IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 18-2574

SHARONELL FULTON, et al., Appellants,

v.

THE CITY OF PHILADELPHIA, et al., Appellees.

APPELLEES' MEMORANDUM IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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APPELLEES' MEMORANDUM IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Appellant Catholic Social Services ("CSS") and its three foster parent co-plaintiffs seek an injunction pending their appeal of the district court's denial of their motion for a temporary restraining order and preliminary injunction. The requested injunction would force the City of Philadelphia (the "City") and its Department of Human Services ("DHS") to enter into a contract with CSS on terms unilaterally imposed by CSS, and would force the City to permit CSS to violate Philadelphia's Fair Practices Ordinance (the "FPO") by discriminating against prospective foster parents who are in same sex marriages.

CSS' claim that DHS is selectively "punishing" it for violating "supposed policies" which CSS asserts have never been "announced, much less applied" to secular foster care agencies could not be more inaccurate. This case is about whether agencies which contract with the City to perform government services and are paid with public funds must comply with City anti-discrimination laws and policies, and which the City's Home Rule Charter itself requires be part of all City contracts.

CSS has brought its motion on an 'emergency' basis asserting that it will have to lay off employees and wind down this particular aspect of its foster care work "within months." Appellants' Emergency Motion for Injunction Pending Appeal ("Mot.") at 1-2. But the emergency is illusory and belied by CSS' actions and arguments. Intake closure began in mid-March, yet CSS waited two months to

initiate this case and almost three more weeks to file its motion for a temporary restraining order or preliminary injunction. *See* Appx.2-3, 8. And CSS' attorney informed the district court that CSS has retained two employees whose positions within the foster care program were no longer supported. *See* Appx.80.[1] CSS also has the power to mitigate this alleged emergency: DHS has repeatedly expressed its willingness to negotiate an interim contract with CSS to protect children CSS currently serves in foster care and to minimize the impact on CSS' business operations.

The District Court held hearings over three days before denying an injunction in a 64-page opinion. CSS now asks this Court to impose, pending its appeal of that decision, the same injunction based on the same record and law.[2] CSS provides no basis for an injunction pending appeal and Appellants' Motion must be denied.

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[1] CSS' included post-hearing submissions in its Appendix. The City's responses are at CityAppx.901-05. Documents cited in the City's Appendix were either admitted as evidence or filed on the docket following the hearing.

[2] CSS filed this "Emergency" motion stating that seeking relief from the district court was "impracticable" despite having filed a motion with the District Court. Today the City opposed the latter motion, on an expedited basis.

STATEMENT OF FACTS

I. DHS Contracts with Private Agencies including CSS To Provide Foster Care.

DHS has custodial responsibility for 6,000 foster children in Philadelphia and contracts with 30 private foster care agencies, including CSS, to provide family foster care services. Under the contract at issue, CSS has cared for approximately 100 of the 6,000 children. CityAppx.339-340.

Consistent with the City's non-discrimination law and policy, multiple provisions of the contract also specifically prohibit an agency from discriminating on the basis of sexual orientation in its provision of services. CityAppx.796, 839-40. The Scope of Services of the contract obligated CSS to recruit, screen, train, and provide certified resource care homes. CityAppx.757-59; 803-04, 806-07, 813. Prospective foster parents have the right to choose the agency with which they want to work. CityAppx.122-23. An agency can provide information that another agency might be a better fit, such as when a foster parent wants to care for a child with specific medical needs which the agency is not qualified to supervise, but ultimately the choice remains the prospective parents.' CityAppx.129. No record evidence exists that the City has ever authorized agencies to refuse prospective parents because of their race or religion, let alone their sexual orientation.

CSS' contract with the City terminated on June 20, 2018.[3] CityAppx.744. The City has offered two foster care agency contracts to CSS: a full contract requiring CSS to follow the non-discrimination provisions or an interim contract to

[3] By law, unless specifically approved by City Council, City contracts are limited to one year. Phila. Home Rule Charter § 2-309. The Charter was also amended by

provide for ongoing care of children currently placed through CSS. CityAppx.287-289,866-67, 869.[4]

II. CSS' Refusal to Consider Same Sex Couples as Prospective Foster Parents.

On March 9, 2018, DHS learned from the *Philadelphia Inquirer* that two of DHS' private foster care agencies – CSS and Bethany Christian Services ("Bethany") – had policies refusing services to same sex couples.[5] CityAppx.349, 399. DHS Commissioner Figueroa confirmed the report with both agencies. CityAppx.349-350, 499. DHS was concerned about CSS' ability to perform its contractual obligations, and potential violations of laws such as the FPO. CityAppx.400-402. Commissioner Figueroa "decided that it was in the best interest [of children] to close intake."[6] *Id.* Under the Contract, the City is not required to make any placement referrals to CSS. CityAppx.813-16.

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the electorate on 2010 to require that contracts "contain a provision that . . . the contractor will not discriminate . . . against any person because of . . . sexual orientation." *Id.* § 8-200(d).

[4] CSS' other foster care service contracts with the City such as for "congregate" care in group homes and case-management services as a Community Umbrella Agency (CUA) are not affected by this lawsuit. CityAppx.200-21, 346.

[5] Contrary to CSS' unsupported assertion, there was no prior "live and live" arrangement. DHS did not know about CSS' outright refusal to work with same sex couples (despite legal and contractual non-discrimination requirements) until reporters called DHS about this story. CityAppx.893.

[6] CSS points to unrelated quotes attributed to Mayor Kenney which substantially preceded this dispute (and his mayoralty) to suggest that the Mayor was involved in the decision to close intake. The district court credited Commissioner Figueroa's testimony that the Mayor was not involved in her decision. CityAppx.504.

CSS cited religious grounds for its refusal.[7] CityAppx.399. Commissioner Figueroa called other foster care agencies to inquire as to their practices, focusing on religious agencies as she understood the issue to arise from religious belief, but also calling at least one agency not religiously affiliated. CityAppx.349-51, 399, 499.Bethany reversed its refusal, its intake was restored, and Bethany will sign a new full contract which will require, *as will all the City's new contracts with its foster care agencies*, service to all protected categories under the FPO. CityAppx.405, 408-09, 869, 902 n.2. CSS continues to refuse, will not sign a full contract, and its intake remains closed. CityAppx.275, 293.

III. The Impact of Intake Closures.

DHS closes intake whenever a foster care agency may cease providing services, to minimize the number of placements that might need to be changed or transferred if the relationship ends. CityAppx.401-02. As of the hearing date, DHS had other intake closures. CityAppx.403. Despite this, the overall placement rates of children in the City have not changed. CityAppx.482-83. The district court credited Commissioner Figueroa's testimony on intake closures, concluding that "closure of CSS' intake of new referrals has had little or no effect on the operation of Philadelphia's foster care system." Appx.11, CityAppx.482-83.

[7] CSS inaccurately describes the City's requirement as a "must certify" policy. We never have and never would suggest that CSS must certify any same sex couple that presents itself. We only required that CSS and other agencies not automatically turn away a same sex couple before even considering whether that couple meets state certification requirements.

IV. The Impact of Intake Closures on CSS and Foster Parents.

The number of children placed through CSS may decline from the intake closure, but the concrete impact on CSS' business depends on DHS and CSS' on-going negotiation of an interim contract. CityAppx.406-07. According to CSS, six employees support family foster care contract services, and two have been reassigned. Appx.80. CSS' other foster care activities, such as group home operations and CUA services, have not been affected. CityAppx.200-01, 287-289, 346, 897. While foster parents working with CSS could refuse to work with another agency, DHS hopes that they will continue as foster parents, and none of the foster parents who testified on CSS' behalf ruled that out. CityAppx.53, 63, 68.

ARGUMENT

I. Applicable Standard.

The standard for obtaining an injunction pending appeal is essentially the same as that for a preliminary injunction. The "four . . . factors are interconnected" and the applicant must first meet the requirements of the first two prongs – likelihood of success on the merits and irreparable harm. *In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015). If it cannot, the request is denied. If it can, the Court "balance[s] the relative harms considering all four factors using a 'sliding scale' approach." *Id.* The bar for an injunction pending appeal is particularly high. *Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *1 (3d Cir. Feb. 8, 2013). And although in First Amendment cases, the appellate court conducts an independent examination of the record, with a full evidentiary record it defers to the district court's findings

concerning witnesses' credibility. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 156–57 (3d Cir. 2002).

II. CSS Is Unlikely to Succeed on the Merits Because It Has No Constitutional Right to Compel the City to Contract With a Provider That Cannot Comply With the City's Anti-Discrimination Requirements.

CSS wants to make this case about a non-existent religious animus by the City because otherwise it has no legal entitlement to a compelled exemption from neutral anti-discrimination laws and policies. The City requires that businesses receiving funds from and providing government services for the City pursuant to contract treat same sex families equally while performing their contracts. Merely because the two providers who stated they could not comply are religious and cited religious grounds for their objection does not mean that the City acted with religious animus when it insisted upon contract compliance with its equal access law and policy.

A. CSS Is Unlikely to Succeed on its Free Exercise Claim Because the Free Exercise Clause Does Not Compel the City to Contract with Religious Providers Who Are Unable to Comply the City's Generally Applicable Civil Rights Laws and Policies that Require All Contractors to Treat Prospective Foster Families Equally.

As the district court correctly found, the City's insistence upon compliance with its anti-discrimination law and policy was permissible, even in the face of religious objection, because an "all comers" policy, i.e., a non-discrimination law or

policy, is a valid neutral law of general applicability as to which claims of impermissible religious conflict must fail. Appx.22-32 (citing *Emp't Div. v. Smith*, 494 U.S. 872, 878-82 (1990)).[8]

In light of *Smith's* holding that religious entities have no blanket right to exemption from neutral laws and policies, CSS is not entitled to have an exemption unilaterally written into a City contract when it asserts that certifying otherwise fully qualified same sex foster couples as foster parents will "violate its faith."[9] Mot.15. CSS ignores the district court's observation that "context matters" when it comes to burden. Appx.32. Below CSS invoked caselaw holding that religious individuals cannot be compelled to "choose" between free exercise of their religion and receiving a generally available benefit, such as unemployment benefits. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2025 (2017) (overturning state constitutional prohibition of grants to religious organizations for secular playground materials solely because

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[8] The district court did not need to reach, but cited approvingly, our argument that the Establishment and Equal Protection Clauses are additional valid, neutral laws of general applicability that do not permit CSS to claim an impermissible burden. Appx.31 & n.24. CSS' reliance upon religious doctrine to determine whom it serves is impermissible in providing City-funded services. Further, in refusing to certify same sex married couples, CSS is treating same sex married couples differently from heterosexual couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015) (same sex couples entitled to equal "rights and responsibilities" of marriage under Equal Protection Clause).

[9] CSS questions the district court's reliance on *Christian Legal Society v. Martinez*, 561 U.S. 661, 697 n.27 (2010). Contrary to CSS' assertion, *Martinez* rejected a free exercise claim under *Smith*. Where a student group that excluded gay persons sought exemption from a school's across-the-board all-comers policy, the Court rejected the group's claim of entitlement to a compelled exemption because in doing so, the group sought "preferential, not equal, treatment." *Id.*

of religious nature). But as the district court recognized, that line of cases "does not stand for the proposition that the State can be required under the Free Exercise Clause to contract with a religious organization," *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 838 (E.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2007), and the court here found that voluntary participation in a government contract is not a public benefit, Appx.25-27, 32.[10]

The district court was correct. This case does not concern a grant program to subsidize private activity, but a contract delegating the City's duty to place children in its custody with foster parents satisfying state qualifications. CSS is not entitled to insist that it be permitted to impose its religious beliefs upon or discriminate against those foster parents, who are compensated by the government and who take care of children in the government's legal custody. CSS has no response to the district court's distinction of the public benefits cases other than to claim, incorrectly, that *Teen Ranch* did not really address a free exercise claim. Mot.18.

While CSS correctly observes that the City cannot mandate churches to perform same sex weddings, the very passage from *Masterpiece Cakeshop* CSS quotes to make this point undermines its argument. The full quote continues that if this exception were "not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons,

[10] CSS now cites *Holt v. Hobbs,* 135 S.Ct. 853, 862-63 (2015), but in *Holt,* a Muslim inmate was required to shave his beard upon pain of disciplinary action. There is no such compulsion where CSS voluntarily contracts to provide government services.

thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). Thus, *Masterpiece Cake* supports, rather than undermines, the district court's conclusion that there is no absolute religious right to exemption from neutral civil rights laws, and that unlimited exemptions would cause unacceptable stigma for LGBTQ citizens who seek to participate fully and equally in public life, including serving as foster parents.

B. While *Smith* Does Not Apply if Religious Animus Motivates Enforcement of a Neutral Law, No Such Inference Can Be Drawn Here

CSS tries to dodge *Smith* with various assertions that the City's neutral anti-discrimination law and its commitment to equal treatment and access for LGBTQ citizens and visitors – which predates this dispute by many years – is not the real reason why DHS closed CSS' intake. CSS asserts that the City was actually motivated by religious animus, and therefore, our refusal to contract with it on CSS' terms is impermissible and subject to strict scrutiny. The district court properly rejected these assertions.

1. Where Only Religious Providers Announced They Could Not Serve Same Sex Couples, the City Did Not Engage in Improper Targeting.

CSS struggles to cobble together a selective enforcement argument because the only two agencies that announced they were unable to comply with the City's requirement of equal treatment were religious entities. The City did not permit any

secular provider to refuse service to prospective foster parents on the basis of membership in a protected category. Thus, while the City opened an investigation into the two groups which indicated they could not comply, and insisted that they comply if they were to receive new contracts, CSS provided no evidence that any secular provider should have been investigated.

Although CSS appears to intimate, incorrectly, that only CSS and Bethany were required to comply, the same contractual equal treatment obligations apply in all the foster care contracts. CityAppx.408-09. Further, while DHS did not ask every provider, CSS and Bethany indicated their inability to serve same sex couples was based upon religious doctrine. Therefore, the Commissioner saw no reason to assume that secular providers were not compliant. CityAppx.347, 399. Finally, the City has restored intake and offered to Bethany a new full contract because Bethany now has agreed to certify otherwise qualified same sex couples. CityAppx.408-409.

In sum, where only two providers announced that they were not willing to work with same sex foster parents, and those providers happened to be religious; where DHS had no indication that any secular providers had this same religiously-based objection; and where DHS resumed its relationship with Bethany as soon as Bethany agreed to comply with the City's neutral laws and policy, it is impossible to draw an inference that the City's insistence upon compliance was motivated by religious animus, as opposed to its longstanding deep commitment to equal rights in public life for LGBTQ citizens. The FPO was enacted in 1963 and amended in 1982 to protect Philadelphians on the basis of sexual orientation. Insistence that

entities who contract with us comply with our civil rights laws does not constitute religious hostility. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 872 (11th Cir. 2011) (university did not impose remediation plan on student in retaliation for religious views, but because counseling degree candidate stated she would impose those views about LGBTQ individuals upon future patients).

2. The District Court Properly Found That *Masterpiece's* Narrow Holding Does Not Apply.

Contrary to CSS' interpretation, *Masterpiece Cakeshop* does not hold that, the City cannot object or enforce its civil rights laws against individuals who object on religious grounds without engaging in impermissible religious hostility. CSS points to statements by City Council and the Commissioner that express nothing more than disagreement with CSS' refusal to serve same sex married couples, and the observation that the refusal to serve those families on equal terms as other couples constitutes discrimination under the City's laws and policies.[11]

The district court properly rejected CSS' overreading of *Masterpiece Cakeshop*. *See* Appx.33. As it observed, *Masterpiece Cakeshop* is a narrow decision based upon the strongly disparaging statements of adjudicators during a supposedly neutral adjudicatory proceeding, together with evidence of different and preferential treatment of similarly situated secular bakers who refused to put anti-

[11] City Council had nothing to do with the decision made by the executive branch and accordingly, its comments should not even be considered. Similarly, the bare fact that the PHRC opened an investigation after reading published reports suggesting violations of the City's FPO connotes no hostility.

gay messages on their cakes. 138 S.Ct. at 1729-30 (describing statement that religious justification was "one of the most despicable pieces of rhetoric that people can use" to justify "hurting others") (invoking Holocaust and slavery as comparable examples where religious freedom had been invoked).

As noted above, CSS has not asserted that the City permitted any secular provider to refuse to work with a prospective foster couple because of their membership in a protected category. Further, none of the cited statements here are similarly disrespectful. Indeed, DHS expressed that it was "genuinely appreciative of the invaluable services that CSS provides on the City's behalf" and expressed regret that the parties could not reach consensus. Appx.103. Nothing in *Masterpiece Cakeshop* suggests that, in order to be permitted to apply an otherwise neutral, generally applicable anti-discrimination law, the City could not observe that a refusal to serve same sex couples on equal terms, even when religiously motivated, violates that law. Further *Masterpiece Cakeshop* found persuasive that the problematic statements were made by adjudicators in a neutral adjudicatory proceeding.[12] The statements cited by CSS were made by parties to a contract, who certainly are permitted to advocate for their respective positions.

In sum, the mere fact that we expressed to CSS that its refusal to serve same sex couples violates our anti-discrimination law and policy falls far short of the

[12] *See id*. at 1730 (noting disagreement as to whether decisionmaker's comments are relevant, but "[i]n this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.").

mark that *Masterpiece Cake* sets for establishing hostility so great that it overcomes application of an otherwise neutral, generally applicable anti-discrimination law.

3. Because the City Has Not Granted Any Secular Exemptions to Its Civil Rights Law and Policies to Secular Providers, CSS Has Not Proven Any Inference of Religious Hostility.

CSS properly observes that if the government grants secular exemptions to a neutral law or policy, but refuses to grant similar religious exemptions, its conduct is constitutionally suspect. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004); *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

The problem for CSS is that none of its alleged exemptions identifies any situation in which the City exempted a foster care provider from anti-discrimination requirements.

The district court agreed that for this very reason, CSS' argument fails. Appx.38-39. CSS alleges only that DHS permits agencies to "refer" foster parents to other agencies to improve proximity to the family, or to provide expertise in addressing specialized medical needs.[13] However, as the district court properly noted, these secular reasons for "referral" are not exemptions from anti-discrimination requirements, and the testimony was clear that the decision of which agency to

[13] CSS' argument is contrary to the Record, which reflects that foster parents have the right to choose the agency with which they want to work and that while agencies may provide *information* about other agencies, the choice remains the foster parents'. CityAppx.126, 129-131.

work remained the applicant's. Appx.39. The type of "referral" that CSS is seeking is actually a *refusal* of service on the basis of the couple's membership in a protected category, something DHS has never permitted. Appx.39. Therefore, cases like *Blackhawk* and *Newark* are inapplicable.

Puzzlingly, CSS asserts that civil rights laws like the FPO cannot apply to foster care because under certain circumstances, factors like disability and race can be considered. Mot.23. This assertion is deeply flawed. Of course agencies must consider whether an individual's mental disability poses a health and safety threat such that they should not be certified to care for a child. Such consideration of disability is not discriminatory, and yet HHS still considers foster parents to be protected under Title II of the ADA.[14] In addition, while the Multiethnic Placement Act of 1994, Pub. L. 103-82 (1994), generally prohibits consideration of race and national origin in placement decisions, HHS has noted that agencies may sometimes consider them as one factor in a placement decision.[15] Thus, the mere fact that protected factors can sometimes be considered in complex child welfare decisions does not foreclose civil rights protections in this area. Consideration of race and disability to serve the best interests of a child has nothing to do with what CSS

[14] HHS Technical Assistance, available at https://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf (last visited July 23, 2018).

[15] Ensuring the Best Interest of Children at 17, available at https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/specialtopics/adoption/mepatraingppt.pdf (last visited July 23, 2018).

seeks here – permission to refuse to even consider whether gay and lesbian couples meet certification criteria solely because of their sexual orientation.

4. If Strict Scrutiny Were to Apply, It Is Satisfied.

Finally, even if for any reason strict scrutiny did apply, CSS' free exercise claim still fails because the City's actions are justified by a compelling interest and are the least restrictive means of achieving that interest.

Respecting and following the City's anti-discrimination law is a compelling interest. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1986). CSS' attempts to impugn our interest in anti-discrimination lack any merit.

And insisting upon compliance is the least restrictive means of addressing the anti-discrimination mandate of the FPO. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018) (compliance with anti-discrimination law was least restrictive means to further compelling government interest in fighting discrimination).

This Court should reject CSS' claim that the "least restrictive means" would require the City to permit CSS to send prospective foster parents that it refuses to serve to some other agency. Mot.26-27. A religious entity cannot elect an accommodation that will harm third parties. *See Estate of Calder v. Thornton*, 472 U.S. 703, 707-08 (1985). Refusing to serve someone based on a protected category under the FPO – a woman, a non-Christian, or a same-sex couple – whether or not one suggests an alternative, is still contrary to the FPO and contrary to the City's compelling interest in remedying discrimination. As the Supreme Court observed in *Masterpiece Cakeshop*, should exemptions be freely granted to those who feel

they cannot serve LGBTQ individuals, harmful "community-wide stigma" that is "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations" would result. 138 S.Ct. at 1727.

C. The CSS Foster Parent Plaintiffs Have No Cause of Action Based Upon Alleged Violation of CSS' Free Exercise Rights.

Despite CSS' assertions, the CSS foster parents have no cognizable claim. "A litigant may only assert his own constitutional rights or immunities," and "one cannot sue for the deprivation of another's civil rights." *O'Malley v. Brierley*, 477 F.2d 785, 789 (3d Cir. 1973) (even though suspension of cleric visiting privileges might violate inmates' free exercise rights, clerics stated no claim themselves). Thus, the foster parents cannot assert deprivation of a right to serve as foster parents piggybacked upon an alleged violation of *CSS'* free exercise rights.

D. CSS' "Compelled Speech" Claim Also Fails.

CSS' compelled speech claim fails because the selection and certification of foster parents is made pursuant to contractual duties that CSS voluntarily assumed. CityAppx.757-59; 803-04, 806-07, 813. If a party objects to a contractual condition on its speech, "its recourse is to decline the funds." *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc. ("AOSI")*, 570 U.S. 205, 214 (2013); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631-32 (1943) (distinguishing "compelled" speech from speech of persons who voluntarily enroll in a program, because "those who take advantage of . . . opportunities may not on grounds of conscience refuse compliance with such conditions").

The district court rejected the argument CSS makes here that its certification activities are not part of its contract with the City, and therefore, the City cannot require it to complete certifications of prospective same sex foster parents through home studies. Appx.19-20, 49-53. Multiple provisions of the Contract belie CSS' assertion. CityAppx.796, 839-40. CSS cannot now walk away and claim that it should be free to refuse to prepare the home study required for certification because a couple is gay. Preparation of that study is integral to certification, and is therefore integral to the contract.

Two cases cited by CSS do not even concern contractual speech, and the others are distinguishable. In *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001), the government was not permitted to compel attorneys who received subsidies to represent indigent clients to refrain from challenging welfare laws because the government essentially was subsidizing private speech through attorney client relationships. *See* 531 U.S. at 543-44. The City foster care services contracts create no such private speech forum. *See* Appx.49-53.

AOSI is similarly distinguishable. There, the government sought to compel agencies who accepted HIV/AIDS prevention funds to adopt a policy against prostitution. Our contract seeks no policy statement from CSS on same sex marriage. It simply asks CSS to certify as foster parents any applicants who are qualified under the governing state law criteria.

III. CSS Has Failed to Demonstrate Irreparable Harm or That the Balance of the Equities and the Public Interest Weigh in Its Favor.

A. CSS Cannot Satisfy Irreparable Harm.

CSS argues in cursory fashion that it will be irreparably harmed absent an injunction, citing only *Elrod v. Burns*, 427 U.S. 347 (1976). Mot.30. But CSS is not likely to succeed on the merits so the alleged First Amendment harm is not present.[16] CSS' claim that "Catholic will likely close before litigation is complete", Mot.30, is not supported by the record as CSS has other foster care related contracts with DHS and contracts with two other counties. CityAppx.272–274. The claimed harm also is financial and not irreparable. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 802 (3d Cir. 1989) (being forced to shut down a business not irreparable harm).

B. CSS' Proposed Injunction Is Against the Public Interest and the Balance of the Equities Strongly Favors the City.

CSS argues that an injunction would be in the public interest because it would ensure that "empty foster homes are filled and at-risk children are placed with loving foster parents in accordance with state law." Mot.31. But the intake closure has not impacted the overall placement rates of children in Philadelphia. *Supra* at 5. Moreover, DHS' intake closure reflects its best interest determination based on concerns about placement disruptions if CSS is unable to contract with DHS. CityAppx.351-52. Forcing DHS to act against its determination of the best

[16] Because intake is closed, CSS will not be compelled pending appeal to violate its religious belief regarding same sex couples (or make compelled speech), and because CSS continues to engage in foster care, any burden to the religious mission it identified would be limited even if CSS could succeed on the merits. Such harm is insufficient under *Revel's* sliding scale approach. 802 F.3d at 571.

interest of children cannot be in the public interest. Permitting CSS to discriminate in a manner that would suppress the diversity of the overall foster parent pool and send harmful messages to LGBTQ children in DHS' care as well as all of Philadelphia's residents is also not in the public interest. CityAppx.400-01, 573-74, 576-77.

CSS is also wrong that the City's harms are hypothetical. The City has many legitimate interests at stake in ensuring agencies adhere to contracts, do not discriminate, that a broad pool of foster parents is available, and that LGBTQ children do not see their custodial agency – DHS – permitting CSS to discriminate against same sex foster parents. Appx.63. The requested injunction would require the City to contract with CSS on terms that permit CSS to violate these policies and interests. The fact that CSS does not believe a same sex couple will ask it to certify them is immaterial to the harm such an injunction would cause the City.

CONCLUSION

For all the reasons set forth above, Appellees respectfully request that this Court deny the Appellants' Emergency Motion for an Injunction Pending Appeal.

Respectfully submitted,

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Date: July 23, 2018

By: /s/ Eleanor N. Ewing

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CERTIFICATION OF COMPLIANCE.

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d) and 32(a)(7)(B) because this brief contains 5176 words, excluding the parts of the brief exempted by Federal R. App. Proc. 32(f).

1. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.
2. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.
3. Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using McAfee LiveSafe, and that no virus was detected.

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CERTIFICATE OF SERVICE

I, Eleanor Ewing, hereby certify that I electronically filed the attached document on July 23, 2018 on the Court's electronic filing system, where it is available for printing and viewing.

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