

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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SHARONELL FULTON, ET AL.,)
) Petitioners,)
) v.) No. 19-123
CITY OF PHILADELPHIA, PENNSYLVANIA,))
ET AL.,))
) Respondents.)
- - - - -

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CITY OF PHILADELPHIA, PENNSYLVANIA,)

ET AL.,)

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Washington, D.C.

Wednesday, November 4, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case Number 19-123,
5 Fulton versus City of Philadelphia.

6 Ms. Windham.

7 ORAL ARGUMENT OF LORI H. WINDHAM

8 ON BEHALF OF THE PETITIONERS

9 MS. WINDHAM: Mr. Chief Justice, and
10 may it please the Court:

11 The courts below made a simple error.
12 They failed to understand where Employment
13 Division versus Smith controls and where it
14 doesn't. Smith doesn't control when the
15 government uses a system of individualized
16 exemptions or when it makes other exceptions
17 that undermine its rules or when it changes the
18 rules to prohibit a religious practice.

19 Philadelphia made all three of those
20 errors here. The City still can't identify a
21 neutral, generally applicable law, even after
22 six attempts. And it now acknowledges its
23 decisions are subjective and individualized.

24 Yet, the courts below still applied
25 Smith. They even said Smith would be a dead

1 letter if Petitioners prevailed. That
2 demonstrates the confusion and instability Smith
3 has caused.

4 Respondents, rather than defend Smith,
5 ask the Court for a newly minted constitutional
6 standard that's even less protective of
7 religious exercise. That approach has no basis
8 in the text, history, or traditions of the Free
9 Exercise Clause.

10 The City has no compelling reason for
11 excluding Catholic Social Services, which has
12 exercised its faith by serving at-risk children
13 in Philadelphia for two centuries. Nor does it
14 have any interest in refusing to allow the
15 agency to step aside and provide referrals
16 elsewhere.

17 Yet, Philadelphia is refusing to place
18 children with loving mothers, like Sharonell
19 Fulton and Toni Simms-Busch, just because they
20 chose to partner with an agency who shares their
21 faith.

22 Respondents act as if this is a
23 zero-sum game: Either LGBTQ couples can foster,
24 or Fulton and CSS can. But the law and decades
25 of experience say otherwise. The Free Exercise

1 Clause is at the heart of our pluralistic
2 society, and it protects Petitioners' vital work
3 for the Philadelphia community.

4 I welcome the Court's questions.

5 CHIEF JUSTICE ROBERTS: Ms. Windham,
6 this is a case involving free exercise rights,
7 but it's in -- they're in tension with another
8 set of rights, those recognized in our decision
9 in Obergefell. And whatever you think or
10 however you think that tension should be
11 resolved as a matter of government regulation,
12 shouldn't the City get to strike the balance as
13 it wishes when it comes to setting conditions
14 for participating in what is, after all, its
15 foster program?

16 MS. WINDHAM: Mr. Chief Justice, I
17 don't believe that that -- that analysis should
18 control here for a couple of different reasons.

19 This Court's precedents make clear
20 that when the government is acting as sovereign
21 using its regulatory authority, like when it's
22 applying a city-wide Fair Practices Ordinance or
23 the ordinances in Lukumi, then the Court does
24 the normal Free Exercise Clause analysis. The
25 same thing is true when the City is deciding at

1 the outset who's able to participate in a
2 program, like --

3 CHIEF JUSTICE ROBERTS: So you don't
4 see --

5 MS. WINDHAM: -- Trinity Lutheran.

6 CHIEF JUSTICE ROBERTS: -- you don't
7 see any difference in terms of the analysis
8 whether it's simply a regulation, the City
9 issuing a rule that governs across the board, as
10 opposed to part of the rules for participating
11 in a program; in other words, not in its
12 sovereign capacity but in a managerial capacity
13 or, you know, a business capacity?

14 MS. WINDHAM: The City isn't acting in
15 one of those capacities here, and I think a key
16 fact here is the fact that they are relying on
17 the Fair Practices Ordinance. The fact that
18 they put that --

19 CHIEF JUSTICE ROBERTS: Well, but do
20 you think there are --

21 MS. WINDHAM: -- into a new context --

22 CHIEF JUSTICE ROBERTS: -- do you
23 think there are different rules in those two
24 different contexts?

25 MS. WINDHAM: Mr. Chief Justice, if

1 you had a situation which is unlike Lukumi,
2 unlike licensing, unlike Trinity Lutheran or
3 Espinoza, when the government is managing
4 internal affairs, then the government's
5 interests may be stronger.

6 But, here, Philadelphia has said that
7 CSS is an independent contractor and is not an
8 employee or agent of the City. That's --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MS. WINDHAM: -- in its old contract.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas.

14 JUSTICE THOMAS: Thank you, Mr. Chief
15 Justice.

16 Counsel, following up on the Chief
17 Justice's question, this seems to involve both
18 contractual relationships with the City, as well
19 as, as the Chief said, regulatory or licensing.

20 In that instance, when you have both
21 aspects of that, do we analyze it as a
22 government contract, again, referring back to
23 the Chief's point, or as sort of a licensure
24 program where the City has basically taken over
25 an area and now it has certain requirements of

1 the -- the regulated industry?

2 MS. WINDHAM: Justice Thomas, as Your
3 Honor acknowledged there at the end, the City is
4 trying to regulate an area that has historically
5 been an area of religious practice, and so I
6 think that that sets this case apart from many
7 cases the City is citing. It's correct they're
8 using regulatory authority, they're using
9 sovereign authority, they're using licensing
10 authority to decide who gets to participate.

11 Those are cases where this Court's
12 precedents have said you do the normal
13 constitutional analysis. There's not some
14 special rule.

15 And, here, where both the old
16 contracts and the new contracts say that we're
17 not an employee or agent of the City, the same
18 analysis should apply here as did in Lukumi and
19 Espinoza and Trinity Lutheran.

20 This is different from a case like,
21 say, Bowen, where you're trying to reach out as
22 a third-party and tell the City how to run its
23 internal affairs.

24 Here, the City is reaching out and
25 telling a private religious ministry which has

1 been doing this work for two centuries how to
2 run its internal affairs and trying to coerce it
3 to make statements that are contrary to its
4 religious beliefs as a condition of continuing
5 to participate in the religious exercise that
6 they have carried out in Philadelphia for two
7 centuries.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: Yes. Thank you.

12 On pages 45 and 46 of the City's
13 brief, they say that they aren't requiring you
14 to endorse same-sex marriages. They say all
15 they're asking you to do is evaluate a couple
16 without reference to whether they are same-sex
17 or not.

18 You've read that. It says your
19 objection is to being required to evaluate and
20 provide written endorsements of a same-sex
21 relationship. But they aren't saying to do
22 that. Indeed, they say add something onto any
23 response you make and say that you do not
24 endorse same-sex marriages. Say it.

25 You see what it says. So suppose

1 pages 45 and 46 were written right into your
2 contract, allowing you to say whatever you want
3 about same-sex. All they want you to do is
4 evaluate this couple irrespective of same or
5 different sex.

6 What is your religious objection to
7 that?

8 MS. WINDHAM: So, Justice Breyer, I'm
9 going to point Your Honor to the Joint Appendix
10 at 210 to 211 and then 237, where that very
11 question was asked.

12 And the head of Catholic Social
13 Services testified that certifying a home of a
14 same-sex couple would be in violation of that
15 religious belief, that a home study is
16 essentially a validation of the relationships in
17 the home, and that a final home study includes a
18 written endorsement of the relevant
19 relationships of the foster parent.

20 And the state law as well asks an
21 agency -- agency to assess the ability of
22 applicants for approval as foster parents.

23 What the City is asking CSS to do here
24 is to certify, validate, and make statements
25 that it cannot make. And I'm not aware of any

1 case where this Court has said it's okay to
2 compel speech or coerce religious exercise as
3 long as you can tag a disclaimer onto the end of
4 it. Respondents certainly haven't cited to any.

5 It would be hurtful for CSS and for
6 the couple, if any couple ever approached them,
7 for them to go into their home, assess their
8 relationships, interview them about their
9 intimate relationships and their family, and
10 then, at the end of that, have to say we cannot
11 provide that approval for you and your family.

12 CSS is making a modest request here,
13 which is to step aside and be able to allow
14 diverse religious agencies to serve the City of
15 Philadelphia, as they have done successfully for
16 many years.

17 JUSTICE BREYER: Well, you don't have
18 to say, according to them, whether the couple is
19 married, whether it's not married, whether it's
20 same-sex, whether it's different sex. You just
21 put that to the side, make a note that you're
22 putting it to the side, and say, other than
23 that, they're okay or they're not okay. That's
24 all you have to do.

25 Now what's the problem? I still don't

1 quite see it. You said in your response that
2 you don't want to do it, which I understand that
3 you don't. But they say they're imposing a
4 requirement that does not interfere with your --
5 they can't figure out how does it interfere.
6 And so we write 45 and 46 right into your
7 contract word for word.

8 And now tell me once again what's the
9 problem. You -- in your last answer, you just
10 said they can't make you say anything. I guess
11 that's true. But we write 45 and 46 and say you
12 can say something if you want, or you don't have
13 to if you don't want to, but just take same-sex,
14 different sex, and put it to the side and say,
15 other than that, are they qualified.

16 MS. WINDHAM: What they're still being
17 asked to do is to evaluate, assess, and approve
18 of a couple under -- under state law. And in
19 their own written report, that's something that
20 they have testified that they cannot do.

21 This is also not an unknown or unusual
22 religious belief. Eleven states have passed
23 laws to specifically protect religious child
24 welfare providers in this context. As the USCCB
25 brief points out, there have been agency

1 closures across the country over this very
2 issue.

3 What we're asking here --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Alito.

7 JUSTICE ALITO: Let me ask you a
8 couple of questions about what's in the record
9 of this case about the facts of the case.

10 To begin, as far as the record
11 reflects, how many same-sex couples in
12 Philadelphia have been denied the opportunity to
13 be foster parents as a result of Catholic Social
14 Services' policy?

15 MS. WINDHAM: Zero. In fact, Justice
16 Alito, none have even approached Catholic Social
17 Services asking for this approval and
18 endorsement.

19 JUSTICE ALITO: Before the events at
20 issue now, how many children had been placed --
21 were in homes that had been evaluated by
22 Catholic Social Services?

23 MS. WINDHAM: At the time of the
24 referral freeze, there were well over 100
25 children who were currently being served, and

1 over the years, there had been thousands who had
2 been served by Catholic Social Services.

3 JUSTICE ALITO: How many children are
4 awaiting placement in foster homes in
5 Philadelphia?

6 MS. WINDHAM: According to the City of
7 Philadelphia, at the time when they froze intake
8 for CSS, there were 250 children who were in
9 group homes who needed to be moved out of those
10 homes and into family homes. This is in the
11 best interests of the children. It's actually
12 an obligation under state law.

13 But Commissioner Figueroa, at page 352
14 to 53 of the JA, acknowledged that those
15 children were still in group homes and that
16 those children were not going to be moved into
17 homes that are supported by Catholic Social
18 Services.

19 JUSTICE ALITO: One of your main
20 arguments concerns a -- the fact that there are
21 exemptions to the generally applicable rules
22 under the City's policy.

23 I'm somewhat uncertain about what the
24 City's final position is about the availability
25 of exemptions. What is your understanding of

1 that?

2 MS. WINDHAM: Justice Alito, I
3 understand that there are individualized
4 exemptions from provision 3.21 of the contract,
5 and also through the Waiver Exemption Committee,
6 that there are categorical exemptions. Whenever
7 an agency conducts a home study, they have to
8 consider disability, marital status, and
9 familial status. That's prohibited by the
10 City's Fair Practices Ordinance.

11 And so those are the -- and the City
12 itself actually deviates from the Fair Practices
13 Ordinance, even though it is bound by it, when
14 it is making placement decisions in foster care.

15 JUSTICE ALITO: Well, do they make the
16 exemptions at the initial stage or only at the
17 placement stage?

18 MS. WINDHAM: Justice Alito, the
19 City's exemptions are at the placement stage.
20 But, for the agencies, those exemptions are
21 happening when they're carrying out the home
22 studies, so the exact same point in the process
23 that the City is trying to coerce Catholic
24 Social Services here.

25 And, of course, the Waiver and

1 Exemption Committee could, in theory, give them
2 at any stage.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, I'm
7 interested in why you see yourself as a licensee
8 as opposed to a government contractor.

9 I understand that many governments
10 throughout the country do these home assessments
11 and certifications internally. They hire
12 employees within the government, they set up
13 criteria, and they're the ones who choose to
14 certify a family or not.

15 So why aren't you any different than a
16 government contractor?

17 MS. WINDHAM: Well, just --

18 JUSTICE SOTOMAYOR: What license are
19 you receiving? I've never heard of a license
20 where they pay you to take the license.

21 MS. WINDHAM: Justice Sotomayor, the
22 City is exercising a licensing authority because
23 it is deciding which foster agencies are able to
24 perform these services in the City of
25 Philadelphia.

1 JUSTICE SOTOMAYOR: But that's no
2 different --

3 MS. WINDHAM: This is just using --

4 JUSTICE SOTOMAYOR: -- that's no
5 different than deciding -- setting forth
6 criteria to hire someone to do work for you.
7 It's a lovely argument, but I'm having a very
8 hard time accepting how, when the City sets
9 forth a set of criteria, only these people can
10 do this work for me. That's not a license.
11 That's an employment contract.

12 MS. WINDHAM: And the City has --

13 JUSTICE SOTOMAYOR: It's an
14 independent contractor, but it's an employment
15 contract.

16 MS. WINDHAM: And the City has been
17 crystal-clear that CSS is not its employee or
18 agent. Philadelphia -- Pennsylvania has chosen
19 to partner with --

20 JUSTICE SOTOMAYOR: No, but --

21 MS. WINDHAM: -- private agencies --

22 JUSTICE SOTOMAYOR: -- but state --

23 MS. WINDHAM: -- to do this work.

24 JUSTICE SOTOMAYOR: -- but state -- I
25 mean, we have often permitted and we have a

1 legion of cases with people who are not state
2 actors or agents or actual employees but
3 contractors or people who are -- are being
4 retained to do things for the government where
5 we said the government could set the criteria it
6 wants. Why are you any different?

7 MS. WINDHAM: What the City's trying
8 to do here is tell religious groups who have
9 been doing this prior to when the City got
10 involved we're going to exclude you, you can no
11 longer carry out this work unless you take
12 actions that are contrary to your faith.

13 That is something that the Free
14 Exercise Clause prohibits. That's what
15 Philadelphia is attempting to do here.
16 Philadelphia's -- and the Respondents' position
17 here is the dangerous one, because we're saying
18 -- they're saying that even if you're not the
19 employee or agent --

20 JUSTICE SOTOMAYOR: Counsel, but --

21 MS. WINDHAM: -- the government --

22 JUSTICE SOTOMAYOR: -- I'm sorry,
23 counsel. I don't have much time, but just one
24 last point.

25 What is dangerous is the idea that a

1 contractor with a religious belief could come in
2 and say: Exclude other religions from being
3 families, certifying families. Exclude someone
4 with a disability. How do we avoid that? Or
5 exclude interracial couples.

6 MS. WINDHAM: Justice Sotomayor, the
7 City actually allows agencies to exclude people
8 with disabilities today. That's one of the
9 exceptions that they have from their contract.

10 JUSTICE SOTOMAYOR: Well, no, that's
11 not exclusion. They require an agency to be
12 specialized in that placement. If the agency
13 gets the specialization, it can become one.

14 MS. WINDHAM: The agency actually can
15 exclude parents on the basis of disability from
16 providing foster care.

17 JUSTICE SOTOMAYOR: Well, what's that
18 have to --

19 MS. WINDHAM: But to go to your --

20 JUSTICE SOTOMAYOR: -- what does that
21 have to do with certifying a family? Meaning
22 those are two different functions. The
23 certification process is who's eligible, and
24 they don't require someone to have -- to be
25 married even, same-sex or not. That's different

1 than placing a child, which is governed by the
2 best interests of the child.

3 CHIEF JUSTICE ROBERTS: Briefly,
4 counsel.

5 MS. WINDHAM: Justice Sotomayor, the
6 state law at 55 Pennsylvania Code 3700.64 does
7 take into account disability, including mental
8 and emotional stability.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Kagan.

12 JUSTICE KAGAN: Good morning,
13 Ms. Windham. I'd like to take you back to the
14 Chief Justice's opening questions and give you a
15 hypothetical.

16 Suppose that there's a state and it
17 doesn't want to operate its prisons itself, so
18 it contracts with private organizations to do
19 so. And in the contract, there's a provision
20 that says that no employee can use drugs of any
21 kind. And -- and a -- a -- a -- a group says --
22 that wants to operate a prison says it wants an
23 exemption for peyote use. What would be the
24 result in that case?

25 MS. WINDHAM: Well, Justice Kagan, I

1 think, to know the result in that case, first of
2 all, we would have to know whether the
3 government's rules there are neutral and
4 generally applicable. I believe the free
5 exercise analysis would apply.

6 JUSTICE KAGAN: Well, you know, I
7 guess the question that I'm trying to get at is
8 here's the government in its capacity as a
9 contractor saying, you know, something -- a
10 condition that's extremely relevant to the
11 contract in its view, and shouldn't the
12 government have leeway to do that, to just say,
13 you know, it doesn't matter why you want to use
14 peyote, whether it's religious or anything else;
15 we're just going to say there -- there should be
16 no peyote use and no other drug use.

17 MS. WINDHAM: Justice Kagan, I think
18 that the state would be likely to prevail in
19 that case for a couple of reasons.

20 One is that, unlike here, the
21 government's interests are going to be a lot
22 stronger. The government there is actually
23 taking something that's traditionally a public
24 function and handing it out to private
25 organizations, as opposed to here, taking --

1 moving in and increasingly regulating and
2 restricting work that has traditionally been
3 private.

4 Second --

5 JUSTICE KAGAN: But there are a lot --

6 MS. WINDHAM: -- there, they --

7 JUSTICE KAGAN: -- of things that
8 governments do now. If you would excuse me, Ms.
9 Windham, just to put another question on the
10 table. I mean, there are a lot of things that
11 governments do now that traditionally were done
12 by private organizations, religious
13 organizations. I mean, you could go through,
14 you know, youth homes or homeless shelters. A
15 lot of old philanthropy is now regulated and
16 conducted by the government.

17 Why should that matter?

18 MS. WINDHAM: Justice Kagan, because I
19 think that really points out the question in
20 this case: Does the Free Exercise Clause shrink
21 every time the government expands its reach and
22 begins to regulate work that has historically
23 and traditionally been done by religious groups?

24 JUSTICE KAGAN: Would you have a
25 different argument if a religious group that had

1 never engaged in this kind of activity said now
2 we want to? Would that make a difference to
3 you?

4 MS. WINDHAM: Justice Kagan, I think
5 it would make a difference. I think the history
6 here is important. I think that when you're
7 looking at the government's interest in that
8 case, that would be relevant too.

9 Here, the City calls CSS a point of
10 light in its foster care system, and it has
11 demonstrated through the years that it can do
12 this work successfully for the children of
13 Philadelphia with no detriment to the LGBTQ
14 population of Philadelphia.

15 And so I think that the --

16 JUSTICE KAGAN: Thank you,
17 Ms. Windham.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning,
21 counsel. What do we do with the fact that the
22 City seems to be representing to us here and now
23 that the Fair Practices Ordinance is binding of
24 its own force and that the department can't
25 offer any exemptions?

1 MS. WINDHAM: Justice Gorsuch, I think
2 that that's a very important fact here because,
3 if we're going to take the City at its word
4 there, what it means is that we've stepped out
5 of the contracting context now and we are firmly
6 in the regulating context.

7 What the City is saying to Catholic
8 Social Services is that it is illegal for you to
9 do this work in the City of Philadelphia
10 according to your religious exercise whether you
11 contract with the government or not.

12 JUSTICE GORSUCH: And -- and -- and
13 how does Philadelphia, in -- in -- in its
14 written documents with the Catholic Social
15 Services, treat it? Is it an employee, an
16 agent?

17 MS. WINDHAM: The City's quite clear,
18 at JA 634 and SA 17, that CSS is an independent
19 contractor and shall not be deemed or intended
20 to be an employee or agent of the City.

21 JUSTICE GORSUCH: And -- and how long
22 has Catholic Services been -- been engaged in --
23 in this activity?

24 MS. WINDHAM: They've been doing it
25 for two centuries now.

1 JUSTICE GORSUCH: Okay. And what do
2 we do with your de facto exemption argument,
3 given the fact that we have a finding by the --
4 the district court that there are none?

5 MS. WINDHAM: The district court's
6 error there is an error of law. The district
7 court said that it was a generally applicable
8 law as long as it didn't prescribe particular
9 conduct only or primarily when religiously
10 motivated. You can see that at Petition
11 Appendix 87.

12 And so the district court there had
13 the wrong idea about what counts as an
14 exception, what counts to make something not
15 generally applicable, and it made an error of
16 law there.

17 JUSTICE GORSUCH: If we thought that
18 were a finding of fact and -- and we were stuck
19 with it, then -- then what would you argue?

20 MS. WINDHAM: I would argue in that
21 case, if the Court did think it was a finding of
22 fact, that under the Court's decisions in Hurley
23 and Bose, in a First Amendment case, the Court
24 is going to make an independent review of the
25 record. And that's particularly pertinent here,

1 where we're talking about the words of a
2 contract, the words of a city law, the words of
3 a state regulation. This is the work-a-day
4 business of the courts to interpret and apply
5 the law.

6 JUSTICE GORSUCH: And with respect to
7 section -- oh, I see my time's expired. Thank
8 you. Thank you, counsel.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Thank you, Mr.
12 Chief Justice.

13 And good morning, Ms. Windham. I want
14 to follow up on some of Justice Alito's
15 questions and just make sure I have some of the
16 facts down pat here.

17 First, as I understand it,
18 Philadelphia contracts with about 30 private
19 foster agencies to find and train and support
20 foster families, and Catholic Social Services is
21 just one of them, as I understand it.

22 And, second, if a same-sex couple ever
23 came to Catholic Social Services, Catholic
24 Social Services would refer that couple to
25 another agency that works with same-sex couples

1 so that the couple could participate and be a
2 foster -- foster parents.

3 And then, third, no same-sex couple
4 has ever come to Catholic Social Services for
5 participation in this program, and, therefore,
6 Catholic Social Services' policy has never
7 actually denied any same-sex couple the
8 opportunity to be foster parents in
9 Philadelphia.

10 I just want to make sure those three
11 facts are accurate, and you can elaborate as you
12 see fit.

13 MS. WINDHAM: That's all correct,
14 Justice Kavanaugh. And that demonstrates,
15 first, that CSS is not going to prevent any
16 same-sex couple from being able to foster in
17 Philadelphia. There are many other agencies out
18 there. They're merely asking to be able to step
19 aside and recuse if that situation ever to --
20 were ever to arise.

21 It also demonstrates the City doesn't
22 have a compelling interest here. This is a
23 system that has worked effectively and worked
24 well for many years. This is an unnecessary
25 conflict. The City of Philadelphia had an easy

1 option here, which is to allow Catholic Social
2 Services to continue the great work that it's
3 been doing.

4 Unfortunately, because the courts
5 below decided to apply Employment Division v.
6 Smith, the City thinks that it's under no
7 obligation to consider, respect, and accommodate
8 religious exercise, which demonstrates how far
9 off the rails our free exercise jurisprudence
10 has gone in this case.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett.

14 JUSTICE BARRETT: Good morning, Ms.
15 Windham. So you just kind of indicated that --
16 you know, that maybe Smith shouldn't have been
17 applied here, and you argue in your brief that
18 Smith should be overruled.

19 But you also say that you win even
20 under Smith because this policy is neither
21 generally applicable nor neutral.

22 So, if you're right about that, why
23 should we even entertain the question whether to
24 overrule Smith?

25 MS. WINDHAM: Justice Barrett, you're

1 exactly right that we can and should win this
2 case even under Smith. The question then to the
3 Court will be how it resolves the legal question
4 and what guidance it provides to the courts
5 below.

6 This Court in cases like Trinity
7 Lutheran and Espinoza looks to the text,
8 history, and traditions of the Free Exercise
9 Clause, and those make clear that Smith is a bad
10 fit. Smith has caused negative results.

11 Developments since Smith was decided
12 make clear that its prediction has actually not
13 borne out, that it is possible for the
14 government to accommodate and partner with
15 religious organizations to do religious
16 exercise.

17 JUSTICE BARRETT: What would you
18 replace Smith with? Would you just want to
19 return to Sherbert versus Verner?

20 MS. WINDHAM: I believe that the
21 Court's free exercise jurisprudence gives us
22 some guidance there. In cases like the
23 Ministerial Exception or Church Autonomy, the
24 Court doesn't even look at the Smith/Lukumi line
25 of cases. In cases like Lukumi and Trinity

1 Lutheran, the Court has looked at the
2 non-neutrality or targeting.

3 But, in other cases, I think the
4 question should be pretty simple: Is the free
5 exercise of -- is the free exercise of religion
6 being prohibited and, if so, does the government
7 have a compelling reason for doing so? Here,
8 the government does not.

9 JUSTICE BARRETT: Last question: If
10 we did overrule Smith or, frankly, even if we
11 didn't, let's take this out of the same-sex
12 marriage context and put it in the interracial
13 marriage context. Justice Sotomayor was
14 indicating an example like this.

15 What if there was an agency who
16 believed that interracial marriage was an
17 offense against God and, therefore, objected to
18 certifying interracial couples as foster
19 families? Would they be entitled to an
20 exemption and, if so, how is that
21 distinguishable from -- or, if not, how is that
22 distinguishable from CSS's refusal to certify
23 children to couples in same-sex marriages?

24 MS. WINDHAM: No, Your Honor. If that
25 case were even to get to strict scrutiny, this

1 Court has been clear in Loving and other cases
2 that government has a compelling interest in
3 eradicating racial discrimination.

4 It's a far cry from here, where
5 Commissioner Ali said that the interest is no
6 stronger or no weaker than enforcing any other
7 policy.

8 It's hard to imagine the City making
9 that kind of concession in a case involving
10 interracial marriage.

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Ms. Windham,
13 you have a minute to wrap up.

14 MS. WINDHAM: Philadelphia will make
15 exceptions to its rules for lots of reasons but
16 not for the reason of CSS's religious exercise.

17 Regardless of the legal mechanism that
18 Philadelphia uses, the bottom line is that CSS
19 is breaking the City's law if it even refers
20 same-sex couples to another agency better suited
21 to help them.

22 And, as a result, Philadelphia won't
23 place children with Sharonell Fulton, Toni
24 Simms-Busch, or CSS unless their church changes
25 or violates its beliefs.

1 In our pluralistic society, a properly
2 functioning Free Exercise Clause is supposed to
3 prevent this kind of unnecessary and harmful
4 conflict. There are children in need of loving
5 homes waiting for them. Neither Philadelphia
6 nor Smith should stand in the way.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Mooppan.

11 ORAL ARGUMENT OF HASHIM M. MOOPPAN
12 FOR THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING THE PETITIONERS

14 MR. MOOPPAN: Mr. Chief Justice, and
15 may it please the Court:

16 Philadelphia has not afforded Catholic
17 Social Services the tolerance of religious
18 practice that is required by the Free Exercise
19 Clause and vital to our pluralistic nation.

20 The City refuses to place foster
21 children in available foster homes certified by
22 CSS simply because, if CSS were ever asked to
23 certify a gay couple, it would respectfully
24 decline and refer them to another foster agency.

25 The City's draconian response to CSS's

1 hypothetical position discriminates against
2 religious exercise for two reasons.

3 First, the City lacks a generally
4 applicable rule because it seeks to apply a
5 non-discrimination requirement to CSS despite
6 having exempted comparable secular conduct,
7 thereby devaluing CSS's religious concerns.

8 Second, the City has not neutrally
9 applied this rule because it has shown undue
10 disrespect to CSS's sincere religious beliefs by
11 pleading a win-win accommodation as too odious
12 to tolerate.

13 CHIEF JUSTICE ROBERTS: Counsel, you
14 rely, as does the Petitioner, on contract
15 provision 3.21, which bans a list of
16 objectionable practices but then has at the end
17 this "unless an exception is granted by the
18 Commissioner in his or her sole discretion."

19 Has an exception ever been granted
20 under that provision?

21 MR. MOOPPAN: I'm not sure that
22 there's any evidence of that one way or the
23 other, Your Honor, but I think the -- the key
24 exceptions that have been granted and have been
25 recognized in the record is that the City both

1 requires, tolerates, and itself engages in the
2 consideration of protected traits when
3 certifying and placing foster children.

4 In particular, under 55 Pennsylvania
5 Code 3700.64, the City requires agencies to
6 consider both familial status and disability in
7 certifying foster children -- foster parents.

8 The City has tolerated racial and
9 ethnic-based outreach to -- for foster parents.
10 And then the City itself considers race and
11 disability when placing children.

12 All of those --

13 CHIEF JUSTICE ROBERTS: The federal
14 government, of course, has an extensive
15 contracting regime, and it draws distinctions, I
16 think, between -- on the basis of, for example,
17 disability, minority ownership, and all that.

18 How does -- do contract rules have to
19 be neutral and generally applicable across the
20 board even with respect to protected status?

21 MR. MOOPPAN: Well, Your Honor, the
22 federal government, of course, is subject to
23 RFRA, but -- so, for the purposes of a state
24 government, if a state chooses to recognize
25 exceptions to its anti-discrimination provisions

1 within its contractual setting, it can no longer
2 claim to be acting in a generally applicable and
3 neutral way. And then it just --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: I have no questions,
8 Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: Yes. Did you --
12 sorry, the machine didn't work.

13 Can you hear me?

14 MR. MOOPPAN: Yes. Yes, Your Honor.

15 JUSTICE BREYER: Very well. I'd like
16 to follow up on two questions that have been
17 asked, the questions of the interracial
18 marriage. Everything is the same except it's
19 interracial.

20 The response so far from your side has
21 been, well, that's a compelling interest. This
22 isn't.

23 Think of other examples. The
24 government wants to contract to a food
25 distributor to supply food on all the military

1 bases, and because they are Orthodox Jews, they
2 want nothing to do with ham and don't want to
3 let anybody else -- they want nothing to do with
4 it. Or consider a -- a religion which says
5 we're bidding on this contract for local
6 transportation and we want men and women to sit
7 separately, or we want women to wear head
8 scarves.

9 Now, in a contracting basis, is it
10 your opinion that the government just has to do
11 that, has to give into the religious belief, or
12 not?

13 MR. MOOPPAN: Your Honor, I think the
14 question under our submission is whether the
15 government is acting in a generally applicable
16 and neutral way.

17 So, if the government has a blanket
18 anti-discrimination provision, that would be one
19 thing. But, if, as in this case, the government
20 has -- wanted -- is forced to have an
21 anti-discrimination provision but then itself
22 recognizes myriad exceptions, it is generally
23 going to have undermined its compelling interest
24 and it's going to have to explain why it can
25 tolerate deviations from that

1 anti-discrimination provision in a whole host of
2 areas but it cannot tolerate a deviation for a
3 -- a religious accommodation.

4 JUSTICE BREYER: We can get other
5 people to supply the ham, they say. And so they
6 -- that's all right. But we can't do anything
7 about this, the -- the -- the head scarves, and
8 we can't do anything about the interracial
9 marriage. So, in your idea, the -- well, how --
10 how does that work out?

11 MR. MOOPPAN: Well, so I would
12 differentiate the interracial marriage from the
13 rest of them, Your Honor. I -- on interracial
14 marriage, this Court has made clear repeatedly
15 that there's a particularly compelling interest
16 in eradicating racial discrimination.

17 JUSTICE BREYER: So you want to start
18 marking --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 JUSTICE BREYER: I'm sorry. I want to
22 interrupt you right here because now two of you
23 have said this, that we should write an opinion
24 which says discrimination on the basis of race,
25 constitutionally speaking, is different than

1 discrimination on the basis of gender, on the
2 basis of religion, on the basis of nationality,
3 on the basis of homosexuality, all right? Is
4 that the opinion you want us to write?

5 MR. MOOPPAN: Well, Your Honor --

6 CHIEF JUSTICE ROBERTS: Briefly,
7 counsel.

8 MR. MOOPPAN: Your Honor, I think this
9 Court in Pena-Rodriguez already said something
10 very similar about how race is unique in this
11 country's constitutional history, and
12 eradicating that type of racial discrimination
13 pretends -- presents a particularly unique and
14 compelling interest.

15 CHIEF JUSTICE ROBERTS: Justice Alito.

16 JUSTICE ALITO: Didn't the Court in
17 Obergefell say exactly that? Didn't the Court
18 say that there are honorable and respectable
19 reasons for continuing to oppose same-sex
20 marriage? Would the Court say the same thing
21 about interracial marriage?

22 MR. MOOPPAN: Certainly, Your Honor,
23 Obergefell does say that. Loving, of course,
24 didn't say that and never would have said that.
25 Masterpiece Cake, in addition, also recognized

1 similarly that there are contexts and
2 circumstances in which gay couples can recognize
3 and accept that there are longstanding,
4 deep-seated, sincere religious beliefs that
5 oppose same-sex marriage, and in a pluralistic
6 nation that respects religious tolerance,
7 accommodating those sort of religious practices
8 is -- does not undermine the compelling interest
9 in the same -- sorry -- tolerating those -- that
10 religious practice is consistent with the Free
11 Exercise Clause in a -- in a way that, if you're
12 dealing with interracial marriage, it would not,
13 given the significant compelling interest in
14 that context.

15 JUSTICE ALITO: We don't reach
16 constitutional questions as a general matter
17 unless we -- unless we have to. That's a strong
18 policy.

19 But what do the arguments in this case
20 about -- the complicated arguments about
21 exemptions and the new arguments about
22 contracting, the question whether Catholic
23 Social Services is more like a regular licensee
24 or more like a contractor, say about the
25 stability of the Employment Division versus

1 Smith precedent?

2 MR. MOOPPAN: Well, Your Honor, the
3 government, as you know, we haven't taken a
4 position on Smith. We do think that this is a
5 relatively straightforward case under Smith that
6 the government -- the City has not acted in a
7 generally applicable and neutral way.

8 We think that the record makes clear
9 that the City has recognized myriad exceptions
10 from its anti-discrimination provision and that
11 the courts below erred just because they made a
12 legal error in not treating those as exemptions
13 because they looked too narrowly at whether, if
14 an entity had engaged in the same practice for a
15 non-religious reason, would the City have
16 treated them differently. And that's just
17 contrary to Lukumi.

18 In Lukumi itself, if there had been a
19 non-religious actor who had engaged in a ritual
20 sacrifice of an animal, Hialeah's ordinances
21 would have picked up those people too, but this
22 Court --

23 JUSTICE ALITO: All right. Thank --
24 thank you, counsel. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: Counsel, I've
3 always thought that a compelling state interest
4 that motivated our holdings in racial
5 discrimination cases was not merely that race
6 was important but that the burden on the people
7 who are rejected because of race is an interest
8 that the state could seek to protect, that a
9 rejection on the basis of race or any protected
10 category creates a stigma on that person and
11 that it's a compelling state interest for the
12 state to have an anti-discrimination law on the
13 basis of protected classes.

14 Are you -- are you diminishing that as
15 a compelling state interest?

16 MR. MOOPPAN: No, Your Honor. I think
17 that consideration of that just cuts in the
18 opposite direction here for two reasons.

19 The first reason is no gay couple is
20 being denied the ability to serve as a foster
21 parent in this situation, first, as a factual
22 matter --

23 JUSTICE SOTOMAYOR: May I interrupt
24 you there. They are by C -- by this agency.
25 CSS is saying to them: I won't certify you. It

1 is --

2 MR. MOOPPAN: Well --

3 JUSTICE SOTOMAYOR: -- an independent
4 contractor with the City. And the City has said
5 to that couple: We won't discriminate against
6 you, but CSS, our independent contractor,
7 doesn't want to serve you, doesn't want to
8 certify you, not on the basis of any of the
9 criteria that the state has set forth. You
10 might meet every criteria the state sets forth.
11 But they're imposing an additional criteria.

12 MR. MOOPPAN: So two points about
13 that, Your Honor.

14 The first is, as a factual matter, no
15 gay couple has ever actually tried to use CSS.
16 And I think that reflects --

17 JUSTICE SOTOMAYOR: Well, I suspect
18 that --

19 MR. MOOPPAN: -- the point --

20 JUSTICE SOTOMAYOR: -- I suspect
21 that's part of -- part of that is just natural,
22 meaning people gravitate to agencies that are
23 known by their community.

24 And so I am sure -- and this is one of
25 the arguments that was resolved against the

1 Petitioner here -- it's not that the agency has
2 -- that the City has agencies who cater only to
3 one community. It's that some agencies live in
4 a particular community, and so more people will
5 come to it from that community.

6 MR. MOOPPAN: Well, Your Honor, I
7 think -- respectfully, I think it might more
8 reflect the point that Justice Alito made
9 earlier, that gay couples can recognize and
10 accept that the Catholic Social Services and the
11 Catholic Church have a deep-seated, sincere
12 religious objection to gay marriage and thus
13 they don't seek out CSS to serve as their foster
14 agency.

15 But, on the flip side, I think it's
16 important to emphasize that the City's rules do
17 consider disability when certifying foster
18 parents. So foster parents can be denied the
19 ability to serve as foster parents because of
20 their disability.

21 So, again, the City is allowing that
22 sort of dignitary harm that Your Honor pointed
23 to, and they're saying that sometimes that
24 dignitary harm isn't enough, but they are not
25 willing to allow that to happen in this context,

1 where it's a totally hypothetical harm and
2 whereby enforcing that hypothetical harm,
3 they're actually harming the children they
4 purport to serve.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Kagan.

8 JUSTICE KAGAN: Good morning,
9 Mr. Mooppan. If I understood you correctly, you
10 said that it is a compelling state interest to
11 eradicate racial discrimination, but it is not a
12 compelling state interest to eradicate
13 discrimination on the basis of sexual
14 orientation.

15 And I was wondering where in this
16 scale that you're using would discrimination on
17 the basis of gender come. Would -- would that
18 be a compelling state interest? So, for
19 example, if there's an agency that refuses to
20 employ women, would the state have to contract
21 with that agency?

22 MR. MOOPPAN: Well, Your Honor, just
23 to be clear, because I don't -- my -- my point
24 was that the government in -- Philadelphia in
25 this case has undermined its compelling

1 interest, any compelling interest it might have
2 in eradicating sexual orientation discrimination
3 because it has recognized a slew of exceptions.

4 And what I was suggesting is, with
5 respect to racial discrimination, given the
6 significance --

7 JUSTICE KAGAN: Do you think it is a
8 compelling state interest to want to eradicate
9 discrimination against gays and lesbians?

10 MR. MOOPPAN: I -- I'm sorry, Your
11 Honor. I didn't hear the beginning of your
12 question.

13 JUSTICE KAGAN: Do you think there's a
14 compelling state interest to try to eradicate
15 discrimination against gays and lesbians? Is
16 that a compelling state interest?

17 MR. MOOPPAN: So we're not denying the
18 significance of that interest in the abstract.
19 What we're saying is that --

20 JUSTICE KAGAN: Is it a compelling
21 state interest, Mr. Mooppan?

22 MR. MOOPPAN: In the abstract,
23 perhaps, but, on the facts of this case, the
24 government has undermined that interest --

25 JUSTICE KAGAN: I don't want a --

1 MR. MOOPPAN: -- by recognizing --

2 JUSTICE KAGAN: -- is it perhaps, or
3 is it yes or is it no?

4 MR. MOOPPAN: Well, Your Honor, we
5 haven't taken a position on that question
6 because the question in this case is whether the
7 City of Philadelphia has a compelling interest.
8 And the City of Philadelphia does not because
9 they have undermined that interest by
10 recognizing a series of exceptions.

11 And having recognized all those
12 exceptions, it no longer has a compelling
13 interest in insisting that the one situation
14 where it cannot abide by any discrimination is
15 sexual orientation, even though --

16 JUSTICE KAGAN: If the City of
17 Philadelphia --

18 MR. MOOPPAN: -- it tolerates racial
19 discrimination, it tolerates disabilities --

20 JUSTICE KAGAN: You said -- excuse me,
21 Mr. Mooppan. You said that the City of
22 Philadelphia could not do the same thing with
23 respect to race. And the same supposed
24 exceptions for -- are there too, ready to
25 undermine it, but you said that that would come

1 out differently. And I'm seeking to find out a
2 reason why.

3 MR. MOOPPAN: The -- the reason why is
4 because -- because racial discrimination is
5 particularly unique and compelling, as this
6 Court has held in cases like --

7 JUSTICE KAGAN: That's why it's
8 super-compelling. Is that the idea?

9 MR. MOOPPAN: That's right. As this
10 Court said in *Pena-Rodriguez*, where it
11 recognized an exception to the jury impeachment
12 rule for racial discrimination, particularly
13 in --

14 JUSTICE KAGAN: Yes. I mean, race is
15 *sui generis* in our society in all kinds of ways,
16 but a compelling state interest usually allows
17 the state to act. It doesn't usually; it does.

18 MR. MOOPPAN: Right. And the question
19 is whether the government has undermined that
20 interest by recognizing exceptions.

21 And what I'm submitting is that the
22 exceptions that the government has recognized
23 here don't undermine its compelling interest
24 with respect to racial discrimination because
25 most of the exceptions don't even involve race.

1 And the only ones that do involve race involve
2 an individualized consideration of race.

3 JUSTICE KAGAN: Thank you, Mr.
4 Mooppan.

5 MR. MOOPPAN: So that doesn't --

6 JUSTICE KAGAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch.

9 JUSTICE GORSUCH: Counsel, can we
10 circle back to the question whether Catholic
11 Social Services should be treated as an employee
12 or agent and whether the City can effectively
13 take over a -- a service that had been provided
14 privately for -- for some time, and -- and taken
15 over so much so that it regulates it pervasively
16 and -- and this analysis shouldn't apply at all.

17 Can -- can you address that concern?

18 MR. MOOPPAN: Well, in this case,
19 while it's true that the government in some
20 contexts gets greater latitude when it's acting
21 in a contracting capacity, what it doesn't get
22 is the ability to discriminate against its
23 contractors on the basis of their religion or
24 religious exercise.

25 So, to take Justice Kagan's

1 hypothetical from earlier, if you have a prison
2 with prison contractors and it allows prison
3 guards to bring in peyote, it can't then turn
4 around and say it won't allow prison guards to
5 bring in ayahuasca.

6 And the argument here is similar, that
7 the City of Philadelphia is allowing all sorts
8 of other exemptions for secular reasons --

9 JUSTICE GORSUCH: Put aside --

10 MR. MOOPPAN: -- but it's not allowing
11 --

12 JUSTICE GORSUCH: -- put aside the
13 exemptions argument. Would it otherwise be
14 identical to a -- a City employee or agent in
15 the government's view?

16 MR. MOOPPAN: Well, no, because of the
17 other aspect of this case that we addressed in
18 our briefs, the Masterpiece Cakeshop type
19 arguments about the statements that were made by
20 Commissioner Figueroa and by the City Council.
21 Those two --

22 JUSTICE GORSUCH: But -- but I'm
23 asking you to put that kind of stuff aside. You
24 know, otherwise, would it be similarly situated
25 to an employee or agent in your view?

1 MR. MOOPPAN: So if -- if you take all
2 that -- both -- if you take both the exemptions
3 and the statements out of the case, Your Honor,
4 the government hasn't taken a position about how
5 a case like that should be addressed.

6 JUSTICE GORSUCH: All right.

7 MR. MOOPPAN: Our submission is
8 focused on both the exemptions and the
9 statements.

10 JUSTICE GORSUCH: All right. Let --
11 let -- let's deal with the exemptions. What do
12 we do with the Fair Practices Ordinance and the
13 argument by the City -- and we normally take
14 their representations about their law with --
15 with some -- some respect -- that the Fair
16 Practices Ordinance applies by its own force and
17 that there are no exemptions here?

18 MR. MOOPPAN: So it's belied by their
19 clear concession. So let me make two points.

20 The first is the language of the SPO
21 bans any differentiation or preference in the
22 treatment of a person on the basis of any of the
23 protected traits.

24 And the City concedes that it
25 considers race and disability when placing

1 children. That's at JA 309 to Mr. Figueroa --

2 JUSTICE GORSUCH: Counsel, thank you.

3 I appreciate it. My time's expired. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice

5 Kavanaugh.

6 JUSTICE KAVANAUGH: Good morning, Mr.

7 Mooppan. What if Catholic Social Services were

8 the only private agency in Philadelphia that

9 performed this service? Meaning that same-sex

10 couples in Philadelphia simply could not become

11 foster parents, and let's also assume there are

12 no exemptions or other statements that are

13 relevant to the analysis.

14 In that circumstance, would there be

15 any different analysis or result in a case like

16 this?

17 MR. MOOPPAN: Yeah, I think that it

18 would be a significantly harder case because the

19 City at that point would have a interest that

20 isn't presented here, namely, the interest in

21 ensuring that gay couples in Philadelphia would

22 have the opportunity to serve as foster parents.

23 But, of course, that isn't the facts

24 that we have here. The facts we have in this

25 case are that there are dozens of foster

1 agencies that are available to serve gay couples
2 in the City of Philadelphia. And there's no
3 evidence that any gay couple has ever even tried
4 to use CSS as its agency.

5 So, on the one hand, what Philadelphia
6 is doing here doesn't even help gay couples.
7 And what it is doing instead is harming the very
8 children it's trying to serve.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett.

12 JUSTICE BARRETT: Good morning. So
13 I'm wondering how we decide whether a law is
14 generally applicable in the -- in the relevant
15 respect.

16 So you said that the City recognizes a
17 slew of exceptions, but none of them are for the
18 same-sex anti-discrimination requirement. So
19 it's not quite the same thing as granting an
20 exemption, say, for, like, Sunday Sabbath
21 observance but not Saturday Sabbath observance.
22 That's a more apples-to-apples comparison.

23 So how do we go about identifying what
24 the, you know, relevant factor is in deciding
25 whether a law is generally applicable?

1 MR. MOOPPAN: So, Your Honor, in this
2 case, the -- the City claims to be enforcing its
3 Fair Practice Ordinance, which list -- prohibits
4 differentiation or preference in the treatment
5 of a person on the basis of a string of
6 protected traits, and they recognize exemptions
7 for a variety of those traits.

8 Now it's true that there isn't an
9 example of them recognizing exemptions for
10 sexual orientation, but unless they could say
11 that for some reason sexual orientation
12 discrimination is the one type of discrimination
13 under which they can abide no exemptions
14 whatsoever, even more so than race, even more so
15 than disability, it reveals that those are
16 comparable traits and they're recognizing
17 exemptions in other contexts for the best
18 interests of the child.

19 But, here, when the children would be
20 better served by recognizing an exemption for
21 CSS that would allow CSS to continue to provide
22 this work, the City refuses to do so.

23 That is the sort of lack of religious
24 tolerance and the lack of neutrality that cases
25 like Lukumi and Fraternal Order of Police in the

1 Third Circuit are focused on.

2 JUSTICE BARRETT: What if the
3 ordinance said expressly that there shall be no
4 exemptions permitted with respect to the
5 same-sex marriage anti-discrimination
6 requirement, period, and then had another
7 section which permitted some exceptions as the
8 City employs here, like in considering race, for
9 example, in the placement of a child?

10 Would that be generally applicable
11 then? The same-sex anti-discrimination
12 requirement, I mean.

13 MR. MOOPPAN: I think it presents a
14 harder question. I think we would still say
15 that in that case, in the absence of any
16 argument for why sexual orientation is the one
17 form of discrimination that can't abide any
18 exceptions, even more so than race, that the
19 City was essentially making a value judgment in
20 the same way that in Lukumi the City allowed
21 killing for certain reasons but not other
22 reasons. You can always imagine parsing out the
23 statute in a different way and sort of
24 gerrymandering the statute so that the provision
25 that's being applied to the religious entity has

1 no exemptions and that it's other sub-provisions
2 that have all the exemptions.

3 Ultimately, though, the question is
4 whether the government is devaluing religious
5 interests vis-à-vis secular interests. And we
6 think that's what's happening here, because the
7 government is recognizing exemptions for the
8 best interests of the children but not doing it
9 --

10 JUSTICE BARRETT: Thank you. My time
11 has expired.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Mooppan, would you like to wrap up
15 for a minute.

16 MR. MOOPPAN: Thank you.

17 I think here, Your Honor, at the end
18 of the day, what the City has done is worse than
19 cutting off its nose to spite its face. What it
20 is doing is cutting off homes from the most
21 vulnerable children in the City to spite the
22 Catholic Church.

23 The government itself requires,
24 tolerates, and itself engages in various forms
25 of discrimination on the basis of protected

1 traits for the best interests of children. But
2 then it turns around and refuses to abide by any
3 form of discrimination with respect to sexual
4 orientation in order to deny an accommodation
5 for the Catholic Church.

6 And the statements that have been made
7 by various officials make clear that the reason
8 they're doing that is that they view this as
9 some sort of odious anachronism rather than, as
10 this Court has recognized, a decent and
11 honorable view that people can recognize and
12 accept in a country that's committed to
13 religious tolerance.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 MR. MOOPPAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Katyal.

18 ORAL ARGUMENT OF NEAL K. KATYAL

19 ON BEHALF OF THE CITY OF PHILADELPHIA,

20 ET AL., RESPONDENTS

21 MR. KATYAL: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 This case is not about private
24 activity or beliefs. When an FCA signs a
25 taxpayer-funded contract, it is delegated

1 government power to inspect and approve foster
2 families under Section 3700 of the Pennsylvania
3 Code.

4 A universal clause in every contract
5 bars sexual orientation discrimination when
6 carrying out that delegated power. That clause
7 contains no exceptions, and it applies equally
8 to every FCA, religious and secular alike.

9 CSS says the Constitution compelled
10 the City to give it a different contract. There
11 is no precedent for such a thing. This is, as
12 the Chief Justice said, the City's own program
13 and its own wards of the state.

14 The government has broad powers to
15 impose conditions on contractors like CSS that
16 stand in the government's shoes performing
17 government functions.

18 Ms. Windham even admitted that the
19 government has more leeway as a contractor. She
20 just says CSS isn't one. That's all the debate
21 narrows down to, and the contract is clear that
22 they are.

23 Ruling otherwise would insert federal
24 courts into contracting decisions in all 50
25 states and imperil government services in many

1 spheres. It means FCAs could discriminate
2 against LGBT kids or categorically against
3 foster parents on gender or religion.

4 Justice Sotomayor asked that question,
5 apart from race, and I didn't quite hear a
6 response from the other side.

7 And this is not a hypothetical. The
8 district court's hearing revealed CSS to require
9 a clergy letter showing foster parents were
10 active members of a congregation. Other FCAs
11 discriminate by religion, such as against
12 Catholics and Jews in South Carolina.
13 Petitioners' rule would compel governments to
14 permit all these practices, balkanizing foster
15 care agencies and ending their openness to all.

16 And, finally, CSS says it was targeted
17 for its beliefs, but the district court found,
18 after three days of live testimony, that never
19 happened. The Third Circuit agreed. And
20 nothing my friends have said comes close to the
21 very obvious and exceptional showing of error
22 that the two-court rule requires to reverse
23 that.

24 CHIEF JUSTICE ROBERTS: Counsel, if a
25 foster child requested not to be placed with a

1 same-sex couple, would you take that into
2 consideration in -- in placing the child?

3 MR. KATYAL: So that's at a very
4 different stage. That's at a matching stage.
5 And we certainly, I think, have come across the
6 idea of foster parents, and we said they can't
7 request a particular race. I'm not sure if
8 we've had the question of the child itself.

9 But I do want to say that's a very
10 different thing. As Justice Alito was saying,
11 that child matching stage, at that stage, you're
12 looking to the best interests. This case is
13 about the pool stage and who is eligible at all
14 to be a foster parent. And the record is clear
15 --

16 CHIEF JUSTICE ROBERTS: Well, I
17 suppose you -- there are certainly different
18 contexts, but the question is at least in
19 certain contexts, you are comfortable with the
20 concept -- concept of discriminating in this
21 program on the basis of sexual orientation, but
22 you have a very strict rule, you've said there
23 will be no exceptions to CSS's similar taking
24 into account of the sexual orientation status of
25 the would-be parent -- foster parents.

1 MR. KATYAL: No -- no, Mr. Chief
2 Justice, it's the same rule at both stages. So,
3 at the pool stage, there's no -- there's --
4 there's a categorical bar against any
5 discrimination. It's always up to the parents'
6 choice to work with an FCA.

7 Now, at the child matching stage, that
8 looks to the best interests of the child, like
9 the federal standard and that in all 50 states.
10 That doesn't categorically exclude anyone. It
11 looks to all potentially relevant
12 considerations.

13 And what my friend on the other side
14 is doing is taking one thing, which is the very,
15 very narrow, limited use of race, that's taken
16 into account as part of the best interests of
17 the child, which is mandated by state law. And
18 I asked the City, when have you ever taken race
19 into account? They could only find one
20 instance, and that was when a kid used racial
21 slurs, so they avoided that placement of the kid
22 with someone of that race.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. KATYAL: But that's a very

1 different thing.

2 CHIEF JUSTICE ROBERTS: Justice --
3 Justice Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.

6 Mr. Katyal, the -- you place,
7 obviously, in your briefs and your argument
8 today a lot of reliance on the fact that -- on
9 your -- your point that CSS is a contractor.

10 Wouldn't -- would -- would your
11 analysis of this case differ if, rather than
12 receiving funds from the City or contracting
13 with the City, CSS was a private organization
14 that was regulated, solely regulated, as opposed
15 to the contractual relationship?

16 MR. KATYAL: Absolutely, Justice
17 Thomas. That would be a very different case,
18 that because this is the contracting
19 circumstance, the government has far more leeway
20 in what is actually similar when you heard all
21 of those things about race and disability and
22 the like. Umbehr says courts must give
23 deference to the government's reasonable
24 assessments of its interests as contractor.

25 And so, when you're looking to what is

1 similar and what is different, I think it's very
2 important to understand that it's not similar in
3 the Lukumi sense.

4 The government is saying that that --
5 those distinctions made on the best interests of
6 the child are made at a point when their
7 interests are very different. It's about
8 matching kids, not growing the pool of safe
9 foster parents.

10 And it's not discrimination. The
11 government is saying, at that point, it's done
12 to protect the welfare of an individual child
13 and is nothing like the across-the-board flat
14 refusal that they wanted here.

15 So, look, if a Catholic teen wanted to
16 be with a Catholic family at the teen -- excuse
17 me -- at the child matching stage, that could be
18 taken into account. Lots of things can be taken
19 into account at that stage.

20 But, here, we're talking about that
21 first stage, as Justice Alito said.

22 JUSTICE THOMAS: Could -- just -- I --
23 I'd like to get one question in before my time
24 expires. Don't you think it's in the best
25 interests of the child to also have a pool that

1 is -- that is beneficial to the child? I don't
2 understand why that isn't also in the best
3 interests of the child.

4 MR. KATYAL: Oh, absolutely, Your
5 Honor, we 100 percent agree. The City's point
6 is that when you enable the -- an FCA to
7 discriminate on the basis of orientation, that
8 will stigmatize the youth. That is a compelling
9 interest. LGBT kids are an outsize number of
10 people in the foster care population, and it'll
11 undermine the ability of the program to operate.

12 But, absolutely, Justice Thomas, we
13 100 percent agree that a child should be -- you
14 know, the best interests of the child looks to
15 what is the best -- best place for that
16 particular child.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer.

20 JUSTICE BREYER: Yes. What's actually
21 bothering me quite a lot about this case is I
22 think that no family has ever been turned down
23 by this agency. Indeed, none has ever applied,
24 no gay family, no gay couple.

25 And the disagreement seems to be

1 whether they now have to sign a piece of paper
2 that says if there were a gay couple, we might
3 have to look into whether they're qualified.
4 And you're willing to have them say, but taking
5 gay into account, you don't have to take it into
6 account at all, but they don't want to do that.

7 Now that seems to me a very narrow
8 ground for deciding a case that has enormous
9 implications. Could you not say, hey, we think
10 if there ever were a gay couple and it really
11 was a problem, you'd have to do something about
12 it, like look into it and don't say gay?

13 And they say: We don't even want to
14 do that, but it's never come up.

15 I mean, the natural thing for me would
16 be to say, okay, you say what you want, we'll
17 say what we want, and if it ever comes up, we'll
18 deal with it. But it never has.

19 Now is there any way that that has
20 anything to do with how we would decide this
21 case?

22 MR. KATYAL: Justice Breyer, this has
23 actually come up. Bethany, the other FCA,
24 turned a couple away. That's what led to the
25 newspaper article in this entire set of events.

1 And in response, I think the City
2 acted reasonably. It had been aware of CSS's
3 religious beliefs for decades -- that's Joint
4 Appendix page 165 -- but had never stopped the
5 contract because it thought that CSS was
6 operating within the contract terms. They took
7 CSS at its word, until they learned otherwise.

8 And it was at that point that the City
9 said: We're worried about being -- making the
10 City itself a party to discrimination. And even
11 then, they didn't declare a breach. Rather,
12 they just said the next annual contract we won't
13 renew because they're telling us, after our
14 investigation, they won't fulfill the terms of
15 the contract.

16 But, notably, of the 17 -- 19 million
17 dollars they gave CSS for foster care, they took
18 two away for this child pool -- excuse me -- the
19 parent pool function, but they left the rest
20 intact. And to this day, CSS is getting 26
21 million dollars a year from the City, which is
22 hardly something demonstrating religious
23 hostility, and that is for foster care and --
24 and child services.

25 So I think the City took that

1 reasonable, limited action, and they certainly
2 don't need to wait for an instance of
3 discrimination with respect to this particular
4 entity. I mean, in NASA versus Nelson, there
5 was no evidence of drug abuse, but the
6 government still insisted on tests, and this
7 Court was unanimous in saying that was okay.

8 CHIEF JUSTICE ROBERTS: Justice Alito.

9 JUSTICE ALITO: In your brief in
10 opposition, when you were trying to persuade us
11 not to take this case, you represented that the
12 City had adopted an Exemption Waiver Committee
13 "to ensure that in the future any requests for a
14 religious exemption of the sort at issue here
15 would be directed to the waiver exemption
16 committee and handled through the procedures
17 that it establishes." Page 15.

18 Was that accurate?

19 MR. KATYAL: That is accurate, Your
20 Honor, that we cite at page 15 that the City had
21 established, after the events that gave rise to
22 this case, in its Law Department, something to
23 "address waiver and exemption requests." That's
24 a general committee. That's not even about
25 foster care agencies, not even about religion.

1 It's a general committee for everything that
2 looked to --

3 JUSTICE ALITO: Well, the plain
4 meaning of that statement is that if CSS or
5 another religious organization came to the City
6 and said that we do not -- it is contrary to our
7 religious beliefs to certify a same-sex couple,
8 there would be consideration of an exemption.

9 MR. KATYAL: Your -- Your Honor --

10 JUSTICE ALITO: Is that true?

11 MR. KATYAL: -- the City's policy --
12 the City's view on this has been clear from the
13 start. They can't make exceptions on the basis
14 of the Fair Practices Ordinance at all when it
15 comes to things like this at the child pool --
16 excuse me -- at the parent pool stage.

17 There are some exceptions that can be
18 done under 3.21 at the matching stage, when the
19 child is matched with an agency, but that's
20 really just about DHS making an individual
21 referral to a particular agency at that limited,
22 particularized stage --

23 JUSTICE ALITO: Well, if that's --

24 MR. KATYAL: -- in its --

25 JUSTICE ALITO: -- if that's the

1 City's policy, then the statement that I just
2 read seems to me to be quite misleading, but
3 I'll move on from that.

4 Look, if we -- if we are honest about
5 what's really going on here, it's not about
6 ensuring that same-sex couples in Philadelphia
7 have the opportunity to be foster parents.

8 It's the fact that the City can't
9 stand the message that Catholic Social Services
10 and the Archdiocese are sending by continuing to
11 adhere to the old-fashioned view about marriage.

12 Isn't that the case?

13 MR. KATYAL: Absolutely not, Justice
14 Alito. The text, of course, of all of this
15 doesn't say anything like that.

16 As the district court and Third
17 Circuit found going evidence by evidence, piece
18 by piece, they rejected that idea.

19 And I think, Justice Alito, the most
20 telling fact about that is, right now, the City
21 is giving that very entity which you're saying
22 that -- you know, which you're saying that we
23 can't stand and the like, 26 million dollars a
24 year for foster care.

25 I think the annual Supreme Court

1 budget -- that's one-third of the annual Supreme
2 Court's budget. We're doing that every single
3 year for this entity. So --

4 JUSTICE ALITO: Well, as far as the
5 record reflects, no -- what Catholic Social
6 Services has done has not denied any same-sex
7 couple the opportunity to be foster parents.

8 And because they would refer such a
9 couple, if one were to come to them, to one of
10 the many agencies that is willing to -- to do
11 what is necessary for them, there's no realistic
12 chance that that is ever going to happen.

13 But the City, nevertheless, is willing
14 to cut them off from participating --
15 participation in this program, even if what that
16 means is that there will be foster children in
17 Philadelphia -- there will be children in
18 Philadelphia who will be denied the opportunity
19 to have foster parents.

20 That's what the record shows, isn't
21 it?

22 MR. KATYAL: Justice Alito, three
23 things.

24 One, we are very happy to talk about
25 the record because we don't think it supports

1 that at all. Indeed, it supports that CSS told
2 us that, if this happens, this is precisely what
3 they would do. It did happen with respect to
4 Bethany.

5 Second, that was the exact colloquy
6 you and I had many years ago in NASA versus
7 Nelson when the petitioner said, hey, there's no
8 evidence of drug abuse, you've got to wait for
9 it. And your unanimous opinion for the Court
10 said, no, the government can -- it doesn't need
11 to wait in order to act.

12 And that's particularly so -- and this
13 is my third point -- here because, here, the
14 government has identified the most compelling of
15 interests in protecting its own wards of the
16 state. It needs to maximize the number of
17 parents in the pool and avoid stigma to parents
18 and to youth because the --

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor.

21 JUSTICE SOTOMAYOR: Counsel, is there
22 any evidence that since CSS has not been a part
23 of this program, that less children have been
24 placed overall?

25 MR. KATYAL: Absolutely not, Justice

1 Sotomayor. In fact, the district court in the
2 record found the opposite. And that's also true
3 in other jurisdictions that have adopted
4 non-discrimination policies, such as D.C. and
5 Illinois. That's all in the 22 states' brief.

6 And the ABA has studied this
7 particular issue and found that these
8 non-discrimination policies increase the number
9 of people available, not decrease, because these
10 acts or policies of discrimination deter people
11 from entering the pool in the first place.

12 JUSTICE SOTOMAYOR: Have Catholic
13 family numbers reduced since CSS hasn't been a
14 part of this program?

15 MR. KATYAL: I don't think we have
16 numbers on Catholic specifically, but we do have
17 numbers, for example, from Massachusetts that
18 when Boston Catholic Charities withdrew, other
19 agencies filled the gap so that there were at
20 least more -- there were more kids in foster
21 care then than now.

22 And we certainly welcome the idea of
23 Catholic -- of CSS and other Catholic entities
24 protect -- protecting and working with the
25 foster kids. That's why we're giving them 26

1 million dollars a year to do so. We
2 tremendously value what they're doing.

3 We weren't looking for some sort of
4 fight here. Obviously, the City was torn up
5 about it. But they looked at the -- the stigma,
6 they looked at the need to increase the pool,
7 and they looked at and thought about the fact
8 that you couldn't have FCAs just grafting on new
9 requirements to a contract that they themselves
10 signed.

11 JUSTICE SOTOMAYOR: Going to that
12 issue in terms of tolerance, because that seems
13 to be part of the questioning of some of my
14 colleagues, and you're addressing it by saying
15 there's tolerance in their work in other areas,
16 they're receiving a tremendous amount of money
17 for their work with foster children in other
18 ways.

19 But looking at this under Smith, that
20 pool, what did -- when you say there's two
21 different pools, one is the pool of can you
22 become an eligible family, and then there's the
23 pool of placing a child.

24 How do you see Smith addressing that?

25 MR. KATYAL: I think what Smith does

1 is, at least in the contracting context, give
2 the government wide latitude. You wouldn't even
3 need it because I think we would win even in the
4 sovereign context, but I think the fact -- what
5 you'd be asking is, is this really a similar
6 circumstance at the pool stage or at the child
7 matching stage. And there are really different
8 interests -- that's what the government is
9 saying -- and different harms.

10 An across-the-board flat refusal of a
11 government agency to say, hey, the doors are
12 closed to you entirely is very different from
13 the sort of individualized best interests of the
14 child determination that they are focusing on.

15 And, you know, they focus on
16 disability as well, but that absolutely
17 misstates the record because it's state law that
18 requires foster care agencies to have a special
19 license for disability needs. That's all that's
20 about. Again, that's not discrimination.
21 That's specialization to meet a child's needs.

22 JUSTICE SOTOMAYOR: Has any parent
23 been, other than disability, but that's because
24 they can't meet certain criteria that's
25 independent of their disability, they can't do

1 certain things for the child which are required,
2 but has there ever been an agency that has or an
3 exemption granted on the basis of a protected
4 characteristic?

5 MR. KATYAL: No, Your Honor. The one
6 thing that I said -- and we don't think of it as
7 an exception, we think of it as an application
8 of the best interests of the child -- was when a
9 particular child used racial slurs, and so they
10 avoided placement of the child with -- with --
11 with someone of that race just for the safety of
12 that individual child. That is so --

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

14 MR. KATYAL: -- fundamentally
15 different.

16 JUSTICE KAGAN: Mr. Katyal, I'm
17 concerned about Section 3.21 of the contract.
18 So the 2019 version of the contract says -- and
19 I'm quoting here -- "that an agency shall not
20 reject prospective foster or adoptive parents
21 for services based on sexual orientation unless
22 an exception is granted by the Commissioner in
23 his or her sole discretion."

24 So why isn't that exactly the kind of
25 exemption that CSS wants here? And why doesn't

1 its presence, you know, undermine this -- the --
2 the state's purported interests?

3 MR. KATYAL: Your Honor, the district
4 court looked into this and found that DHS has
5 never made an exception to its
6 non-discrimination requirement, including under
7 3.21, because, with 3.2 --

8 JUSTICE KAGAN: Well, let's say that
9 that's true, Mr. Katyal, I mean, that no
10 exemption has ever been granted under that
11 provision. I mean, I read Smith and Lukumi to
12 say that you -- you can't get out of it so
13 easily, that as long as there is an exemption,
14 as long as it exists, as long as you could rely
15 on it in the future, that there is not
16 neutrality here.

17 MR. KATYAL: Well, I disagree both on
18 the law and then with respect to the facts.

19 So, with respect to the law, Your
20 Honor, Smith doesn't say that the mere existence
21 of a system triggers strict scrutiny.

22 It says you can't give exemptions
23 discriminatorily. So, if the City was exempting
24 secular organizations from non-discrimination
25 rules but not religious ones, that would be what

1 would trigger strict scrutiny.

2 And we know this because Smith said an
3 across-the-board criminal prohibition is
4 paradigmatic of something that is generally
5 applicable, but that's also obviously the
6 paradigmatic example of something with
7 exemptions and broad discretion, as this Court's
8 opinions in Armstrong and McCleskey recognize.

9 And with respect to 3.21, Your Honor,
10 it does two basic things.

11 First, it says that it bars FCAs from
12 rejecting a referral from DHS. And a referral
13 can only be from DHS. And, indeed, their blue
14 brief at page 13 admits that.

15 And then the second thing it does is
16 it says DHS can make an exception to that. It
17 says, "providers shall not reject a child unless
18 an exception is granted by the Commissioner."

19 So that's about, like, if the child
20 lives far away or something like that, we're not
21 going to force the FCA to take it, but there's
22 nothing about any sort of categorical or
23 classified -- classification on race or gender
24 or anything like that with respect to 3.21.

25 And it certainly hasn't happened in

1 practice, which is actually, I think, the
2 standard of Smith.

3 JUSTICE KAGAN: Thank you, Mr. Katyal.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch.

6 JUSTICE GORSUCH: Good morning,
7 counsel. I'd -- I'd like to follow up more or
8 less where we left off. There seems to be some
9 lack of clarity about which stage we're at here,
10 whether we're at the matching stage or at the
11 screening stage.

12 As -- as I understand it, this case is
13 about the screening stage, whether Catholic
14 Services would be eligible to participate in a
15 program at all. Is that correct?

16 MR. KATYAL: Well, when I say
17 screening, I mean parent screening. Basically,
18 CSS has said they will not permit LGBT couples
19 to be part of their screening process.

20 So, if you're a married gay couple,
21 you can't --

22 JUSTICE GORSUCH: Right.

23 MR. KATYAL: -- the doors are closed
24 to you, but not to a -- not to a heterosexual
25 couple.

1 JUSTICE GORSUCH: And -- and that's
2 the stage of the process we're currently dealing
3 with, is that right?

4 MR. KATYAL: Correct. Exactly.

5 JUSTICE GORSUCH: All right. And at
6 the screening stage, my understanding is from --
7 from your latest brief at least that the -- the
8 Fair Practices Ordinance forbids any exemptions
9 at all. Is that right?

10 MR. KATYAL: Correct. And that's
11 always been our policy.

12 JUSTICE GORSUCH: Okay. And then can
13 -- can -- just to follow up on Section 3.21 at
14 the -- at the matching stage, why is that
15 legally irrelevant here?

16 MR. KATYAL: Well, because it's at a
17 very different stage. And at least in the
18 government contracting case, it's not similar in
19 the Lukumi sense because the City is saying --
20 and I think it gets a lot of deference -- under
21 Umbehr, our City interests are different. We're
22 about trying to grow the number of maximum safe
23 foster parents, and policies like this deter and
24 block LGBT parents from coming in and send
25 signals to LGBT youth.

1 At the matching stage, of course, it's
2 -- first of all, you're complying with state
3 law, so it's a very different thing, the best
4 interests of the child, but, second, that's a
5 much more particularized inquiry.

6 And, again, it applies evenhandedly.
7 It just may be that it's in the really rarest of
8 instances, like the one example I was able to
9 give you, you know, you might take a protected
10 classification into account.

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Good morning, Mr.
15 Katyal. I have kind of a bigger picture thought
16 to express, and you can react as -- as you wish.

17 It seems like this case requires us to
18 think about the balance between two very
19 important rights recognized by this Court, the
20 religious exercise and belief right, obviously,
21 in the First Amendment, and the same-sex
22 marriage right, as recognized in Obergefell.

23 And it seems when those rights come
24 into conflict, all levels of government should
25 be careful and should often, where possible and

1 appropriate, look for ways to accommodate both
2 interests in reasonable ways. It's a very --
3 you know it's very sensitive, controversial.
4 There are strong -- very strong feelings on all
5 sides that warrant respect.

6 And it seems like we and governments
7 should be looking, where possible, for win-win
8 answers, recognizing that neither side is going
9 to win completely on these issues given the
10 First Amendment on the one hand and given
11 Obergefell on the other.

12 But, when I look at this case, that's
13 not at all what happened here. It seems like
14 Philadelphia created a clash, it seems, and was
15 looking for a fight and has brought that
16 serious, controversial fight all the way to the
17 Supreme Court even though no same-sex couple had
18 gone to CSS, even though 30 agencies are
19 available for same-sex couples, and even though
20 CSS would refer any same-sex couple to one of
21 those other agencies.

22 And to be clear, I fully appreciate
23 the stigmatic harm. I completely understand
24 that, fully appreciate it. But we need to find
25 a balance that also respects religious beliefs.

1 That was the promise explicitly written by the
2 Court in Obergefell and in Masterpiece,
3 explicitly promised that respect for religious
4 beliefs.

5 And what I fear here is that the
6 absolutist and extreme position that you're
7 articulating would require us to go back on the
8 promise of respect for religious believers.

9 MR. KATYAL: So, Justice Kavanaugh,
10 four things.

11 First, we absolutely agree with you
12 that these are feelings that warrant respect,
13 and, you know, both of these rights are
14 important, and we share that same spirit.

15 Second, I don't think the framing of
16 this as religion versus same-sex equality is the
17 right one. The way the City sees this is
18 actually a case about religion versus religion
19 because, if you accept what the -- what their
20 argument is, then they'll allow -- you know,
21 another -- another FCA can say we won't allow
22 Baptists, we won't allow Buddhists, or we'll
23 only allow those things.

24 And in that sense, religion will be
25 pitted against religion. Foster care agencies

1 will be balkanized. And this will be true not
2 just in foster care but in any number of other
3 areas in which the government contracts.

4 Third, practically, I don't think you
5 can look at this and just say, oh, this is a
6 small, tiny accommodation, what's the harm in
7 it, because any individual accommodation will
8 look reasonable.

9 The problem is, as Chief Justice
10 Burger's unanimous opinion in United States
11 versus Lee says, once you do it for one
12 objector, the Court's going to be stuck doing it
13 for all.

14 I mean, the accommodation there was a
15 pittance. It was someone objecting to paying
16 Social Security. But the Court said income tax
17 will be next, and you can't have a workable
18 system, either for Social Security payments or
19 now for FCAs, with so many religious
20 accommodations.

21 And then, lastly, when you say the
22 City was looking for a fight or something, we
23 couldn't profoundly disagree more. We certainly
24 didn't rush this case to the Supreme Court.
25 Indeed, we won it in both courts below and the

1 first one, after a three-day hearing looking at
2 live testimony, looking at precisely the
3 allegations you said about religious hostility,
4 and all of those dissolved.

5 And, indeed, I think --

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Thank you, Mr. Chief
9 Justice.

10 Good morning, Mr. Katyal. I just want
11 to be sure that I'm clear in thinking about this
12 question of whether the City was functioning as
13 a contractor or whether it was granting
14 licenses.

15 Is it possible for any entity to
16 participate in the recruitment and certification
17 of foster families without a contract from the
18 City?

19 MR. KATYAL: Not with respect to this
20 function, and so I think that's a very important
21 point about what Ms. Windham said. She kept on
22 saying we've been doing this for two centuries,
23 this. Private entities have never done this
24 because whatever these entities did before, like
25 CSS, they never selected who cares for kids in

1 City custody, applying state criteria.

2 Indeed, the whole point of the modern
3 foster care system is to bring responsibility
4 for those kids inside the government and not to
5 leave it into the private hands. I mean, these
6 are wards of the state, and the City has the
7 highest interests in screening parents.

8 So this isn't an example at all of
9 something that could be described as a licensee
10 function, because a licensee is someone, you
11 know, when someone's licensed, like to practice
12 law or run a barber shop, they're not carrying
13 out the government's work, they're performing
14 their own work, a private profession, with the
15 permission of the government.

16 This is the opposite of that, Justice
17 Barrett. This is about the City's own kids, and
18 the City's interests here are at their zenith.

19 JUSTICE BARRETT: Well, let's imagine
20 that the state takes over all hospitals and says
21 from now on, you know, we are going to be
22 responsible for hospitals, but we will contract
23 with private entities to actually run them.

24 And so there's a Catholic hospital and
25 gets a contract with the City to run it. In

1 fact, it's a -- a Catholic hospital that's in
2 existence before the state adopts this policy.

3 And its contract with the state
4 provides that there are -- in the contract the
5 state gives everyone is that you can get some
6 exceptions for some medical procedures, but
7 every hospital has to perform abortions.

8 In that context, do we analyze this as
9 a licensing question, or, given that the
10 Catholic hospital can't even enter the business
11 without this contract, do you still say that
12 this was the provision of a contractual service?

13 MR. KATYAL: So three things, Your
14 Honor.

15 First, this isn't -- just factually,
16 this is not a monopolization case at all,
17 contrary to what my friend says. After all,
18 they still have 26 million dollars, the lion's
19 share of their foster care budget. So it's not
20 as if we're occupying the field or something --
21 something like that.

22 With respect to your hypothetical, I
23 think there are two problems. One is I think
24 the real thing that does the force in the
25 hypothetical is the government somehow

1 monopolizing a private care system, a healthcare
2 system or hospital system. That itself would
3 raise any number of constitutional problems.

4 And I think our intuition as to why
5 that hypothetical sounds so horrible is because
6 of that. That's what does the work.

7 And secondly --

8 CHIEF JUSTICE ROBERTS: A minute to
9 wrap up, Mr. Katyal.

10 MR. KATYAL: Thank you.

11 I'd say three things are notable.

12 First, this case, I think, as Justice
13 Scalia might say, comes as a wolf. Petitioners'
14 rule would enable an FCA to exclude parents of
15 any religion, from Buddhist to Baptist. And
16 this Court, because it can't second-guess the
17 reasonableness of a belief, it opens the door to
18 all sorts of claims, indeed, this very case, the
19 clergy letter, and it radiates far beyond foster
20 care to all government contracts in all 50
21 states.

22 Second, the City would act the very
23 same way if a secular FCA discriminated, and the
24 flip side is true too. The City contracts with
25 Bethany, which is open to same-sex couples

1 despite its religious opposition. And the City
2 continues to contract with CSS to the tune of 26
3 million dollars.

4 These three indicia -- a uniform
5 policy, continued contracting with Bethany, and
6 continued contracting with CSS itself -- are
7 strong evidence the two courts below got it
8 right.

9 And, finally, my friends never
10 overcome the two-court rule on neutrality.
11 After three days of live testimony, the trial
12 court found the preponderance of evidence
13 favored the City.

14 For these reasons, we ask the
15 unanimous judgment of the Third Circuit be
16 affirmed.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Fisher.

20 ORAL ARGUMENT OF JEFFREY L. FISHER
21 ON BEHALF OF THE SUPPORT CENTER FOR CHILD
22 ADVOCATES AND PHILADELPHIA FAMILY
23 PRIDE RESPONDENTS

24 MR. FISHER: Mr. Chief Justice, and
25 may it please the Court:

1 I think what makes this feel like a
2 hard case is that CSS is doing valuable work, it
3 is acting based on traditional religious
4 beliefs, and it may appear that the costs of
5 accommodating it would not be too high.

6 But that overlooks two serious
7 problems with CSS's claim.

8 First, CSS is not acting in its
9 private capacity but, rather, as a government
10 contractor. Its claim, therefore, implicates
11 the government's managerial interests, as well
12 as the imperative that governmental services are
13 made evenhandedly available to all citizens.

14 And, second, free exercise claims
15 cannot turn on judicial assessments of whether
16 religious views are honorable or offensive. If
17 the Constitution requires an accommodation here,
18 as Mr. Katyal said, all manner of other
19 allowances must be made for foster care and
20 other service agencies.

21 And because there's no constitutional
22 difference between independent contractors and
23 government employees, CSS's position would also
24 imply, for example, that police officers could
25 decline on religious grounds to enforce

1 particular laws, prison guards could insist on
2 evangelizing to inmates.

3 The implications go on and on, but the
4 upshot is this: Whatever rules might govern
5 free exercise claims outside of government
6 contracting, the City's anti-discrimination
7 requirement is constitutional because it is a
8 reasonable rule governing the selection of those
9 who will care for children in the City's
10 custody.

11 CHIEF JUSTICE ROBERTS: Mr. Fisher,
12 suppose that the City of Philadelphia decides
13 that it doesn't like the message that the church
14 having an all male priesthood -- the message
15 that that conveys. It doesn't want to expose
16 foster children to that belief in foster
17 parents. And so it terminates CSS's contract
18 because of the church's -- that church -- the
19 church's belief in that respect.

20 Are they free to do that?

21 MR. FISHER: I think there would be
22 two big differences between that and this case,
23 Mr. Chief Justice.

24 Number one, as the Court recognized in
25 Hosanna-Tabor and the like, clergy members of

1 the church and the way that they are structured
2 within the church raise Establishment Clause
3 questions and free exercise questions that are
4 entirely different from a government contracting
5 scenario like this on -- on their own terms.

6 And, second of all, I don't understand
7 any way that that rule would relate to the
8 carrying out of foster care services. The core
9 problem, the core question here is whether the
10 government is imposing a reasonable condition --

11 CHIEF JUSTICE ROBERTS: Well, the --
12 the way it would relate --

13 MR. FISHER: -- on the carrying out of
14 a service.

15 CHIEF JUSTICE ROBERTS: -- the way it
16 would relate is the same way that the -- the
17 same-sex ban because of -- of the church's view
18 on it, CSS's, is that they think it's
19 stigmatizing, that it sends the wrong message
20 for foster parents to belong to an entity that
21 discriminates on the basis of -- of gender.

22 MR. FISHER: No, I think that the --
23 the stigma and the harm that the City's looking
24 to avoid is the discrimination with respect to
25 people participating in the program. That's

1 very different than the church's own structuring
2 of its own internal clergy and its own internal
3 operations, as my --

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief
8 Justice.

9 Mr. Fisher, I want to go back to the
10 assessment of the pool, as Mr. Katyal designated
11 it, and the placement. Do you agree with him
12 that both of these are in the -- have to be
13 looked at in the interests, best interests, of
14 the child?

15 MR. FISHER: Well, I think, just to be
16 precise, Justice Thomas, the state law best
17 interests of the child test applies only at the
18 placement stage. That's -- that's unique to the
19 placement stage.

20 I think what Mr. Katyal was saying is,
21 of course, the City and the State are going to
22 establish rules for certification -- for family
23 certification at the outset in the -- you know,
24 in the general interests of children. But,
25 specifically speaking, the best interests of the

1 child test comes into matching and -- and, just
2 as under federal law and under other state laws,
3 applies --

4 JUSTICE THOMAS: So on what --

5 MR. FISHER: -- only to --

6 JUSTICE THOMAS: Excuse me, I'm sorry
7 to interrupt you. It's just we -- we're short
8 on time, but -- so what would be the standard?
9 Why the assessment of the -- of the family then
10 if it's -- if -- if you say statutorily it's
11 only the placement that's in the best interests
12 of the child? What's the policy behind
13 assessing the family?

14 MR. FISHER: I think the idea behind
15 assessing the family goes to the core of the
16 reason why this is a city program, is that these
17 are children in City custody. And so the City
18 is establishing criteria that are for -- that
19 are going to govern which people are allowed to
20 undertake that, and those criteria --

21 JUSTICE THOMAS: No, I mean,
22 generally, what are you looking for?

23 MR. FISHER: You're looking for people
24 that can provide care and loving environments
25 and safe environments to kids --

1 JUSTICE THOMAS: And -- and why --

2 MR. FISHER: -- which is laid out --

3 JUSTICE THOMAS: -- are you looking
4 for that kind of a family?

5 MR. FISHER: Pardon me?

6 JUSTICE THOMAS: Isn't that ultimately
7 just for the best interests of the child?

8 MR. FISHER: I think that's one way to
9 think about it, Justice Thomas, which is why I
10 think Mr. Katyal answered your question that
11 way. I'm -- I'm just trying to be precise about
12 the way the law works here, which is that the
13 standards for certification are laid out in
14 Pennsylvania Code Section 3700.64. And the best
15 interests of the child standard is not present
16 there. It's simply a list of secular criteria
17 that the agencies are being asked to apply.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer.

21 JUSTICE BREYER: In general, what have
22 you thought should be the right rule? I mean,
23 I've always thought that Smith is a problem or a
24 solution to a problem that nobody could figure
25 out how to answer it.

1 If your opponents win, it's pretty
2 hard to see how all kinds of government programs
3 can exist with every religion making exceptions
4 every which way for all kind of reasons,
5 sincerely too.

6 If you win, it's pretty hard to see
7 how, for example, a -- a religious group that
8 wants to meet on Sunday, the only place to hold
9 services, but there is a -- there are a no
10 parking sign, and they can't do it. I mean,
11 they can't even hold religious services.

12 And -- and we could think of lots of
13 examples, like abortion and so forth. And that,
14 I think, is what led Justice Scalia to that more
15 absolute rule. He couldn't figure out another
16 one.

17 So have you anything there that you
18 can suggest?

19 MR. FISHER: But --

20 JUSTICE BREYER: After all, RFRA is
21 one way, but RFRA they can change, Congress, if
22 we make a mistake. The Constitution you really
23 can't. That's why I asked the question just to
24 see what's in your mind.

25 MR. FISHER: Right, Justice Breyer. I

1 think that Justice Scalia, for the reasons he
2 laid out in Smith itself and in the City of
3 Boerne concurrence, reached a quite reasonable
4 conclusion that is right on its own terms and
5 entitled to stare decisis effects.

6 But the most important thing I would
7 tell you here is that you don't even have to ask
8 that question. The Court recognized before
9 Smith itself, in cases like Lyng and Roy, that
10 when we're dealing with internal affairs of the
11 government and its own operations, that a simple
12 -- a different test applies.

13 And the test that I would say governs
14 this case, which is really quite narrow in this
15 sense because it's a government contracting
16 case, is the test the Court made -- laid out in
17 NASA versus Nelson, where the Court asked
18 whether it was a reasonable rule that the
19 government was insisting for its contractors.

20 And, actually, the Court in that case
21 used the phrase "internal operations." So all
22 you have to do is put Nelson together with Lyng
23 and Roy, which tell you that the Free Exercise
24 Clause allows the government the same power when
25 it deals with its internal operations.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: Do you think it's fair
3 to say this is simply a government contracting
4 case when Catholic Social Services and other
5 agencies cannot participate in this activity at
6 all, an activity in which some of them at least
7 have been participating long before it was taken
8 over by the state, unless they are approved by
9 the City? Even if it's a -- partially a
10 contracting case, is it not also partially a
11 licensing case?

12 MR. FISHER: For two reasons, we don't
13 think it is, Justice Alito.

14 First, even if the City did monopolize
15 the services here, it wouldn't be any different
16 than Lyng, where the government owned the land.
17 It wouldn't be any different from NASA versus
18 Nelson, where the government was the only way to
19 work in the space program.

20 And the government, as Justice Kagan
21 said earlier, can take over certain operations.
22 Indeed, the City, as Justice Sotomayor said,
23 could do the certification itself.

24 But also I want to answer, Justice
25 Alito, in terms of the history, and I want to

1 echo what my friend, Mr. Katyal, said, which is
2 that, yes, the same term, "foster care," is used
3 that was used historically, but it's a
4 completely different program now because the
5 children are in city custody and we're talking
6 about selecting people --

7 JUSTICE ALITO: Well, government has
8 --

9 MR. FISHER: -- to care --

10 JUSTICE ALITO: -- government has
11 expanded at all levels, and it has taken over
12 more and more programs that were previously
13 conducted by -- by private entities.

14 What -- what if the government took
15 over all provision of assistance to homeless
16 people? Would that -- and -- and an issue arose
17 about whether a private entity could participate
18 in that charitable activity. Would you say
19 that's purely a contracting case?

20 MR. FISHER: I think I might have to
21 hear a little more, but, in general, I do think
22 the government could take over something like
23 homeless shelters in a -- in a given county or a
24 community. I don't think there's any way to
25 draw a line between what the government can and

1 can't take over. It's --

2 JUSTICE ALITO: Well, what about
3 Justice -- what about Justice Barrett's example
4 of a hospital? What if the -- if the -- the
5 state were to take over all hospitals and then
6 contract that out to private entities?

7 MR. FISHER: Well, I think that that's
8 really hard to imagine exactly how that would
9 work. We know healthcare is such a uniquely
10 complicated context. And I think that even in
11 systems where the government does take over
12 healthcare, private options are still available.
13 So it's hard for me to understand, you know,
14 exactly how a hypothetical along those lines
15 would play out.

16 JUSTICE ALITO: Well, you're just
17 disagreeing with the hypothetical. I don't
18 think it's hard to imagine at all. But, if you
19 accept the hypothetical, then what's the answer?

20 MR. FISHER: What's the answer to
21 whether -- to what? I'm sorry.

22 JUSTICE ALITO: Would your answer be
23 the same, that -- that if the government took
24 over all hospitals but contracted it out to
25 private entities, it could insist that the

1 hospitals perform procedures that are
2 objectionable on religious grounds to the
3 contractors, so-called contractors, running
4 these hospitals?

5 MR. FISHER: I think to some degree,
6 perhaps, Justice Alito, but I think there'd be
7 very different questions raised about medical
8 procedures and doctors that -- that certainly
9 have the opportunity to decide which kind of
10 procedures they're going to carry out.

11 I think, if this were the federal
12 government, which I take is what your
13 hypothetical is raising, you'd also have any
14 number of RFRA implications that would have to
15 be layered on to a question like that.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Mr. Fisher,
19 perhaps we should talk about the function,
20 because there is an amicus brief that suggests
21 that in normal contractor cases, the Rutherford
22 brief, that in normal contractor cases, you
23 apply a rationale basis, but where the
24 government has taken over a field, it should be
25 strict scrutiny.

1 And this goes back to Justice
2 Barrett's earlier question about how to define
3 the field. There are still foster parents that
4 -- private placement with foster parents that
5 CSS can still engage in. The only children that
6 in the -- in the state's custody are those that
7 have been essentially abandoned or taken away
8 from their parents, correct?

9 MR. FISHER: I think in general terms
10 it's correct, Justice Sotomayor, that -- that
11 there's on the one hand foster care
12 certification services for children in the
13 city's custody, which is something that you can
14 do only through a contract with the City under
15 the terms we're discussing here.

16 And there are other things that, as
17 Mr. Katyal noted, with the foster care program
18 that CSS is allowed to do, and there are other
19 private things that CSS can do without even
20 contracting with the City related to adoption
21 and other ways to care for needy children.

22 JUSTICE SOTOMAYOR: So there -- there
23 -- there is no occupying a field here, other
24 than these are the -- these happen to be the
25 kids who, either because of abandonment or

1 abuse, have been taken away from their parents
2 that are in the City's custody, correct?

3 MR. FISHER: I think that's right.

4 But -- but the thing I would want to make sure I
5 stress, Justice Sotomayor, is that even if the
6 other side were right that the City, however you
7 would want to look at this, has occupied the
8 field of parental certifications, it would make
9 it no different than Lyng. It would make it no
10 different than Nelson. It would make it no
11 different than Garcetti, where the government
12 occupies the field of prosecutions.

13 The government occupies the field of
14 law enforcement. There are lots of places where
15 the government has reasonably made the
16 determination to carry out a certain service and
17 is allowed to establish, as Nelson put it,
18 reasonable rules to carry out that service.

19 JUSTICE SOTOMAYOR: I have one last
20 question. If one wanted to find a compromise in
21 this case, can you suggest one that wouldn't do
22 real damage to all the various lines of law that
23 have been implicated here?

24 MR. FISHER: Well, I think, Justice
25 Sotomayor, the place to start in that respect

1 would be where Justice Breyer started earlier
2 today with the City's concession at pages 45 and
3 46 of its brief that if what CSS is concerned
4 about is a perception that by participating in
5 this program they are endorsing marriage for
6 same-sex couples, that they can disclaim that
7 and make very clear that all they're doing is
8 following state law and to carry out a
9 government function on the government's behalf
10 and they're not purporting to speak for
11 themselves in any certifications.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Mr. Fisher, the -- the
14 solicitor general's main argument here is that
15 the City has undermined its asserted interests
16 in non-discrimination by having a series of
17 other exemptions to the one that's at issue --
18 to the one that -- other exemptions that --
19 similar to what CSS wants.

20 And I talked with Mr. Katyal about
21 3.21. The solicitor general also references
22 various policies that have to do with placing
23 children, consideration of race and disability
24 at that stage.

25 So I was wondering if you could

1 explain to me why those are permissible, but --
2 but the City should not be able to give an
3 exemption to CSS?

4 MR. FISHER: Of course, Justice Kagan.
5 Let me say one thing about the law and then give
6 you a broad-stroke answer and any specifics I'm
7 happy to answer.

8 First, the solicitor general, I think,
9 somewhat strangely tried to put entirely aside
10 the contracting context of this case in asking
11 these questions about general applicability. As
12 the Court said in *Umbehr*, the Court has to give
13 reasonable deference to government's assessment
14 of its own interests in the contracting space.

15 So even in this general applicability
16 context, Justice Kagan, I want to stress that
17 the government contexting -- I'm sorry, the
18 government contracting context is highly
19 relevant to this comparability inquiry that is
20 required. And I don't think the solicitor
21 general even denied that.

22 And I'll just say in broad strokes the
23 purported exemptions that the other side points
24 to when it comes to the certification process
25 simply do not exist. The closest they've come

1 is to talk about disability being taken into
2 account, but it's not disability that's taken
3 into account. It's just the criteria that I
4 discussed with Justice Thomas that are neutral
5 and secular as to the ability to care for a
6 child to which disability is sometimes relevant.

7 That leaves child placement. And in
8 child placement, it's just a different set of
9 rules that apply because that's a different
10 stage of the process. And so the key answer
11 there is that the City has reasonably concluded
12 that that's just not a comparable setting
13 because the best interests of the child in
14 matching somebody on an individualized basis
15 kicks in. And that's not the scenario at the
16 certification stage, where all we're asking is
17 whether somebody can care for children.

18 And back to the question about a
19 compromise, CSS has not disputed that same-sex
20 couples are equally able to care for children.
21 And so we think the placement scenario is just
22 entirely different.

23 JUSTICE KAGAN: Thank you, Mr. Fisher.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch.

1 JUSTICE GORSUCH: I'd -- I'd like you
2 to expand on that just a little bit further, Mr.
3 Fisher.

4 One of the challenges of Smith, of
5 course, is asking whether there's an exception,
6 and that raises all sorts of questions about at
7 what level of generality should we look and
8 what's comparable enough.

9 Why isn't the 3.21 matching process in
10 that contract process sufficiently like the
11 screening process that we should consider it?

12 MR. FISHER: Justice Gorsuch, I think
13 for two reasons that I'd stress.

14 One is, as I understand Section 3.21,
15 it applies to referrals from DHS. That is not
16 the certification process. That is the matching
17 process or similar situations.

18 JUSTICE GORSUCH: Well, I -- I -- I --

19 MR. FISHER: And so the same answer
20 that I just gave to Justice Kagan --

21 JUSTICE GORSUCH: I'm sorry to
22 interrupt, but I'll -- I accept the legal point
23 that they're different stages in the process,
24 formally speaking, legally.

25 But why -- why -- why shouldn't we

1 take cognizance of it when we're doing the Smith
2 analysis?

3 MR. FISHER: Okay. Well, let me
4 answer it this way then. Smith did not say the
5 mere availability in the air of individualized
6 treatment is enough to make it not a generally
7 applicable law because, as Mr. Katyal said, then
8 the criminal law itself would not be a neutral,
9 generally applicable law.

10 You have to have some disparate
11 treatment of religious reasons versus secular
12 reasons. That's what Justice Alito said in the
13 Fraternal Order of Police opinion the solicitor
14 general relies on, that it's not okay to let
15 people wear beards for medical reasons but not
16 for religious reasons.

17 And so, as the -- as the Volokh brief
18 also described, it's not just whether in the air
19 there's a possibility for exceptions or
20 different -- differential treatment. It's
21 whether you've actually had such treatment,
22 because otherwise you just simply don't have a
23 workable system of law.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh.

2 JUSTICE KAVANAUGH: Good morning, Mr.
3 Fisher, and welcome. Thank you for your -- and
4 I want to thank all the parties for their
5 excellent briefs and arguments and all the
6 amicus briefs, which have all been very valuable
7 in thinking through these issues.

8 Just a couple questions to just
9 confirm a couple things factually here. You
10 agree, I assume, that Catholic Social Services
11 does important, valuable work for vulnerable
12 foster children in Philadelphia?

13 MR. FISHER: Of -- of course, yes.

14 JUSTICE KAVANAUGH: And then do you
15 agree that a same-sex couple in Philadelphia can
16 become foster parents by going to one of the 30
17 agencies? Indeed, do you agree that no same --
18 same-sex couple has ever gone to CSS and, if
19 they did, that they would be referred to one of
20 those 30 agencies? Do you disagree with any of
21 that?

22 MR. FISHER: Justice Kavanaugh, no, I
23 don't as a factual matter, but remember that a
24 same-sex couple was turned away from Bethany.
25 And the -- and the caution I would give you to

1 rely too heavily on this 30-agency idea is that,
2 remember, we don't know how many agencies will
3 discriminate against people based on sexual
4 orientation, religion, or other characteristics
5 if the City is required to grant exemptions.

6 And I don't think the Court wants to
7 go down a road of having to count up how many
8 agencies at the end of the day are
9 discriminating on what basis. As you yourself
10 asked, what if there were just one agency? What
11 if there were two or three or five?

12 I think that's a really difficult area
13 for the Court to have to get into.

14 JUSTICE KAVANAUGH: Well, I -- I agree
15 to that, but, arguably, the other -- the
16 response to that might be we shouldn't be
17 looking for problems before we confront them.

18 MR. FISHER: Fair -- fair enough,
19 Justice Kavanaugh, but remember you don't even
20 get to this set of questions because this is a
21 government contracting case.

22 And as the Court said in Nelson, you
23 just ask whether the government's position here
24 is reasonable. And the government has two
25 eminently reasonable interests it's seeking to

1 vindicate here. One is to treat all citizens
2 equally when people are carrying out the
3 government's own programs and not to balkanize
4 its services.

5 And, secondly, the government just has
6 a managerial interest. As I was just
7 describing, if you have to start granting
8 exemptions, all of a sudden running a program
9 through the government gets very, very hard,
10 even to the point where the City might just say,
11 the heck with it, we're going to take this
12 in-house and do it ourselves.

13 And I don't think anybody disputes
14 that the City could do that. And once you've
15 admitted the City could just do these
16 certifications itself, it seems very odd to
17 conclude that CSS is entitled to insist on own
18 rules when it's carrying them out on the City's
19 behalf.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett.

23 JUSTICE BARRETT: Good morning,
24 Mr. Fisher. I have a question about something
25 that some of the amicus briefs brought up, which

1 is this third-party harm principle, the
2 principle that religious beliefs can never give
3 a believer the right to harm a third-party even
4 slightly.

5 I'm wondering if you agree with that
6 and, if so, if you could tell me where in law
7 the principle comes from.

8 MR. FISHER: Justice Barrett, I'm not
9 sure that that's true as a categorical rule. I
10 think that, as some of the questions have
11 pointed out this morning, when you get into
12 situations like this, you need to balance the
13 free exercise interests on the one hand against
14 whatever the governmental interests are on the
15 other at least in the abstract.

16 So I think that, as I was just saying
17 to Justice Kavanaugh, you don't get to a balance
18 of the harms in this particular case because
19 it's a government contracting case, and all you
20 ask under Nelson is whether the government's
21 rule is reasonable.

22 But even if you did get to that and
23 even if it were relevant whether there were
24 third-party harms, as I was just describing, we
25 would say there are serious governmental harms

1 and there are also private harms. We've talked
2 about people being turned away in Philadelphia,
3 and the amicus briefs tell you they're turned
4 away elsewhere.

5 But, remember, there's also a
6 deterrent effect. If people are aware that the
7 government program allows discrimination, they
8 may never enter the pool in the first place.
9 There's no brochure that tells people, you know,
10 this agency prefers people of this -- of your
11 kind and these other agencies prefer people of
12 the other kind. And, frankly, if there were a
13 brochure in that respect, it would just make it
14 all the worse.

15 JUSTICE BARRETT: I wanted to sneak in
16 one --

17 MR. FISHER: So I think there are very
18 harms here, Justice Barrett. I wouldn't take
19 the categorical view, though.

20 JUSTICE BARRETT: I want to sneak in
21 other question. I think we would agree that
22 there's really not any circumstance we can think
23 of in which racial discrimination would be
24 permitted as a religious exemption.

25 Can you think of any example in which

1 saying, as, you know, CSS has done here, that
2 they, you know, will not certify same-sex
3 couples, that -- where an objection to same-sex
4 marriage would justify an exemption? Or is it
5 like racial discrimination?

6 MR. FISHER: Well, Justice Barrett, I
7 think, for purposes of your analysis here, it is
8 like race discrimination. I understand that
9 race is special in many ways in the Court's
10 jurisprudence. But, as Justice Gorsuch stressed
11 in Masterpiece Cakeshop, it is the proudest
12 boast of free exercise jurisprudence that we do
13 not judge the legitimacy or the offensiveness of
14 religious beliefs if they are deeply felt,
15 which, as we know from the Bob Jones case, for
16 example, some religious organizations do have
17 deeply felt views about interracial marriage.

18 I think the Court would have to accept
19 them. Then the only question would be whether
20 the compelling interest test applies differently
21 in that scenario, and I don't think it would.

22 As a matter of just compelling
23 interest law, the Court has said not just that
24 governments have an interest in eradicating race
25 discrimination, but also, in Jaycees, the Court

1 said sex discrimination, as we know from last
2 term in Bostock, this could be thought of as sex
3 discrimination. And so I just don't think you
4 could draw a line in this context between sexual
5 orientation --

6 CHIEF JUSTICE ROBERTS: A minute to
7 wrap up, Mr. Fisher.

8 MR. FISHER: Thank you, Mr. Chief
9 Justice.

10 I think I would just leave you with
11 the -- with the last -- a couple of the last
12 points I was making, which is I don't think
13 anybody can dispute that if the City wanted to
14 do this work itself, it could. And so the any
15 -- only question that you have is whether the
16 analysis is any different because the City is
17 operating through an independent contractor.
18 And cases like Nelson and Lyng tell you the
19 answer is no. Also Rust v. Sullivan, a case we
20 haven't yet discussed today, tells you the
21 answer is no. And so that just leaves the
22 arguments the solicitor general is making about
23 neutrality and the like.

24 And I think the irreducible fact in
25 that respect is that the City here would not

1 allow race discrimination -- I'm sorry, would
2 not allow this discrimination for any reason.
3 The district court found this at page 85a to
4 88a. I don't think anybody really thinks that
5 this kind of activity would have been allowed in
6 2018 or going forward for any provider for any
7 reason.

8 And for that reason, we think that
9 this is a case -- one way to think about this is
10 a case about equal treatment versus special
11 privileges. The City has satisfied the equal
12 treatment requirement, and it's not required to
13 give special privileges here.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Three minutes for rebuttal, Ms.
17 Windham.

18 REBUTTAL ARGUMENT OF LORI H. WINDHAM
19 ON BEHALF OF THE PETITIONERS

20 MS. WINDHAM: Thank you, Mr. Chief
21 Justice. Three quick points.

22 First, the discussion this morning has
23 confirmed that Philadelphia does not have a
24 neutral and generally applicable law. They have
25 waivers and exemptions. They let agencies

1 consider factors that are prohibited under the
2 Fair Practices Ordinance, and they don't follow
3 that ordinance themselves.

4 Philadelphia now admits it's applying
5 its public accommodations law, and the analysis
6 would be different if the Court analyzed the use
7 of sovereign authority under that law. Even
8 under Smith, that triggers strict scrutiny, and
9 the City loses.

10 Second, Respondents ignore the long
11 history of Catholic Social Services doing the
12 work it does today, partnering with foster
13 parents to provide children with a family,
14 walking with and supporting those families
15 through a years-long and difficult process.

16 This is the ministry that the City of
17 Philadelphia is trying to extinguish. The fact
18 that CSS carries out other ministries and
19 provides services at a loss, subsidizing the
20 City, does not change the fact that the City is
21 trying to extinguish this ministry.

22 And it has done so in the most
23 restrictive manner, sending the message that
24 Sharonell Fulton must be excluded because she
25 partners with an agency who shares her faith.

1 Respondents urge the Court to decide
2 some other case, not this case. They claim all
3 kinds of harms. But religious foster agencies
4 continue to serve in most states, and multiple
5 states have even protected those agencies by law
6 without negative results.

7 Longstanding protections like RFRA's
8 protect religious exercise and, yes, even
9 government contractors. Yet, Respondents cannot
10 identify where their parade of horrors has
11 come to pass.

12 Finally, none of this was necessary.
13 It all could have been avoided by a properly
14 functioning Free Exercise Clause. The courts
15 are struggling to parse the exact contours of
16 general applicability, while loving foster
17 families remain excluded.

18 The text, history, and traditions of
19 the Free Exercise Clause teach that when the
20 government wants to prohibit a longstanding
21 religious exercise, it needs a compelling reason
22 to do so. That's a straightforward approach,
23 and Philadelphia can't hope to pass it here.

24 In our pluralistic society, this Court
25 has repeatedly said that there should be room

1 for those with different views. But Smith's
2 narrow view of the Free Exercise Clause stands
3 in the way of that sensible result.

4 Under Smith, particularly as applied
5 by the courts below, government officials have
6 no incentive to reach sensible accommodations,
7 knowing they will be shielded by the flimsiest
8 claim to have a generally applicable law.

9 Our pluralistic society is at its best
10 when it has a Free Exercise Clause that protects
11 free exercise, not just of those who agree with
12 the officials in charge.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:52 a.m., the case
17 was submitted.)

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Official - Subject to Final Review

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