No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL., PETITIONERS

v.

CITY OF PHILADELPHIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the City of Philadelphia's termination of a contract that allowed Catholic Social Services to help place children in the City with foster parents, on the basis of Catholic Social Services' unwillingness to endorse same-sex couples as foster parents, violated the Free Exercise Clause of the First Amendment.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
A. Factual background 1
B. Proceedings below 7
Summary of argument 9
Argument 10
A. Laws that lack neutrality or general applicability are subject to strict scrutiny 12
1. A law that regulates religious conduct but authorizes individualized exemptions or exempts comparable secular conduct lacks neutrality and general applicability 14
2. A law also lacks neutrality and general applicability if the context of its adoption or enforcement indicates hostility to religion 18
B. Philadelphia's policy is not neutral and generally applicable, but instead unconstitutionally discriminates against religion 20
1. The City's refusal to extend its system of exemptions to Catholic Social Services discriminates against religion and violates the Free Exercise Clause 21
2. The context of the City's actions reveals impermissible hostility toward religion 26
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Bowen v. *Roy*, 476 U.S. 693 (1986) 15, 16
Brown v. *Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) 18
Bush v. *Vera*, 517 U.S. 952 (1996) 30

Cases—Continued: Page

Carey v. *Brown*, 447 U.S. 455 (1980) 18
Christian Legal Soc'y v. *Martinez*, 561 U.S. 661 (2010) 28
Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) ..... *passim*
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 11
Employment Div. v. *Smith*, 494 U.S. 872 (1990)..... *passim*
Epperson v. *Arkansas*, 393 U.S. 97 (1968)..... 34
Florida Star v. *B. J. F.*, 491 U.S. 524 (1989)..... 26
Forsyth County v. *Nationalist Movement*, 505 U.S. 123 (1992)..... 16
Fraternal Order of Police v. *City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999)..... 16, 17
J. E. B. v. *Alabama ex rel. T. B.*, 511 U.S. 127 (1994)..... 30
Kennedy v. *Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019)..... 11
Larson v. *Valente*, 456 U.S. 228 (1982)..... 15
Masterpiece Cakeshop, Ltd. v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)..... *passim*
Railway Express Agency, Inc. v. *New York*, 336 U.S. 106 (1949)..... 14, 15
Saia v. *New York*, 334 U.S. 558 (1948) 16
Sherbert v. *Verner*, 374 U.S. 398 (1963)..... 15
Stormans, Inc. v. *Wiesman*, 136 S. Ct. 2433 (2016)..... 17
Trinity Lutheran Church v. *Comer*, 137 S. Ct. 2012 (2017) 20, 27
Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 19
Ward v. *Polite*, 667 F.3d 727 (6th Cir. 2012)..... 15

Constitution, statutes, and regulation: Page

U.S. Const. Amend. I:
Free Exercise Clause ..... *passim*
Free Speech Clause 16
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 10
23 Pa. Cons. Stat. (2020):
§ 6344(d)(2) 2
§ 6344(d)(2)(ii)-(iv) 2
Phila. Code (2020):
Fair Practices Ordinance, ch. 9-1100 4
§ 9-1102(1)(e) 23, 24
§ 9-1106(1) 23
55 Pa. Code § 3700.64 (2020) 2

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INTEREST OF THE UNITED STATES

This case concerns the application of the Free Exercise Clause of the First Amendment to the City of Philadelphia's termination of a contract allowing Catholic Social Services to help place children in the City with foster parents, on the basis of Catholic Social Services' unwillingness to endorse same-sex couples as foster parents. The United States has a substantial interest in the preservation of the free exercise of religion. It also has a substantial interest in the enforcement of rules prohibiting discrimination by government contractors.

STATEMENT

A. Factual Background

1. The City of Philadelphia has protective custody of over 5000 children who have been abused or neglected.

Pet. App. 194a. Each year, the City enters into contracts with private foster-care agencies to help place those children with foster parents. *Id.* at 13a. At the start of this litigation, the City had contracts with 30 such agencies, many of which specialize in helping particular groups—such as Latino children, Native American children, and children of teenage mothers. *Id.* at 13a, 263a-264a. A guide published by the City explains that "[e]ach agency has slightly different requirements, specialties, and training programs" and encourages potential parents to "[b]rowse the list of foster agencies to find the best fit." *Id.* at 197a. Foster agencies that "[can]not accommodate" particular parents or families routinely refer those applicants to other agencies. *Id.* at 219a; see *id.* at 219a-220a.

Once a potential foster family and agency decide to work with each other, the agency helps the family go through a process of certification that takes three to six months to complete. Pet. App. 197a. As part of that process, the applicants receive training and undergo background checks. *Id.* at 197a-198a. The agency also reviews the suitability of the applicants' home and family. *Id.* at 198a, 257a. In doing so, the agency considers (among other things) the applicants' "[m]ental and emotional well-being," "[s]upportive community ties with family, friends and neighbors," and "[e]xisting family relationships, attitudes and expectations regarding the applicant's own children and parent/child relationships." 23 Pa. Cons. Stat. § 6344(d)(2) (ii)-(iv) (2020); see 55 Pa. Code § 3700.64 (2020). At the end of the process, the agency decides whether to "approv[e]" the applicants as fit foster parents. 23 Pa. Cons. Stat. § 6344(d)(2) (2020); see Pet. App. 35a. If the agency so

certifies, the City decides whether to place foster children with the foster parents. Pet. App. 13a. The City pays the agency a sum of money for each child the agency helps place, in order to help cover a portion of the agency's expenses. *Ibid.*

2. Petitioner Catholic Social Services, a religious non-profit organization affiliated with the Archdiocese of Philadelphia, operates a foster agency in the City of Philadelphia. Pet. App. 12a. The organization "sees caring for vulnerable children as a core value of the Christian faith and therefore views its foster care work as part of its religious mission and ministry." *Ibid.* The organization was founded as the Catholic Children's Bureau in 1917, and for over 50 years it has entered into contracts with the City to provide foster services as part of the City's foster-care system. *Id.* at 137a, 254a.

In accordance with its religious beliefs, Catholic Social Services is willing to provide foster certifications for households headed by married couples or single people, but not households headed by unmarried couples. Pet. App. 14a. Because it adheres to the belief that marriage is the union of a man and a woman, it regards all same-sex couples as unmarried. *Ibid.* The upshot of those beliefs is that the organization will provide foster certifications for married opposite-sex couples and single, unmarried individuals (including gay and lesbian individuals) but not for same-sex couples or unmarried opposite-sex couples. *Ibid.*; see J.A. 188. The organization has no objection to referring same-sex couples and unmarried opposite-sex couples to other foster agencies in the City, however, and has explained that "[i]f Catholic Social Services is unable to perform in-depth home assessments and make recommendations to the state for any reason, including consistency with its religious

mission, then Catholic Social Services will refer the potential foster parent to one of 28 nearby agencies who can better serve their needs." Pet. App. 158a; see *id.* at 14a.

3. As far as the government is aware, there is no evidence in the record that any same-sex couple has ever approached Catholic Social Services for its help with foster certification, and no such couple has ever filed a complaint against the agency for refusing service. Pet. App. 14a, 159a. In March 2018, however, a reporter from the Philadelphia Inquirer published an article stating that Catholic Social Services and Bethany Christian Services, another religious foster agency in the City, were unwilling on religious grounds to help same-sex couples become foster parents. *Id.* at 14a.

Three days after the publication of the article, the city council adopted a resolution addressing discrimination by foster agencies. Pet. App. 146a-148a. The resolution explained that Section 14.1 of the City's Professional Services Contract prohibited contractors from discriminating on the basis of sexual orientation and that the City's Fair Practices Ordinance, Phila. Code ch. 9-1100 (2020), prohibited discrimination on the basis of sexual orientation in places of public accommodation. Pet. App. 146a-147a. The resolution asserted that "[a]t least two" foster agencies "have policies that prohibit the placement of children with LGBTQ people based on religious principles, although the City of Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom." *Id.* at 147a. The resolution authorized an investigation into the City's "policies on contracting with social services agencies that * * * discriminate against prospective LGBTQ foster parents." *Ibid.* The resolution also

recommended that the City Department of Human Services conduct "a thorough review of its contracts with all of its * * * foster care agencies to ensure that providers are adhering to antidiscrimination policies as they pertain to the City's protected classes." *Ibid.*

Around the same time, the Commissioner of the Department of Human Services, Cynthia Figueroa, began investigating the practices of some foster agencies in the City. Pet. App. 14a-15a. She called all of the faith-based foster agencies in the City to ask them whether they objected to working with same-sex couples. *Id.* at 123a. Commissioner Figueroa also called a single secular agency because she "ha[d] a good relationship" with its chief executive officer. *Id.* at 304a. "As to all of the other nonreligious foster care agencies in the city, [she] did not call them to ask them their policy about LGBT couple applicants." *Ibid.* None of the agencies that the Commissioner called, apart from Catholic Social Services and Bethany Christian Services, responded that it objected to certifying same-sex couples as foster parents. *Id.* at 14a-15a.

Soon thereafter, Commissioner Figueroa met with Catholic Social Services to discuss the agency's policies. Pet. App. 15a. At the meeting, Catholic Social Services explained that it had been serving foster children in the City for over 100 years. *Id.* at 305a. Commissioner Figueroa responded that "times have changed" and that "women didn't have the rights and African Americans didn't have the rights" 100 years ago that they do now. *Ibid.* According to a representative of the agency who was present, Commissioner Figueroa also said that the agency "should be listening more to Pope Francis than the Archbishop and the Archdiocese's position on this." *Id.* at 269a. Commissioner Figueroa admitted saying

that "it would be great if we followed the teachings of Pope Francis," as she understood them, but indicated that she "d[id]n't recall * * * specifically" whether she had referred to the Archbishop or the Archdiocese. *Id.* at 306a.

After the meeting ended, the City informed Catholic Social Services that it would no longer refer new foster children to the agency for placement. Pet. App. 15a-16a. As a result, Catholic Social Services could neither certify any new applicants as foster parents, nor place any new foster children with foster parents that it had already certified. *Ibid.*

The City described the reasons for its actions in two letters to Catholic Social Services. See Pet. App. 149a-152a; *id.* at 165a-172a. In the first, the City invoked the City's Fair Practices Ordinance, which prohibits discrimination on the basis of sexual orientation in places of public accommodation. *Id.* at 149a-150a. In the second, the City invoked a provision that allowed it to terminate the contract "for any reason, including, without limitation, the convenience of the City." *Id.* at 166a-167a (citation omitted). The City also invoked Provision 3.21 of the Professional Services Contract, which stated: "[A] Provider shall not reject a child or family for Services based upon the location or condition of the family's residence, their environmental or social condition, or for any other reason if the profiles of such child or family are consistent with Provider's Scope of Services or [the Department of Human Services'] applicable standards as listed in the Provider Agreement, unless an exception is granted by the Commissioner * * * in his/her sole discretion." *Id.* at 167a (emphasis omitted). In addition, the second letter stated that "any fur-

ther contracts with [Catholic Social Services] will be explicit" in prohibiting discrimination because of sexual orientation. *Id.* at 170a.

B. Proceedings Below

1. In May 2018, petitioners sued the City in federal court. Pet. App. 54a. In June 2018, petitioners moved for a preliminary injunction, seeking an order compelling the City to resume placement of foster children through Catholic Social Services. *Ibid.*

The district court denied the motion for a preliminary injunction. Pet. App. 52a-132a. As relevant here, the court rejected petitioners' contention that the City's refusal to place foster children through Catholic Social Services violated the Free Exercise Clause of the First Amendment. *Id.* at 79a-101a. The court noted that, under this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), a law that burdens religious exercise is not subject to strict scrutiny if it is neutral and generally applicable. Pet. App. 80a. The court concluded that the City's policies were neutral and generally applicable and that there was "insufficient evidence to support the conclusion that [the City] explicitly targeted [Catholic Social Services] for religious reasons." *Id.* at 101a.

While the motion for a preliminary injunction remained pending, the City's annual contract with Catholic Social Services for Fiscal Year 2018 expired. Pet. App. 25a. The City insisted that its Fiscal Year 2019 contracts with foster agencies include "new, explicit language forbidding discrimination on the ground of sexual orientation as a condition of contract renewal." *Ibid.* Yet the City also established a new "Waiver/Exemption Committee" to grant "'waivers of, or exemptions from,

City contracting requirements.'" City Resps. Br. in Opp. 15 (citation omitted).

2. The court of appeals affirmed. Pet. App. 1a-51a.

The court of appeals reasoned that, because the Fiscal Year 2018 contract had expired, any dispute about the City's enforcement of that contract was "now moot." Pet. App. 25a. The court believed that the only remaining issue was whether "[the City] may insist on the inclusion of new, explicit language forbidding discrimination on the ground of sexual orientation as a condition of contract renewal, or whether it must offer [Catholic Social Services] a new contract that allows it to continue engaging in its current course of conduct." *Ibid.*

As relevant here, the court of appeals concluded that the City's new contractual language amounted to a neutral and generally applicable policy and therefore complied with the Free Exercise Clause. Pet. App. 23a-38a. In the court's view, there was insufficient evidence that the City had "treated [Catholic Social Services] differently because of its religious beliefs." *Id.* at 32a. The court rejected petitioners' reliance on the statement in the city council's resolution that "Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom," explaining that the statement "falls into [a] grey zone" because it "could express contempt for religion or could merely state the well-established legal principle that religious belief will not excuse compliance with general civil rights laws." *Ibid.* The court also rejected petitioners' reliance on Commissioner Figueroa's statements at their meeting, acknowledging that "some might think" that those statements were "improper," but ultimately concluding that "[t]he First Amendment does not pro-

hibit government officials working with religious organizations in this kind of partnership from speaking those organizations' language and making arguments they may find compelling from within their own faith's perspective." *Id.* at 33a. The court likewise found it insignificant that the Commissioner had targeted religious foster agencies for investigation; in the court's view, Commissioner Figueroa "had little reason to think that nonreligious agencies might have a similar policy." *Ibid.*

SUMMARY OF ARGUMENT

While the petition for a writ of certiorari raises the question whether to overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court need not decide that question here. Even under *Smith*, governmental actions that substantially burden religious exercise are subject to strict scrutiny unless they are carried out under neutral and generally applicable laws, free from hostility toward religious beliefs. Philadelphia's actions do not satisfy those requirements, for two independent reasons.

First, Philadelphia has impermissibly discriminated against religious exercise in its approach to exemptions. This Court has long recognized that a law is not neutral and generally applicable if it allows government officials to grant individualized exemptions, because the application of such a rule in any particular case depends on a government official's discretionary decision to grant or withhold an exemption. A law also is not neutral and generally applicable if it excludes from its scope secular conduct that undercuts the government's asserted interests to a similar or greater degree than the religious conduct that it covers. Here, Philadelphia not only has allowed for individualized exemptions, but also

has applied its policies in a manner that excludes from their scope wide swaths of conduct that undercut the City's asserted interests to a similar or greater degree than the conduct by Catholic Social Services. Strict scrutiny therefore applies, and the City cannot satisfy it.

Second, Philadelphia's actions also reflect unconstitutional hostility toward Catholic Social Services' religious beliefs. The City singled out religious organizations for investigation; suggested that religious beliefs are merely a pretext for discrimination; imposed unnecessarily severe restrictions on Catholic Social Services' participation in the foster-care program; and tried to persuade Catholic Social Services that its understanding of Catholic doctrine was outmoded and inconsistent with the views of Pope Francis, as the City understood them. The City has thus unconstitutionally "passe[d] judgment upon or presuppose[d] the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

ARGUMENT

In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that the enforcement of neutral and generally applicable laws against conduct that is religiously motivated ordinarily does not trigger strict scrutiny under the Free Exercise Clause, even if those laws impose a substantial burden on religious exercise. *Id.* at 877-879. That decision prompted Congress to enact the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, which the government has found establishes an administrable regime at the federal level that protects both religious liberty and governmental flexibility. *Smith* continues to apply to state

and local practices, though, and its validity has been questioned by some Justices of this Court. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 571-577 (1993) (*Lukumi*) (Souter, J., concurring in part and concurring in the judgment); cf. *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (statement of Alito, J., respecting the denial of certiorari) (noting that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause").

Although the petition for a writ of certiorari raises the question whether *Smith* should be overruled, this Court need not decide that question in this case. Regardless of whether *Smith* was correctly decided, Philadelphia's actions here violate the Constitution. Even under *Smith*, laws that burden religious exercise are subject to strict scrutiny if they lack neutrality or general applicability. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Lukumi*, 508 U.S. at 531-534. Under that principle, any law that restricts religious conduct but authorizes exemptions for comparable secular conduct is necessarily subject to strict scrutiny and is ordinarily unconstitutional. Separately, a law also violates the Free Exercise Clause if its adoption or enforcement reflects hostility to religion. In this case, Philadelphia's actions are unconstitutional under either approach. The City has authorized individualized exceptions and effectively exempted comparable secular conduct, which establishes that the policy is not neutral and generally applicable and is sufficient to render the City's denial of a religious exemption unconstitutional. In addition, the surrounding context makes clear that the

adoption and enforcement of the City's policy reflect impermissible hostility to religion.

A. Laws That Lack Neutrality Or General Applicability Are Subject To Strict Scrutiny

However far the protections of the Free Exercise Clause reach, it is settled law that, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. If a "law burdening religious practice" is "not neutral or not of general application," it "must undergo the most rigorous of scrutiny"—a standard that a law lacking in neutrality or general applicability will almost always fail. *Id.* at 546.

Those principles apply in a straightforward way to a law that "discriminate[s] on its face" against religion, but the Free Exercise Clause "extends beyond" such "facial discrimination," also "'forbid[ding] subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'" *Lukumi*, 508 U.S. at 533-534 (citations omitted). For example, in *Lukumi*, the Court held invalid a local government's adoption of ordinances that effectively prohibited animal sacrifices at a planned Santeria church. *Id.* at 526-528. Although the Court found no "conclusive" evidence of discrimination against religion on the face of the ordinances, it "reject[ed] the contention" that its "inquiry must end with the text of the laws at issue." *Id.* at 534. The Court instead examined the secular exemptions the local government had allowed, the circumstances in which the government had acted, and the purposes it had sought to advance. See *id.* at 534-540, 542-546. That close re-

view led the Court to hold that the ordinances were neither neutral nor generally applicable and thus were subject to (and could not survive) strict scrutiny. *Id.* at 546.

Similarly, in *Masterpiece Cakeshop*, the Court addressed the Colorado Civil Rights Commission's application of the Colorado Anti-Discrimination Act to punish a baker who had declined to bake a wedding cake for a same-sex couple's wedding reception. See 138 S. Ct. at 1723. Examining remarks by Commission officials during the Commission's investigation, as well as inconsistencies in the Commission's enforcement of the statute, this Court concluded that the Commission had failed "to proceed in a manner neutral toward and tolerant of [the baker's] religious beliefs." *Id.* at 1731. The Court accordingly concluded that "the Commission's order must be invalidated," even though the Act itself did not discriminate against religion on its face. *Id.* at 1732.

As those cases illustrate, the requirements of neutrality and general applicability are "interrelated." *Lukumi*, 508 U.S. at 531. Indeed, the terms "substantially overlap." *Id.* at 557 (Scalia, J., concurring in part and concurring in the judgment). Regardless of doctrinal labels, the requirements taken together establish at least two critical propositions. First, if the law in question prohibits religious conduct but authorizes exemptions for comparable secular conduct, that unequal treatment by itself triggers—and almost always fails—strict scrutiny. Second, whether or not the law allows for such exemptions, courts must carefully examine the context of the law's adoption and enforcement to determine whether the government has demonstrated impermissible hostility to religious beliefs.

1. A law that regulates religious conduct but authorizes individualized exemptions or exempts comparable secular conduct lacks neutrality and general applicability

a. In order to satisfy the requirements of neutrality and general applicability, the government must, at the very least, pursue its interests against religious and secular conduct alike. That requirement follows from the bedrock principle that the government may not discriminate against religion in general (or a specific religion in particular). When the government pursues its interests "against conduct with a religious motivation" but not against comparable conduct with a secular motivation, the government "of necessity devalues religious reasons for [the conduct] by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537-538, 543. That value judgment is a form of "discriminatory treatment" that necessarily triggers strict scrutiny under the Free Exercise Clause. *Id.* at 538.

Applying strict scrutiny when the government fails to accommodate religious interests at least as much as it accommodates comparable secular interests (or favored religious interests) also promotes religious liberty. "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). By contrast, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon

them if larger numbers were affected." *Id.* at 112-113; see *Larson* v. *Valente*, 456 U.S. 228, 245-246 (1982) (applying that principle to the Free Exercise Clause). Accordingly, burdens on religious exercise are likely to be more severe and less justified when secular society is able to exempt other, favored interests; conversely, the burdens are likely to be less severe and more justified when secular society must also impose those burdens "upon itself." *Lukumi*, 508 U.S. at 545 (citation omitted).

b. Under those principles, a government's adoption of a policy that reserves discretion to grant individualized exemptions is enough, by itself, to trigger strict scrutiny for the denial of a religious exemption. Indeed, a law subject to "ad hoc" exceptions is "the antithesis of a neutral and generally applicable policy." *Ward* v. *Polite*, 667 F.3d 727, 739-740 (6th Cir. 2012) (Sutton, J.).

This Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963)—as interpreted in *Smith*—illustrates that principle. In *Sherbert*, a state law denied unemployment benefits to anyone who had declined to accept available employment, unless the person had "good cause" for refusing the work. *Id.* at 401. The good-cause standard "created a mechanism for individualized exemptions" from the requirement to accept available work. *Smith*, 494 U.S. at 884 (citation omitted). Because the State retained the power to grant individualized exemptions, its refusal to grant one for religious reasons was subject to strict scrutiny. *Sherbert*, 374 U.S. at 401 n.4; see *Smith*, 494 U.S. at 884.

This Court has reaffirmed that principle in numerous cases since *Sherbert*. For example, in *Bowen* v. *Roy*, 476 U.S. 693 (1986), a plurality of the Court explained

that, when a State creates "a mechanism for individualized exemptions," "its refusal to extend an exemption to an instance of religious hardship" must undergo strict scrutiny. *Id.* at 708. In *Smith*, the Court explained that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884 (citation omitted). And in *Lukumi*, the Court again held that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" 508 U.S. at 537 (citation omitted).

This Court's cases interpreting the Free Speech Clause support that reading of the Free Exercise Clause. Under those cases, the government's retention of discretion to grant ad hoc exemptions to an otherwise content-neutral regulation of speech suffices to trigger strict scrutiny. See, *e.g.*, *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-133 (1992); *Saia* v. *New York*, 334 U.S. 558, 560-561 (1948). The government's retention of discretion to grant ad hoc exemptions likewise triggers strict scrutiny for application of a regulation that burdens religious exercise.

c. Even if a law burdening religious exercise lacks a system for individualized exceptions, it still triggers strict scrutiny if the government excludes secular conduct from its scope in a way that produces "substantial" "underinclusion" with respect to the government's asserted ends. *Lukumi*, 508 U.S. at 543. Then-Judge Alito's opinion for the Third Circuit in *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, cert. denied, 528 U.S. 817 (1999), illustrates that principle. In that

case, a police department that ordinarily forbade officers from wearing beards created a categorical exemption for medical reasons, but refused to grant exemptions for religious reasons. *Id.* at 360. The court concluded that the police department's policy lacked neutrality and general applicability because the policy was substantially underinclusive with respect to the asserted interest in promoting uniform appearance among police officers. *Id.* at 366. The exception "indicate[d] that the Department ha[d] made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Ibid.* That choice "to provide medical exemptions while refusing religious exemptions" was by itself "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id.* at 365; see *Stormans, Inc.* v. *Wiesman*, 136 S. Ct. 2433, 2438 (2016) (Alito, J., dissenting from the denial of certiorari) (reiterating that "[a]llowing secular but not religious" exemptions that undermine the asserted governmental interest is "flatly inconsistent with [*Lukumi*]").

Of course, for this concern to arise, the secular conduct exempted must be comparable to the religious conduct with respect to, or otherwise materially undermine, the asserted governmental interest. See *Lukumi*, 508 U.S. at 542; *Fraternal Order of Police*, 170 F.3d at 366. The government thus does not trigger strict scrutiny, for example, merely by including an exception to murder laws for homicide motivated by self-defense but not religious belief. At a minimum, though, strict scrutiny does apply where a law, by its terms or through its manner of enforcement, "fail[s] to prohibit nonreligious

conduct that endangers [the asserted] interests in a similar or greater degree than [religious conduct]." *Lukumi*, 508 U.S. at 543.

d. In order to satisfy strict scrutiny, a law must be narrowly tailored to serve a compelling interest. *Lukumi*, 508 U.S. at 546. A law that pursues asserted interests "against conduct with a religious motivation," but not against comparable conduct with a secular motivation, "will survive strict scrutiny only in rare cases." *Ibid.* The government's failure to prohibit all conduct that significantly undermines its asserted interest "suggests that [the government itself] has determined that [the interest] is not a transcendent objective." *Carey* v. *Brown*, 447 U.S. 455, 465 (1980); see *Lukumi*, 508 U.S. at 546-547. In addition, the underinclusiveness of the law raises "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring [religious practices]." *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011). Finally, the restriction of religious conduct but not comparable secular conduct indicates that the law lacks narrow tailoring, and "[t]he absence of narrow tailoring suffices to establish the invalidity of [a law]" under strict scrutiny. *Lukumi*, 508 U.S. at 546.

2. A law also lacks neutrality and general applicability if the context of its adoption or enforcement indicates hostility to religion

a. Separately, this Court's cases establish that strict scrutiny also is appropriate if governmental action is tainted by "hostility" to religion. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. Courts must survey the record "meticulously" to ensure that the government does not act on the basis of such hostility. *Lukumi*, 508 U.S. at 534 (citation omitted).

In conducting that meticulous review, a court may properly consider whether "the historical background of the decision under challenge" reflects hostility to religion. *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citation omitted). For example, if a decision follows "a series of official actions taken for invidious purposes," the "sequence of events leading up to the challenged decision" may suggest that the decision is discriminatory. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). More indirectly, adoption of a law in reaction to particular religious conduct may suggest that the government is impermissibly targeting religious exercise, rather than simply targeting a given type of conduct without regard to its religious motivation. *Ibid.* That is especially so if the government previously had "always" acted in a particular way, but "suddenly" changed course "when [it] learned" of the conduct at issue. *Ibid.*

Strict scrutiny likewise is appropriate if the circumstances surrounding enforcement of the law show that the government has not "applied [it] in a manner that is neutral toward religion." *Masterpiece Cakeshop*, 138 S. Ct. at 1732. A variety of circumstances may demonstrate such a lack of neutrality. For example, a court may properly consider comments made by government officials when formally enforcing the law. *Id.* at 1729. A court also may properly consider how the government has enforced the law in practice; for example, the government triggers strict scrutiny if it treats religious objections and secular objections in a manner that "could reasonably be interpreted as being inconsistent." *Id.* at 1730. Finally, if the government enforces its law in a manner that "visits 'gratuitous re-

strictions' on religious conduct," the government's decision to prohibit "more religious conduct than is necessary to achieve [the] stated ends" may provide evidence that the government "seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Lukumi*, 508 U.S. at 538 (citation omitted).

b. Governmental action tainted by hostility to religion fails strict scrutiny almost by definition. This Court has never recognized even a legitimate governmental interest—much less a compelling one—that justifies hostility toward religion. Quite the contrary, the Court has explained that hostility to religion is "odious to our Constitution" and "cannot stand." *Trinity Lutheran Church* v. *Comer*, 137 S. Ct. 2012, 2025 (2017).

B. Philadelphia's Policy Is Not Neutral And Generally Applicable, But Instead Unconstitutionally Discriminates Against Religion

Under the foregoing principles, Philadelphia's actions in this case burdened Catholic Social Services' exercise of religion in a manner that the Free Exercise Clause prohibits. Philadelphia has defended its actions by arguing that it is simply enforcing neutral and generally applicable antidiscrimination policies, and that in any event it has a compelling interest in excluding Catholic Social Services from its foster-care program for as long as Catholic Social Services adheres to its religious objection to endorsing same-sex marriages. See City Resps. Br. in Opp. 23-25, 27-28. But those arguments are mistaken. The City has both retained the formal power to create individualized exemptions and granted de facto exemptions—each of which triggers strict scrutiny that the City cannot satisfy. Separately, the application of the City's policies in this case was tinged with

hostility toward religious exercise, not the "neutrality that the Free Exercise Clause requires." *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

1. The City's refusal to extend its system of exemptions to Catholic Social Services discriminates against religion and violates the Free Exercise Clause

This Court can and should resolve this case on the straightforward ground that the policies the City has invoked for excluding Catholic Social Services are subject to numerous exemptions—and yet the City has refused to grant such an exemption to accommodate Catholic Social Services' religious views.

The City has relied principally on the Fair Practices Ordinance, a local ordinance that prohibits discrimination in places of public accommodation on the basis of traits such as sexual orientation or race, and on a contractual provision requiring compliance with that ordinance. The City also has invoked Provision 3.21 of the Professional Services Contract, which the City has interpreted in this case to require foster agencies to serve all qualified foster parents who seek their services. Finally, the City has insisted on incorporating new language into its contracts expressly prohibiting discrimination on the basis of sexual orientation. The record shows, however, that the City has both created a mechanism for individualized exemptions to those policies and also granted de facto exemptions for secular conduct. Each undercuts its asserted interests no less than Catholic Social Services' religious conduct. Either one of those by itself would suffice to trigger strict scrutiny, which the City cannot satisfy here.

a. The City has expressly codified a system for making individualized exemptions, but has refused to extend such an exemption to Catholic Social Services.

Provision 3.21 states that the Commissioner may grant "an exception" to its requirements "in his/her sole discretion." Pet. App. 167a. And while the City has modified its contracts to bolster its exclusion of Catholic Social Services, it has only reinforced its ability to make individualized exceptions, formally vesting that authority in a new "Waiver/Exemption Committee" in the City's Law Department. See City Resps. Br. in Opp. 15 & n.4; Pet. App. 25a. The City, however, has stated flatly that "the Commissioner has no intention of granting an exception" to enable Catholic Social Services to avoid violating its religious beliefs regarding endorsement of same-sex marriages. Pet. App. 168a.

Having "created a mechanism for individualized exemptions," the City "may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884 (citations and internal quotation marks omitted). And the City cannot escape strict scrutiny by contending that the record contains no evidence it has ever, *in fact*, granted individualized exemptions. See City Resps. Br. in Opp. 23-24. That contention ignores the de facto exemptions the City has allowed, see pp. 23-24, *infra*; and even setting those to the side, it makes no legal difference. As this Court has explained, a law that burdens religious exercise is subject to strict scrutiny if the government "has in place" a system of individualized exemptions, *Smith*, 494 U.S. at 884, or makes such exemptions "available," *Lukumi*, 508 U.S. at 537—not just when they have been granted. That is because such a law's application in any given case depends on a government official's discretionary decision about whether to grant an exemption, which is the antithesis of general applicability and neutrality.

b. The City's creation of formal mechanisms by which it can grant individualized exemptions is enough, by itself, to trigger strict scrutiny. In addition, though, the City has created a series of de facto exemptions for comparable secular conduct that independently warrant strict scrutiny here.

On its face, the Fair Practices Ordinance prohibits, as a form of "discrimination," any "distinction, * * * differentiation or preference in the treatment of a person on the basis of" race, ethnicity, sexual orientation, disability, marital status, familial status, or any other protected characteristic. Phila. Code § 9-1102(1)(e) (2020); see *id.* § 9-1106(1) (2020) (listing protected characteristics). Despite that seemingly categorical prohibition, however, city officials tolerate, and indeed themselves rely on, various distinctions, differentiations, and preferences on the basis of traits covered by the Fair Practices Ordinance. For example, the City's official guide for prospective foster parents explains that "[e]ach agency has slightly different requirements [and] specialties," Pet. App. 197a, and city officials acknowledged in the district court that, in other contexts, the City tolerates "specialized providers * * * that *only* work with" children identified by protected traits, *id.* at 296a (emphasis added). Other agencies focus their outreach only on foster families of particular ethnicities, *id.* at 263a-264a, and city officials themselves consider race and disability in deciding whether to place foster children with particular families, *id.* at 295a-296a. Moreover, the City allows foster agencies to account for a potential foster parent's mental or physical disability and familial status (including marital status) in deciding whether to approve that parent's application. See *id.* at 13a.

These practices show that the City has demanded that Catholic Social Services adhere to what the City understands to be the precise letter of its Fair Practices Ordinance, while at the same time allowing (or even engaging in) conduct that violates that same reading. Philadelphia has failed to articulate any "principled rationale for the difference in treatment." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. And while the departures from the Fair Practices Ordinance's facial requirements do not appear to be formally codified in any official City document, that does not insulate them from searching review. The Free Exercise Clause prohibits "covert" discrimination against religion no less than overt discrimination. *Lukumi*, 508 U.S. at 534 (citation omitted).

Moreover, much of the exempted conduct "fall[s] within the city's [asserted] interest." *Lukumi*, 508 U.S. at 544. The City tries to defend its unequal treatment by recharacterizing its interest as ensuring that agencies do not "*categorically* exclude prospective foster parents based on protected traits." City Resps. Br. in Opp. 23-24 (emphasis added). But the Fair Practices Ordinance prohibits *any* "distinction" or "differentiation" based on protected criteria, Phila. Code § 9-1102(1)(e) (2020), not just "categorical" exclusion. And regardless, the record shows that the City has allowed some other (secular) agencies to work "only" with certain children identified by protected characteristics. Pet. App. 296a. The City has thus seemingly determined that its interest in avoiding categorical treatment of individuals with protected traits should be pursued "against conduct with a religious motivation," but not against comparable conduct with a secular motivation. *Lukumi*, 508 U.S. at 543.

Philadelphia also claims that its policies seek to avoid "the exclusion of qualified parents on grounds unrelated to the best interests of children." City Resps. Br. in Opp. 24. Again, though, the ordinance by its terms prohibits *all* distinctions based on protected criteria, and the City's invocation of an unwritten "best interests of children" exception is just another way of saying that the City has not applied that policy in an evenhanded manner. Instead, it has allowed City officials to make ad hoc value judgments that accommodate secular agencies' views about how best to serve children (such as by giving preference to parents of a particular race) but that discount religious agencies' views (including Catholic Social Services' view about opposite-sex households). And regardless, denying an exception here produces the very outcome that Philadelphia ostensibly seeks to avoid—it excludes foster families affiliated with Catholic Social Services not because of the best interests of the child, but because of the City's disagreement with this religious organization's view of same-sex marriage.

Philadelphia further claims that its policies seek to avoid a "signal to [the LGBTQ] community that [its] rights are not protected." City Resps. Br. in Opp. 6 (citation omitted; brackets in original). But Philadelphia's approach in the context of disability and race poses a comparable risk: telling parents with disabilities that they cannot serve as foster parents, or declining to place a child with particular foster parents because of their race, risks sending the same message to those parents. That does not necessarily mean that Philadelphia is acting unreasonably in making such exceptions to its antidiscrimination polices; it might well determine, for example, that the benefits of considering disability in

the foster-care system outweigh the cost of making some individuals feel excluded or marginalized. But by tolerating secular reasons for imposing such costs, yet refusing to accept religious reasons for imposing the same costs, the City is "devalu[ing] religious reasons" and "judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537-538.

c. Philadelphia's actions cannot survive strict scrutiny. As just discussed, the City has authorized city officials to grant formal exemptions from its policy any time they wish, and it has also granted numerous informal exemptions through its pattern of inconsistent enforcement. Thus, notwithstanding a governmental interest in preventing discrimination on the basis of protected traits, the City has failed to "demonstrate its commitment to advancing this interest * * * evenhandedly." *Florida Star* v. *B. J. F.*, 491 U.S. 524, 540 (1989). As a result, that interest cannot be regarded as compelling under the circumstances of this case. In addition, the City's pattern of enforcement renders its law substantially underinclusive in practice, demonstrating an "absence of narrow tailoring" and "establish[ing] the invalidity" of the City's policy. *Lukumi*, 508 U.S. at 546.

2. The context of the City's actions reveals impermissible hostility toward religion

The City's actions are also unconstitutional because the record shows the City failed to "proceed in a manner neutral toward and tolerant of [Catholic Social Services'] religious beliefs," as it was "obliged [to do] under the Free Exercise Clause." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. The evidence demonstrates the City's impermissible hostility in numerous ways, and so the decision resulting from that hostility—exclusion of Catholic Social Services from the foster-care program—

"cannot stand." *Trinity Lutheran Church*, 137 S. Ct. at 2025.

a. At the outset, the record shows that the City's decisions about how to interpret and enforce its policies came as a direct response to learning of Catholic Social Services' religious objections. The Deputy Commissioner of the Department of Human Services, for example, testified that before the events giving rise to this case, she had never once in her nearly two decades at the Department communicated to foster agencies that they were required to perform home studies for everyone who requests them or that they could not make distinctions or preferences for or against different groups. Pet. App. 247a-248a. Similarly, Commissioner Figueroa testified that, as Commissioner of the Department, she could not recall ever "do[ing] anything to make sure that people at [the Department] follow the Fair Practices Ordinance when doing foster care work." *Id.* at 293a. Upon learning of Catholic Social Services' religious views about endorsing same-sex marriages, however, the City began articulating a requirement that foster agencies must provide home studies for anyone who asks, and may not distinguish favorably or unfavorably among different groups of potential foster parents. Thus, just as the ordinances in *Lukumi* were adopted "in direct response to the opening of the Church," 508 U.S. at 540, the City's policy here was adopted in direct response to learning of Catholic Social Services' religious views.

The City's stated rationale for that policy, moreover, evolved over time, demonstrating that it was adopting a new position in response to Catholic Social Services' religious exercise rather than simply enforcing an exist-

ing, neutral policy. Initially, the City justified its actions by invoking a provision of the contract with Catholic Social Services stating that "[t]his Contract is entered into under the terms of * * * the Fair Practices Ordinance." Pet. App. 59a (citation omitted); see *id.* at 149a-150a. But after Catholic Social Services noted this approach was inconsistent with the City's own past actions, see *id.* at 153a-164a, the City articulated a number of new rationales for its decision, see *id.* at 165a-172a. In particular, the City relied on Provision 3.21 of its contract with Catholic Social Services, which states that an agency "shall not reject a child or family for Services * * * for any * * * reason if the profiles of such child or family are consistent with Provider's Scope of Services or [the Department of Human Services'] applicable standards," subject to exceptions granted in the Commissioner's "sole discretion." *Id.* at 58a-59a (citation omitted); see *id.* at 167a. The City also claimed that it had "the unilateral right under the contract to terminate or suspend the contract, regardless of any breach or lack thereof by [Catholic Social Services], 'for any reason, including, without limitation, the convenience of the City.'" *Id.* at 166a-167a (citation omitted). And eventually, the City decided to insert new language in its future contracts with foster agencies expressly forbidding discrimination on the basis of sexual orientation, again subject to individualized exceptions. *Id.* at 25a; City Resps. Br. in Opp. 15.

This progression from one rationale to the next suggests that the City was not seeking to neutrally enforce existing, generally applicable law. Cf. *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 737 (2010) (Alito, J., dissenting) (noting that "[s]ubstantial changes over time in [the] proferred reason for [the] decision" themselves

"support a finding of pretext") (citation omitted; first set of brackets in original). That inference is particularly strong here because the City eventually decided to add language to its future contracts, effectively conceding that its existing policies did *not* require Catholic Social Services to act in contravention of its religious beliefs. See pp. 6-7, *supra*. And of course Catholic Social Services' long practice and participation as a foster agency provide a further indication that the City's rules were not understood to require Catholic Social Services to certify foster parents without regard to its religious beliefs.

b. Making matters worse, the City impermissibly targeted religious organizations for enforcement of its newly articulated policies. Commissioner Figueroa testified that, in determining whether foster-care agencies were complying with the antidiscrimination requirements of their contracts, the City focused only on religious agencies, making just a single inquiry to a secular foster-care agency (because the Commissioner had a "good relationship" with its Chief Executive Officer). Pet. App. 304a. City officials made no effort to determine whether other secular agencies perform home studies for everyone who requests them, or show preference for or against individuals who fall within particular groups. *Ibid.*

The City's investigation thus "singled out" religious organizations for "discriminatory treatment." *Lukumi*, 508 U.S. at 538. It did so, moreover, even though there was ample reason to believe that secular organizations were considering protected criteria listed in the Fair Practices Ordinance as well. See p. 23, *supra*. That pattern of discriminatory enforcement violates "the First Amendment's guarantee that our laws be applied in a

manner that is neutral toward religion." *Masterpiece Cakeshop*, 138 S. Ct. at 1732. At a minimum, it shows that Commissioner Figueroa relied on religious stereotypes to guide enforcement, assuming that religious organizations are less likely to comply with the City's requirements than are secular organizations. Cf. *Bush* v. *Vera*, 517 U.S. 952, 968 (1996) ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."); *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U.S. 127, 143 (1994) ("[A potential juror's] gender simply may not serve as a proxy for bias.").

The restrictions Philadelphia imposed on religious organizations were also "gratuitous" in light of the City's stated objectives. *Lukumi*, 508 U.S. at 538 (citation omitted). When Catholic Social Services indicated that it intended to adhere to its religious beliefs, city officials put in place a "referral freeze." Pet. App. 269a-270a. That meant that Philadelphia would not only stop allowing Catholic Social Services to arrange for *new* foster parents (the context in which Philadelphia's concern about discrimination arose), but also stop referring children for placement with long-established foster families merely because of the families' affiliation with Catholic Social Services. For example, one of the original individual plaintiffs in this case, Cecilia Paul, had provided foster care to Philadelphia children for 46 years, but the City stopped making ordinary foster-care referrals to her based solely on her affiliation with Catholic Social Services. See *id.* at 226a-228a.

Philadelphia thus "proscribe[d] more religious conduct than [wa]s necessary to achieve [its] stated ends." *Lukumi*, 508 U.S. at 538. Indeed, by effectively exclud-

ing foster parents affiliated with Catholic Social Services, the City's measures *undermined* Philadelphia's stated goal of maximizing the number of available foster parents. And while Philadelphia has expressed concern that same-sex couples who are interested in becoming foster parents might feel marginalized if Catholic Social Services refused to perform a home study for them, the City could have addressed its asserted concern in numerous other ways, including by informing potential foster families of the City's commitment to diversity in its foster-care program and the availability of other agencies better suited to working with particular applicants. See Pet. App. 220a ("Referrals are made all the time."); *id.* at 287a (testimony from Commissioner Figueroa that "[t]o [her] knowledge, [the Department of Human Services] has received no complaints against Catholic [Social Services] for operating according to its religious beliefs" and that "[t]o [her] knowledge, [the Department] ha[s] received no complaints against Catholic [Social Services] for failing to perform a home study for someone who wanted it").

c. Those discriminatory actions amply demonstrate hostility toward Catholic Social Services' religious beliefs, but the record in this case even contains express statements that confirm that hostility.

The first such statement came from the city council. After learning from a local newspaper that two religious foster agencies—Catholic Social Services and Bethany Christian Services—might be unwilling to endorse same-sex couples as foster parents, the council adopted a resolution demanding an investigation into whether agencies "discriminate against prospective LGBTQ foster parents." Pet. App. 146a. The resolution asserted

that the two religious agencies "have policies that prohibit the placement of children with LGBTQ people based on religious principles, although the City of Philadelphia has laws in place to protect its people from *discrimination that occurs under the guise of religious freedom*." *Id.* 147a (emphasis added).

That resolution revealed hostility toward religion in two ways. First, it did not accurately portray the agencies' positions: Catholic Social Services indicated that it *would* work with a gay or lesbian individual who desired to be a foster parent, so long as doing so did not require it to endorse a same-sex relationship, see J.A. 188, and Bethany Christian Services in fact did have same-sex couples that it had certified to provide foster care, see *id.* at 273 (testimony from Commissioner Figueroa that representatives of Bethany Christian Services "were unclear about their ability to serve same-sex couples," but "indicated that they actually had same-sex homes that were certified"). And second, by ignoring the organizations' actual views and suggesting that they were engaged in invidious "discrimination that occurs under the guise of religious freedom," Pet. App. 147a, the resolution explicitly and formally "disparage[d] * * * religion" as an "insincere" cover for discriminating against gay people. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. Those expressions of religious hostility are relevant even though the city council plays no direct "role in [Department of Human Services] contracting." City Resps. Br. in Opp. 7 n.2. A formal resolution of the city council calling for steps against organizations that act "under the guise of religious freedom," Pet. App. 147a, adopted contemporaneously with a city official's decision to terminate Catholic Social Services' participation in the foster-care program, is strong

evidence about what motivated that termination—especially given Commissioner Figueroa's statement during her meeting with Catholic Social Services that the issue "had the attention of top levels of government" in the city, *id.* at 268a.

Commissioner Figueroa's own statements during that formal meeting also revealed an impermissible lack of neutrality in their own right. She acknowledged telling the Catholic Social Services representatives in attendance that they should be following "the teachings of Pope Francis" as she understood them, Pet. App. 306a, and one of the other attendees testified that her comments went further—telling Catholic Social Services that "[they] should be listening more to Pope Francis than the Archbishop and the Archdiocese's position on [same-sex couples]." *Id.* at 269a. That attendee testified that Figueroa also told the Catholic Social Services representatives that "times have changed, attitudes have changed, science has changed"—implying that it was "time for the Catholic Church * * * to change," too. *Id.* at 268a.

That overt hostility toward religious belief and intermeddling with religious doctrine was unconstitutional under *Smith*, which makes clear that "the First Amendment obviously excludes all 'governmental regulation of religious *beliefs*'" and that "[t]he government may not * * * lend its power to one or the other side in controversies over religious authority or dogma." *Smith*, 494 U.S. at 877 (citation omitted). The court of appeals, though acknowledging that "some might think" the Commissioner's remarks were "improper," concluded that they were appropriate because Commissioner Figueroa was "Jesuit-educated," and was in its view simply making "an effort to reach common ground with

[Catholic Social Services' leaders] by appealing to an authority within their shared religious tradition." Pet. App. 15a, 33a. But as a city official exercising governmental power to decide whether Catholic Social Services could continue providing foster care in Philadelphia, Commissioner Figueroa had no business "promot[ing] one religion or religious theory against another," *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968), by attempting to persuade Catholic Social Services that its views on same-sex marriage were inconsistent with those attributed to Pope Francis and should therefore be changed. At a minimum, the comments demonstrate impermissible hostility to religion when considered in the context of the other evidence of discrimination by the City. Cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1729 ("Standing alone, these statements are susceptible of different interpretations. * * * In view of the comments that followed, [the view that the comments expressed hostility to religion] seems the more likely.").

d. In short, the City's actions and words reflected "animosity to religion or distrust of its practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citation omitted). And just as that impermissible animosity required that the Colorado Civil Rights Commission's judgment in *Masterpiece Cakeshop* be "invalidated," *id.* at 1732, so too here the City's hostility toward Catholic Social Services' religious views requires barring the City from excluding Catholic Social Services from its foster-care program based on the organization's refusal to endorse same-sex relationships.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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