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 Denial of a Preliminary Injunction by the
United States District Court for the Eastern District of Pennsylvania
Case No. 18-cv-2075, Hon. Petrese B. Tucker

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS *AMICUS CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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INTERESTS OF THE *AMICUS CURIAE*[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the U.S. Supreme Court, this court, and federal and state appellate and trial courts across the country. Americans United represents more than 125,000 members and supporters, including many in the State of Pennsylvania. Americans United believes that religious criteria should never be used to deny anyone services that are funded, supported, or delegated by the government.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellees correctly explain that Catholic Social Services is not entitled to strict scrutiny under any constitutional clause or the Pennsylvania Religious Freedom Protection Act. But even if strict scrutiny were triggered, Catholic Social still would not be entitled to deny based on its religious beliefs foster-care-placement services to families headed by

[1] No counsel for a party authored this brief in whole or in part. No party or party's counsel—and no person other than *amicus*, its members, or its counsel—contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

same-sex couples. For such discrimination is barred by the Establishment and Equal Protection Clauses of the U.S. Constitution.

With respect to the conduct at issue in this case, Catholic Social is a state actor that is bound by the Constitution. Catholic Social provides placement-related services for children who have been removed from their homes by the state. In so doing, Catholic Social exercises power that is traditionally reserved exclusively to the state. And Catholic Social obtains its authority to provide these services by delegation from the City of Philadelphia.

As a state actor with respect to its placement-related work, Catholic Social must comply with the Establishment and Equal Protection Clauses. Denying placement-related services to same-sex couples based on religious criteria violates both Clauses. The Establishment Clause prohibits state actors from discriminating based on religion, allocating aid based on religious criteria, making decisions based on a predominantly religious purpose, disfavoring conduct because it is contrary to religious tenets, or otherwise acting to advance particular religious beliefs. And the Equal Protection Clause bars state actors from discriminating based on sexual orientation in determining who may serve as a foster parent. Catholic Social's discriminatory policy runs afoul of all these principles.

But even if Catholic Social were not a state actor with respect to the conduct at issue in this litigation, the City is. And the Establishment and Equal Protection Clauses prohibit the City from allowing Catholic Social to discriminate. Both Clauses bar the City from aiding conduct—such as discrimination in the provision of government-funded services—that a governmental body could not engage in directly. The Establishment Clause also prohibits the City from delegating its governmental authority relating to placement of children to a religious institution that uses religious criteria to determine who may serve as a foster parent.

Finally, the Establishment Clause forbids exempting religious entities from generally applicable legal rules unless the exemption alleviates a significant government-imposed burden on the exercise of religion and does not impose costs, burdens, or harms on third parties. The City's nondiscrimination requirements for placement of foster children do not burden Catholic Social's religious exercise because Catholic Social is free to care for needy children without state support. And allowing Catholic Social to discriminate in the provision of governmental services with respect to foster care would gravely harm both same-sex couples and children in need of families. Hence, exempting Catholic Social from the City's nondiscrimination policies is impermissible.

Religion-based discrimination has no place in government-sponsored services. The district court's judgment should be affirmed.

ARGUMENT

I. In its placement-related work, Catholic Social Services is a state actor prohibited from discriminating against same-sex couples by the Establishment and Equal Protection Clauses.

Catholic Social is a state actor for purposes of its placement-related work because the City has delegated to it the City's duty to care for children whom the City has removed from their homes. As a state actor, Catholic Social is prohibited by the Establishment and Equal Protection Clauses from discriminating based on religious principles against same-sex couples.

A. Catholic Social is a state actor in its placement-related work because it performs a traditional governmental function under a delegation of exclusive governmental authority.

The Supreme Court has "treated a nominally private entity as a state actor . . . when it has been delegated a public function by the state." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). Whether a particular function qualifies as public generally turns on whether the function is "traditionally associated with sovereignty" or has been "traditionally the exclusive prerogative of the State." *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

But even activities that are normally private can qualify as state action if performed in conjunction with an exclusively governmental function. For example, in *West v. Atkins*, 487 U.S. 42 (1988), the Supreme Court held that a private physician who contracted with a state prison hospital to provide medical services was a state actor when treating inmates. The Court explained that it did not matter that "the provision of medical services is a function traditionally performed by private individuals." *Id.* at 56 n.15. Because the state is responsible for depriving inmates of their liberty—an exclusively governmental function—"the State has a constitutional obligation . . . to provide adequate medical care to those whom it has incarcerated." *Id.* at 54. And because "the State delegated that function" to the physician, the physician "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.* at 49, 56 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Thus, the physician in *West* "ha[d] been delegated a public function by the state." *Brentwood*, 531 U.S. at 296 (describing *West*).

So too here. The City contracts with Catholic Social to determine who may serve as foster parents for children whom the City has removed involuntarily from their homes. J.A. 165–70 (testimony of City official). Just as government had exclusive authority to imprison in *West*, the state

has sole authority to remove children from their homes in Pennsylvania. *See* 42 Pa. Cons. Stat. § 6324; *see also* J.A. 165 (testimony of City official). And this Court has "accepted the analogy between persons the state places in foster care and those it incarcerates or institutionalizes." *Nicini v. Morra*, 212 F.3d 798, 807 (3d Cir. 2000) (*en banc*). For "[f]oster children, like the incarcerated or the involuntarily committed, are 'placed . . . in a custodial environment . . . [and are] unable to seek alternative living arrangements.' " *Id.* at 808 (quoting *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987) (*en banc*) (alterations in original)).

Thus, when the state removes children from their homes, it "enter[s] into a special relationship with [them] which imposes upon it certain affirmative duties," including protecting them and " 'meet[ing] [their] basic needs.' " *Id.* at 807–08 (quoting *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992) (*en banc*)). And placing children in appropriate foster homes (or institutional care facilities) is one of the duties that the state owes to the children in its custody. *See* 62 Pa. Cons. Stat. §§ 701–08, 901–21. Therefore, like the physician who fulfilled the state's duty to provide medical treatment to inmates in *West*, Catholic Social performs a traditionally exclusive governmental function when it acts for the City in providing placement-related services concerning children removed involuntarily from their homes.

As in *West*, Catholic Social "exercise[s] power 'possessed by virtue of state law and made possible only because [it] is clothed with the authority of state law.' " *See* 487 U.S. at 49 (quoting *Classic*, 313 U.S. at 326). By regulation, the state has "delegate[d] its authority under [state law] to inspect and approve foster families to . . . approved" foster-family care agencies such as Catholic Social. 55 Pa. Code § 3700.61. These agencies are, therefore, "a stand-in for the [government], which would typically be responsible for the[ ] tasks of" " 'recruit[ing], approv[ing], supervis[ing], and plac[ing] children with foster families.' " *I.H. ex rel. Litz v. County of Lehigh*, 610 F.3d 797, 805–06 (3d Cir. 2010) (quoting 55 Pa. Code § 3700.4). Moreover, as Catholic Social has conceded, foster-family care agencies cannot legally provide foster-care-related services without a contract with the City. *See* Appellants' Br. 7; Doc. 13-2 (Pls.' TRO Br.) at 5–7.

Because it "has been delegated a public function by the state" (*Brentwood*, 531 U.S. at 296), Catholic Social is a state actor for purposes of the conduct at issue in this case. Indeed, reasoning as above, many district courts have ruled that Pennsylvania foster-care placement agencies are state actors. *See Harris ex rel. Litz v. Lehigh Cty. Office of Children & Youth Servs.*, 418 F. Supp. 2d 643, 651 (E.D. Pa. 2005); *Donlan v. Ridge*, 58 F. Supp. 2d 604, 609–10 (E.D. Pa. 1999); *S.B. ex rel. D.M. v.*

City of Philadelphia, No. CIV. 07-768, 2007 WL 3010528, at *2 (E.D. Pa. Oct. 12, 2007); *Barron v. Washington Cty. Children & Youth Soc. Serv. Agency*, No. CIV.A. 05-1517, 2006 WL 931678, at *4 (W.D. Pa. Apr. 11, 2006); *Estate of Earp v. City of Philadelphia*, No. CIV. A. 96-7141, 1997 WL 255506, at *1–2 (E.D. Pa. May 7, 1997); *Campbell v. City of Philadelphia*, No. CIV. A. 88-6976, 1990 WL 102945, at *3–4 (E.D. Pa. July 18, 1990). The Second, Sixth, and Ninth Circuits have also agreed that institutions that care for or place with foster parents children who are removed involuntarily from their homes are state actors. *See Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 676–77 (6th Cir. 2018); *Taylor v. First Wyoming Bank, N.A.*, 707 F.2d 388, 390 (9th Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 822 n.4 (2d Cir. 1977); *Perez v. Sugarman*, 499 F.2d 761, 765 (2d Cir. 1974).

Catholic Social argues to the contrary (Appellants' Br. 41 n.130), pointing to *Leshko v. Servis*, 423 F.3d 337 (3d Cir. 2005). But *Leshko* held only that individual foster parents in Pennsylvania are not state actors. *Id.* at 347. That is because providing the actual "hands-on care" to foster children—i.e., being a foster parent—is not traditionally an exclusive governmental function. *Id.* at 343. *Leshko* recognized, however, that "removing children from their homes and placing them with other

caregivers arguably *are* exclusively governmental functions in Pennsylvania." *Id.* (emphasis added).

The vast majority of the state-action cases cited by Catholic Social's *amici* 43 United States Senators and Members of the United States House of Representatives (at 19–21) likewise address only whether foster parents are state actors. *See Ismail v. County of Orange*, 693 F. App'x 507, 512 (9th Cir. 2017); *Rayburn v. Hogue*, 241 F.3d 1341, 1348–49 (11th Cir. 2001); *Milburn v. Anne Arundel Cty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989); *Marr v. Schofield*, 307 F. Supp. 2d 130, 134 (D. Me. 2004); *P.G. v. Ramsey County*, 141 F. Supp. 2d 1220, 1226 (D. Minn. 2001); *Pfoltzer v. County of Fairfax*, 775 F. Supp. 874, 891 (E.D. Va. 1991). The remaining three cases on which the Senators and Members rely are similarly inapposite: *Malachowski v. City of Keene*, 787 F.2d 704, 710–11 (1st Cir. 1986) (*per curiam*), involved an institution that, unlike Catholic Social, was not "regulated or funded by, or under contract with, the state" but merely "made recommendations to the juvenile court with respect to child placement." In *Hall v. Smith*, the appellant argued only that the placement agency was a state actor under the "state compulsion test" (which asks whether the state "'exerts coercive power over the private entity or provides significant encouragement'" to the conduct at issue), so the court did "not opine on whether, if applying the public function test, a

private child placement agency could be considered a state actor with respect to the foster child placement decisions it makes pursuant to a contractual relationship with a state." 497 F. App'x 366, 375 & n.13 (5th Cir. 2012) (quoting *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005)). And *Letisha A. by Murphy v. Morgan*, 855 F. Supp. 943, 946–49 (N.D. Ill. 1994), involved a group home that had no placement authority at all.

B. The Establishment and Equal Protection Clauses bar Catholic Social from discriminating against same-sex couples in approving foster parents.

Because it is a state actor when it determines which families may provide foster care to children removed involuntarily from their homes, Catholic Social must comply with the U.S. Constitution in its placement-related work. *See, e.g.*, *Callahan v. City of Chicago*, 813 F.3d 658, 661 (7th Cir. 2016); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). And both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment bar Catholic Social's discrimination against same-sex couples in foster-placement services.

1. The Establishment Clause prohibits governmental actors from discriminating for religious reasons.

Catholic Social makes crystal clear that it refuses to serve same-sex couples for religious reasons. *E.g.*, Appellants' Br. 13. But when it is functioning as a state actor performing a state service, the Establishment Clause prohibits Catholic Social from engaging in such religiously motivated discrimination.

The Clause bars governmental actors from acting with a predominantly religious purpose. *E.g.*, *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860, 865 (2005). For example, a state violated the Establishment Clause when it prohibited the teaching of evolution in public schools because the instruction was "deemed antagonistic to a particular dogma." *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). Here, Catholic Social violates the Establishment Clause when, because same-sex relationships are condemned by its religious doctrines, it refuses to provide services to same-sex couples.

Catholic Social's discriminatory conduct also runs afoul of the Establishment Clause principle that governmental actors must allocate public aid and benefits "on the basis of neutral, secular criteria . . . on a nondiscriminatory basis." *See Agostini v. Felton*, 521 U.S. 203, 231 (1997); *accord Mitchell v. Helms*, 530 U.S. 793, 813, 829 (2000) (four-Justice

plurality opinion); *id.* at 846, 848 (O'Connor, J., concurring in the judgment). Government must not require people to meet a religious test (*e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961)) or conform their conduct to religious requirements (*e.g.*, *Venters v. City of Delphi*, 123 F.3d 956, 970 (7th Cir. 1997)) as a condition of obtaining a governmental benefit or privilege. Yet rather than applying secular criteria in evaluating potential foster parents, Catholic Social requires couples to satisfy the religious test of conforming to the religious belief that only heterosexual marriage is proper.

More generally, governmental actors must not "'convey . . . a message that . . . a particular religious belief is [officially] favored or preferred.'" *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (quoting *Wallace v. Jaffree,* 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)), *dicta on different issue disapproved by Town of Greece v. Galloway*, 572 U.S. 565 (2014). When in performing a governmental function Catholic Social rejects same-sex couples based on religious doctrine, it places governmental imprimatur on the religious belief that only heterosexuals should marry and raise children.

2. The Equal Protection Clause prohibits governmental actors from discriminating based on sexual orientation.

Whereas the Establishment Clause prohibits governmental actors from engaging in discrimination (of any sort) that is religiously motivated, the Equal Protection Clause prohibits them from discriminating based on sexual orientation (regardless of motivation). In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–05 (2015), the Supreme Court held that the Equal Protection Clause bars government from discriminating based on sexual orientation with respect to marriage. And in *Pavan v. Smith*, the Court underscored that the Equal Protection Clause prohibits "differential treatment [that] infringes *Obergefell*'s commitment to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.' " 137 S. Ct. 2075, 2077 (2017) (*per curiam*) (quoting *Obergefell*, 135 S. Ct. at 2601). This "constellation of benefits" includes "child custody" and "adoption rights," along with many other "rights and responsibilities intertwined with marriage." *See Obergefell*, 135 S. Ct. at 2601, 2606.

In performing the state function of approving foster-care families, Catholic Social therefore runs afoul of the Equal Protection Clause by depriving same-sex couples of "the benefits afforded to opposite sex couples." *See id.* at 2604. When a state actor treats same-sex couples differently in this regard, it violates the "long-established precept that the

incidents, benefits, and obligations of marriage are uniform for all married couples within each state." *See United States v. Windsor*, 570 U.S. 744, 768 (2013).

II. Even if Catholic Social were not a state actor, the Establishment and Equal Protection Clauses prohibit the City from allowing discrimination based on religion or sexual orientation in foster-care placement.

Even if Catholic Social were not a state actor with respect to its placement-related work, the Establishment and Equal Protection Clauses bar the City from contracting with foster-care placement agencies that discriminate either for religious reasons or based on sexual orientation. The Establishment Clause prohibits government from funding entities that use religious criteria in deciding whom they will serve. The Equal Protection Clause likewise prohibits government from aiding private discrimination. The Establishment Clause also prohibits government from delegating governmental authority to religious institutions that use that authority to advance religious purposes. In addition, the Establishment Clause bars the City from granting a religious exemption from its antidiscrimination rules for foster-care placement agencies because the exemption would not lift a significant burden on religious exercise and would substantially harm third parties.

A. The Establishment and Equal Protection Clauses prohibit the City from funding or supporting discriminatory practices.

Even if Catholic Social were not a state actor in its placement-related work and for that reason could not be held liable for violating the constitutional rights of same-sex couples by refusing to approve them for placements (*see, e.g.*, *Kach v. Hose*, 589 F.3d 626, 646 (3d Cir. 2009)), the City cannot constitutionally fund or otherwise support that practice. The Establishment and Equal Protection Clauses both prohibit the City from doing so.

The Establishment Clause prohibits government from providing funding to institutions that use public dollars "for religious purposes" or "to advance their religious objectives." *Mitchell*, 530 U.S. at 844, 857 (controlling concurring opinion of O'Connor, J.[2]); *accord Bowen v.*

[2] Four circuits have agreed that Justice O'Connor's opinion in *Mitchell* represents controlling law under *Marks v. United States*, 430 U.S. 188, 193 (1977), because she provided the decisive vote to sustain the judgment on narrower grounds than the plurality in the case. *See Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1058 (9th Cir. 2007); *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Grp.*, 247 F.3d 397, 418 (2d Cir. 2001); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001). Catholic Social's *amici* 43 United States Senators and Members thus err in relying (at 22 n.10, 25–26) on the plurality opinion in *Mitchell*, 530 U.S. at 809, for the proposition—which Justice O'Connor's controlling opinion rejected (*id.* at 840–44)—that the Establishment Clause allows religious institutions to use public funds

Kendrick, 487 U.S. 589, 614–15, 621 (1988); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973). The Establishment Clause also requires, as noted earlier, that governmental aid must be allocated "on the basis of neutral, secular criteria"; recipients of the aid must not be defined "by reference to religion." *See Agostini*, 521 U.S. at 231, 234. Because of these rules, the Establishment Clause prohibits payment of public funds to institutions that discriminate based on religious criteria in deciding whom they will serve. In other words, the rights of private, religiously affiliated entities to decide based on religious criteria who should receive their private, charitable services do not extend to the provision of government-funded services in government-sponsored programs.

Thus, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the controlling concurring opinion concluded that educational institutions receiving governmental aid must not "restrict[] entry on racial or religious grounds." *See Lemon v. Kurtzman*, 403 U.S. 602, 665 n.1 (1971) (opinion of White, J.).[3] As noted in *Bowen*, 487 U.S. at 609, when the Supreme Court

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to support religious purposes if religious and secular institutions are equally eligible for the funds.

[3] Like Justice O'Connor's concurrence in *Mitchell*, Justice White's concurrence in *Tilton*, which addresses both *Tilton* and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is controlling because Justice White provided the decisive vote in favor of the judgment on grounds narrower

upheld federal aid to a religiously affiliated hospital in *Bradfield v. Roberts*, 175 U.S. 291, 298–99 (1899), the Court emphasized that the hospital was willing to serve anyone and was managed based on purely secular principles. And in *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 425 (8th Cir. 2007), the court held that state funding of a privately operated prison rehabilitation program violated the principle that governmental funding must be "allocated on neutral criteria and . . . available on a nondiscriminatory basis," because the program's operators required prospective participants to meet a religious test to enroll.

Catholic Social is mistaken in arguing (Appellants' Br. 47–48) that the Supreme Court's recent decision in *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017), permits the City to fund religious institutions that discriminate. In *Trinity Lutheran*, the Court held that a state violated the Free Exercise Clause by denying a church-operated preschool—"solely because of [its] religious character"—a grant to purchase a rubber surface for its playground. 137 S. Ct. at 2017–18, 2021, 2024–25. The Court did not analyze whether the grant violated the Establishment Clause but instead simply accepted the parties' agreement

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than those given by the plurality. *See Marks*, 430 U.S. at 193; *Clayton v. Kervick*, 285 A.2d 11, 20 (N.J. 1971).

that it did not. *Id.* at 2019. The preschool did not discriminate based on religious grounds in admissions, and the record contained no evidence that the playground was used for religious activity. *See id.* at 2017–18, 2024 n.3. The Court thus strictly limited the scope of its holding: "This case involves express discrimination based on religious identity with respect to playground resurfacing. *We do not address religious uses of funding* or other forms of discrimination." *Id.* at 2024 n.3 (emphasis added).[4] Here, by contrast, Catholic Social wishes to employ religious criteria in deciding which couples are worthy of being foster parents, and thus to use public funds in a publicly funded program to advance its religious belief that same-sex relationships are forbidden.

The Establishment Clause's prohibition on public funding of religion-based discrimination is consistent with a broader principle of constitutional law: "'[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to

[4] Though this footnote was joined by only four Justices, it is controlling because it set forth narrower grounds for the judgment than did the two Justices who joined the body of the majority opinion but not the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2025–26 (concurring opinions of Thomas, J., and Gorsuch, J.); *Marks*, 430 U.S. at 193. In addition, Justice Breyer, who did not join any of the majority opinion, wrote a concurrence expressing views similar to those in the footnote. *See Trinity Lutheran*, 137 S. Ct. at 2026–27.

accomplish.'" *See Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (quoting *Lee v. Macon Cty. Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala.), *aff'd mem. sub nom. Wallace v. United States*, 389 U.S. 215 (1967)); *accord City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J.). Therefore, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990); *accord, e.g.*, *Young v. City of Simi Valley*, 216 F.3d 807, 819 (9th Cir. 2000). For instance, applying that principle, the Second Circuit concluded in *DeStefano v. Emergency Housing Group* that because the Establishment Clause prohibits government from "'coercing anyone to support or participate in religion or its exercise,'" the Clause also bars government from providing public funds to private institutions that use those funds "to coerce worship or prayer." 247 F.3d 397, 411–12 (2d Cir. 2001) (quoting *Warner v. Orange Cty. Dep't of Prob.*, 115 F.3d 1068, 1073 (2d Cir. 1996), *reinstated after vacatur and remand*, 173 F.3d 120 (2d Cir. 1999)).

The principle that "[a]ctivities that the . . . government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity" applies in the Equal Protection Clause context as well. *See Nat'l*

Black Police Ass'n v. Velde, 712 F.2d 569, 580 (D.C. Cir. 1983). "A State's constitutional obligation" under that Clause "requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood*, 413 U.S. at 467. Simply put, "the Constitution does not permit the State to aid discrimination" by private entities. *Id.* at 465–66.

Thus the Supreme Court held in *Norwood* that a state violated the Equal Protection Clause by lending textbooks to students who attended private schools that discriminated on the basis of race, even though there was no contention that the private schools were state actors. *See id.* at 466–67. Likewise, in *Louisiana Financial Assistance Commission v. Poindexter*, 389 U.S. 571 (1968), *aff'g mem.*, 275 F. Supp. 833, 857 (E.D. La. 1967), the Court ruled that a state's provision of tuition grants to students attending private, racially discriminatory schools violated the Equal Protection Clause. *Accord United States v. Mississippi*, 499 F.2d 425, 432 (5th Cir. 1974) (*en banc*) (lease of public-school facility to private, segregated school violated Equal Protection Clause); *see also Brown v. Califano*, 627 F.2d 1221, 1235 (D.C. Cir. 1980) ("The Constitution's prohibition against governmental support of . . . invidious discrimination is too obvious and well-established to require elaboration . . . .").

Here, there is no question that the City significantly aids and supports Catholic Social's performance of foster-placement-related services. The City agreed to pay Catholic Social nearly $20 million under the parties' most recent contract for those services. J.A. 12 (district-court findings). The Equal Protection Clause thus prohibits the City from allowing Catholic Social to discriminate against same-sex couples in the performance of that contract.

B. The Establishment Clause prohibits the City from delegating its child-placement authority to a religious institution that employs religious criteria in the exercise of that authority.

The Establishment Clause prohibits government from " 'delegat[ing] a governmental power to a religious institution' " that infuses religious tenets into the exercise of that power. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 269 (3d Cir. 2011) (quoting *Allegheny*, 492 U.S. at 591 (alteration in original)); *accord Bd. of Educ. v. Grumet*, 512 U.S. 687, 696–97 (1994) (plurality opinion). For example, in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), the Supreme Court held that a state statute that granted churches the right to veto certain applications for liquor licenses violated the Establishment Clause. The Court explained that the "statute enmeshe[d] churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause." *Id.*

at 126. The Court was particularly concerned that the governmental authority granted to the churches "could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." *Id.* at 125. The statute failed to "'guarantee[]' that the delegated power 'will be used exclusively for secular, neutral, and nonideological purposes.'" *Id.* (quoting *Nyquist*, 413 U.S. at 780).

Here, as explained above, the state has "delegate[d] its authority under [state law] to inspect and approve foster families to . . . approved" foster-family care agencies such as Catholic Social. 55 Pa. Code § 3700.61. Thus, Catholic Social "is a stand-in for the [City], which would typically be responsible for the[] tasks of" "'recruit[ing], approv[ing], supervis[ing], and plac[ing] children with foster families.'" *See I.H.*, 610 F.3d at 805–06 (quoting 55 Pa. Code § 3700.4). Yet Catholic Social wishes to "employ[]" this authority not for exclusively "'secular, neutral, and nonideological purposes'" but "for [the] explicitly religious goal[]" (*Larkin*, 459 U.S. at 125 (quoting *Nyquist*, 413 U.S. at 780)) of favoring those who adhere to its religious teaching that people must not engage in same-sex relationships. The City cannot constitutionally permit Catholic Social to do so using governmental funds under a governmental contract for the provision of a governmental service.

C. The Establishment Clause prohibits the City from elevating religious interests over the rights and dignity of LGBTQ couples and the needs of children who require care.

The Establishment Clause prohibits "the government [from] favor[ing] one religion over another, or religion over irreligion." *McCreary*, 545 U.S. at 875. This principle bars government from giving special preferences to religious organizations. For example, in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Supreme Court ruled that a state violated the Establishment Clause by enacting a sales-tax exemption for religious periodicals without extending the exemption to nonreligious periodicals. Similarly, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Supreme Court invalidated under the Establishment Clause a state statute that provided Sabbath observers with an absolute right not to work on their Sabbath but did not grant any similar right to nonreligious employees.

To be sure, government in some circumstances may accommodate religious institutions by exempting them from generally applicable laws. *See, e.g.*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). But to be constitutional, any religious accommodation must meet two requirements: First, it must lift a substantial, government-imposed

burden on the exercise of religion. *See infra* § II.C.1. And second, it must not impose significant burdens on third parties. *See infra* § II.C.2.

Neither requirement is met here. Hence, the City is prohibited from giving Catholic Social special authorization to discriminate against LGBTQ people. Exempting Catholic Social from the City's nondiscrimination policies would unconstitutionally favor the organization's religious views over the rights of same-sex couples and the needs of children for caring homes.

1. Permitting Catholic Social to discriminate in selection of foster parents would not lift a substantial burden on religious exercise.

An accommodation of religion is potentially permissible if it "alleviates exceptional government-created burdens on private religious exercise." *See Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *see also Allegheny*, 492 U.S. at 613 n.59 ("an accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden *on the exercise of religion*'" (quoting *Amos*, 483 U.S. at 348 (O'Connor, J., concurring))). For example, in *Texas Monthly*, the Court concluded that a special exemption from sales taxes for religious publications could not be upheld as an accommodation of religion in part because it did not "remov[e] a significant state-imposed deterrent to the free exercise of religion." 489 U.S. 1, 15 (1989) (three-Justice plurality

opinion); *see also id.* at 28 (Blackmun, J., concurring in the judgment, joined by O'Connor, J.) (agreeing that exemption was not constitutional accommodation).

Catholic Social's religious exercise is not substantially burdened by the City's prohibition against sexual-orientation discrimination in foster-care placement. Catholic Social asserts that it is religiously motivated "to care for the orphaned and widowed." Appellants' Br. 6. But caring for children, even when religiously motivated, is not in itself a religious practice or exercise. *See Ridley Park United Methodist Church v. Zoning Hearing Bd.*, 920 A.2d 953, 960 (Pa. Commw. Ct. 2007); *see also Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 746 (Mich. 2007). And in any event, Catholic Social can fulfill its mission of caring for children by providing the care directly instead of contracting with the City to screen foster parents.

Like the payment of sales taxes in *Texas Monthly*, the City's decision to end funding of Catholic Social's discriminatory placement policy does not create a "significant state-imposed deterrent to the free exercise of religion." *See* 489 U.S. at 15 (plurality opinion). Not funding religious exercise at most places only "a relatively minor burden" on that exercise. *See Locke v. Davey*, 540 U.S. 712, 725 (2004). For "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of

a 'penalty' on that activity." *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980); *accord United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 212 (2003) (plurality opinion).

Again, *Trinity Lutheran* has no bearing here, because there the Supreme Court concluded that a religiously affiliated preschool's religious exercise was burdened not because the preschool was denied "a subsidy" but because it was prohibited "solely because" of its religious status from "compet[ing] with secular organizations for a grant" to resurface its playground. *See* 137 S. Ct. at 2022. Catholic Social is not being excluded as a foster-care placement agency because it is religiously affiliated; it is being excluded because it is unwilling to provide the nondiscriminatory placement services for which the City wishes to contract.

2. Permitting Catholic Social to discriminate would impermissibly burden same-sex couples and children in need of care.

To be constitutionally permissible, an accommodation of religion not only must lift a substantial government-imposed burden on religious exercise but also "must be measured so that it does not override other significant interests." *Cutter*, 544 U.S. at 722. Thus, *Caldor* held that a state law that provided a right exclusively to Sabbath observers not to work on the Sabbath was unconstitutional in part because it "would cause the employer substantial economic burdens" and "require the imposition of

significant burdens on other employees required to work in place of the Sabbath observers." *See* 472 U.S. at 710. Similarly, *Texas Monthly* held that a sales-tax exemption limited to religious publications was not a proper religious accommodation in part because it "markedly" "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount [wa]s needed to offset the benefit bestowed on subscribers to religious publications." *See* 489 U.S. at 15, 18 n.8 (three-Justice plurality opinion); *see also id.* at 28 (Blackmun, J., concurring in the judgment, joined by O'Connor, J.) (agreeing that exemption was not constitutional accommodation).[5]

Here, allowing Catholic Social to discriminate in approving prospective foster families would substantially harm people who do not adhere to Catholic Social's religious belief that same-sex couples should not marry. Most obviously, permitting this discrimination would burden the same-sex couples turned away by Catholic Social, who would not receive the same consideration to be foster parents (and thereby to parent

[5] *Cf. Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (Establishment Clause permitted judicially created religious exemption from state unemployment-benefits law for employee fired for refusing to work on Sabbath, because exemption would not "abridge any other person's religious liberties"); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986) (requirement in Title VII of Civil Rights Act of 1964 that employers provide certain religious accommodations to employees does not violate Establishment Clause because it "allows for consideration of the hardship to other employees and to the company").

children in need) as other couples would, and would thus receive a message that they are worthy of less respect from a government-sanctioned, government-funded program. Such obstacles could cause same-sex couples to give up on foster parenting entirely. And that, in turn, would harm children who need and would benefit from the loving foster parents who are turned away, including LGBTQ children who may benefit from being raised by LGBTQ couples familiar with the particular challenges that the children may face growing up.

To be sure, the Supreme Court has permitted religious institutions to be exempted from antidiscrimination laws when they hire ministers (*see Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012)) or hire employees of their faith to carry out non-profit endeavors (*see Amos*, 483 U.S. at 39). But those cases are premised on special solicitude to "the internal governance" of religious institutions, which must be allowed "control over the selection of those who will personify [their] beliefs." *See Hosanna–Tabor*, 565 U.S. at 188; *see also Amos*, 483 U.S. at 339. Catholic Social seeks to discriminate not internally with respect to the selection of its leaders or staff, but externally among those who seek its services. The Establishment Clause prohibits the City from giving Catholic Social a special privilege to so discriminate at the

expense of members of the public who desire government-supported services.

CONCLUSION

This Court should affirm the decision of the district court, and may do so on the grounds that the Establishment and Equal Protection Clauses prohibit the license to discriminate in the conduct of a governmental program that Catholic Social desires.

Respectfully submitted,

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Date: October 4, 2018

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that:

(i) this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 6,093 words including footnotes and excluding the parts of the brief exempted by Rule 32(f) and 3d Cir. Rule 29.1(b);

(ii) this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013, set in Century Schoolbook font in a size measuring 14 points or larger;

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CERTIFICATE OF SERVICE

I certify that on October 4, 2018, the foregoing brief was filed using the Court's CM/ECF system. Counsel for all parties in the case are registered CM/ECF users and will be served electronically via that system.

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