices petitioners reference. What petitioners characterize as discrimination based on disability yet again refers to DHS's practice of ensuring that special-needs children are placed with foster families licensed to care for them. *See* JA 83-84, 115-119, 309-310. That cannot plausibly be considered "discrimination," and is plainly distinguishable from the practices CSS wishes to engage in.

As for race, the discussion of this subject in the preliminary-injunction record is sparse, but DHS made clear that it considers race in foster placements only as one of several factors and pursuant to its duty to protect "the best interest of the child" and to ensure a child's "safety." JA 307. For instance, if a child, due to severe abuse she suffered in a prior home, has a deep-seated distrust of persons of anoth-

er race or habitually employs racial slurs, it may be in the best interest of the child to consider race during placement. There is substantial authority indicating that consideration of race for the narrow purpose of protecting a child's best interests is lawful and comports with the Equal Protection Clause. *See, e.g.*, Children's Bureau of the Admin. of Children & Families, U.S. Dep't of Health & Human Servs., Child Welfare Policy Manual § 4.3, *available at* https://tinyurl.com/y2r6lees (last visited Aug. 13, 2020) (advising public agencies that a federal law withholding funding from state entities that deny prospective adoptive or foster parents "on the basis of race" does not prohibit consideration of race where necessary "to achieve the best interests of the child"); *Drummond* v. *Fulton Cnty. Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978) (similar).

This case does not, of course, present occasion to evaluate the legality of that practice. It is sufficient to note that consideration of race for this narrow purpose is highly "dissimilar" to the practice CSS wishes to engage in. *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief). Unlike CSS's policy of across-the-board-discrimination against same-sex couples, it advances the City's superseding obligation to ensure "the best interest and special needs of the child" when making foster placements. 55 Pa. Code § 3130.67(b)(7)(i). And it does so in a narrow, case-by-case manner, rather than as a categorical rule. It is, at minimum, reasonable for DHS—acting as manager—to conclude that this practice does not injure the interests underlying its non-discrimination requirement to the same degree as a

blanket refusal to serve individuals because of a protected characteristic.

b. Failing to make any showing of selective enforcement, petitioners claim that the non-discrimination requirement is not generally applicable simply because DHS *may* grant "individualized exemption[s]." Br. 25. But petitioners' premise is incorrect and, in any event, their conclusion does not follow.

DHS has no authority to grant exemptions to the contract's non-discrimination requirement. That provision contains no exemption authority. *See* SA 31; JA 654. And the Fair Practices Ordinance, which is binding of its own force, grants city agencies no authority to make exceptions. *See* Phila. Code § 9-1106. As the District Court correctly concluded, the services provided under an FFCA contract are "public accommodations" within the meaning of the Fair Practices Ordinance because they are "services" that FFCA must "ma[k]e available to the public." Phila. Code § 9-1102(1)(w); *see* Pet. App. 77a-78a; *see also Frisby* v. *Schultz*, 487 U.S. 474, 482 (1988) (noting the Court's "normal practice" of "defer[ring] to the construction of a state statute given it by the lower federal courts" (citation omitted)). FFCAs are thus categorically barred from discriminating on the basis of sexual orientation in providing those services. *See* Phila. Code § 9-1106(1).

Petitioners claim that Section 3.21 of the FFCA contract permits DHS to make exemptions to both the Fair Practices Ordinance and the contractual non-discrimination requirement. Br. 26. Petitioners are mistaken. Section 3.21 states merely that a provider may not reject a "[r]eferral" of an otherwise

qualified "child or family" unless DHS grants an "exception." JA 582; *see* U.S. Br. 22. As petitioners elsewhere acknowledge, "this provision applies only to 'a rejection of a referral *from DHS*' "—that is, it addresses an agency's right to refuse "referrals" to place a child with a certified foster family. Br. 13 (quoting JA 107). And it allows "exception[s]" only from the obligation set forth in Section 3.21 itself, not from the non-discrimination requirement or the Fair Practices Ordinance. JA 582. Accordingly, this provision does not permit DHS to authorize discrimination in the recruitment or certification of foster parents—and, indeed, there is no evidence that DHS has ever granted an exemption under this provision for *any* purpose.

Petitioners also speculate that a City-wide "Waiver/Exemption Committee" may grant exemptions to the non-discrimination requirement. Br. 26; *see* U.S. Br. 22 (same). This argument appears to rest on a misreading of the City's website. The Waiver/Exemption Committee is a legal committee run by the City's Law Department. Linda Huss, Law Dep't, *New Privacy Review and Waiver/Exemption Committees*, City of Phila. (Apr. 3, 2019), https://tinyurl.com/yy5w2gxo. It advises city agencies as to whether they are "legally required" or "ha[ve] discretion" "to grant or deny [a] requested waiver or exemption." City of Phila. Law Dep't, Waiver/Exemption Committee Procedures, at 1 (Apr. 29, 2020), https://tinyurl.com/y62adfq8. It has no authority—let alone untrammeled authority—to grant exemptions.

In any event, even if DHS *could* grant exemptions from the non-discrimination requirement, that would

not defeat general applicability. The general applicability requirement prohibits "unequal treatment" on the basis of religion. *Lukumi*, 508 U.S. at 542 (citation omitted). The existence of an exemption power does not demonstrate unequal treatment unless the government "refuse[s] to extend" exemptions to religiously motivated conduct while making them available for comparable secularly motivated conduct. *Smith*, 494 U.S. at 884 (explaining that the law in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), "allow[ed] benefits for unemployment caused by at least some 'personal reasons' " but not for reasons grounded in religion); *Lukumi*, 508 U.S. at 537-538 (finding the city's "application" of a system of "individualized exemptions" unconstitutional because "religious practice [wa]s being singled out for discriminatory treatment"); *see also South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief) (rejecting free-exercise challenge because the government withheld "exempt[ions]" to comparable religious and secular gatherings).

The Solicitor General suggests that a system of individualized exemptions is automatically unconstitutional because it vests the government with too much "discretion." U.S. Br. 16, 22. But the government grounds that concern exclusively in a pair of free-speech cases disapproving of overly discretionary standards for imposing "prior restraint[s]." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-133 (1992); *see Saia* v. *New York*, 334 U.S. 558, 560-561 (1948). There, however, the government was regulating speech as such, not regulating conduct in a way that incidentally burdened speech. As *Smith* explained, the latter is the proper analog to

the type of rule at issue here. *See* 494 U.S. at 878. And individualized determinations are not just permissible but ubiquitous when the government imposes generally applicable restrictions on conduct. Indeed, criminal laws—the archetypal type of law to which *Smith* applies—are invariably subject to the government's prosecutorial discretion. And as this Court has emphasized, "subjective and individualized" determinations are "par for the course" in the contracting context. *Engquist*, 553 U.S. at 604. If the existence of discretion to grant exemptions defeated general applicability, *Smith* would be a dead letter.

2. The non-discrimination requirement is neutral.

Petitioners also argue that DHS's non-discrimination requirement is not neutral. To carry their burden, petitioners must demonstrate that the "object" of including the non-discrimination requirement in the current contract—the sole live question remaining in this case—is to target CSS "because of" its religious beliefs. *Lukumi*, 508 U.S. at 533. Both courts below found no evidence of targeting here. *See* Pet. App. 35a-36a, 39a, 93a-103a. Petitioners do not come close to demonstrating that this finding was clear error.

When assessing the object of a challenged action, this Court "must begin" with its text and operation. *Lukumi*, 508 U.S. at 533. Here, both are entirely neutral. The non-discrimination requirement does not draw any distinctions based on religion. *See* JA 653-654. And it has been applied in an evenhanded manner to all FFCAs, religious and secular alike. *See supra* pp. 28-35. Indeed, both lower courts found

that DHS would have held CSS to the exact same requirement regardless of whether its basis for discrimination was religious or secular. *See* Pet. App. 32a, 88a.

Petitioners therefore rest their claim of religious hostility exclusively on extrinsic statements. This Court has never found that a law had an unconstitutional object based solely on the statements of government officials. *Cf. Lukumi*, 508 U.S. at 535 (finding animus based on the law's operation); *Masterpiece*, 138 S. Ct. at 1730-31 (similarly relying on the law's unequal application). "Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account" when conducting the free-exercise inquiry. *Masterpiece*, 138 S. Ct. at 1730; *see Lukumi*, 508 U.S. at 558-559 (Scalia, J., concurring in part and concurring in the judgment). If the bare statements of government officials could ever establish unconstitutional animus in the managerial context, they would need to do so with special clarity. *See supra* pp. 23-24. As two lower courts determined, petitioners cannot make that showing.

First, Petitioners invoke a resolution adopted by the City Council and several statements by the Mayor of Philadelphia, most from before he was Mayor or unrelated to the events at issue. Br. 10 & n.2. The District Court, however, found "insufficient evidence * * * that the Mayor had any influence in DHS's decisions in this case." Pet. App. 94a; *see id.* at 34a; JA 369-371. Similarly, the City Council does not oversee DHS contracts, and there is no evidence that its resolution played any role in DHS's actions. Both sets of statements are therefore irrelevant. *See*

Dep't of Homeland Sec. v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) (refusing to consider statements "remote in time" from the decision in question and not made by the "relevant actors").

Second, petitioners suggest that DHS betrayed animus by giving "six [different] *post hoc* justifications" for finding that CSS's policy violated the FFCA contract. Br. 12-15. This charge is false. DHS has consistently explained that CSS's policy violates the Fair Practices Ordinance and the non-discrimination requirement giving effect to that ordinance. It said so in its initial letter to CSS, Pet. App. 169a, its discussions with CSS, JA 185, 313, and at every stage of the proceedings below, *see* Pet. App. 25a, 73a-79a. DHS has not "shifted" its justification, Pet. Br. 24, by including even more explicit non-discrimination language in its more recent contracts. That language was designed to address CSS's objection that the prior language was unclear, *see* Pet. App. 163a, 170a, and was inserted into every FFCA contract to ensure uniformity. SA 31; *see* DHS, *Section 15.1: Foster Care Contract*, https://tinyurl.com/y4dt2www.

Third, the Solicitor General claims that animus may be inferred from the alleged fact that the referral freeze in 2018 was prompted by discovery of CSS's religious beliefs. U.S. Br. 27. Not so. CSS's beliefs about same-sex marriage have been a matter of common knowledge for decades. The freeze was not prompted by those beliefs, but by DHS's discovery that CSS had a policy of discriminating against same-sex couples when carrying out its contract. JA 273-275.

Fourth, petitioners place considerable weight on statements made by Commissioner Figueroa surrounding the freeze of referrals in March 2018. Br. 10-11. The question in this case, however, is not what motivated the referral freeze in 2018, but whether the City has a valid reason for including an explicit non-discrimination term in its *current* FFCA contract—the most recent of which was offered to CSS earlier this year by a different DHS Commissioner, Kimberly Ali. *See* SA 40-42. Figueroa's statements are thus of limited probative significance on the question actually presented. *See Regents*, 140 S. Ct. at 1916.

Furthermore, the record does not suggest that Commissioner Figueroa's conduct was in any way motivated by hostility toward CSS's religious beliefs. Petitioners and the Solicitor General note that when Commissioner Figueroa learned of CSS's policy, she reached out predominantly to faith-based providers to ask whether they had similar policies. But given that DHS had just learned that two FFCAs had policies of declining to serve same-sex couples based on their religious beliefs, it made sense for DHS to focus its investigation there. *See* JA 279-280. Petitioners have identified no evidence that DHS enforced its rules differently against faith-based providers. And DHS has since included a new non-discrimination requirement in every foster-care contract, religious and secular alike. *See supra* p. 9.

Petitioners also fasten onto a remark that Commissioner Figueroa made at a meeting with CSS in March 2018. But Commissioner Figueroa made that statement in an effort to *preserve* the contract: After the Law Department informed her that CSS was in

violation of the non-discrimination requirement, JA 298, 302-304, Commissioner Figueroa invited CSS to a meeting in which she attempted to resolve the dispute by "appealing to an authority within their shared religious tradition," Pet. App. 33a. This statement was not an expression of hostility toward CSS's religion, but an effort to find "common ground" in a shared faith. *Id.* And given that the City had already determined that CSS was in violation of its contract, this comment does not plausibly indicate that DHS froze referrals "because of" CSS's religious beliefs. *Lukumi*, 508 U.S. at 533.

In any event, DHS's subsequent actions eliminate any suggestion that its conduct is or was motivated by religious animus. *See* Pet. App. 39a. Since the March 2018 meeting, DHS officials have repeatedly affirmed that they "respect [CSS's] sincere religious beliefs" and that they have a "strong desire to keep CSS as a foster care agency." Pet. App. 68a, 169a; *see* JA 336, 704-705. Consistent with those avowals, DHS has repeatedly offered CSS "the same" FFCA contract as every other agency, JA 284-285, and has continued to pay CSS millions of dollars to serve as a CUA and a congregate-care provider, Pet. App. 39a, 187a; JA 506. Further, DHS has entered into full FFCA contracts with Bethany, notwithstanding Bethany's religious objection to endorsing same-sex marriages. Pet. App. 39a; JA 287.

These actions are irreconcilable with CSS's charge that DHS seeks to penalize CSS for its religious beliefs about same-sex marriage. And they confirm that CSS's current practice—the only legally relevant practice before the Court—is not "taint[ed]" by any trace of religious hostility. *McCreary County* v.

ACLU of Ky., 545 U.S. 844, 873-874 (2005); *see Trump* v. *Hawaii*, 138 S. Ct. 2392, 2416-18 (2018).

D. The Non-Discrimination Requirement Does Not Require CSS To Engage In Conduct Contrary To Its Stated Religious Beliefs.

Petitioners' free-exercise claim fails for a final, independent reason: CSS has not identified any cognizable burden that the non-discrimination requirement imposes on its religious exercise. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605-606 (1961) (plurality opinion) (rejecting free-exercise claim because "the statute at bar does not make unlawful any religious practices of appellants"); *see also Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2389-90 & n.5 (2020) (Alito, J., concurring) (describing need to identify such a burden). Throughout this litigation, CSS has asserted that it objects on religious grounds to "provid[ing] a written endorsement of a same-sex relationship," and that it "*understands* the home studies as an endorsement of the relationships of those living in the home." Pet. Br. 1, 8 (emphasis added). The City does not question the sincerity of CSS's religious objection to endorsing same-sex relationships. But CSS's legal "understanding" that a certification requires such an endorsement is simply mistaken.

During the preliminary injunction hearing, CSS's representative, James Amato, was specifically asked to explain why CSS "understand[s]" a secular certification to constitute an "endorsement" of the foster parents' relationship. JA 237. Amato did not state—there or anywhere else—that this understanding was

grounded in religious belief. *See* JA 170, 188, 211. Rather, Amato said that it was based on his interpretation of "state law." JA 237. In particular, Amato explained that he "understood" 55 Pa. Code § 3700.64(b)(1) to "entitle[] and indeed require[] [CSS] to evaluate the ability of the applicant to work in partnership with [CSS]," and that "this state law requirement meant that [CSS], to perform an adequate home study, needed to evaluate the relationships of any foster parent living in the same home." JA 237-238. Petitioners' brief is to the same effect, citing only the bare text of the state regulations and two irrelevant transcript pages—not any religious beliefs—to substantiate CSS's "understand[ing]" of state law. Br. 8-9 (citing 55 Pa. Code § 3700.69; JA 49-50).

As the District Court concluded, however, CSS's legal interpretation is incorrect. Pet. App. 112a; *see Frisby*, 487 U.S. at 482 (lower courts' interpretation of state law entitled to deference). Nothing in Section 3700.64 or any other provision of Pennsylvania law requires an FFCA to "endorse" foster parents' relationships. Rather, it sets forth a variety of secular criteria that FFCAs "shall consider" in certifying foster parents. 55 Pa. Code § 3700.64(a). These provisions do not require (or permit) an FFCA to evaluate whether it believes a couple's "family relationships" are valid as a religious matter. *Id.* § 3700.64(b)(1). Rather, the agency may "consider" those relationships, along with other factors, solely in "determin[ing]" whether the parents can provide care, nurturing and supervision for a child, are mental and emotionally stable, and have supportive community ties. *Id.* § 3700.64(a)-(b). CSS has never asserted that its religious beliefs prevent it from

stating that "a resource parent in a same-sex relationship is * * * qualified to raise a foster child." JA 213. CSS's "only" objection is to "being required to evaluate and provide written endorsements of a same-sex relationship." JA 188. State law requires it to do no such thing.

CSS's suggestion that it is required to "endors[e] * * * same-sex marriage[s]" is similarly misplaced. JA 171-172; *see* Pet. Br. 1. Not only does state law require no endorsement, but Amato acknowledged below that "nothing in the state regulations" or "the Contract with the City" requires CSS to determine whether a couple is married; that is "*CSS's* requirement[ ]" which it adopted pursuant to its own "policy and procedure." JA 212, 217-218 (emphasis added). CSS cannot be "burden[ed]" by a requirement it voluntarily imposed on itself. *Braunfeld*, 366 U.S. at 606. And state law bars an FFCA from adding its own extra-legal requirements that "inappropriately exclude[ ] otherwise potentially qualified foster care applicants." *Berks Cty. Children & Youth Servs.* v. *Dep't of Pub. Welfare*, No. 1238 C.D. 2010, 2011 WL 10844954, at *2 (Pa. Commw. Ct. Jan. 6, 2011); *see* JA 296.

In short, by reading a religious-endorsement requirement into the state regulations, CSS is "imbuing its certifications with meaning that is not required or compelled by the Services Contract." Pet. App. 112a. What is more, it is adopting an interpretation that DHS itself has consistently informed it is incorrect. *See* JA 33-34, 466-468. To be completely clear: DHS would not find CSS in violation of its contractual duties if it accompanied its certifications with an express statement that they do not consti-

tute endorsements of the parents' relationship. That CSS nonetheless insists it is required to make such an endorsement cannot serve as the basis for a claim that the City has "prohibit[ed]" the exercise of its religion. U.S. Const. amend. I.

II. THE CITY'S CONTRACT COMPORTS WITH THE FREE SPEECH CLAUSE.

Petitioners' free speech claim fails for much the same reasons as their free exercise claim. Petitioners contend that the non-discrimination requirement "unconstitutionally compel[s] speech" by requiring CSS to endorse same-sex marriages. Br. 30. But nothing in state law or the FFCA contract requires CSS to endorse foster parents' relationships. *See supra* pp. 43-46. Further, CSS performs certifications as part of its official duties as a government contractor, and so has no First Amendment right to object to what those certifications say. *See Garcetti*, 547 U.S. at 422-423; *AOSI*, 570 U.S. at 214-215.

In addition, the non-discrimination requirement is a prohibition on conduct, not speech. As this Court explained in *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), a prohibition on "discriminati[on]" should not "be analyzed as one regulating * * * speech rather than conduct" merely because it "will require an employer to take down a sign reading 'White Applicants Only.'" *Id.* at 62. So too here, the fact that DHS's across-the-board prohibition on discrimination would prohibit CSS from filing a written certification that effectuates such discrimination does not convert that prohibition into a restriction on speech.

III. *SMITH* SHOULD NOT BE OVERRULED.

As a final argument, petitioners invite this Court to overrule *Smith*. The Court should decline.

A. This Case Is Not A Suitable Vehicle To Revisit *Smith*.

This case is an exceptionally poor vehicle to consider the validity of *Smith*. Even under pre-*Smith* case law, individuals lacked a right to object to how the government managed its "internal affairs." *Bowen*, 476 U.S. at 699. And petitioners have not offered any historical evidence that the "free exercise [of religion]" includes a right to wield government power as one's religion dictates. Overruling *Smith* therefore would not warrant the application of strict scrutiny in the context presented here.

Furthermore, even if *Smith* were overturned and strict scrutiny were held to apply, petitioners would still lose. *See* Pet. App. 47a. The non-discrimination requirement serves several state interests of the highest order. *See supra* pp. 25-26. It is also narrowly tailored to serve those interests. Where "granting a selective exemption * * * would seriously impair" the state's "compelling interest," the "Free Exercise Clause does not require the State to accommodate [the] religiously motivated conduct." *Smith*, 494 U.S. at 906 (O'Connor, J., concurring in the judgment). "[U]niform application" of the City's non-discrimination requirement is "essential to accomplish" its objective in ensuring equal treatment of City residents, maximizing the pool of available foster parents, and preventing contractors acting on the government's behalf from violating individuals' constitutional rights. *Id.* at 905 (citation omitted); *see* Intervenor-Respondents' Br. Section III.B.

B. *Stare Decisis* Favors Retaining *Smith*.

1. Even if this Court were to revisit *Smith*, it should not overturn it. "[S]tare decisis * * * is a 'foundation stone of the rule of law.'" *Allen* v. *Cooper*, 140 S. Ct. 994, 1003 (2020) (citation omitted). It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Gamble* v. *United States*, 139 S. Ct. 1960, 1969 (2019) (citation omitted). It also reflects "a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday." *June Med. Servs. L.L.C.* v. *Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment). Thus, "[b]efore overturning a long-settled precedent," the Court "require[s] 'special justification.'" *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

This Court has "traditional[ly]" looked at several "factors" when considering whether to jettison a precedent. *Barr* v. *Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 n.5 (2020) (plurality opinion). Each demonstrates that *Smith* should not be overruled.

a. *The quality of the decision's reasoning*. Petitioners contend, relying largely on the work of Professor McConnell, that *Smith* is contrary to the text and original understanding of the Free Exercise Clause. Justice Scalia, however, rebutted these arguments virtually point-by-point in his concurrence in *City of Boerne* v. *Flores*, 521 U.S. 507, 537-543 (1997). And as one leading originalist scholar has put it, Professor McConnell's "exemption thesis" "lack[s] textual

and structural support" and "finds next to no [historical] support." Akhil Reed Amar, The Bill of Rights 327 n.96 (1998).

This Court does not need to decide who is right about the text and original understanding of the First Amendment. It is sufficient—and unquestionably true—that petitioners' evidence does "not come close to settling the historical question with enough force to meet [their] particular burden under *stare decisis*." *Gamble*, 139 S. Ct. at 1974.

Briefly: Petitioners claim that the "most natural" reading of the First Amendment "is that it protects an *affirmative* freedom from government interference." Br. 42-44 (emphasis added). Not so. A broad but neutral law that incidentally encompasses some religious conduct does not "*prohibit*[]" the free exercise of religion. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1115 (1990) (calling this argument "plausible"). Further, by beginning with the phrase "Congress shall make no law," "the First Amendment assumes Congress can avoid enacting laws that prohibit free exercise." Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 938 (1992).

Turning to history, petitioners seek support in the "language of the Clause's state forerunners." Br. 44. Justice Scalia refuted this argument at length, finding "the protections afforded by those enactments * * * more consistent with *Smith*'s interpretation of free exercise." *Boerne*, 521 U.S. at 538-540. Moreover, that some legislatures *chose* to create exemptions for religious minorities around the founding,

Pet. Br. 45-46, "does not establish that accommodation was understood to be constitutionally *mandated* by the Free Exercise Clause," *Boerne*, 521 U.S. at 541 (Scalia, J., concurring in part); *see* McConnell, *supra*, at 1118-19 (finding such exemptions "fully consistent with the position in *Smith*"). The evidence from "[e]arly state decisions," Pet. Br. 46, is similarly "weak," *Boerne*, 521 U.S. at 543 (Scalia, J., concurring in part).

b. Consistency with related decisions. Petitioners present *Smith* as a sharp departure from prior free-exercise precedents. But *Smith* correctly noted that its rule was consistent with "more than a century" of this Court's "free exercise jurisprudence," 494 U.S. at 878-879, and distinguished the small number of cases applying a "balancing test" as involving discrete circumstances. *Id.* at 883. Adopting the muscular version of strict scrutiny that petitioners endorse—and applying it to *every* type of government action—would result in far more judicial invalidations (and a far more active federal judiciary) than the pre-*Smith* status quo.

Smith also furnished the "background" for *Boerne*, which partially invalidated the Religious Freedom Restoration Act (RFRA) because it went beyond this Court's authoritative "judicial interpretation of the Constitution." 521 U.S. at 536. And it provided the basic doctrinal framework for *Lukumi*. In short, *Smith* grew out of and is now deeply embedded in this Court's free-exercise jurisprudence.

c. Subsequent legal developments. Petitioners next argue that "subsequent history debunks *Smith*'s 'courting anarchy' prediction." Br. 38. Federal courts have, of course, applied RFRA to federal laws.

But, as this Court has observed, "[w]e have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006). That this Court nonetheless "[a]ppl[ied]" the test required by "Congress," *id.*, is hardly confirmation that RFRA is significantly more administrable than *Smith*.

In any event, petitioners elide the critical practical consequence of overturning *Smith*. If *Smith* were overturned, the "numerous state laws" that "impose a substantial burden on a large class of individuals" would be subject to strict scrutiny. *Boerne*, 521 U.S. at 535. That would effect a massive transfer of power to federal courts. Indeed, the threat of these "substantial costs" was part of what motivated the Court to hold RFRA unconstitutional as applied against the States. *Id.* at 534-535.

d. Reliance. "*Stare decisis* has added force when the legislature * * * ha[s] acted in reliance on a previous decision." *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Petitioners give short shrift to this concern. Overruling *Smith* would cause substantial "regulatory * * * disruption" by displacing the legislative protections for religious freedom that Congress and a large number of States enacted in the wake of *Smith* with a federal constitutional rule. *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1406 (2020).

Moreover, Petitioners do not reveal what *Smith* should be replaced with, or how that test would work. They suggest only that "strict scrutiny" would apply. That papers over several complex questions. When is the burden on religious practice onerous

enough to subject a neutral law to strict scrutiny? Must courts resolve the "centrality" of a particular religious burden before subjecting a law to strict scrutiny, even though that is "a role [courts] were never intended to play"? *Lyng*, 485 U.S. at 457-458. Would courts pretend *Smith* never happened and apply pre-*Smith* precedents, even though *Smith* understood itself as a distillation of those precedents, under which religious claimants rarely won? Should courts constitutionalize the RFRA test, even though RFRA imposes "a least restrictive means requirement *** that was not used in the pre-*Smith* jurisprudence RFRA purported to codify"? *Boerne*, 521 U.S. at 535.

"It is the rare overruling that introduces so much instability into so many areas of law, all in one blow." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2422 (2019). Overturning *Smith* would create a doctrinal mess, and petitioners offer little guidance on how courts would clean it up.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM

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STATUTORY PROVISIONS INVOLVED

1. **23 Pa. Cons. Stat. § 6344 provides in pertinent part:**

Employees having contact with children; adoptive and foster parents.

(a) Applicability.--Beginning December 31, 2014, this section applies to the following individuals:

* * * * *

(2) A foster parent.

* * * * *

(b) Information to be submitted.--An individual identified in subsection (a)(7) or (8) at the time the individual meets the description set forth in subsection (a)(7) or (8) and an individual identified in subsection (a)(1), (2), (3), (4), (5)(i) or (6), (a.1), (a.2) or (a.3) prior to the commencement of employment or service or in accordance with section 6344.4 shall be required to submit the following information to an employer, administrator, supervisor or other person responsible for employment decisions or involved in the selection of volunteers:

(1) Pursuant to 18 Pa.C.S. Ch. 91 (relating to criminal history record information), a report of criminal history record information from the Pennsylvania State Police or a statement from the Pennsylvania State Police that the State Police central repository contains no such information relating to that person. The criminal history record information shall be limited to that

which is disseminated pursuant to 18 Pa.C.S. § 9121(b)(2) (relating to general regulations).

(2) A certification from the department as to whether the applicant is named in the Statewide database as the alleged perpetrator in a pending child abuse investigation or as the perpetrator of a founded report or an indicated report.

(3) A report of Federal criminal history record information. The applicant shall submit a full set of fingerprints to the Pennsylvania State Police for the purpose of a record check, and the Pennsylvania State Police or its authorized agent shall submit the fingerprints to the Federal Bureau of Investigation for the purpose of verifying the identity of the applicant and obtaining a current record of any criminal arrests and convictions.

* * * * *

(d) Prospective adoptive or foster parents.-- With regard to prospective adoptive or prospective foster parents, the following shall apply:

* * * * *

(2) In the course of approving a prospective foster parent, a foster family care agency shall require prospective foster parents and any individual over the age of 18 years residing in the home to submit the information set forth in subsection (b) for review by the foster family care agency in accordance with this section. If a prospective foster parent, or any individual over 18 years of age residing in the home, has resided outside this Commonwealth at any time within the previous five-year period, the foster family care agency

shall require that person to submit a certification obtained within the previous one-year period from the Statewide central registry, or its equivalent in each state in which the person has resided within the previous five-year period, as to whether the person is named as a perpetrator of child abuse. If the certification shows that the person is named as a perpetrator of child abuse within the previous five-year period, the foster family care agency shall forward the certification to the department for review. The foster family care agency shall not approve the prospective foster parent if the department determines that the person is named as the equivalent of a perpetrator of a founded report of child abuse within the previous five-year period. In addition, the foster family care agency shall consider the following when assessing the ability of applicants for approval as foster parents:

(i) The ability to provide care, nurturing and supervision to children.

(ii) Mental and emotional well-being. If there is a question regarding the mental or emotional stability of a family member which might have a negative effect on a foster child, the foster family care agency shall require a psychological evaluation of that person before approving the foster family home.

(iii) Supportive community ties with family, friends and neighbors.

(iv) Existing family relationships, attitudes and expectations regarding the applicant's own

children and parent/child relationships, especially as they might affect a foster child.

(v) Ability of the applicant to accept a foster child's relationship with his own parents.

(vi) The applicant's ability to care for children with special needs.

(vii) Number and characteristics of foster children best suited to the foster family.

(viii) Ability of the applicant to work in partnership with a foster family care agency. This subparagraph shall not be construed to preclude an applicant from advocating on the part of a child.

* * * * *

2. **42 Pa. Cons. Stat. § 6351 provides in pertinent part:**

Disposition of dependent child.

(a) General rule.--If the child is found to be a dependent child the court may make any of the following orders of disposition best suited to the safety, protection and physical, mental, and moral welfare of the child.

* * * * *

(2) Subject to conditions and limitations as the court prescribes transfer temporary legal custody to any of the following:

(i) Any individual resident within or without this Commonwealth, including any relative, who, after study by the probation officer or other person or agency designated by the court,

is found by the court to be qualified to receive and care for the child.

(ii) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child.

(iii) A public agency authorized by law to receive and provide care for the child.

* * * * *

3. **11 Pa. Stat. § 2633 provides in pertinent part:**

Children in foster care

Children in foster care shall be provided with the following:

* * * * *

(4) The ability to live in the least restrictive, most family-like setting that is safe, healthy and comfortable and meets the child's needs.

* * * * *

(18) First consideration for placement with relatives, including siblings. In the absence of relatives, to have any kinship resource be considered as the preferred placement resource if the placement is consistent with the best interest of the child and the needs of other children in the kinship residence.

(19) Consideration of any previous resource family as the preferred placement resource, if relative and kinship resources are unavailable and the placement resource is consistent with the best interest of the child.

* * * * *

4. **62 Pa. Stat. § 2301 provides in pertinent part:**

Powers and duties as to care of dependents

The local authorities shall have the power, and it shall be their duty with funds of the institution district or of the city, according to rules, regulations and standards established by the State Department of Public Welfare--

(a) To care for any dependent, having a settlement in the county or city, who is not otherwise cared for: Provided, however, That no applicant for public nursing home care under the medical assistance for the aged provisions of the Public Assistance Law who resides in Pennsylvania shall be rendered ineligible for such care by lack of settlement in the county or city;

* * * * *

(g) To contract with any individual, association, corporation, institution or governmental agency, for the purpose of providing foster home care for persons over eighteen years of age if, in the discretion of the local authorities, such foster home care is advisable. The local authorities may expend funds for such foster home care in addition to any funds paid by the Commonwealth or any individual, association, corporation, institution or governmental agency to or for such persons over eighteen years of age;

(h) To require that any person cared for in an institution as defined herein shall pay for the cost of his care to the extent of his available resources.

(i) To provide or to contract with any individual, association, corporation or governmental agency to

provide care and services designed to help dependents and potential dependents to live outside of the county institution.

5. **62 Pa. Stat. § 2305 provides:**

Powers and duties of local authorities as to children

The local authorities of any institution district shall have the power, and for the purpose of protecting and promoting the welfare of children and youth, it shall be their duty to provide those child welfare services designed to keep children in their own home, prevent neglect, abuse and exploitation, help overcome problems that result in dependency, neglect or delinquency, to provide in foster family homes or child caring institutions adequate substitute care for any child in need of such care and, upon the request of the court, to provide such service and care for children and youth who have been adjudicated dependent, neglected or delinquent.

No child under the age of sixteen years shall, unless he is mentally or physically handicapped, and no other care is available for him, be admitted to, or maintained in, an institution conducted by the local authorities other than a hospital or sanitarium.

6. **Phila. Code § 9-1102 provides in pertinent part:**

Definitions.

(1) For purposes of this Chapter the following terms shall have the following meanings:

* * * * *

(e) *Discrimination.* Any direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of actual or perceived race, ethnicity, color, sex (including pregnancy, childbirth, or a related medical condition), sexual orientation, gender identity, religion, national origin, ancestry, age, disability, marital status, source of income, familial status, genetic information or domestic or sexual violence victim status, or other act or practice made unlawful under this Chapter or under the nondiscrimination laws of the United States or the Commonwealth of Pennsylvania.

* * * * *

(w) *Public Accommodation*. Any place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public; including all facilities of and services provided by any public agency or authority; any agency, authority or other instrumentality of the Commonwealth; and the City, its departments, boards and commissions.

* * * * *

7. **Phila. Code § 9-1106 provides in pertinent part:**

Unlawful Public Accommodations Practices.

(1) It shall be an unlawful public accommodations practice to deny or interfere with the public accommodations opportunities of an individual or

otherwise discriminate based on his or her race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, disability, marital status, familial status, or domestic or sexual violence victim status, including, but not limited to, the following:

(a) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any public accommodation to:

(.1) Refuse, withhold from, or deny to any person, either directly or indirectly, any of the accommodations, advantages, facilities or privileges of such public accommodation on a discriminatory basis.

(.2) Publish, circulate, issue, display, post or mail, either directly or indirectly, any written or printed communication, notice or advertisement to the effect that any of the accommodations, advantages, facilities, and privileges of any such public accommodation shall be refused, withheld or denied to any person on a discriminatory basis, or that the patronage of any such person is unwelcome, objectionable or not acceptable, desired or solicited.

(.3) Prohibit a breastfeeding mother from or segregate a breastfeeding mother within any public accommodation where she would otherwise be authorized to be, irrespective of whether or not the nipple of the mother's breast is covered during or incidental to breastfeeding.

(.4) Refuse, withhold from, or deny any person access to any separate-gender bathroom where

the person's gender identity is consistent with the gender for which such bathroom is reserved.

* * * * *

REGULATORY PROVISIONS INVOLVED

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1. **55 Pa. Code § 3130.12 provides:**

Responsibilities for children and youth services.

(a) The Department and each of the 67 counties are jointly responsible for the achievement of the goal of children and youth services and for assuring the availability of adequate children and youth social services to children who need the services, regardless of race, sex, religion, settlement, residence, economic or social status.

(b) The Department is responsible for:

(1) Regulating the level and the scope of minimum children and youth services, minimum standards of children and youth services delivery and minimum standards of children and youth services administration, including the provision of procedural safeguards for parents and children when the goal of a family service plan is changed, or when a child's placement location or visitation arrangements are modified.

(2) Supervising the administration of children and youth social services.

(3) Reimbursing counties in accordance with Chapter 3140 (relating to planning and financial reimbursement requirements for county children

and youth social service programs) for Department approved services provided in accordance with State laws and Department regulations.

(4) Monitoring the county agencies to ensure compliance with minimum standards for children and youth services including the requirements of this chapter.

(c) Each county is responsible for administering a program of children and youth social services that includes:

(1) Services designed to keep children in their own homes; prevent abuse, neglect and exploitation; and help overcome problems that result in dependency and delinquency.

(2) Temporary, substitute placement in foster family homes and residential child care facilities for a child in need of the care.

(3) Services designed to reunite children and their families when children are in temporary, substitute placement.

(4) Services to provide a permanent legally assured family for a child in temporary, substitute care who cannot be returned to his own home.

(5) Service and care ordered by the court for children who have been adjudicated dependent or delinquent.

2. **55 Pa. Code § 3130.67 provides in pertinent part:**

Placement Planning.

(a) Except for emergency placement, the county agency shall prepare an amendment to the service plan prior to placing a child.

(b) The amendment to the service plan shall include the following, for each child placed:

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(7) An identification of the type of home or facility in which the child will be placed and a discussion of the appropriateness of the placement, including:

(i) How the placement setting is the least restrictive—most family-like setting available for the child, consistent with the best interest and special needs of the child.

(ii) How the location of placement is in proximity to the child's home and will serve to encourage visiting between the child and parents, consistent with the best interest and special needs of the child.

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3. **55 Pa. Code § 3700.61 provides:**

Transfer of approval authority.

The Department delegates its authority under Article IX of the Public Welfare Code (62 P. S. §§ 901—922) to inspect and approve foster families to an approved FFCA.

4. **55 Pa. Code § 3700.64 provides:**

Assessment of foster parent capability.

(a) The FFCA shall consider the following when assessing the ability of applicants for approval as foster parents:

(1) The ability to provide care, nurturing and supervision to children.

(2) A demonstrated stable mental and emotional adjustment. If there is a question regarding the mental or emotional stability of a family member which might have a negative effect on a foster child, the FFCA shall require a psychological evaluation of that person before approving the foster family home.

(3) Supportive community ties with family, friends and neighbors.

(b) In making a determination in relation to subsection (a) the FFCA shall consider:

(1) Existing family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships, especially as they might affect a foster child.

(2) Ability of the applicant to accept a foster child's relationship with his own parents.

(3) The applicant's ability to care for children with special needs, such as physical handicaps and emotional disturbances.

(4) Number and characteristics of foster children best suited to the foster family.

(5) Ability of the applicant to work in partnership with an FFCA.

5. **55 Pa. Code § 3700.69 provides:**

Annual reevaluation.

(a) The FFCA shall visit and inspect annually each foster family to determine continued compliance with the requirements of § § 3700.62—3700.67 (relating to foster parent requirements; foster child discipline, punishment and control policy; assessment of foster parent capability; foster parent training; foster family residence requirements; and safety requirements).

(b) The FFCA shall give each foster family written notice regarding the results of the annual evaluation.

(c) The FFCA shall give written notice to foster families of its decision to approve, disapprove or provisionally approve the foster family. The written notice shall inform the foster parents that they may appeal the FFCA's decision to disapprove or provisionally approve the foster family.

6. **55 Pa. Code § 3700.72 provides in pertinent part:**

Foster family approval appeals.

(a) The FFCA shall give written notice to each applicant of its decision to approve, disapprove or provisionally approve the foster family. The written notice shall inform the foster parents that they may appeal the FFCA's decision to disapprove or provisionally approve the foster family.

(b) Foster parents who wish to appeal an FFCA decision to disapprove or provisionally approve the foster family shall submit to the FFCA a written appeal. The appeals are subject to 2 Pa.C.S. §§ 501—508 and 701—704 (relating to

Administrative Agency Law) and 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure).

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