

## **PLANNED LOCAL GOVERNMENT AMICUS BRIEF IN FULTON V. CITY OF PHILADELPHIA**

The City of New York is preparing an amicus brief on behalf of local governments in support of the City of Philadelphia in a case before the Supreme Court concerning whether the First Amendment requires Philadelphia to continue to contract with a private, faith-based foster-care agency that refuses to work with same-sex couples, in contravention of the city's non-discrimination ordinance.

### **DEADLINE:**

The deadline to sign on is **noon Eastern Time on August 17th**, and the brief will be filed later that week, on August 20th. An outline of the brief appears below and a draft will be circulated on August 10th. We recommend that local-government attorneys begin thinking about the authorizations your jurisdiction will require before it can sign on to the brief and to begin taking appropriate steps to prepare for securing that approval. We are happy to discuss the contents of the brief in more detail with any interested jurisdiction.

### **ABOUT THE CASE:**

The City of Philadelphia contracts with private agencies to help fulfill its obligation to care for children placed in its protective custody. These contracts involve private entities, rather than the city itself, recruiting, providing oversight to, supporting, and certifying eligible parents for the city to place children in foster care with, though it is ultimately the city that decides where to place each child in its custody. Philadelphia has long partnered with private foster-care agencies, including faith-based ones, to assist in the administration of the foster-care system under uniform, renewable, one-year contracts. Like all city contractors, agencies may not discriminate on the basis of, among other grounds, race, religion, or sexual orientation when performing under the contracts. Thus, when a prospective foster parent walks into a private foster-care agency, the agency must evaluate that person's ability to serve as a foster parent without regard to these traits.

One private, faith-based contractor, Catholic Social Services (CSS), is unwilling to comply with this nondiscrimination requirement. CSS believes that certifying same-sex couples would "endorse" the couple's relationship as acceptable, whereas its religious beliefs bar the agency from such supposed endorsement. CSS categorically refuses to certify same-sex couples seeking to become foster parents, even if the couples meet all state-law certification requirements. It claims that the

City of Philadelphia must continue to contract with it while exempting it from the obligation not to discriminate when performing under its contract, unlike all other agencies with contracts with the city.

#### **PLANNED BRIEF:**

A ruling endorsing CSS's argument could have broad ramifications for how any jurisdiction provides a host of essential services, from foster care to services for the homeless to the availability of public-school space for privately run after-school programs, as well as for jurisdictions' ability to ensure that such services are delivered to residents in a non-discriminatory way. Indeed, no one in this case disputes that, if the City of Philadelphia were administering the foster-care system on its own, it could not discriminate against same-sex couples who want to become foster parents. That the city has chosen to work in a public-private partnership should not affect that result.

Accordingly, the City of New York believes that an amicus brief highlighting potential unintended, adverse consequences that could flow from that ruling could benefit the Court as it considers the case. The City anticipates that, to show the breadth of those potential unintended consequences, the brief will not necessarily focus on only the foster-care system or the issue of LGBTQ discrimination. Rather, a ruling in favor of CSS could have a dramatic impact on a whole host of services; implicate other types of discrimination or even contract terms beyond the commitment not to discriminate when performing under the contract; and critically impair jurisdictions' ability to deliver services effectively and enforce the terms of the contracts it enters into with service-providers.

The brief will discuss the types of services that jurisdictions provide by contracting with private agencies, as well as jurisdictions' critical interest in providing these services in this way and ensuring that they are delivered without discrimination. The brief will also explore whether a ruling in favor of CSS could force jurisdictions to decide to deliver some services directly—which could create bureaucratic or other inefficiencies as well as compromise the effective delivery of services to the community—or not at all.

#### **HOW TO JOIN:**

The deadline to sign on is **noon Eastern Time on August 17th**. Please email confirmation that your city, county, mayor, or county leader will sign on—with the signature block of the representing attorney—to Lorenzo Di Silvio,

Senior Counsel, Appeals Division, New York City Law Department, via [ldisilvi@law.nyc.gov](mailto:ldisilvi@law.nyc.gov) by that date. For reference, the representing attorney does not need to be a member of the Supreme Court bar. Any other questions or requests for information can also be emailed to Lorenzo.

Here is a sample signature block:

JAMES E. JOHNSON  
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New York, New York 10007  
(212) 356-2500  
*Attorney for the City of New York*

**REQUEST FOR INFORMATION:**

To demonstrate the impact of a ruling endorsing CSS's argument, please share any of the following:

- Examples of services your jurisdiction provides by contracting with private entities that could be affected by a ruling in favor of CSS;
- Any real-world examples of faith-based contractors that have claimed a right to continue receiving government contracts, while being exempted from the requirement not to discriminate in the delivery of services under those contracts;
- Any data or real-world examples of why it's so important that services be provided in a nondiscriminatory manner; and
- Any information about the scope of government contracts and the impact of endorsing a religious-based exemption to contract terms beyond the requirement to provide services equally to all.

## APPENDIX: FULTON PROCEDURAL POSTURE

When Philadelphia learned of CSS's policy, it met with the agency to discuss its existing contract and the upcoming contract renewal. When it became clear that CSS would not comply with the contractual nondiscrimination requirement, the City stopped referring new children to CSS for foster-care services. CSS (and a handful of individual plaintiffs) then sued the City of Philadelphia in federal court, seeking a preliminary injunction to reverse the City's referral freeze and requiring it to continue to contract with CSS while permitting the agency to refuse to accept same-sex couples during the lawsuit.

The district court denied the request for a preliminary injunction. After a three-day hearing, the court concluded that the contract and the City's nondiscrimination requirements "are neutral with respect to religion" and are "generally applicable"— they are required of all contractors, and any agency that objects to complying for non-religious reasons would be treated the same as one that objects for religious reasons. The court also concluded that there are numerous permissible government objectives furthered by the nondiscrimination requirement, including ensuring that the pool of foster parents is as diverse and broad as the children in need of foster care and trying to avert the dignitary and emotional harms of being discriminated against.

CSS appealed to the Third Circuit, which unanimously affirmed the denial of the preliminary injunction. The court concluded that CSS had not shown that the City treated it differently because of its religious beliefs. It further rejected CSS's claim that, by requiring it to certify same-sex couples as acceptable foster parents, the City was compelling it to speak in violation of its First Amendment rights.

CSS then petitioned for certiorari, which the Supreme Court granted. The Court agreed to consider what the test is under current precedent for alleged violations of the free exercise of religion; whether that precedent should be reversed in favor of a rule more protective of religious exercise; and whether Philadelphia's actions placed unconstitutional conditions on CSS's rights to free speech and free exercise of religion by requiring it to make statements and act in ways that it says are contrary to its religious beliefs.