No. 18-2574

In the United States Court of Appeals for the Third Circuit

SHARONELL FULTON, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, LOUISIANA, MISSOURI, NEBRASKA, OKLAHOMA, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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Interest of Amici

Amici are the States of Texas, Alabama, Arkansas, Louisiana, Missouri, Nebraska, Oklahoma, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin. They provide child welfare services through their state-wide agencies and local municipalities. They contract with private entities, known as child-placing agencies, to help find safe and loving foster parents for children under state care. Some of the private child-placing agencies States partner with have religious missions, but many have no religious purpose. Ten States have enacted laws to protect the ability of religious agencies to function according to their beliefs while still providing ample services to children in state care and potential parents willing to care for them. The outcome of this litigation, and specifically whether government agencies may contract with private entities to provide foster care services, even when those entities must abide by certain beliefs in placing children, may impact the ability of States to continue working with both religious and nonreligious child welfare providers. Thus, Amici States submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) in support of Appellants and urge the Court to reverse the judgment of the district court and remand the case for issuance of a preliminary injunction.

Summary of the Argument

When children can no longer live safely at home, and no relative or close family friend can care for them, state and municipal agencies step in to temporarily place these children in foster care. There are nearly half a million children in foster care in

the United States.[1] Private child-placing agencies, like Appellant Catholic Social Services, often receive state and federal funding to offset expenses as they work to find homes for children in need. Some of these agencies help children because of a religious calling; others help because of a moral calling; but all of them play a vital role in protecting the most vulnerable members of society.

Many States and the federal government provide additional statutory protections for religious people and entities beyond those found in the First Amendment. In light of controversies erupting over the ability of same-sex couples to work with these religious child-placing agencies, ten States passed laws expressly protecting the religious liberty of faith-based child-placing agencies to operate according to those beliefs and prohibiting state and local governments from refusing to work with those agencies because of their beliefs. These States have done so because working with a diversity of placing agencies benefits children and potential foster parents. And religious child-placing agencies make especially good partners because they are motivated by a sense of religious duty to help children and an obligation to provide services to those in need.

By partnering with faith-based child-placing agencies and providing them with government funding to help address the foster care crisis, the government does not violate the Establishment Clause. For decades the Supreme Court has held that

[1] U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Admin. on Children, Youth & Families, Children's Bureau, *The Adoption and Foster Care Analysis and Reporting System Report* 1 (Oct. 20, 2017), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf

when the government operates a program that neutrally welcomes the participation of secular and religious organizations, the Establishment Clause is not offended. This is true even when the government provides funding through the program. Thus, the contract between Philadelphia and Catholic Social Services does not violate the Establishment Clause. For the reasons stated herein, the Court should reverse the judgment of the district court and remand the case for issuance of a preliminary injunction.

ARGUMENT

I. Religious Child-Placing Agencies Play a Vital Role in Expanding the Options Available to Children Who Need Homes.

When considering child custody issues, nearly every State in the union pledges to act in the best interest of the child. To implement this standard, several States have recognized that promoting a diversity of child-placing agencies, religious and nonreligious, maximizes the placement opportunities for children. And faith-based organizations make good partners because they often have a religious duty to help children. Texas is a good example.

Like most States, Texas recognizes the "best interest of the child" as the "primary consideration" for courts when determining parentage, possession, and access to the child. Tex. Fam. Code § 153.002; *see also id.* § 161.001(b)(2). Texas's "fundamental interest in parental-rights termination cases is to protect the best interest of the child." *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003) (citations omitted). In Texas,

the best interest of the child standard "is aligned with another of the child's interests—an interest in a final decision on termination so that adoption to a stable home or return to the parents is not unduly prolonged." *Id.* (citations omitted).

The Texas Department of Family and Protective Services ("DFPS"), through its Child Protective Services division ("CPS"), cares for children and families and seeks permanency for children in substitute care. At the end of fiscal year 2017, CPS placed over 48,000 children in substitute care (including foster care), and out of more than 7,000 children in CPS custody awaiting adoption, Texas DFPS placed over 5,000 in adoptive homes.[2]

Texas DFPS works with private child-placing agencies to find loving homes for children in the foster care system. These agencies train prospective foster parents, find homes for foster children, and provide continuing services to foster parents after placement. Several of the child-placing agencies that work with Texas DFPS are faith-based organizations. Many are not. For Texas, as with many States, the paramount concern is placing children in safe, loving homes. Working with both religious and nonreligious child-placing agencies ensures that Texas finds as many possible placement opportunities for children as possible.

To that end, Texas operates several initiatives intended to engage the faith community in the child welfare system. One initiative, called Congregations Helping in

[2] Texas Dep't of Family & Protective Services, CPS Substitute Care: Placements During Fiscal Year 2017, https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Placements/Substitute_Care_During_Fiscal_Year.asp

Love and Dedication ("CHILD"), encourages faith partners across Texas to join with Texas DFPS to help provide support, training, and resources to current and potential adoptive and foster parents.[3] Part of CHILD is the Network of Nurture Initiative, which seeks loving homes for children in foster care, educates parents about these opportunities, and provides continuing support for children in foster care.[4] The purpose of the initiative is to ask faith communities to do more to support the children and families in Texas's child welfare system. The initiative is open to religious and nonreligious entities.[5]

Another program of Texas DFPS is the One Church, One Child adoption recruitment program designed to partner with the minority community.[6] The program works primarily through churches with predominantly minority congregations to identify adoptive families and single parents for children in need of homes. It informs church congregations about children awaiting adoption, identifies families willing to

[3] Texas Dep't of Family & Protective Servs., Adoption and Foster Care, Children in Our Care (last visited Sept. 4, 2018), https://www.dfps.state.tx.us/adoption_and_foster_care/children_in_our_care.asp.

[4] Texas Dep't of Family & Protective Servs., Texas Adoption Resource Exchange, Faith Based Collaboration (last visited Sept. 4, 2018), https://www.dfps.state.tx.us/Adoption_and_Foster_Care/CHILD/default.asp.

[5] Office of the Texas Governor, First Lady, Network of Nurture (last visited Sept. 4, 2018), https://gov.texas.gov/first-lady/network-of-nurture.

[6] Texas Dep't of Family & Protective Servs., Texas Adoption Resource Exchange, One Church One Child of Texas (last visited Sept. 4, 2018), http://www.dfps.state.tx.us/adoption_and_foster_care/adoption_partners/one_church_one_child/default.asp.

adopt, educates the community about the need for adoptive homes and adoption procedures, provides support services to these families, and, ultimately, decreases the amount of time children are in foster care, waiting to be placed permanently with families.

Aside from these specific programs designed to engage the faith community with foster care and adoptions, some child-placing agencies that already work with Texas are faith-based organizations. The availability of these faith-based organizations diversifies the family placement options available to children, which thereby increases the chances for good placement outcomes. Some of these faith-based agencies operate under certain religious beliefs or requirements.[7] But even if an individual parent or couple disagrees with the agency's religious beliefs or requirements, that individual or couple may use any number of other child-placing agencies in Texas to foster or adopt a child. In other words, it is up to the person who wants to be a foster parent to find the right organization he or she wants to work with. Texas's network of child-placing agencies serves all children and potential families. The same is true in other States.

[7] A list of these providers is located on the DFPS website. *See* Texas Dep't of Family & Protective Servs., Texas Adoption Resource Exchange, *available at* https://www.dfps.state.tx.us/Adoption_and_Foster_Care/Adoption_Partners/private.asp. The particular requirements of each provider may be determined by clicking on a provider's name and accessing that provider's website.

II. Ten States Expressly Extend Religious Liberty Protections to Child-Placing Agencies.

Despite the constitutional protections faith-based organizations enjoy, many States have enacted additional protections for faith-based organizations that partner with them to provide child-placing services. The threats to faith-based organizations participating in public life and even government programs are not new. *See, e.g., Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947) (rejecting claim that town violated the Establishment Clause by providing transportation of students to religious schools); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that allowing religious student group to use public university buildings did not violate the Establishment Clause).

But the threats to these faith-based entities have taken new forms in recent years. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (declaring baker enjoyed First Amendment protection from making cake contrary to his religious beliefs); *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (holding that florist violated state nondiscrimination law by refusing to arrange flowers for same-sex wedding), *vacated*, 138 S. Ct. 2671 (2018) (vacated and remanded in light of *Masterpiece*); *but see Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) (holding that photographer who refused to photograph same-sex wedding violated anti-discrimination ordinance).

In addition to the present litigation against Catholic Social Services, individuals and entities have sued child-placing agencies, the federal government, and at least one State outside this Circuit for choosing to follow the tenets of their faith and work

only with individuals or couples who share those beliefs. *See Marouf v. Azar*, No. 1:18-cv-378 (D.D.C.) (filed Feb. 20, 2018) (suit against U.S. Department of Health and Human Services and U.S. Conference of Catholic Bishops); *Dumont v. Lyon*, No. 17-cv-13080 (E.D. Mich.) (filed Sept. 20, 2017) (suit against Michigan Department of Health and Human Services and St. Vincent Catholic Charities). Thus, the Court must be mindful of the impact of any ruling it issues that could conflict with State laws in other jurisdictions.

Many States provide more robust religious liberty protection than what the First Amendment's Free Exercise Clause provides. *Compare Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (holding a neutral and generally applicable law that burdens religious practices does not violate the Free Exercise Clause); *with* Ark. Code §§ 16-123-401—16-123-407; Fla. Stat. §§ 761.01–.061; 775 Ill. Comp. Stat. 35/1–99; La. Stat. §§ 13:5231–13:5242; S.C. Code §§ 1-32-10—1-32-60; Tex. Gov't Code §§ 110.001–.012. Many States modeled these laws after the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb—2000bb-4, which provides greater protection for religious exercise than is available under the First Amendment, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760–61 (2014).

In anticipation of the particular concerns with religious child-placing agencies, several state legislatures, including several Amici States, enacted laws to protect the religious liberty of child-placing agencies who work under state government contracts to help find safe, loving homes for children. For example, in 2017, Texas enacted House Bill 3859, which protects the religious liberty of religious child-placing

agencies and prohibits the State from granting or denying funding to such organizations because of their religious beliefs. *See* Tex. Hum. Res. Code §§ 45.001–.010. HB 3859 prohibits government entities in Texas from discriminating or taking adverse action against a child-placing agency if that provider has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with the provider's sincerely held religious beliefs. *Id.* § 45.004(1); *see also id.* § 45.005(a) ("child welfare services provider may not be required to provide any service that conflicts with the provider's sincerely held religious beliefs").

By enacting HB 3859, the Texas Legislature sought:

> to maintain a diverse network of service providers that offer a range of foster capacity options and that accommodate children from various cultural backgrounds. To that end, the legislature expects reasonable accommodations to be made by the state to allow people of diverse backgrounds and beliefs to be a part of meeting the needs of children in the child welfare system. Decisions regarding the placement of children shall continue to be made in the best interest of the child, including which person is best able to provide for the child's physical, psychological, and emotional needs and development.

Id. § 45.001. To protect the religious liberty of child-placing agencies and also maximize potential homes for children in need, Texas law ensures that there is a secondary child-placing agency in the same area able to provide the same service if a religious agency cannot. *Id.* § 45.005(b). Moreover, a religious agency unable to serve someone because of its religious beliefs must provide the person seeking services with a list of other providers on the internet or refer the person to another provider, to Texas DFPS, or to another agency who can refer the person to an appropriate

provider. *Id.* § 45.005(c). This increases the diversity of possible child-placing agencies helping the State find homes for children while protecting the ability of all interested individuals or couples to find an agency who will work with them.

Other states provide similar protections to religious child welfare providers. Five states, including Texas, expressly prohibit state agencies or local governments from discriminating against child-placing agencies that operate according to religious or moral beliefs. *See* Ala. Code § 26-10D-4(1); Miss. Code § 11-62-5(2); S.D. Codified Laws § 26-6-39; S.C. Exec. Order 2018-12; Tex. Hum. Res. Code § 45.004. Six states declare, as a matter of public policy, broad protections for child-placing agencies to act according to their religious beliefs. *See* Ala. Code § 26-10D-4(2); Mich. Comp. Laws § 722.124e(1); Miss. Code §§ 11-62-3, 11-62-15; S.C. Exec. Order 2018-12; S.D. Codified Laws § 26-6-46; Tex. Hum. Res. Code § 45.009.

Ten states prohibit their agencies or local governments from requiring child-placing agencies to engage in practices that violate their religious or moral beliefs or denying license applications or renewals for child-placing agencies because of their religious beliefs. *See* Ala. Code §§ 26-10D-4(1–2), 26-10D-3(1), 26-10D-5(a); Kan. Stat. Ann. § 60-5322(b–c); Mich. Comp. Laws §§ 722.124e(2–3) & (7)(a), 710.23g, 400.5a; Miss. Code §§ 11-62-5(2), 11-62-7(2); N.D. Cent. Code §§ 50-12-03, 50-12-07.1; S.B. 1140 § 1(A–B), 56th Leg., 2d Reg. Sess. (Okla. 2018); S.C. Exec. Order 2018-12; S.D. Codified Laws §§ 26-6-38, 26-6-39, 26-6-40; Tex. Hum. Res. Code §§ 45.002(1), 45.004; Va. Code § 63.2-1709.3(A–B).

Nine states prohibit government entities from denying or canceling a grant to a child-placing agency due to the agency's actions undertaken for religious or moral

purposes. *See* Kan. Stat. Ann. § 60-5322(d); Mich. Comp. Laws §§ 722.124e(3), (7)(a), 710.23g, 400.5a; Miss. Code § 11-62-7(1)(c-d); N.D. Cent. Code § 50-12-07.1; S.B. 1140 § 1(C), 56th Leg., 2d Reg. Sess. (Okla. 2018); S.C. Exec. Order 2018-12; S.D. Codified Laws § 26-6-39; Tex. Hum. Res. Code §§ 45.002(1)(A), 45.004; Va. Code § 63.2-1709.3(C).

To be clear, a child-placing agency need not have a religious mission or creed it follows. States and municipalities need help from all qualified agencies. But by allowing child-placing agencies that have a religious tradition of helping children in need, like Catholic Social Services, States increase the diversity of child-placing agencies in their jurisdictions, and because these faith-based organizations possess a religious duty to help children in need, they increase the chances that a child in State care will find a safe, loving home.

III. Philadelphia Does Not Violate the Establishment Clause by Contracting with Faith-Based Child-Placing Agencies to Provide Foster Care Services.

When the government operates a public welfare program, it cannot exclude persons from participation solely because of their religious beliefs. To do so is impermissible targeting of religion for discriminatory treatment that violates the Free Exercise Clause of the First Amendment. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). And when the government creates a public welfare program in which religious entities participate, it does not violate the Establishment Clause of the First Amendment. *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality op.). These are simply two sides of the same coin. On the one side, the government

remains neutral toward religion in the *creation* of the program. On the other side, the government remains neutral toward religion in *operation* of the program. Thus, Philadelphia's program does not violate the Establishment Clause by allowing Catholic Social Services to participate in the city's network of child-placing agencies.[8]

Because the Court reviews the district court's legal conclusions *de novo*, Amici States address one of the arguments raised in the lower court by Philadelphia and the intervenor-defendants, and mentioned in the lower court's ruling. Defendants and intervenor-defendants argued that because Catholic Social Services is a religious entity that chooses to operate according to its religious and moral beliefs, and because Philadelphia delegates foster care authority to Catholic Social Services, the city is violating the Establishment Clause. *See, e.g.*, Appx. 1184–85. The district court latched onto this argument and found that the Establishment Clause would justify Philadelphia's discriminatory treatment of Catholic Social Services. The district court and the defendants, however, are on the wrong side of precedent.

When "a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor. . . ." *Mitchell*, 530 U.S. at 827 (plurality op.). While the government may open a program only to a limited number of applicants, it must not exclude persons or

[8] Philadelphia violates the Establishment Clause by *excluding* Catholic Social Services from participation in the program, as Appellants explain. Appellants' Br. 38–41.

entities based on "a religious distinction." *Trinity Lutheran*, 137 S. Ct. at 2027 (Breyer, J., concurring). "Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson*, 330 U.S. at 16.

The government does not violate the Establishment Clause by giving in-kind benefits to religious entities. Thus, the government may allow religious worship in publicly available buildings on equal terms with other nonreligious speech, even when that means the religious group is receiving the benefit of air conditioning, lighting, and bathrooms. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111–12, 119 (2001) (holding the exclusion of a Christian club from use of public school facilities after hours violated the freedom of speech, and that allowing the club to use school facilities would not violate the Establishment Clause); *Widmar*, 454 U.S. at 269, 271 (holding that allowing a Christian student group to use a public university building for worship did not violate the Establishment Clause, but excluding the group from using the building violated the Free Speech Clause).

The government may provide aid to both secular and religious entities without running afoul of the Establishment Clause. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding University of Virginia did not violate the Establishment Clause by permitting student activity fee funding to be used by a religious student publication). The government may exempt religious organizations from property taxes. *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664 (1970). The federal government may distribute funds to states and local government agencies to

lend educational materials and equipment to public, private, and religious schools without violating the Establishment Clause. *Mitchell*, 530 U.S. at 829 (plurality op.). And the government may pay the bus fares of children who attend religious schools. *Everson*, 330 U.S. at 16.

Philadelphia's foster care program offers competitive contracts to child-placing agencies that work to keep at-risk youth in their homes and find foster placements when necessary. Appellants' Appx. 827. Of the thirty state-licensed child-placing agencies in Philadelphia, some are faith-based organizations and some are not. *Id.* at 423. Philadelphia awarded eight organizations a special contract to provide the most needed services. *Id.* at 827. Nothing in the record indicates that the competitive contract program, on its face, prefers one religion to another. *Id.* at 1018–22. And it is undisputed that both religious and nonreligious organizations help Philadelphia place children in foster care. *Id.* at 832. Thus, Philadelphia does not violate the Establishment Clause by partnering with Catholic Social Services, or any other religious child-placing agency, to provide foster care services.

The district court erroneously concluded that the Establishment Clause justified Philadelphia's decision to terminate Catholic Social Services' contract. Appx. 36. The district court acknowledged that in *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), this Court rejected the notion that avoiding an Establishment Clause violation justifies religious discrimination. But the district court found that because same-sex couples can marry, and because Catholic Social

Services "conditions the provisions of its services on prospective parents' procurement of a clergy letter," the possibility of an Establishment Clause violation "is not as remote" as in *Tenafly*. Appx. 36 n.24.

The district court misapprehended this Court's decision in *Tenafly*, which rejected using the Establishment Clause as a justification to target a religious entity for discriminatory treatment. *See Tenafly*, 309 F.3d at 172 ("[A] government interest in imposing greater separation of church and state than the federal Establishment Clause mandates is not compelling in the First Amendment context."). In that case, the Court found that "[n]o reasonable, informed observer would perceive the decision of the plaintiffs to affix lechis [strips of plastic used religiously to represent a doorpost] to utility poles . . . as a choice attributable to the State." *Id.* at 177. In fact, the government's removal of the lechis would demonstrate hostility toward religion in light of evidence that it had allowed other private individuals and groups to affix various items to utility poles. *Id.*

Similarly, no reasonable observer would find that Catholic Social Services' alleged religious decision to not place children in same-sex households is attributable to Philadelphia. The city contracts with numerous child-placing agencies, and the contract with Catholic Social Services expressly disclaims that Catholic Social Service is an agent of the city. Appx. 432 & 1103. In other words, contrary to the district court's conclusion, *Tenafly* rejects the notion that Philadelphia may rely on the Establishment Clause as a compelling justification for its discriminatory treatment of Catholic Social Services.

Faced with this precedent, intervenors argued that Philadelphia violates the Establishment Clause by contracting with Catholic Social Services to provide child placing services, because the government may not delegate authority to a private entity and allow that entity to make decisions based on religious criteria. In support of this proposition, intervenors cite *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), which involved a Massachusetts law that allowed churches and schools to veto liquor licenses. Although the Supreme Court labeled its analysis as an evaluation of anti-establishment principles, it concluded that the government may not delegate to private entities a decisional power normally vested in government agencies. *See Larkin*, 459 U.S. at 122 (concluding the law "delegates to private, nongovernmental entities power to veto certain liquor license applications. This is a power ordinarily vested in agencies of government."). Unlike *Larkin*, a decision by Catholic Social Services not to place a child with a certain foster care applicant because of religious reasons is not determinative of whether a child may be placed with that applicant. Other entities provide placement without regard to religious tenets and applicants are free to pursue placement with one of those options. By contrast, in *Larkin*, the state granted the nongovernmental entities power to veto that was determinative of the outcome. That is not the case here.

Intervenors also rely on *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696 (1994), which held that a New York law creating a public school district solely within a city populated by a particular religious sect impermissibly entangled government with religion because the government cannot delegate discretionary legislative power to a religious entity. In *Grumet*, however, the Court

distinguished "between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id.* at 699. Here, there is no delegation of legislative power, but even if there was, it is neutral toward religion.

Philadelphia's contract with Catholic Social Services or the other seven child placing agencies does not involve a delegation of government power. In *Field v. Clark*, the Court explained the non-delegation doctrine as

> the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

143 U.S. 649, 693–94 (1892). In *Larkin* and *Grumet*, the government delegated power without standards to guide its exercise. Here, Philadelphia is not delegating to child-placing agencies the power to legislate or make policy; rather, it is asking those agencies to help the city find homes for children in accordance with Pennsylvania's foster care standards and the city's contractual requirements that the agencies already satisfy. Catholic Social Services unquestionably satisfies those standards. The fact that it operates according to certain religious beliefs is protected by the Constitution.

When States or municipalities partner with religious and nonreligious entities on a neutral basis to help find loving home for children, they do not violate the Establishment Clause. Therefore, the City cannot use the specter of a potential Establishment Clause violation to justify excluding Catholic Social Services from its network of child-placing agencies.

Conclusion

Many States conclude that working with a diverse coalition of child-placing agencies provides better services to children in foster care and the potential parents eager to care for them. Religious child-placing agencies add to this diversity, and States want to work with organizations motivated by a sense of duty and obligation to help children and those in need. The Court should not to disrupt these interests and the laws based on them. For these reasons, the Court should reverse the district court's ruling and remand the case for issuance of a preliminary injunction.

Respectfully submitted.

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Certificate of Service

On September 4, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with L.A.R. 25.3; (2) the electronic submission is an exact copy of the paper document in compliance with L.A.R. 31.1(c); and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/David J. Hacker
David J. Hacker

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,495 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count); and (3) the requirement of L.A.R. 28.3(d), because at least one of the attorneys whose name appears on the brief is a member of the bar of the court.

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