UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

SHARONELL FULTON, et al.,   CASE NO. 18-2574

V.

CITY OF PHILADELPHIA,

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TRANSCRIPT OF APPEAL PANEL HEARING

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 1                       APPEARANCES

 2   BECKET FUND FOR RELIGIOUS LIBERTY

 3   By: Lori H. Windham, Esq.

 4   1200 New Hampshire Avenue N.W., Suite 700

 5   Washington, D.C. 20036

 6   Appearing for the Appellants

 7

 8   CITY OF PHILADELPHIA

 9   LAW DEPARTMENT

10   By: Jane Istvan, Esq.

11   1515 Arch Street, 17th Floor

12   Philadelphia, PA 19102

13   Appearing for the Appellee

14

15   AMERICAN CIVIL LIBERTIES UNION

16   By: Leslie Cooper, Esq.

17   125 Broad Street, 18th Floor

18   New York, NY 10004

19   Appearing for the Interveners

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21   APPEALS PANEL

22   JUDGE THOMAS L. AMBRO

23   JUDGE ANTHONY J. SCIRICA

24   JUDGE MARJORIE O. RENDELL

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APPEAL PANEL HEARING

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1   JUDGE AMBRO: It's number 18-2574, Fulton v.

2   City of Philadelphia. Ms. Windham, Ms. Istvan, and

3   Ms. Cooper.

4   MS. WINDHAM: Good afternoon and may it please

5   the Court. My name is Lori Windham. I represent the

6   appellants, and I would like to reserve 10 minutes of

7   my time for rebuttal. Thank you, Judge Ambro.

8   For a century, Catholic Social Services has

9   served the children of Philadelphia, finding them

10   loving families when they must be separated from their

11   parents. Today, the City of Philadelphia claims the

12   right to extinguish that ministry. Our laws and our

13   constitution were designed to address the needs of a

14   diverse pluralistic society whose members and their

15   elected officials are not always going to agree with

16   each other. Here, the constitution and state law --

17   JUDGE AMBRO: The existing contract between --

18   this is not going to be like an en banc where you get

19   five minutes uninterrupted. So --

20   MS. WINDHAM: Certainly.

21   JUDGE AMBRO: Besides that, I'm sure you'd

22   like to have questions anyway. The existing contract

23   is expired.

24   MS. WINDHAM: That's correct, Judge Ambro.

25   JUDGE AMBRO: So do we need to get into the

1 | details of the old contractual arrangement or not?

2 | MS. WINDHAM: Judge, I think that what is

3 | relevant here is what relationship that Catholic is

4 | asking the Court to continue. This is a contract that

5 | has been in place for 50 years that has been

6 | automatically renewed for as long as anyone in this

7 | courtroom can probably remember. And so what we're

8 | asking the Court to do is to enter relief that would

9 | require the City to continue the existing contractual

10 | relationship on the same terms that it existed prior to

11 | March 15th of this year.

12 | JUDGE SCIRICA: Did the FPO apply at that

13 | time.

14 | MS. WINDHAM: No, Judge Scirica, it did not.

15 | The City has identified three different provisions or

16 | laws that it claims the Catholic has violated. One of

17 | those was Section 15.1 of the contract and the Fair

18 | Practices Ordinance, which is incorporated into that.

19 | Under the Fair Practices Ordinance, the only provision

20 | of that which anyone has claimed applies here is the

21 | public accommodations provision.

22 | But foster care home studies are not a public

23 | accommodation. Under state law, foster care providers

24 | are required to undergo a series of subjective

25 | determinations to decide whether a family is

1   appropriate to care for foster children. This is not

2   the kind of determinations that you would go through in

3   order to buy a bus pass, or a hotel room, or a

4   restaurant meal.

5   JUDGE SCIRICA: But state law requires

6   certification to qualify.

7   MS. WINDHAM: That's exactly right, Your

8   Honor. State law requires the agency to issue a

9   certification that approves or disapproves of a family

10   to become a foster family, and that is a legal

11   requirement for them to be able to have children placed

12   in their home.

13   UNIDENTIFIED JUDGE: So can't we just look at

14   this going forward as to whether the City can impose a

15   new explicit nondiscrimination requirement in the

16   contract that you would like to enter into.

17   MS. WINDHAM: I think that, that is one

18   question to look at, Your Honor, but I think that the

19   City's desire to create a new nondiscrimination

20   requirement here is evidence of religious targeting.

21   And you can see this if you look at the City's May 7th

22   letter.

23   JUDGE AMBRO: You've got two competing or

24   conflicting principles. One is nondiscrimination,

25   which you see in a host of contracts, and ordinances,

1   and laws versus somehow the way I express my religion

2   is being hindered and how do we deal with it. It seems

3   like over the years the City and Catholic Social

4   Services has worked it out. I mean, when I look at

5   this case I see doe foster child number one, which may

6   have been the catalyst for the suit being -- that was

7   brought here. They ultimately worked that out with

8   respect to that particular individual.

9   You had Catholic Social Services in the past

10   asking for a pastoral letter, and there was some

11   pushback. And they said, okay, we'll abandon that. So

12   it seems like people are trying to get together, and I

13   don't know why we've hit this constitutional wall when

14   it appears that in the past no one ever had to get

15   there.

16   MS. WINDHAM: Judge Ambro, when we first

17   started this case, we were hopeful that there would be

18   some path forward for the parties to be able to work

19   things out. Catholic Social Services doesn't want to

20   be here. They don't want to be in federal court

21   fighting with the City over whether they can continue

22   to serve children. They want to be able to just

23   continue that service and continue working with the

24   City going forward.

25   Unfortunately, the City has dug in its heels,

1   and has announced to Catholic Social Services that they

2   cannot continue to provide foster care to Philadelphia

3   children unless they are willing to make certifications

4   that violate their faith, unless they are willing to

5   comply with what the City now claims it's going to

6   insert.

7   JUDGE AMBRO: Going back to Judge Scirica's

8   question. You've got a proposed contract for

9   certification that's required by the State, and I think

10   the State also requires nondiscrimination. And what

11   you're doing is you're carrying out the evaluation, the

12   report that the contract requires. How is that a

13   violation of Catholic Social Services' religious

14   expression?

15   MS. WINDHAM: In a couple of ways, Your Honor.

16   It is undisputed what the legal requirements are for

17   that certification, what the legal effect of it is.

18   Number one, under 55 Pennsylvania Code

19   3700.64, an agency shall consider existing family

20   relationships, attitudes, and expectation regarding the

21   applicants' own children, ability of the applicant to

22   work in partnership with an agency among other

23   considerations. And the outcome of that decision is a

24   decision to certify and approve or disapprove a family

25   to be foster parents.

1   Catholic was also quite clear, testifying at

2   the hearing, that they understand this certification to

3   be an endorsement of the relationships in the home.

4   And you can see this in the record at page 312,

5   "Providing a written certification endorsing a same-sex

6   marriage would violate the religious exercise of

7   Catholic Social Services." On page 389, it is

8   Catholic's sincere belief that a final home study

9   includes a written endorsement of any relevant

10   relationships of the foster parent.

11   JUDGE AMBRO: So, okay, that's -- that's the

12   argument. But how is this endorsing same-sex marriage?

13   I mean, you're just -- you're doing a report.

14   MS. WINDHAM: They're undertaking a subjective

15   consideration of the relationships within the home.

16   They are then providing that family with a

17   certification saying, yes, we have approved this family

18   to serve as foster parents. That's something that

19   Catholic, because of its religious beliefs about

20   marriage, cannot do.

21   I would also note, Your Honor --

22   JUDGE SCIRICA: My understanding is that a

23   single gay person would be -- would not be turned away;

24   is that correct?

25   MS. WINDHAM: That's correct, Your Honor.

1   They're only required to consider the relationships of

2   the adults in the home, and so if there's not another

3   adult who is living in that home, there would be no

4   reason to have to endorse or certify any other

5   relationships.

6   JUDGE RENDELL: You say this is endorsing, and

7   this you would -- you would be endorsing. But I'm

8   missing the analytic path that -- that gets you to --

9   on the constitutional action here. What -- where do

10 you fit? Are you talking about free exercise? You

11 talking about establishment? What are you talking

12 about, and how do you get there?

13   MS. WINDHAM: That's a great question, Judge

14 Rendell. I think the question of endorsement goes to

15 two claims. It goes to the free exercise claim,

16 explaining exactly what the religious exercise here is

17 that is being restricted. It goes to the Pennsylvania

18 RFPA claim explaining --

19   JUDGE RENDELL: Well, let's -- let's talk

20 about free exercise. Under Smith, if there is a

21 generally applicable neutral law -- and that's what

22 this is -- how can you contend that there's a violation

23 of free exercise?

24   MS. WINDHAM: Your Honor, this is not a

25 neutral and generally applicable law. The City --

1   JUDGE RENDELL: Isn't it being required of

2   every contracting party.

3   MS. WINDHAM: And so your argument, as I

4   understand, is that the -- are you referring to 15.1 of

5   the contract and the Fair Practices Ordinance as a

6   neutral and generally applicable law?

7   JUDGE RENDELL: Yeah. One that says you have

8   to sign a nondiscrimination -- you have to agree to

9   nondiscrimination. Yes.

10   MS. WINDHAM: And so the nondiscrimination

11   provision the City is talking about only applies to

12   public accommodations. Catholic is not a public

13   accommodation.

14   JUDGE RENDELL: How are you not a public

15   accommodation?

16   MS. WINDHAM: Because a home study

17   certification is not a good or service that is

18   generally available to the public. Its purpose is to

19   be selective. Even if Catholic were a public

20   accommodation --

21   JUDGE RENDELL: Well, then if someone is a

22   hotel and the service is to just provide lodging that's

23   very selective, is that not a public accommodation?

24   MS. WINDHAM: We certainly agree a hotel would

25   be a public accommodation, but what State law --

1   JUDGE RENDELL: Right. It's just a single

2 focus. It's providing overnight accommodation. Why is

3 that not the same as -- as your argument that you're

4 limited?

5   MS. WINDHAM: Because what Catholic is being

6 asked to do here is to engage -- and what all foster care

7 agencies are being asked to do here -- is to engage in a

8 selective process and to look at things that are --

9   JUDGE RENDELL: How does that not fit within

10 the definition of public accommodation?

11   MS. WINDHAM: Because they are --

12   JUDGE RENDELL: Does it exempt selective

13 processes?

14   MS. WINDHAM: It refers to things that are

15 generally open and available to the public. Even if

16 this were --

17   JUDGE RENDELL: All facilities of any services

18 provided, all kinds of public service acts. I'm just

19 trying to figure out which -- which component here is

20 lacking.

21   MS. WINDHAM: Judge Rendell, even if this were

22 a public accommodation, the City -- it is not neutral

23 and generally applicable because the City is creating

24 exceptions to it. It's permitting exceptions to it.

25 The City says that it expects foster agencies to follow

1   state law. What does state law tell you to do? It

2   says you shall consider existing family relationships.

3   You shall consider demonstrated stable, mental, and

4   emotional adjustment, including perhaps a psychological

5   evaluation. You must consider --

6   JUDGE RENDELL: Those are exemptions, or those

7   are things that need to be considered?

8   MS. WINDHAM: Those are things that need to be

9   considered, and so you have a situation where the City

10   is suddenly saying now -- there's no evidence that they

11   had previously considered this to be a public

12   accommodation. They're suddenly saying --

13   JUDGE RENDELL: But that doesn't matter.

14   They're all of a sudden requiring it of everyone. It

15   doesn't matter that they didn't require it of anyone,

16   does it?

17   MS. WINDHAM: Yes. Because it determines

18   whether they have a neutral and generally applicable

19   law and whether they're engaging in religious

20   targeting. What the City is doing here is it's saying

21   on one hand, well, we expect you not to consider

22   familial status, marital status, disability, including

23   mental disability. And on the other hand they're

24   saying you must follow a state law which doesn't just

25   allow you but requires you to consider marital status,

1 familial status, and mental disability as a part of

2 making these determinations. And so this law here is

3 not neutral and generally applicable. Even if it were,

4 the City would still have to --

5   JUDGE RENDELL: I don't know how that -- how

6 that detracts from the neutrality and the general

7 applicability, the fact that they are saying certain

8 factors need to be considered.

9   JUDGE AMBRO: Because it applies to religious

10 and secular alike; does it not?

11   MS. WINDHAM: It applies to -- if it applies

12 at all, it applies to religious and secular alike. But

13 what the City is doing is on one hand saying you can't

14 look at these things in public accommodation, and on

15 the other hand saying you have to follow a state law

16 that requires you to look at these things, even if you

17 are a public accommodation. And so this is not

18 neutral, not generally applicable.

19   JUDGE SCIRICA: Before this came up as an

20 issue over all these years, what happened in the past

21 when there was a report done? I take it they never

22 went into a same -- same-sex marriage home or what?

23   MS. WINDHAM: No, Your Honor. The evidence

24 shows that there is no same sex couple who has ever

25 approached Catholic Social Services to request a home

1   study. And so there's no one who has even come

2   knocking on their door seeking this service from them.

3   Therefore, there is no one who has actually been harmed

4   by the City continuing to work with Catholic Social

5   Services to place children in loving homes.

6   Even if this Court were to think that there

7   were a neutral and generally applicable law that

8   applies here, the City is still compelling speech by

9   reaching outside of the program that it is actually

10   funding and attempting to compel Catholic Social

11   Services --

12   JUDGE AMBRO: Let's go back to Judge Scirica's

13   question then. You would still do a report if there

14   were a LGBT person in the home; would you not?

15   MS. WINDHAM: If it were a single LGBT --

16   JUDGE AMBRO: Yes.

17   MS. WINDHAM: -- individual, yes, they would

18   still issue the report because --

19   JUDGE AMBRO: But church has views on that.

20   MS. WINDHAM: But the church is not being

21   asked by the state law here to issue an opinion on a

22   person's sexual orientation or their relationships with

23   people outside of their own home. They're merely being

24   asked to issue a written certification and an

25   endorsement for the relationships of the adults that

1   are in the home, and this was something that was

2   discussed for quite a bit at the hearing. And so this

3   issue only comes up when you have a couple, who is in

4   an unmarried relationship or same sex relationship, who

5   comes in seeking a certification and an endorsement

6   under state law.

7   JUDGE AMBRO: So what happens if you have a

8   person who is gay, who wants to be a foster parent, has

9   done so in the past and has done a good job, and that

10   person is not married but is clearly living with a

11   significant other? What do you do then?

12   MS. WINDHAM: In that case, Catholic would

13   refer that couple to any one of the 29 other agencies

14   who would happily serve them, just as they would with

15   an opposite sex, unmarried couple.

16   JUDGE SCIRICA: What has been the City's

17   response to that?

18   MS. WINDHAM: Your Honor, the City's response

19   is what we have heard and what we will hear today. The

20   City has not taken any action against Catholic or had

21   any complaints that we're aware of against Catholic on

22   this issue until this issue came up in March of this

23   year.

24   JUDGE RENDELL: Did you propose, though, a

25   change in the contract whereby all you would do would

1   be referring those that you felt within your religious

2   beliefs you couldn't address from a relationship

3   standpoint? In other words, you say to them, listen,

4   we'll sign this -- this contract, but it's understood

5   that when someone comes to us, say same-sex marriage,

6   we'll refer that out?

7   MS. WINDHAM: Your Honor, we believe that,

8   that is the way the contract worked today, and so we

9   have no objection to entering into a contract that

10   would allow Catholic to continue to have that religious

11   practice of making referrals.

12   JUDGE SCIRICA: So the City's interest is the

13   stigmatization of LGBT individuals?

14   MS. WINDHAM: Yes, Your Honor. This is --

15   this is the interest --

16   JUDGE SCIRICA: Is there any other response by

17   the City with respect to what you just said?

18   MS. WINDHAM: With regard to why --

19   JUDGE SCIRICA: The reason why they -- does

20   your response answer the City's concern that it's

21   stigmatizing certain individuals by not -- by allowing

22   you to make a referral out.

23   MS. WINDHAM: I believe it does, Your Honor,

24   and the Supreme Court addressed this in Masterpiece,

25   where it recognized that there were certain situations

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 1    where -- for example, if a member of the clergy was

 2    unable to solemnize a same-sex marriage, this would be

 3    an exercise that gay persons could recognize and accept

 4    without serious diminishment of their own dignity and

 5    worth.  And it recognized that you could have a

 6    situation where you would have too many such

 7    exceptions.  You might have a long list of persons.

 8              But here we don't have that.  Here we know

 9    that 29 out of 30 agencies will provide these home

10    study certifications, and so we're talking about one

11    agency that the City is attempting to shut down simply

12    because of its religious practice.

13              JUDGE SCIRICA:  They haven't shut down the

14    congregate care --

15              JUDGE AMBRO:  Or the CUA.

16              JUDGE SCIRICA:  -- or the CUA; is that right?

17              MS. WINDHAM:  That's correct, Your Honor.  I'm

18    not aware of any case, and the City has not cited any

19    that say that it's okay to burden one part of a

20    person's religious exercise and extinguish one part of

21    that exercise as long as you don't do it all at the

22    same time.  The Supreme Court in Holt noted that it was

23    a substantial burden on Mr. Holt's religious exercise

24    when he was prohibited from growing a half-inch beard,

25    even though he could still engage in practicing his
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1 faith in other ways. I think it's particularly

2 troubling here, given the evidence that we have of

3 targeting on behalf of the City.

4   JUDGE RENDELL: Yeah. What about that

5 evidence? Now, the district court made a finding that

6 there was no targeting and no motivation, no anti-

7 religious animus, if you will, and that's a finding of

8 fact. So that's subject to clear error review when it

9 comes to us. How do you satisfy that standard that it

10 was clearly erroneous on the part of the district

11 court?

12   MS. WINDHAM: Your Honor, under Brown v. City

13 of Pittsburgh and the Borough of Tenafly case. This

14 Court considers factual findings by the district court

15 in a free exercise case or first amendment case

16 differently. It conducts an independent review of the

17 factual record, and so --

18   JUDGE RENDELL: So is that a de novo, or abuse

19 of discretion, or how?

20   MS. WINDHAM: What the statement says is an

21 independent review of the -- of the factual record,

22 which I would analogize to de novo review.

23   JUDGE RENDELL: So how should we look at it

24 differently as far as you're concerned?

25   MS. WINDHAM: I believe --

 1   JUDGE RENDELL: What is it? What's the
 2   smoking gun here?
 3   MS. WINDHAM: What's different about this case
 4   is that you have a whole series of actions which all a
 5   targeted Catholic's religious exercise. You have the
 6   Commissioner's statements that it's not 100 years ago,
 7   and Catholic needs to follow the teachings of Pope
 8   Francis. You then have the referral shut down in
 9   minutes later. You have PCHR, which ignored its own
10   due process regulations in instituting an investigation
11   of Catholic at the behest of the Mayor. You have the
12   Mayor's public statements criticizing the archdiocese.
13   You have the City Council issuing --
14   JUDGE RENDELL: So the Mayor's comments were
15   temporally far removed from this action. How do you --
16   how do you align them?
17   MS. WINDHAM: We do know that the PCHR
18   acknowledged this investigation was coming at the
19   request of the Mayor. But we do have something that is
20   much more temporally close, which is the City Council
21   resolution condemning discrimination under the guise of
22   religious freedom was what they phrased it. It's very
23   similar to the sort of statements that the Supreme
24   Court found in Masterpiece, where it demonstrated that
25   Masterpiece did not receive the neutral and respectful

1   consideration to which it was entitled because it

2   treated religious exercise as something insubstantial

3   and even insincere.

4   JUDGE RENDELL: So what did the ordinance

5   provide specifically that you're relying on here?

6   MS. WINDHAM: I'm sorry. Which ordinance are

7   you referring to?

8   JUDGE RENDELL: You said there was a city

9   ordinance that said -- that was hostile.

10   MS. WINDHAM: This was a resolution by the

11 City Council --

12   JUDGE RENDELL: Right.

13   MS. WINDHAM: -- which directed DHS to conduct

14 an investigation and also called upon them to terminate

15 any contracts with such organizations with all

16 deliberate speed. And we see that the City did just

17 that, immediately ending referrals under the contract

18 and now asking that it be permitted to terminate that

19 contract altogether and no longer renew it.

20   We focused a lot on free exercise. But I do

21 have just a moment, and I want to talk about compelled

22 speech. The City is reaching outside the scope of the

23 contract and the scope of the contracted for services

24 and trying to compel Catholic to engage in speech which

25 it understands and which state law says is an

1 endorsement of relationships, an endorsement it cannot

2 make. Even if this were purely factual information, we

3 know under the Supreme Court's recent decision in NIFLA

4 v. Becerra that this can still be compelled speech by

5 the government.

6   JUDGE AMBRO: How is compelled? I mean, it's

7 understood that the Catholic Social Services does not

8 believe in condoned same-sex marriages. And why not do

9 the evaluation, the report with in effect a caveat:

10 we're doing this pursuant to our contract. We do not

11 believe that this comports with the tenets of the way

12 we understand Catholicism, period. You're not

13 compelled to speech of any kind. Your reservations are

14 completely stated openly, and in effect, that today is

15 what Bethany Christian is doing.

16   MS. WINDHAM: Two points on that, Your Honor.

17 With regard to Bethany Christian, I believe this gets a

18 little bit into what the Supreme Court said in Thomas

19 v. Review Board, where it is not the job of the government --

20   JUDGE AMBRO: That's -- that's five minutes.

21   MS. WINDHAM: -- to determine who best

22 perceived the commands of their common faith. But I

23 would also note that the solution that you're

24 suggesting, where you just say, yes, we approve this;

25 oh, by the way, we don't approve of same-sex marriages

1   is essentially what the Supreme Court said was not

2   acceptable in NIFLA. There you had prolife pregnancy

3   centers who were required to have a government-mandated

4   statement, and the government-mandated statement said

5   that other services was available. Here's where you

6   could access them.

7   NIFLA was free to then go and have a sign

8   right next to that saying we think abortion is a bad

9   idea. Don't do it. And yet the State was still

10   requiring them to tell women where they could go to get

11   an abortion, and the Supreme Court said, no. You are

12   still compelling their speech --

13   JUDGE AMBRO: You're doing --

14   MS. WINDHAM: -- even if they --

15   JUDGE AMBRO: Here it's different. You're

16   doing the report based on someone else's criteria. If

17   you were doing this alone, this were solely under your

18   egis, you would not do it, and you make it clear that

19   if this was yours alone, you would not do it.

20   Or the flip to that is you've set conditions

21   on us that we don't like, that are required for both a

22   secular and the religious. We don't like it, and we're

23   opting out. It's your choice.

24   MS. WINDHAM: In that case, Your Honor, I

25   think that this still runs headlong into the Supreme

1   Court's compelled speech precedents. This would be as

2   if in the AOSI case, Alliance for Open Society

3   International. The agencies had to adopt an anti-

4   prostitution policy, and they could just say, okay, the

5   government made us do it.

6   JUDGE AMBRO: But that was --

7   MS. WINDHAM: We don't really like it.

8   JUDGE AMBRO: That was being forced to do

9   something that's against -- isn't that different than

10   this. Actually you're not -- all you're doing is

11   following the procedures others have selected for its

12   criteria, and you're going along with that, even though

13   if you were in charge, you wouldn't do it. How does --

14   how does that fit with that particular case?

15   MS. WINDHAM: I think two parts on that, your

16   honor. Number one, under the Pennsylvania code, this is

17   not a checklist where you just say check, check, check,

18   check, check. Okay. You fit the boxes. Here's your

19   certification. This is actually subjective

20   considerations that an agency has to engage in. They

21   have to -- they must consider a number of different

22   things, and there's no if this, then that statement in

23   the Pennsylvania regulations.

24   JUDGE AMBRO: Well, they added a few things

25   and -- like the pastoral letter. They said, okay,

 1 we'll back off doing the pastoral letter. You've

 2 objected to it. Isn't there -- I keep coming back to

 3 what Judge Tucker said almost at the outset. There

 4 seems -- this cries for some type of resolution done

 5 between Catholic Social Services and the City, and my

 6 guess is it's been done like this for a long time.

 7   MS. WINDHAM: Your Honor, my understanding is

 8 that it has been done like this for a long time, and

 9 I'm not sure why the City has chosen to dig in its

10 heels now; but it has. It has done so in a very pubic

11 and very open way.

12   JUDGE AMBRO: The whole issue --

13   JUDGE RENDELL: If it were to exempt you, then

14 it would be preferring religion. So as long as it's

15 generally applicable, they're not -- they're not

16 digging in their heels as much as they're applying it

17 to everyone, and you happen to be in that group. If

18 they were to exempt you, then they'd be establishing

19 religion.

20   MS. WINDHAM: Certainly not, Your Honor,

21 because this would then fall under the Supreme Court's

22 precedents in Amos and in Cutter, where the Court has

23 recognized that, in fact, it is permissible to

24 accommodate religion, even beyond that, which is

25 strictly required by the free exercise clause, and that

1 governments can do that without violating the

2 establishment clause, as this Court recognized in Real

3 Alternatives. "Even when non-interference is not

4 strictly required, the government has discretion to

5 grant certain religious accommodations subject to

6 constitutional limitation." And we've explained in our

7 briefing why we believe that the accommodations that

8 Catholic would receive here are not violating the

9 constitution because they exist within a system of true

10 private choice within which LGBT families have a free

11 choice among 29 different providers, who they would be

12 able to go to and be able to access these home study

13 services.

14   JUDGE AMBRO: Is there a syllogism at play

15 here? The City is going after us because we

16 discriminate. We discriminate because of our religious

17 beliefs. Therefore, the City is going after us because

18 of our religious beliefs.

19   MS. WINDHAM: Your Honor, I'm sure that, that

20 is what the City would say. What Catholic --

21   JUDGE AMBRO: What would you say? I mean,

22 what is -- how do you play out this theme?

23   MS. WINDHAM: Your Honor, first of all, what I

24 think you're asking here is that Catholic understands

25 that its religious beliefs are not just something that

1 sit alone and exist quietly within the church. There

2 is something that they have to go out and live in

3 public. That's why they're engaged in foster care in

4 the first place because their faith requires them to,

5 and this is why the individual foster parents, like

6 Ms. Fulton and Ms. Simms-Busch are out there serving.

7 They said it was a religious calling.

8   And so the City is putting Catholic to an

9 impossible choice. It's saying if you want to go out

10 and live out this part of your religious calling and

11 your religious mission, you must do so at the price of

12 making certifications that violate your religious

13 faith.

14   JUDGE AMBRO: But what are the consequences if

15 we go your way? What happens to the Smith case, going

16 back to the very first question of Judge Rendell? You

17 have a neutral law of general applicability. That's going

18 to be upheld. What happens -- if we go your way, what

19 happens to Smith?

20   MS. WINDHAM: Your Honor, we have explained at

21 length why we believe this is not a neutral law of

22 general application, and why this is also religious

23 targeting. If you look at the Masterpiece case, what

24 the Supreme Court said in that decision is that it was

25 undisputed that Masterpiece Cakeshop was subject to the

1 public accommodations laws of Colorado. That was not

2 at issue in that case. And even so, the way the

3 government had targeted that religious practice and

4 that religious individual, the fact that it did not

5 receive the neutral and respectful consideration to

6 which he was entitled was still a violation.

7   JUDGE RENDELL: The very decision-making of

8 the Commission reflected that hostility, the actual

9 decision of the Commission in finding that it violated

10 the law was totally hostile to religion, but we don't

11 -- we don't have that here.

12   MS. WINDHAM: Your Honor, the decision-making

13 has been from DHS, and there are statements from DHS

14 disagreeing with how Catholic understands its religious

15 obligations. We have the statements of City Council.

16 We have indications from different parts of City

17 government that Catholic was not receiving neutral and

18 respectful consideration to which they were entitled

19 under the Supreme Court's decision in Masterpiece.

20   JUDGE SCIRICA: So are you conceding general

21 applicability and public accommodation in this matter?

22   MS. WINDHAM: Not at all, Your Honor. I'm

23 simply making the point that even if this Court were

24 not persuaded on the points of general applicability

25 and public accommodations that, that would still not

1 answer the question because under the Supreme Court's

2 Masterpiece decision, when there is religious targeting

3 involved, even when you have something that might be a

4 general -- generally applicable law, there might still

5 be violations of the free exercise clause, and we

6 believe that's exactly what's happened here.

7   JUDGE AMBRO: What would happen if someone

8 opened a hotel, and they said that it was part of their

9 religious mission that only whites could be there

10 because they believe in white supremacy; and so they

11 have to operate the hotel to fulfill their religious

12 calling, has to be whites only? Isn't -- what's the

13 government's interest then?

14   MS. WINDHAM: The government's interest in --

15   JUDGE AMBRO: The government's interest being

16 nondiscrimination. What would happen in that case?

17   MS. WINDHAM: In that case the government

18 would win and for a couple of different reasons.

19 Number one, you have a group that's coming in and

20 asking to violate something that is unquestionably a

21 public accommodations law that applies to them.

22   Number two, the government has a compelling

23 interest in eradicating racial discrimination under the

24 Bob Jones' case. And so even in the unlikely event you

25 got to compelling interest there, the government would

1   win that case.

2   Here I think it's important to look at the

3   history and understand the history. We're not talking

4   about somebody who has come in and said we want to set

5   up some new establishment in order to discriminate.

6   We're talking about an organization that has served

7   Philadelphia children for a century. We're talking

8   about individual --

9   JUDGE AMBRO: We're saying there are certain

10 people or certain groups that we will not serve in this

11 capacity. Thank you. Maybe it's -- it's choosing. So

12 I'm not saying pejoratively discrimination, but it is

13 discriminating with a small D; is it not?

14   MS. WINDHAM: It is refusing to make

15 certifications that violate their religious beliefs.

16 They're not saying we can never work with LGBT foster

17 parents, and in fact, they've said they welcome

18 children regardless of their sexual orientation and are

19 happy to serve them. They're simply asking that in

20 this one small way they be permitted to follow what

21 their faith requires and be allowed to make referrals

22 to other agencies.

23   JUDGE AMBRO: So I come back to one of the

24 questions I asked earlier stated another way. Isn't

25 this a straightforward application of participation in

1   a public program? You just don't have to participate

2   if you don't agree.

3   MS. WINDHAM: There are a couple of different

4   problems with that, Your Honor. Number one is the fact

5   that the City now effectively occupies the field, and

6   so this is not a case where Catholic -- this is not a

7   case like the AOSI case where you could say we don't

8   want that government grant. We're just going to go

9   over here and keep doing our work without it. Without

10 a contract with the City of Philadelphia, it is

11 impossible --

12   JUDGE SCIRICA: The City and State occupy that

13 now.

14   MS. WINDHAM: I'm sorry?

15   JUDGE SCIRICA: The City and the State occupy

16 that now.

17   MS. WINDHAM: Yes, that's correct. The City

18 and the State occupy the field. But without a contract

19 with the City of Philadelphia, Catholic cannot provide

20 foster care to the children of Philadelphia, so that's

21 off the table.

22   Number two, if you look at the Supreme Court's

23 decision in Trinity Lutheran, they were clear that even

24 within the context of government grant program, the

25 government cannot make -- cannot discriminate according

1   to religion. And so -- the Supreme Court, in making

2   that decision cited to the Associated Contractors of

3   Jacksonville case, so acknowledging that this applies

4   to government contracts as well. So the government is

5   not getting a get out of the constitution free card

6   simply because they have a contract.

7   JUDGE AMBRO: All right. We'll, hear from you

8   back on rebuttal.

9   MS. WINDHAM: Thank you.

10   JUDGE AMBRO: And Ms. Istvan, are you going to

11   be first?

12   MS. ISTVAN: Jane Istvan, and I represent the

13   City defendants.

14   Judge Ambro, I would like to start out picking

15   up on some of your points. I know you've expressed

16   some concern that we should work this out, and I will

17   say the trial court credited the fact that we do have a

18   strong desire to continue the contract.

19   Everything in this record demonstrates that,

20   but it seems to us that the only thing that Catholic

21   will suggest is that they should be allowed to operate

22   on this -- on this so called referral system. And

23   respectfully, you suggested that, that might have been

24   going on for a time, and respectfully, I'd like to push

25   back on that a little bit and just say there's no

1   evidence in the record that we knew that -- that

2   Catholic was willing to turn away otherwise qualified

3   same-sex foster couples until the Inquirer reporter --

4   JUDGE AMBRO: The Inquirer article.

5   MS. ISTVAN: And I'd also just like to point

6   out that with respect to the pastoral letter, that's

7   something that we didn't become aware of until the

8   hearing -- until the hearing itself when there was some

9   testimony on that point.

10   But I did want to say --

11   JUDGE AMBRO: All I was saying there is when

12   -- when you objected to it, they did back off, as I

13   understand.

14   MS. ISTVAN: Yes. Yes, Your Honor. They did

15   write a letter to Judge Tucker and state that they

16   would no longer enforce that requirement.

17   JUDGE AMBRO: Do we need to get into the

18   details of the old contract?

19   MS. ISTVAN: It's our position that we don't.

20   As we explained, we -- this case is about prospective

21   relief. This case is about what we ask them to do

22   going forward with the new contract, and our May 7th

23   letter demonstrated, what we told them is we obviously

24   have a disagreement about what the old contract

25   required. We believe that whenever you're a contractor

1 with us and you sign a commitment that you won't

2 discriminate, that, that means that when you're serving

3 the public, you won't discriminate. Nevertheless, we

4 have a disagreement.

5   But going forward, we need everyone to commit

6 that they will treat all otherwise qualified foster --

7 prospective foster parents equally and not discriminate

8 against them on the basis of a protected

9 characteristic.

10   JUDGE RENDELL: What about a referral system?

11 Would that work? Say but if there is something you

12 believe violates your religion, we'll permit you to

13 referral the suitability of that couple to another

14 entity?

15   MS. ISTVAN: No, Judge Rendell. That wouldn't

16 work for several reasons, and we went over a couple in

17 the brief. But I just want -- I guess the first thing

18 I would want to explain is that it seems to be a

19 suggestion that we need a mandated -- that there should

20 be a mandated conscience clause. They seem to be

21 invoking the notion of a conscience clause where, for

22 example, a pharmacist can refuse to provide

23 reproductive services to a client and refer that person

24 to another pharmacist.

25   We submit that in the context of

1   discrimination, it's a completely different animal. It

2   would be like saying that if a Christian restaurant

3   owner doesn't want to serve a Muslim, that, that's okay

4   because that Muslim can walk down the street and 99.9

5   percent of the restaurants in Philadelphia would serve

6   them, and there would be basically no imposition on

7   them. So it's our position that it simply doesn't

8   work.

9   Second, we've also -- we also addressed in our

10 brief the stigma point, and the stigma -- I just want

11 to emphasize, the stigma isn't just to adults. As the

12 Commissioner explained very eloquently during the

13 hearing, it's a stigma that we have to be concerned

14 about with respect to the LGBT youth in our care

15 because it sends a message, we're okay with you now.

16 We're protecting your rights now, but when you grow up,

17 we're going to contract with someone who assesses that

18 you're not good enough to have a family. And that was

19 very concerning to the Commissioner because we have a

20 mission to serve all youth.

21   JUDGE AMBRO: The City has entered into, what,

22 29 other contracts for foster care; is that right?

23   MS. ISTVAN: Yes, Your Honor.

24   JUDGE AMBRO: Do all of them contain language

25 regarding discrimination against same-sex couples being

1 prohibited?

2 　　　　MS. ISTVAN: They all contain that the sexual

3 orientation -- the sexual orientation provision. The

4 clarification that we talked about is outside the

5 record because the contracts all went out after the

6 hearing. But the Commissioner did testify at page 617

7 of the record that the -- that the new contracts were

8 going to go out with this clarification.

9 　　　　But as I stated, it's our position that --

10 that if you go back to the prior contract, that there's

11 no reason why these providers shouldn't have considered

12 themselves to be a public accommodation, and we're

13 contracting with them to provide qualified foster

14 parents for us. That they should assume that when

15 they're selecting those foster parents, that they

16 should not be turning people away solely on the basis

17 of their protected characteristics.

18 　　　　JUDGE RENDELL: Seems to me one of the key

19 findings here was the finding regarding targeting, and

20 under Tenafly, we look at the record anew. We're not

21 -- we're not confined to clear error. So the

22 Commissioner's statements about -- about the Pope and

23 hundred years and -- why wouldn't we not view that as

24 hostility somewhat akin to what happened in

25 Masterpiece?

1   MS. ISTVAN: Judge Rendell, as we explain more

2   thoroughly in the brief, and I'm happy to go over all

3   those points now, it's -- it's something that neither

4   in Lukumi nor in Masterpiece did the Court focus solely

5   on comments and decide that was enough. They looked at

6   those comments in the context of the particular case.

7   And --

8   JUDGE RENDELL: Okay. We'll look at the

9   comments in the context of the case.

10   MS. ISTVAN: Right. And so in those cases it

11   was persuasive for the -- it was persuasive for the

12   Court, not just that there were troubling comments, but

13   that there was action on those comments because this is

14   not about civility. This is not about being nice to

15   each other. This is about determining whether the

16   decision-maker is actually acting neutrally. And so in

17   both of those cases it was determinative that there was

18   evidence that when there was a secular incident that

19   was similar to the religious exemption, that, for

20   example, the Baker in Masterpiece saw, that the

21   Colorado Civil Rights Commission said you're okay. And

22   that was incredibly troubling to the Court.

23   And it was the same in Lukumi where the Court

24   basically held that the statute at issue had been

25   religiously gerrymandered such that basically the only

1 type of animal slaughter that was prohibited was animal

2 slaughter performed by members of the Santeria

3 religion.

4   JUDGE RENDELL: So you're saying the targeting

5 -- it's not comments alone. It's if the targeting

6 causes the entity to act in a manner that actually

7 targets in terms of the decision treating it

8 differently. And here you're saying since the policy

9 was across the board against everyone that targeting

10 really doesn't -- the hostility isn't the same as in

11 those cases?

12   MS. ISTVAN: Yes, Judge Rendell. And I can't

13 emphasize enough that there's no evidence in this case

14 that we've ever permitted a secular excuse for

15 violating our -- for violating nondiscrimination

16 requirements. And I'd also like to point out that just

17 the factual context of this case is kind of the

18 opposite of a situation that's hostile. We're looking

19 at a situation where we've had a long-time relationship

20 with Catholic Social Services in spite of their well-

21 known views on same-sex marriage and yet that

22 relationship has still been fruitful.

23   And in fact, we continue to contract with them

24 with respect to the more lucrative aspects of their

25 contracts with us. And so to infer that somehow there

1   was something hostile going on just doesn't make sense

2   in light of the record.

3   JUDGE SCIRICA: And this issue does not come

4   up in the congregate care area?

5   MS. ISTVAN: No. It doesn't Judge Scirica.

6   Those contracts moved forward. I believe that's in the

7   record, but I know that they did move forward.

8   And I also just wanted to point out just a

9   couple more things --

10   JUDGE SCIRICA: One other thing.

11   MS. ISTVAN: I'm sorry.

12   JUDGE SCIRICA: If you were affirmed in this

13   and we honor preliminary injunction here --

14   MS. ISTVAN: Yes.

15   JUDGE SCIRICA: -- do you intend then to go

16   back to the district court?

17   MS. ISTVAN: Sure. I mean, we're the

18   defendants. So we have to -- we're guided by however

19   -- however Catholic Social Services wants to proceed if

20   we go back.

21   JUDGE AMBRO: In connection with the comments

22   that were made by Commissioner Figueroa, what your

23   response to you should act more like Pope Francis?

24   It's almost like the Jesuit side and the more

25   conservative side. And in Tenafly we had a bit of the

1   same thing, you know, with the same religion but very

2   different groups with different views.

3   MS. ISTVAN: Yes. And I'm glad that you

4   brought us back to that, Judge Ambro, because the other

5   thing I was going to point out is that -- is that her

6   comments were completely different in character from

7   what you see in cases like Lukumi, Masterpiece, and

8   even Tenafly, I think, where you have -- where you have

9   some -- where you have just denigration and disrespect

10   for the religion itself and questioning of the

11   justification. None of that was present here. It's a

12   completely different circumstance.

13   And furthermore, it's important to take note

14   of the fact that this occurred in the context of

15   contractual negotiations. It wasn't a neutral

16   adjudication. And while certainly our City officials

17   shouldn't be acting in a biased manner, it was a

18   situation that was much less formal, and it was a

19   situation, obviously, where you're trying to persuade

20   someone. And that's the -- I think that's the context

21   in which you have to look at that comment. It's trying

22   to persuade them that it would be okay to come around

23   to our position.

24   I did want to swing back for a moment,

25   actually. I had a third point on referrals because I

1   know that it came up in your conversations with

2   Ms. Windham about how there's 29 other providers and --

3   and people can be served. And I know that CSS has

4   claimed in their briefs that we're claiming it's

5   somewhat speculative that we will have a situation if

6   they're permitted to take a religious exemption,

7   whereby others would take the same religious exemption.

8   But I would submit that it's not at all speculative,

9   and there's a couple things in the record on that.

10   First of all, the pastoral letter, which

11   demonstrates that Catholic has already attempted to

12   operate in such a manner by which it only serves

13   believers. And furthermore, the interveners noted a

14   couple situations, as did the amici, where

15   we have Christian providers in other parts of the

16   country that have determined that they can only serve

17   Christians.

18   CSS wants to analogize this to a private

19   choice type of situation where we have different

20   providers serving different kinds of people. But

21   again, we submit that, that's -- that's permitting

22   discrimination, and we simply don't have to allow that.

23   JUDGE SCIRICA: We haven't heard anything

24   about the Pennsylvania Act. Anything comment you would

25   like to make on that?

1   MS. ISTVAN: I'm sorry, Judge Scirica. About

2   the regulations?

3   JUDGE SCIRICA: Yes.

4   JUDGE AMBRO: Yeah, the RFPA.

5   MS. ISTVAN: Oh, the Religious Freedom

6   Protection Act.

7   JUDGE AMBRO: Right.

8   MS. ISTVAN: I know Ms. Windham -- there was a

9   little bit of commentary about -- about the fact that

10 they're entitled to a contract and that it

11 substantially burdens their religious exercise because

12 they otherwise can't do this work because we occupy the

13 field. And I submit that, that's just a completely

14 novel, unprecedented approach to free exercise and to

15 religious freedom jurisprudence. Religious freedom

16 jurisprudence looks at the extent to which we're

17 interfering with your private exercise of religion.

18   Nothing about the free exercise clause

19 entitles you -- says that you have an entitlement for

20 the government to give you something affirmative in

21 order to -- to exercise your religious rights, and it's

22 our position that, that would certainly be the case

23 here.

24   In addition, on the RFPA claim, we also don't

25 --

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1              JUDGE AMBRO:  Let's go back to the RPA.

2              MS. ISTVAN:  Yes, Your Honor.

3              JUDGE AMBRO:  I mean, I think the argument

4  being made is they're being put to a Hobson's choice.

5  They have to refrain from conduct that's mandated by

6  sincerely held religious beliefs, or engage in conduct

7  or expression that violations the tenets of their

8  faith.

9              MS. ISTVAN:  But as you pointed out yourself,

10 Judge Ambro, this is in the context of a contract.  No

11 one is forcing them to do this.  They could simply walk

12 away from the contract, or they can persuade us that

13 we're wrong.

14             JUDGE RENDELL:  It's not public benefit.

15             MS. ISTVAN:  Exactly, exactly, Judge Rendell.

16             JUDGE RENDELL:  How about compelled speech?

17 You want to address their view that this is compelling

18 speech?

19             MS. ISTVAN:  Sure, absolutely.  I've never

20 quite understood their argument because -- and

21 Ms. Windham was talking about Becerra.  Becerra is not

22 a case about a contract, and it's clear in the

23 situation of a contract, going back to the AOSI case

24 that if your speech is in the context of the contours

25 of the contract that you're executing for the
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1   government, that we can impose conditions on that.

2   It's not unconstitutional.

3   And here we're talking about a contract by

4   which they've agreed to provide us with qualified

5   foster parents to take care of the children who are in

6   our custody. In order for them to get those foster

7   parents qualified, they need to write that piece of

8   paper, the home study or however you want to

9   characterize it, and turn it into the State in order to

10   get these parents certified. So the execution of that

11   piece of paper is within -- 100 percent within the

12   terms of the contract, so we just don't see how they

13   avoid case law like that.

14   In addition -- I mean, we touched on this a

15   little bit in our RFPA argument too -- it's also hard

16   to see how it's a burden for them and where the speech

17   comes in regarding same-sex marriage where, as

18   Mr. Amato admitted himself, the commonwealth doesn't

19   require you to certify that people are married

20   when you write that piece of paper and turn it in

21   and get someone qualified. We're not asking them

22   to not write op-eds in the paper. We're not asking

23   them to give up their views. We're not asking them to

24   write a policy statement as occurred in the AOSI case.

25   We're simply asking them to file this piece of paper to

1 get these people qualified. And where they don't --

2 it's essentially a self-imposed burden in terms of --

3 in terms of endorsing marriage where the State itself

4 doesn't require that.

5   JUDGE AMBRO: Thank you.

6   MS. ISTVAN: Thank you.

7   JUDGE AMBRO: Now we'll hear from Ms. Cooper.

8   MS. COOPER: Good afternoon. May it please

9 the Court. I'm Leslie Cooper with the American Civil

10 Liberties Union representing the interveners, Support

11 Center for Child Advocates and Philadelphia Family

12 Pride.

13   CCS here is making an extraordinary claim,

14 unsupported by any case law --

15   JUDGE AMBRO: Let me ask you just something I

16 haven't asked either side. Analytically, which test do

17 we go about? Do we -- do we resurrect, I suppose,

18 Lemon, or do we just -- is it the endorsement test or

19 what?

20   MS. COOPER: For our establishment clause

21 position? Well, I think, as an initial matter, the

22 Court doesn't need to reach the establishment clause

23 argument that interveners have made because there is no

24 basis for the free exercise or free speech or RFPA

25 claims that were made. But if we want to turn to the

1 establishment clause, I think this Court has continued

2 to apply the Lemon test over the years, sometimes talks

3 about endorsement, sometimes talks about the Lemon 3

4 three prong test --

5   JUDGE AMBRO: And there's an argument that --

6 I don't know if it's Lynch v. Donnelly or whatever is.

7 It really just takes the second part of the Lemon test,

8 the endorsement and just that's -- that's the law.

9   MS. COOPER: Well, and I think either way --

10   JUDGE AMBRO: So it's never been technically

11 overruled.

12   MS. COOPER: I'm sorry?

13   JUDGE AMBRO: Lemon's never really been

14 overruled.

15   MS. COOPER: That's right. That's right. I

16 think that that's -- that's the way I read it. And I

17 think that, no matter how you configure it -- again, I

18 don't think the court needs to reach this question, but

19 allowing the use of religious eligibility criteria in a

20 public program, a government service, violates the

21 establishment clause under any of those configurations.

22 The government itself could not have religious

23 eligibility criteria for foster families, couldn't say

24 no gay couples because of religious objections, no

25 Jews, no Christians --

1   JUDGE AMBRO: Well, whatever argument is

2 done --

3   MS. COOPER: Excuse me?

4   JUDGE AMBRO: What's being done here is

5 forcing them to, in effect, endorse something that they

6 don't believe in.

7   MS. COOPER: Well, nobody is being forced to

8 endorse anything. There's no right under the free

9 exercise clause or any other constitutional provision

10 to a government contract to perform a government

11 service, and to do so in according with your religious

12 beliefs and override the policy decisions of the

13 government that's hiring you to perform that government

14 service.

15   JUDGE AMBRO: Well, that was a -- countered

16 some of my questions to the other side. That was the

17 tone of some of my questions to the other side.

18   MS. COOPER: I think so. But I do think it's

19 important to think about the implications of their

20 argument if accepted here. If, in fact, the right to

21 free exercise entitles someone to a government contract

22 to perform government services on terms that violate

23 the government's policies just because the organization

24 or the entity has a religious objection to complying

25 with those policies, the consequences would be endless

1   and staggering.

2   The government would have to abandon, not just

3   sexual orientation nondiscrimination requirements, but

4   any nondiscrimination requirements that any agency felt

5   intruded on their religious beliefs. In fact, it was

6   precisely concern about discrimination against people

7   because of their faith, especially religious

8   minorities, that animated a strong outpouring of amicus

9   support for the City on the part of a very broad

10   spectrum of faith leaders and organizations. And --

11   JUDGE RENDELL: Well, if they were going to

12   abandon the discrimination clause -- the anti-

13   discrimination clause, they'd have to do it across the

14   board, wouldn't they? I mean, if they exempted CSS,

15   then that would be a form of establishment, would it

16   not?

17   MS. COOPER: I think if they were to say that

18   CSS could use its religious criteria -- and in this

19   case, it happens to be a religious-based -- religiously

20   motivated exclusion of same-sex couples -- they've

21   abandoned their other -- or at least some of their

22   other religious criteria. Right. The City, if it were

23   to allow that, it would have to allow any agency that

24   has any religious objection to any class of people --

25   whether Jews, Muslims, non-Christians, people who are

1   in interracial relationships.

2   And I would say I don't even see how they could

3   cabin it to nondiscrimination law. It seems if you

4   have a free exercise right to opt out of a government

5   contract requirement because it doesn't match your

6   religious beliefs, I don't see why that wouldn't apply

7   to any contract requirements. So, for example, here

8   taking the child welfare context that this case arose

9   in, if there are family reunification services that

10   agencies provide, that would mean an agency could say,

11   I'm not going to provide family reunification services

12   for that child because I have a religious objection to

13   their family of origin.

14   And we can't even really cabin it to the child

15   welfare system. If there is an entitlement under the

16   free exercise clause to dictate the terms of a

17   government contract if you're a faith-based

18   organization, that would seem that there'd be no line

19   to draw to limit that to the circumstances of this

20   case. We -- interveners have been talking about these

21   extensive implications since the district court, and

22   CSS still has not said whether it believes that

23   government contractors with religious objections to

24   complying with other nondiscrimination requirements

25   should get the same -- or any other requirement --

1   should get the same treatment it seeks for itself: a

2   right to opt out.

3   They have offered no basis to cabin the legal

4   argument to the circumstances of the case. The only

5   thing they've said about that, in their reply brief, I

6   believe was that "We've identified various harms, but

7   they have not occurred, despite the fact that many

8   states have RFPAs and laws specifically allowing child

9   welfare providers to discriminate based on religious

10   beliefs."

11   Well, no court anywhere in this country has

12   ever held that any RFPA authorizes faith-based agencies

13   to opt out of government contract requirements to

14   provide government services. We will not see the

15   impact of such ruling -- or such a rule of law on the

16   ground unless their extraordinary interpretation of the

17   right to free exercise of religion were accepted by a

18   court.

19   And to be sure, in states that have authorized

20   religiously motivated discrimination by

21   state-contracted child-placing agencies, as we discuss

22   in our brief, a number of those agencies are not just

23   limiting eligibility to heterosexual couples; they are

24   limiting eligibility to people of their own faith,

25   Christians or a certain form of Christians.

1   So the implications -- there's really no way

2 to give the relief to CSS that it's seeking without

3 opening a door to allowing any kind of government

4 contractor to opt out of any government contract

5 requirement in the provision of a public service. And

6 that's what makes the case, I think, so extreme in this

7 context, that we're talking about the City providing

8 child welfare services to wards of the City, children

9 the City has an obligation to care for because the City

10 has removed them from their families because they

11 couldn't remain safely there.

12   The City has made the reasoned determination

13 that it's good for these children to have all good

14 families that can care for them, take care of them.

15 And they have a need for families to take care of them.

16 There is nothing about the free exercise clause that

17 requires the City to be forced to abandon that very

18 critical child welfare policy judgement and allow

19 agencies to turn away qualified families.

20   There's nothing in the free exercise clause or

21 Pennsylvania RFPA that gives anyone a right to a

22 taxpayer-funded contract to provide that government

23 service. And the Supreme Court has made clear, in

24 cases like Rust, and Locke v. Davey, that there's just

25 no right to government funding of a constitutionally

1   protected activity.

2   And the only cases that have addressed claims,

3   anything like the one CSS is making here, are the Sixth

4   Circuit decision in Teen Ranch and more recently, a

5   federal district court decision in Dumont, in Michigan,

6   where those courts clearly rejected the idea that

7   faith-based agencies can opt out of government contract

8   requirements or are entitled to a contract that meets

9   their religious standards.

10   And I want to say just a few comments about

11   the CSS argument that it's -- you know, you can't

12   provide foster care without a City contract; therefore,

13   their ministry is effectively being extinguished is the

14   way they put it. I think this is a remarkable argument

15   because I think they're saying, if an organization says

16   we have a religious belief that we need to provide a

17   particular service that is only -- one the government

18   provides, that we have to be given the right to do

19   that, even if we're unwilling to follow the policy

20   decisions of the government and violate those policy --

21   the government policies just to accommodate our

22   religious beliefs. If somebody had a religious belief

23   that they need to provide firefighting or police

24   services, I just don't think there would be a right to

25   provide that services in violation of the police

1   department's policies or the fire department's

2   policies.

3   And again, when we're talking about wards of

4   the state, the City cannot be required -- and the free

5   exercise clause certainly does not require that the

6   City has to surrender child welfare policy judgements

7   it has made about how to properly care for wards of the

8   City to accommodate an agency's religious beliefs that

9   it wants to provide care for them.

10   I do want to talk a little bit about the claim

11 of religious targeting, because it felt like, in CSS'

12 argument, that perhaps they were accepting that absent

13 a claim of anti-religious targeting, their claim would

14 not survive, that there is just no free exercise right

15 freestanding to get a government contract that lets you

16 provide government services how your religion would do

17 so.

18   The targeting -- I think the district court

19 found, based on a very clear record, that it makes no

20 sense to say, as CSS claims, that the City decided to

21 close intake, and decided not to offer a new contract,

22 in order to punish CSS for its religious beliefs about

23 same-sex marriage. It makes no sense because the City

24 has long known about CSS' religious beliefs about

25 marriage, and that never stopped the City from

1 partnering with CSS, and they continue to provide

2 something to the tune of $17 million of contract child

3 welfare services with CSS to this day.

4   The City did not close foster care intake to

5 CSS when it learned of CSS' religious beliefs. It

6 closed intake when it learned that CSS is unwilling to

7 comply with its child welfare policy of not turning

8 away families based on any protective characteristics.

9   JUDGE AMBRO: Anything to sum up?

10   MS. COOPER: Excuse me?

11   JUDGE AMBRO: Anything to sum up?

12   MS. COOPER: I want to say one small thing

13 about something made on the establishment clause. And

14 again, I don't think there is any reason for the Court

15 to reach that. But the private-choice argument that

16 the other side has articulated -- you know, this is

17 nothing like Zelman or the vouchers cases involving

18 private choice. This is the opposite of private choice

19 because this is government services for children, who

20 have no choice in the matter. They don't get to raise

21 their hand and say, I want to make sure that -- I want

22 -- that all the decisions are made based on our

23 interests, not the agency's religious beliefs.

24   But even if you focus on the prospective

25 families, unlike in Zelman and the other cases about

1   private choice that they cited, you can't say here

2   there's no harm because families have private choice.

3   Here, it's the opposite. They don't have private

4   choice. Same-sex couples can't choose to go to any

5   agency. And even if these agencies were all fungible,

6   right, that would be a harm, that some set of people

7   get a choice of 30 agencies; another class of people

8   gets fewer. Imagine if Christians get 30; Jews,

9   Muslims, everyone else gets some fewer amount,

10 etcetera. That would be a harm in and of itself, even

11 if they were fungible.

12   But they're not fungible, as CSS is the first

13 to point out. They have different services they offer

14 families. They have different expertise with respect

15 to the care of populations of children. So that means

16 that if -- you know, for example, medically needy

17 children -- if a family headed by a same-sex couple

18 would like to care for a medically needy child, and if

19 the City were to accede to CSS' demands and allow any

20 agency that wants to discriminate, to do so, that

21 family may no longer be able to go to the agency that

22 would make sense for the circumstances. That means

23 fewer families, potentially, for children.

24   So the City -- it sort of pivots to the City's

25 very compelling interests here. There's no reason to

1 get to strict scrutiny, but even if the Court needed to

2 for any reason, the compelling interest in eradicating

3 discrimination -- Supreme Court recognized in Masterpiece

4 -- that that harm of discrimination is no less when the

5 discrimination is based on sexual orientation. And the

6 children having the City's compelling interest in

7 making sure that families are not turned away --

8   JUDGE AMBRO: Okay.

9   MS. COOPER: -- for reasons unrelated --

10   JUDGE AMBRO: Assuming that is a compelling

11 interest, is this the most narrow to attack it?

12   MS. COOPER: Absolutely, because the -- it --

13 what -- the idea of referring to other agencies or

14 pointing out, as CSS does, that there are other

15 agencies that don't discriminate, even assuming the

16 number of agencies that don't discriminate were to

17 remain the same if the City were to authorize

18 discrimination -- and we have no idea what that would

19 look like -- but even so, the -- to say go to another

20 agency -- I think that Ms. Istvan, you know, addressed

21 that well -- it was -- it's never been an answer in our

22 tradition -- legal tradition to say that discrimination

23 is okay, as long as you can be -- you know, there are

24 other venues that won't discriminate against you.

25   And by referring politely, it doesn't make a

1   difference. If a restaurant owner who discriminated

2   against African Americans politely said, "I can't serve

3   you, but there are restaurants down the block that

4   would," the humiliation and degradation that come --

5   JUDGE AMBRO: But the question is: Is this

6   really a public accommodation?

7   MS. COOPER: Well, I think it doesn't matter

8   if this is a public accommodation. I think it is,

9   under the terms of the public accommodation ordinance

10   in the City of Philadelphia. I don't see how you could

11   say it's not. And the argument that it's not a public

12   accommodation because race and disability can be

13   considered in making individual placement decisions --

14   you know, that falls apart because that is not -- that

15   doesn't go to the interest in protecting against

16   discrimination. Those are considerations that go to

17   making best-interest determinations for each child.

18   In fact, the Americans with Disabilities Act

19   public accommodation provision applies to foster care

20   services. And the Middle District of Pennsylvania in Doe

21   v. County of Centre recognized that that applies to the

22   foster care system. But it doesn't matter if it's a

23   public accommodation. Even if the CSS -- they say they

24   didn't understand that provision to apply to it, the

25   City clearly always did, and has clarified their

1 contracts to that effect. But even if there were never

2 a provision, once the City learned that there were two

3 agencies, now just one, who were unwilling to accept a

4 class of families, prospective foster families, based

5 on a characteristic that has nothing to do with the

6 ability to care for a child, they were not required to

7 continue to contract with that agency and let them turn

8 away good families.

9   If they had learned an agency was turning away

10 Republicans or Catholics or interracial couples, I

11 don't think anybody would question that this was -- or

12 assume this was anti-religious targeting to say, hey,

13 wait a minute. We hired you to find families for

14 children who desperately need them. If you're

15 unwilling to accept all qualified families we -- I'm

16 sorry, we can't continue to contract with you.

17   JUDGE AMBRO: Thank you very much.

18   MS. COOPER: Thank you.

19   JUDGE AMBRO: Ms. Windham?

20   MS. WINDHAM: Prior to this case arising, the

21 standard practice was that referrals happened all the

22 time. Ms. Simms-Bush and Mr. Amato testified to that

23 at the hearing. Deputy Commissioner Ali acknowledged

24 that in some circumstances, such as medical or

25 specialized behavioral health, that referrals were, in

1 fact, appropriate. And so the City, on its own

2 website, told foster families to find the agency that

3 is the best fit for you because agencies can have

4 different requirements. You can see that at appendix,

5 page 1017.

6   So the City has never had a policy that

7 referrals are somehow unimportant or not prohibited.

8 It has told families to find the agency that's the best

9 fit for you.

10   JUDGE AMBRO: Let's go back to an area that

11 you talked about, and you got a number of questions,

12 especially from Judge Rendell. How is the City

13 requiring Catholic Social Services to change its views

14 on gay marriage in order to receive a contract? Isn't

15 it really saying that you can't discrimination in the

16 performance of carrying out that contract?

17   MS. WINDHAM: Your Honor, the City

18 acknowledged at the hearing -- Commissioner Figueroa

19 testified that the City has nothing to do with home

20 studies. This is at the appendix, page 532 to 33.

21   JUDGE AMBRO: But how is Commissioner Figueroa

22 or anyone in the City asking CSS to change its views on

23 gay marriage?

24   MS. WINDHAM: What -- what the City is asking

25 Catholic to do is to take an action and make a written

1 certification, which is inconsistent with Catholic's

2 religious beliefs. I'm not aware of any precedent out

3 there that says it's okay for the government to

4 restrict your religious exercise and burden your

5 religious exercise pursuant to a non-neutral, non-

6 generally applicable law as long as you say, okay, it's

7 just because the government made me do it.

8   JUDGE AMBRO: But the flip of that, is there

9 anything more simple, direct, plain vanilla than you

10 shall not discriminate in the performance of carrying out

11 a contract?

12   MS. WINDHAM: Your Honor, that's not what the

13 contract says. The contract says with regard to race,

14 national origin, and religion, you shall not

15 discriminate. You can see this in 15.1 of the

16 contract.

17   JUDGE AMBRO: And also sexual orientation.

18   MS. WINDHAM: No, Your Honor. With regard to

19 sexual orientation, disability, and a whole host of

20 other protected classes, it says that you must abide by

21 the Fair Practices Ordinance, and we

22 get into the question of public accommodation.

23   JUDGE AMBRO: What does the FPO say?

24   MS. WINDHAM: I'm sorry?

25   JUDGE AMBRO: And what does the FPO say, Fair

1   Practices Ordinance.

2   MS. WINDHAM: The Fair Practices Ordinance

3   says that if you are public accommodation, then you may

4   not discriminate in the public accommodation on -- on

5   sexual orientation or other protected classes.

6   JUDGE AMBRO: Does it make any difference if

7   this is or is not a public accommodation?

8   MS. WINDHAM: Your Honor, I believe --

9   JUDGE AMBRO: Because we're going forward, and

10   my understanding is the next 29 contracts are going to

11   have -- have a nondiscrimination provision in them; is

12   that correct?

13   MS. WINDHAM: That's what the City has said.

14   With regard to whatever the City wants to insert in the

15   contract, now, they have made clear -- and you can see

16   this in the May 7th letter, page 860 of the appendix --

17   that they are changing the language across the board in

18   order to make it impossible for Catholic to continue

19   contracting with the City. This is a poison pill that

20   is put into the contract to ensure that a particular

21   religious exercise by a particular religious group is

22   impermissible.

23   JUDGE AMBRO: Nondiscrimination is a poison

24   pill is what you're saying?

25   MS. WINDHAM: I am saying that the way the

1 City has gone about this here, they have made it clear

2 that the reason for changing their contracts is to

3 target and prohibit a particular religious exercise.

4   JUDGE AMBRO: Well, it hasn't stopped Bethany

5 Christian.

6   MS. WINDHAM: And Bethany Christian was

7 willing to change its practice in regard to City

8 pressure. That says nothing about the religious

9 practices and the religious beliefs of Catholic and

10 whether Catholic can then -- would be violating its own

11 faith by changing its ways, by creating this policy in

12 order to appease the City.

13   What the City is talking about here with

14 regard to Commissioner Figueroa -- and I would

15 emphasize it's not just Commissioner Figueroa's

16 statements we're talking about. But what the City is

17 talking about here is a situation where a City official

18 calls a religious group into her office, calls some

19 leaders from the religious group into their office;

20 tells her you're really getting it wrong. You don't

21 understand how to interpret your faith. Let me tell

22 you how. And then when they refuse, when they get it

23 wrong, backing that up with penalties.

24   JUDGE AMBRO: This was a meeting, right; this

25 was not a public hearing, right?

1   MS. WINDHAM: This was a meeting and not a

2   public hearing.

3   JUDGE RENDELL: But then, if she had targeted

4   them for different treatment, that would be one thing.

5   But there was no targeting here for different

6   treatment. It was abide by -- we want you to abide by

7   what everybody else is abiding by, and is trying to

8   persuade them to indeed fall in line with the generally

9   applicable law as compared to other cases where the

10   conduct -- the speech has led them to target an act in

11   a way that targets religion.

12   MS. WINDHAM: The government is expressly

13   changing its contracts and adding these provisions to

14   specifically prohibit Catholic's religious practice.

15   JUDGE RENDELL: Well, it's to apply

16   nondiscrimination provisions to everybody.

17   MS. WINDHAM: Which acknowledges that they

18   didn't apply to everyone before. That there was some

19   sort of gap, and now they're trying to cover that over.

20   They're doing that in a way that's targeting.

21   JUDGE RENDELL: But are you saying now that,

22   in light of the civil rights movement and other

23   movements in society, that when a city determines that

24   new policies are needed to address changing situations,

25   that -- that they can't do that?

1   MS. WINDHAM: Not at all, Your Honor.

2   JUDGE RENDELL: This wasn't to address

3   religion. It was to address different relationships

4   and different marital customs, which, you know, we've

5   come to -- come to recognize.

6   MS. WINDHAM: What the City is doing here is

7   specifically addressing a particular religious

8   practice.

9   JUDGE RENDELL: Really?

10   MS. WINDHAM: The arguments that I'm hearing

11   --

12   JUDGE RENDELL: Really?

13   MS. WINDHAM: Yes, Your Honor. Because

14   they're changing their contract to specifically

15   prohibit Catholic's religious practice.

16   JUDGE RENDELL: But not just vis-à-vis you,

17   vis-à-vis everyone.

18   MS. WINDHAM: Yes. And I'm not aware --

19   JUDGE RENDELL: That's not a religious

20   practice. It has to do with a type of a marital or

21   cohabiting relationship; does it not?

22   MS. WINDHAM: And yet they're changing it

23   across the board in order to make it impossible for

24   Catholic to continue its religious practice.

25   JUDGE RENDELL: What is -- what is it that

1　says they're doing it in order to prevent Catholic from

2　having a service? What is it that says they're

3　changing in order to do that?

4　　　　　MS. WINDHAM: The City said in their May 7th

5　letter to Catholic Social Services -- they argued that

6　this was something that was impermissible under the

7　contract, but they said any future contracts will be

8　explicit in this regard. They're changing the contract

9　in order to address and to prohibit a particular

10　religious exercise.

11　　　　　With regard to Masterpiece, I heard the

12　argument here that -- that it was determinative that

13　there -- the determinations, they were not neutral and

14　generally applicable. It was not, in fact,

15　determinative. The Supreme Court rested its

16　determination there on religious targeting.

17　　　　　What the government --

18　　　　　JUDGE AMBRO: Go ahead, Tony.

19　　　　　JUDGE SCIRICA: Yeah. I have a question, and

20　you can tell me if I'm wrong. But I thought the City

21　had viewed sexual orientation as a protected class for

22　nondiscrimination purposes since 1982 and has required

23　all City contracts since 2010 to prohibit sexual

24　orientation discrimination. Am I right on the timing

25　of that?

1   MS. WINDHAM: So they have -- they have added

2   sexual orientation discrimination to their public Fair

3   Practices Ordinance in 1982. In 2010 they added a City

4   charter provision in 8-200 regarding sexual orientation

5   discrimination. That provision actually does not apply

6   here. You can see that on page 1057 of the record

7   saying that this is a professional -- a professional

8   services contract, not subject to the lowest

9   responsible bidder requirements of Section 8-200 of the

10   charter.

11   JUDGE RENDELL: So following on Judge Scirica

12   looking at the dates, how can you say that they're

13   changing the contract now in order to prevent Catholic

14   if it's been changed and in effect for years?

15   MS. WINDHAM: Because the City has

16   acknowledged that it is -- the City said we're changing

17   the contract. The City said any future contracts will

18   be explicit in this regard and with regard to the prior

19   contract. They are trying to enforce it that burdens

20   Catholic's religious exercise.

21   JUDGE AMBRO: Sounds like the policy before

22   they hadn't completely gone through, making sure that,

23   that policy was implemented in every contract, and now

24   they're going to make sure that's done.

25   MS. WINDHAM: And they are doing that in

1   respond to a particular practice and to target a

2   particular religious exercise.

3   With regard -- I want to turn here for a

4   moment to the RFPA argument, which was discussed some.

5   In a similar federal statute the Supreme Court said

6   this is the cry of bureaucrats everywhere. If I have

7   to make an exception for you, I have to make an

8   exception for everybody, therefore, no exceptions.

9   The Supreme Court ruled against that 8 to 0 in

10   the Gonzales v. UDV case. And so the Supreme Court has

11   acknowledged that laws like RFPA -- that laws like RFPA

12   can protect religious exercise and that the importance

13   of those laws is a case by case determination of

14   weighing the burdens on religious exercise and then the

15   government's supposed compelling interests.

16   JUDGE RENDELL: But in Pennsylvania, the view

17   of what religious activity actually constitutes

18   religious exercise is extremely narrow; is it not?

19   MS. WINDHAM: It's a little bit higher than

20   under federal law, but we're talking about a situation

21   where a particular religious ministry would have to be

22   entirely shut down. We're talking about a situation

23   where foster parents who testified that they would be

24   devastated, and they would struggle to continue to

25   carry out their religious calling.

1   JUDGE RENDELL: But if daycare is not a

2   fundamental exercise to the Catholic faith, it probably

3   wouldn't pass muster, would it? I mean, really.

4   MS. WINDHAM: Your Honor, the Supreme Court in

5   Smith has said that it does not engage in centrality or

6   fundamental considerations of which --

7   JUDGE RENDELL: No.

8   MS. WINDHAM: -- religious exercise --

9   JUDGE RENDELL: (Indiscernible) Supreme Court.

10   MS. WINDHAM: Under Pennsylvania law, I

11 believe that this would qualify as -- as a religious

12 exercise. If the Court were to rule that this were not

13 fundamental, I believe that, that is contrary to both

14 the facts of this case, showing Catholic's 100 years of

15 serving foster children in Philadelphia, showing the

16 sacrifices and the work done by the foster parents,

17 something that even the district court acknowledged.

18   JUDGE SCIRICA: All of that is very

19 commendable, and we understand that. But I thought the

20 Pennsylvania Supreme Court talked about daycare

21 services and said they were not fundamental to -- to

22 the religious doctrine. Why would that -- if I'm right

23 about that, why -- why wouldn't that apply here?

24   MS. WINDHAM: The Ridley Park Methodist case

25 is actually very interesting in comparison to here.

1 What happened in that case was the church was renting

2 out space to a secular daycare, and it tried to get a

3 zoning exemption, found out it couldn't, and then

4 transformed the secular daycare into a religious

5 daycare and said now this is our religious exercise.

6 And the Pennsylvania -- I forget if it was the Supreme

7 Court or the appeals court said, no, that does not

8 qualify. That stands in stark contrast to the century

9 of service we have here, and I think it also answers

10 some of the concerns that the City has raised with

11 regard to RFPA.

12   This is not a situation where somebody has

13 walked in the door and said I want a contract; here is

14 my list of demands. This is a situation where a

15 longstanding service to the children of Philadelphia is

16 about to be shut off over an unnecessary concern and

17 over unnecessary religious targeting, when that simply

18 could continue.

19   Government contracts are not a get-out-of-the-

20 Constitution-free card. The Supreme Court recognized

21 this with Trinity Lutheran, a grant program. It

22 recognized this in Umbehr. This Court

23 recognized this in the Allied Contractors of Eastern

24 Pennsylvania case, and this Court is going to be

25 considering that again tomorrow when the City of

1   Philadelphia is arguing that the government cannot

2   impose unconstitutional conditions, even on a

3   government grant program.

4   And so even in that context, the Court must

5   consider and the City must consider what its

6   obligations are under the free exercise clause, under

7   RFPA, under the establishment clause, and under the

8   free speech clause.

9   With regard to free speech, the City has said

10   that this is under the contract, but at the hearing,

11   Commissioner Figueroa said we had nothing

12   to do with home studies. Before the Supreme Court in

13   their brief there, the City conceded that

14   certifications and home studies are not expressly

15   funded under the contract because CSS' compensation is

16   based on the number of children in its care rather than

17   on the number of home studies performed. And three

18   justices of the Supreme Court thought that we had an

19   indisputably clear right to relief and would have given

20   us relief on that point -- or on that motion.

21   The City also has no minimum number of home

22   studies that has to be performed in the contract. They

23   do not put guidelines in the contract of how home

24   studies are to be performed. This is carried out under

25   state law.

1   And so the City's attempt now to change its

2   program to subsume the conduct that they want to reach

3   out and prohibit is a violation of AOSI where the

4   Supreme Court recognized that you cannot change the

5   definition of a particular program or manipulate it to

6   subsume the challenged condition.

7   JUDGE AMBRO: It's still carried out under

8   state law no matter what, right?

9   MS. WINDHAM: I'm sorry?

10   JUDGE AMBRO: It's still carried out, the

11   report, under -- under state law criteria; is that

12   correct?

13   MS. WINDHAM: It is carried out under --

14   under, yes, criteria that are laid out in Pennsylvania

15   state law.

16   JUDGE AMBRO: Anything you want to do to sum

17   up?

18   MS. WINDHAM: Yes, Your Honor. We've heard a

19   lot today about exactly what precedent that this could

20   set, and I do want to finish by asking the Court what

21   precedent it does want to set. Whether it wants to set

22   a precedent that accepting the interveners' arguments,

23   it would be impossible for states nationwide to be able

24   to contract with religious agencies, even if they want

25   to do so, if those agencies have religious

1   requirements.

2   Whether this Court wants to set a precedent

3   saying it's okay for government officials to tell faith

4   groups how to interpret their faith and then to

5   penalize them when they get it wrong, to say it's okay

6   for the executive to tweet out whatever he wants and

7   then penalize religious organizations and call for an

8   investigation, ignoring due process procedures, and

9   that, that's okay.

10   Whether it's okay for the legislative branch

11   to target particular religious groups and call for

12   penalties on them and then for the agencies to carry

13   that out. That is what is at stake in this case.

14   And for those reasons and all those foregoing,

15   we ask that this Court reverse the decision below and

16   enter an order directing the district court to grant

17   the preliminary injunction.

18   JUDGE AMBRO: All right. Thank you.

19   MS. WINDHAM: Thank you.

20   JUDGE AMBRO: Thank you to all counsel.

21   Extremely well presented, briefs and argument. You're

22   all to be congratulated. It's a privilege to have you

23   here.

24   I would ask that if you would get together and

25   have a transcript prepared of the oral argument and to

1 split it evenly 50/50, that side and that side.

2   And again, thank you for being with us today.

3   MS. ISTVAN: Thank you, Your Honor.

4   (HEARING CONCLUDED)

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1   CERTIFICATE OF TRANSCRIPTIONIST

2   I certify that the foregoing is a true and accurate

3   transcript of the digital recording provided to me in

4   this matter.

5   I do further certify that I am neither a

6   relative, nor employee, nor attorney of any of the

7   parties to this action, and that I am not financially

8   interested in the action.

9

10

11   _____

12   Julie Thompson, CET-1036

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