No. 18-2574

United States Court of Appeals for the Third Circuit

SHARONELL FULTON, ET AL.,

Plaintiffs-Appellants,

V.

CITY OF PHILADELPHIA, ET AL.,

Defendants-Appellees.

On Appeal from the U.S District Court for the Eastern District of Pennsylvania, No. 2:18-cv-02075-PBT (Hon. Petrese B. Tucker, U.S.D.J.)

Reply of Plaintiffs-Appellants in Support of Motion for a Fed. R. App. P. 8 Injunction Pending Appeal

NICHOLAS M. CENTRELLA
Conrad O'Brien PC
1500 Market Street, Suite 3900
Philadelphia, PA 19102-2100
(215) 864-8098
ncentrella@conradobrien.com

MARK L. RIENZI
LORI H. WINDHAM
STEPHANIE BARCLAY
NICHOLAS R. REAVES
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketlaw.org

Counsel for Plaintiffs-Appellants

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INTRODUCTION

The City's response is notable for what it does not deny—or even address. The City received no complaints against Catholic, investigated only religious agencies, and never checked on the practices of secular agencies. It does not deny that it summoned Catholic to headquarters, where the DHS commissioner told Catholic's leadership that should follow the "teachings of Pope Francis" instead of their Archbishop and that it was "not 100 years ago." It does not deny that the City Council criticized what it deemed discrimination under the "guise of religious freedom," that the Mayor has a Twitter problem, or that the City did not even await a Human Relations Commission inquiry (which it attempted to conduct without jurisdiction) before starting a process that will terminate Catholic's century-old foster care program.

The City freely admits that it froze Catholic's foster care intake and that it now seeks to condition future contracts on Catholic's willingness to make written certifications that violate its faith. The City does not deny that future home studies have nothing to do with already-certified homes, and that the City is refusing to place foster children with Appellants like Mrs. Paul, whose only sin is working with Catholic, an

agency she chose because of her own religious faith. Nor does the City deny that it still has 250 children who need to move from group homes into families like Mrs. Paul's.

The City says none of this matters, because (1) foster care requires a contract, and (2) Philadelphia has an FPO. But the City never connects the dots—it never explains why a government contract should be a "get-out-of-the-First-Amendment-free" card, nor how its FPO applies to foster care. The City keeps inventing new *post hoc* rationalizations, and none of them work.

Ultimately, the City asks this Court to overlook the harm the City is inflicting on real children, real families and a real foster program over a hypothetical question. Appellants have asked this Court to preserve the status quo, and they have satisfied the test for doing so. If the injunction is not granted, homes will sit empty, foster parents will lose support, Catholic will lay off staff, and the foster agency will continue the process of winding down its operations and closing its doors—all without a single complaint against it and all before Appellants are able to litigate this appeal.

ARGUMENT

I. Catholic is likely to succeed on the merits.

A. Catholic retains its First Amendment rights as a contractor.

The City relies heavily on its discretion in contracting.[1] But the Supreme Court has held that the government cannot "automatic[ly] and absolute[ly] exclu[de] [a party] from the benefits of a public program for which [it] is otherwise fully qualified," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). Public programs include government contracts: *Trinity Lutheran* relied upon *Northeastern Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993), for the proposition that the harm in such cases is "the inability to compete on an equal footing in the bidding process." *Trinity* Lutheran, 137 S. Ct. at 2022.

Elsewhere, the Supreme Court has "recognize[d] the right of independent government contractors not to be terminated for exercising their First Amendment rights." *Bd. of County Comm'rs v. Umbehr*, 518

[1] The City incorrectly claims that an injunction would force the city to enter into a new contract on Catholic's terms. Opp.1. Catholic has merely asked that the parties continue the status quo under the old contract, as is routinely done. CityAppx.262-63.

U.S. 668, 686 (1996); *see also Blackburn v. City of Marshall*, 42 F.3d 925, 931, 934 (5th Cir. 1995) (holding that a contractor's exclusion from future contracts was subject to First Amendment scrutiny as "a benefit to a person on a basis that infringes his constitutionally protected interests"); *Springer v. Henry*, 435 F.3d 268, 275 (3d Cir. 2006) (First Amendment protections "extend[] to independent contractors").[2] Thus, the First Amendment imposes limits on the City's ability to terminate or not renew contracts.

Here, the City's actions (a) infringe on Appellants' religious exercise and (b) require Catholic to engage in particular speech or face exclusion from foster care. The First Amendment applies, even though the City is imposing these harms in connection with a contract. Catholic is simply requesting that the City be enjoined from imposing—on current or future contracts—conditions that violate the First Amendment.

[2] *Teen Ranch* was undermined by the later decision in *Trinity Lutheran*, which analogized government contracts to government grants and rejected the City's proposed distinction between a government contract and a public benefit. Opp.8-9.

B. The City violated the Free Exercise Clause.

The City has violated the Free Exercise Clause in four separate ways.

The City violated the Free Exercise Clause because it engaged in religious targeting (Mot.16-19); its policies are not neutral (Mot.19-22); its policies are not generally applicable (Mot.22-24); and it provides individualized, discretionary exemptions, but denied one here (Mot.24-25). Each of these constitutes an independent violation of the Free Exercise clause. *See Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (religious targeting); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (summarizing Free Exercise law and its separate neutrality, general applicability, and individualized exemption requirements). The City fails to rebut any of the four.

Targeting. The City engaged in religious targeting. Mot.16-19. The City attempts to distinguish *Masterpiece* by (1) minimizing its own actions, (2) claiming *Masterpiece* only applies to neutral adjudicators, and (3) claiming that respecting Catholic's religious exercise would create a "community-wide stigma" against LGBTQ couples. Opp.9-10,

12-14. None is true. First, the City's words and actions speak for themselves. The City does not deny—indeed, it embraces—the fact that it only investigated religious foster care agencies. Opp.11. Nor does it deny that:

- the DHS commissioner accused them of not following "the teachings of Pope Francis";
- the Commissioner told Catholic it was "not 100 years ago";
- City Council passed a resolution criticizing "discrimination that occurs under the guise of religious freedom";
- the Human Relations Commission opened an extra-jurisdictional inquiry at the behest of the mayor;
- The mayor publicly denigrated the Archdiocese;
- The City is revising its contracts to explicitly prohibit Catholic's religious practice (*see* Opp.5).

See Mot.9-10, 16-17.

Second, the City claims that *Masterpiece* applies to neutral adjudicators. But unlike *Masterpiece*, where the Commission imposed penalties after an ALJ determination, the City penalized Appellants without awaiting even the HRC inquiry. *See Masterpiece*, 138 S. Ct. at 1726. The City has set itself up as judge, jury, and executioner. It claims the right to judge Catholic's compliance (Opp.13), reject its religious rationale (Opp.16-17), and terminate its current and future contracts (Op.4-5, 19). That makes this an *a fortiori* case.

Third, the "community-wide" stigma argument is irreconcilable with the fact that no one has complained against Catholic and that 29 other agencies serve same-sex couples. Mot.31-32. *Masterpiece* recognized that religious exemptions for even some state-regulated practices like solemnizing marriages do not create stigma, particularly where there is no "long list" of objectors. *Masterpiece*, 138 S. Ct. at 1727. The City's arguments cannot be squared with *Masterpiece*.

Neutrality. The City freely admits that it did not even investigate secular agencies. Opp.11-12. The City claims only that any other reasons for making referrals were not contrary to the FPO—without bothering to explain why the FPO applies in the first place or how these other referrals did not violate the alleged "all comers" policy. Opp.14-15. But the City cannot point to any time when it applied its newly-minted policies to anyone except religious foster agencies, offers no defense to the cases cited by Appellants, and offers no defense for penalizing the individual Appellants for the mere fact that they work with Catholic. Mot. 20-21.

General applicability. The City acknowledges exceptions to its must certify policy (therefore confirming the policy lacks general

applicability) and instead argues that only exceptions to the FPO matter. Opp.14-15. But the City has never before considered foster care a public accommodation under the FPO. Mot.12, 23-24. The City assumes the FPO applies without any attempt to explain *why* Catholic's provision of home studies qualifies as a public accommodation. Mot.22-24.

Nor does federal guidance referring to foster care change this analysis. Opp.15. It says nothing about the question here: whether foster care is a public accommodation within the meaning of the FPO. Indeed, the federal guidance the City cites has specific language addressing its application in the foster care context.[3] The FPO does not. Catholic is not claiming that anti-discrimination law can *never* apply to foster care—it is claiming that the anti-discrimination law relied on by the City does not.[4]

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[3] *See* Opp.15 (citing HHS guidance).

[4] For the first time on appeal, the City makes an argument under its Charter. Opp.1, 3-4 & n.3. The City waived this argument by failing to raise it previously. And regardless of the source of the City's alleged policy, application of that policy must comply with the First Amendment.

The City fails to explain how to reconcile state law—which requires foster agencies to make subjective inquiries about family relationships, mental health, and ability to work with an agency—with the newly-minted argument that foster care is a public accommodation under the FPO. Mot.23 (quoting 55 Pa. Code § 3700.64). And the City admitted it has never before applied the FPO to foster care. CityAppx.439-42. Therefore, its application of the FPO to foster care cannot be generally applicable.

Discretionary exemptions. The City does not address this, nor deny its admission that it has the power to make discretionary exemptions, and it denied one for Catholic. Mot.24. This alone triggers strict scrutiny. *Blackhawk,* 381 F.3d at 207, 209-10.

C. The City cannot satisfy strict scrutiny.

The City's only alleged compelling interest is a general interest in the enforcement of anti-discrimination laws. Opp.16-17. But when applying strict scrutiny, courts must "look[] beyond broadly formulated interests" and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). The

City fails to address whether providing religious exceptions even undermines this interest. Nor could it, since it admitted that its interest was "no stronger or no weaker than enforcing any other policy."[5]

The City's least restrictive means argument is nothing more than a restatement of its interest enforcing the FPO. That argument contradicts Supreme Court precedent making clear that generally strong interests in anti-discrimination laws must give way to First Amendment rights where, as here, the government fails to make a particularized showing of harm. *Masterpiece*, 138 S. Ct. at 1727; *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995).

D. The City violated the Free Speech Clause.

The City claims that Catholic's home studies are "made pursuant to contractual duties" and are therefore government speech. Opp.17. But the City ignores its prior admission that it has "nothing to do" with home studies. CityAppx.449-450, Appx.265. And the City has not

[5] Appx.213.

pointed to a single instance in which it has treated home studies as its own. Appx.216, Appx.240-241, Appx.277.

Home studies are governed only by State law[6]—a law the City never cites; Catholic's compensation is unrelated to the number of studies it provides[7]; and the contract makes clear that Catholic is an independent contractor, *not* a City agent. Appx.118. Nor does the contract require Catholic to perform a certain number of home studies, or any at all, or to perform home studies or recruitment in any specific manner. *See* Opp.18.

To get around this, the City argues that the contract refers to certifications, the "[p]reparation of [a home] study is integral [to] certification," and thus the home study is "integral to the contract." Opp.18. This bootstrapping concedes that home studies are not actually required by (or even mentioned in) the contract.

The City is trying to do something the First Amendment forbids: "recast[ing]" its contract so as to subsume the compelled speech into "the definition of a particular program" in order to evade First

[6] Appx.230, Appx.257, 55 Pa. Code § 3700.64.
[7] Appx.265.

Amendment review. *Agency for Int'l Dev. v. AOSI*, 570 U.S. 205, 215 (2013).

The City is similarly mistaken that Catholic's only recourse is to stop contracting. Opp.17-19. As the Court explained, "the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *AOSI*, 570 U.S. at 214 (citation omitted). Accordingly, when a government "demand[s] that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* at 218 (citation omitted). This is exactly what the City is requiring here, by conditioning Catholic's ability to provide foster care on adopting government-approved viewpoints during home studies.

II. The remaining factors favor Appellants.

A. Harm to Appellants is real and imminent.

The City does not deny that loss of First Amendment rights is an irreparable harm. Opp.19. In addition, Catholic will be forced to close

its foster program in a matter of months.[8] Appx.76-77. The City contends that an interim contract will ameliorate these harms, Opp.6, but that contract was designed for the very purpose of "wind[ing] down" Catholic's operations "in an orderly fashion." Appx.76-77; CityAppx.620. Irreparable harm, imposed "in an orderly fashion," remains irreparable.

The City says Catholic can provide foster care services elsewhere. Opp.19. But as the Supreme Court held in *Missouri ex rel. Gaines v. Canada*, the obligation to allow Appellants to exercise their religion "cannot be cast by [Philadelphia] upon another jurisdiction." 305 U.S. 337, 350 (1938). Further, Catholic's work in neighboring counties account for a tiny fraction of its foster care. *See* CityAppx.274.

Moreover, Catholic's work in other counties does nothing for *individual* Appellants in Philadelphia. Were Catholic to close, each would face a devastating loss that would be "very harmful" for their families. *See* Appx.83-93. The District Court acknowledged it "may be difficult, uncertain, and emotionally challenging." Appx.60. It would be

[8] The City claims that Appellants' harm is not urgent because they did not immediately sue. But Appellants initially attempted to resolve this issue without litigation. *See, e.g.,* Appx.101-106.

difficult (if not impossible) to continue foster care without Catholic. Appx.84-85, 87-88, 91-92. Some foster children may have to be transferred. Appx.85.

The City claims the foster parents' harm is "piggybacked" upon Catholic's rights. But the individual Appellants are each religiously motivated to provide foster care services, they chose Catholic because of shared religious beliefs, and they are being excluded because they work with Catholic. Mot.21; Appx.176-77, 189, 183-85.

B. The City has presented no evidence of harm.

The City points only to generic interests in contracts and non-discrimination. Opp.20. When assessing harm to a nonmovant, this Court applies the same irreparable harm standard. *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015). Harms that are "tenuous at best, and entirely hypothetical" will not suffice. *Sunoco Partners Mktg. & Terminals L.P. v. Powder Springs Logistics, LLC*, No. CV 17-1390-LPS-CJB, 2018 WL 395750, at *6 (D. Del. Jan. 8, 2018).

Here, the City has nothing but *hypothetical* harms—despite Catholic's decades-long adherence to its religious beliefs. Given the real harm suffered by both Appellants and the foster children who could be

placed in Catholic's homes, the equities tilt decidedly toward an injunction.

CONCLUSION

The motion should be granted.

Date: July 24, 2018

Respectfully submitted,

/s/ Mark L. Rienzi

MARK L. RIENZI
LORI H. WINDHAM
STEPHANIE BARCLAY
NICHOLAS R. REAVES
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
mrienzi@becketlaw.org

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of this motion to the counsel of record for the parties.

Executed this 24th day of July, 2018.

/s/ *Mark L. Rienzi*
Mark L. Rienzi

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND LOCAL RULE 31.1

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate procedure 29(d) and 32(a)(7)(B). It contains 2,597 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 32.
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.
3. This brief complies with the electronic filing requirements of Local Rule 25. The text of this electronic brief is identical to the text of the paper copies, and the latest version of Bitdefender Endpoint Security Tools has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 24th day of July, 2018.

/s/ *Mark L. Rienzi*
Mark L. Rienzi