CASE NOTES

Fulton v. City of Philadelphia: The Third Circuit's Bittersweet Advancement of LGBTQ+ Rights

I. OVERVIEW

Since 1917, Catholic Social Services (CSS) had cemented its presence in Philadelphia (the "City") by providing assistance to underprivileged youth without issue.[1] However, in March 2018, the City received a troubling phone call from the *Philadelphia Inquirer*.[2] CSS, the 102-year-old, publicly religious organization, was refusing to work with same-sex couples for foster care placement.[3] The organization's stance directly conflicted with the City's Fair Practices Ordinance[4] (the "Ordinance"), which was incorporated in the City's annually renewed contract with CSS.[5] During meetings with the City, CSS Secretary James Amato emphasized the organization's century-long relationship with Philadelphia[6] and explained that the organization's refusal to place foster children with otherwise eligible same-sex couples directly stemmed from the Catholic Church's beliefs and inability to recognize same-sex marriage as an institution.[7] Still, CSS refused to change its position after the

1. Fulton v. City of Philadelphia, 922 F.3d 140, 147, 149 (3d Cir. 2019).
2. *Id.* at 148.
3. *Id.*
4. The Fair Practices Ordinance "prohibits sexual orientation discrimination in public accommodations." *Id.* Section 9-1106 of the Fair Practice Ordinance states, "It shall be an unlawful public accommodations practice to deny or interfere with the public accommodations opportunities of an individual or otherwise discriminate based on his or her . . . sex, sexual orientation, gender identity . . . ." PHILADELPHIA, PA., CODE § 9-1106 (2016). "Discrimination" is defined as "[a]ny direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of actual or perceived . . . sex (including pregnancy, childbirth, or a related medical condition), sexual orientation, gender identity . . . or other act or practice made unlawful under this Chapter or under the nondiscrimination laws of the United States or the Commonwealth of Pennsylvania." PHILADELPHIA, PA., CODE § 9-1102(e) (2016).
5. *Fulton*, 922 F.3d at 148.
6. *Id.*
7. *Id.* The Roman Catholic Church has historically refused to recognize same-sex marriages. *Stances of Faiths on LGBTQ Issues: Roman Catholic Church*, HUM. RTS. CAMPAIGN,

meetings.[8] The City immediately placed CSS under an "intake freeze."[9] While the Philadelphia Commission on Human Rights (the "Commission") sought further discussion with CSS to clarify its discriminatory position and to potentially terminate its contract with the City, CSS did not respond.[10] Instead, CSS filed a lawsuit against the City with the United States District Court for the Eastern District of Pennsylvania.[11]

The suit focused on the "suspension" of the contract following the *Philadelphia Inquirer*'s publication of CSS's refusal to work with same-sex couples as foster parents due to its religious stance.[12] CSS argued that its discrimination against same-sex couples during the foster parent screening process did not meet the criteria for a "public accommodation" under the Ordinance.[13] CSS filed a motion for a temporary restraining order and preliminary injunction requiring the City to continue referring foster children to its organization and to resume its contract.[14] Specifically, CSS argued in its Free Exercise Clause claim that the enforcement of the Ordinance was "neither neutral nor generally applicable,"[15] but rather targeted the organization because of its refusal to work with same-sex couples.[16] CSS argued in its Establishment Clause claim that the City unlawfully adopted a "preferred religious viewpoint"[17] that conditioned its future contracts with CSS so long as it adhered to the acceptance of same-sex marriage.[18] As part of its Freedom of Speech claims, CSS separately argued that the City had compelled it to endorse same-sex marriage as a

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https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-roman-catholic-church (last updated Aug. 8, 2018).

8. *Fulton*, 922 F.3d at 148.

9. The City no longer provided them with foster children in anticipation of the City's expiring contract that would, presumably, not be renewed. *Id.* at 148-49.

10. *Id.* at 150.

11. *Id.*

12. *Id.* at 149.

13. *Id.* at 150. The Ordinance defines "public accommodation" as

> [a]ny place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public; including all facilities of and services provided by any public agency or authority; any agency, authority or other instrumentality of the Commonwealth; and the City, its departments, boards, and commissions.

PHILADELPHIA, PA., CODE § 9-1102(w) (2016).

14. *Fulton*, 922 F.3d at 150-51.

15 *Id.* at 153.

16. *Id.* at 153-54.

17. *Id.* at 159.

18. *Id.* at 159-60.

condition to receive government funding,[19] while also retaliating against it for engaging in the "constitutionally protected activity" of providing foster care services.[20] Finally, CSS argued that the City had "substantially burden[ed]" its exercise of religion by limiting its involvement in the religious activity of foster care services under the Pennsylvania Religious Freedom Protection Act (RFPA).[21] The district court denied CSS's petition for preliminary injunctive relief, noting that CSS was not likely to succeed on the merits of its First Amendment claims or under the RFPA.[22] The United States Court of Appeals for the Third Circuit *held* that the district court did not abuse its discretion in denying the motion for preliminary injunctive relief when finding CSS could not establish a reasonable likelihood of success on any of its claims.[23] *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019).

II. BACKGROUND

When seeking a preliminary injunction, a plaintiff generally has the burden of showing a sufficient likelihood of success on the merits of their claims, and an appellate court may only review clearly erroneous fact findings, legal questions *de novo*, and abuses of discretion made in granting the requested relief.[24] However, the Third Circuit amended its standard of review in *Brown v. City of Pittsburgh* for First Amendment-related claims by allowing appellate courts to independently review a case's record—a significantly lower amount of deference to the district court's findings.[25] The substantive considerations courts must weigh in granting preliminary injunctions for claims are described by the United States Supreme Court in *Winter v. Natural Resources Defense Council, Inc.* as striking a "balance of equities and consideration of the public interest."[26] Courts must assess whether (1) the plaintiff has a reasonable chance of succeeding at the litigation stage with their claim; (2) the plaintiff would experience irreparable harm in the absence of the

19. *Id.* at 161.
20. *Id.*
21. *Id.* at 162-63.
22. *Id.* at 151.
23. The Third Circuit found the district court's analysis to be a "thorough and well-reasoned decision." *Id.* at 165.
24. Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (quoting Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010)).
25. Brown v. City of Pittsburgh, 586 F.3d 263, 268-69 (3d Cir. 2009) (citing Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 524 (3d Cir. 2004)).
26. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 32 (2008).

injunction; (3) the granted or denied injunctive relief would cause potential harm to others; and (4) the injunction would affect the public interest.[27]

In defining Free Exercise Clause claims under the First Amendment, the Supreme Court explained that "valid and neutral law[s] of general applicability"[28] are not violative, while those that are created in the effort of regulating religion are unenforceable.[29] To evaluate claims under the Free Exercise Clause, courts must decide whether the plaintiff has shown that they were treated disparately because of their religion and if the antagonistic conduct specifically targeted them.[30] When the purpose of the law "infringe[s] upon or restrict[s] practices because of . . . religious motivation, the law is not neutral."[31] Even when laws appear facially neutral and the superficial objective is not religiously motivated, courts must determine if the laws are being selectively enforced against the plaintiff's religion—a less obvious, more pervasive form of discriminatory behavior that the Third Circuit discussed in *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*.[32] The court in *Tenafly* examined the "expressly granted exemptions" made by law enforcement to ordinance violators of various backgrounds that did not allow for similar, relaxed enforcement to those affiliated with Orthodox Judaism.[33] There, the court held that by making a "value judgment"[34] to enforce the "often-dormant" ordinance against an Orthodox Jewish plaintiff, discriminatory intent was blatant and a strict scrutiny analysis was activated to review the non-neutral behavior.[35]

Establishment Clause claims are equally scrutinized to ensure that the government is not pressuring individuals "to support or participate in religion."[36] The court must review the circumstances of the case and establish whether the government has "impermissibly advanced religion"

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27. Del. River Port Auth. v. Transam. Trailer Transp., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974).

28. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-131, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 135 S. Ct. 853, 859 (2015)).

29. *Id.* at 877-79.

30. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

31. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

32. 309 F.3d 144, 167-68 (3d Cir. 2002).

33. *Id.* at 167.

34. *Id.* at 166 (quoting Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366 (1999)).

35. *Id.* at 168.

36. Lee v. Weisman, 505 U.S. 577, 587 (1992).

to prevent a muddled bond between church and state.[37] In *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, the Third Circuit followed the Supreme Court's three-part test to analyze Establishment Clause claims.[38] Under that test, a government action involving religion is not violative of the Establishment Clause if "(1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create an excessive entanglement of the government with religion."[39] More recent precedent followed by the Third Circuit, however, has truncated the analysis into a single question for Establishment Clause claims: whether a "reasonable, informed observer, *i.e.*, one familiar with the history and context . . . perceive[s] the challenged government action as endorsing religion."[40]

Within the realm of compelled speech violations, the Supreme Court has recognized that forcing individuals to speak and behave inconsistently with their personal beliefs is a constitutional violation.[41] The Court subsequently limited this protection in *Rust v. Sullivan* by explaining that an individual's freedom of expression can be "permissibly restricted by the funding authority,"[42] even in the government subsidy context.[43] However, *Rust*'s ruling was further clarified by the Court, which held that individuals could not be forced "to pledge allegiance to" policies contrary to their beliefs even when made a condition to receiving a government subsidy.[44] The Third Circuit has similarly recognized that scrutinizing this type of claim is dependent upon whether the government is involved with forcing the adoption of a specific viewpoint.[45] Such compulsions may also be more visceral and less obvious, as they do not require "a direct threat or a gun to the head."[46] Constitutional retaliation claims are analyzed under a more rigorously mechanical three-part test requiring the plaintiff to show "(1) that [they] engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation."[47]

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37. Lynch v. Donnelly, 465 U.S. 668, 685 (1984).
38. Am. Civil Liberties Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1483 (3d Cir. 1996) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
39. *Id.*
40. *Tenafly*, 309 F.3d at 174.
41. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
42 500 U.S. 173, 199 (1991).
43. *Id.* at 199-200.
44. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 220 (2013).
45. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 188-89 (3d Cir. 2005).
46. *Id.* at 189 (quoting Axson-Flynn v. Johnson, 356 F.3d 1277, 1290 (10th Cir. 2004)).
47. Eichenlaub v. Twp. of Ind., 385 F.3d 274, 282 (3d Cir. 2004).

Finally, state claims brought under the RFPA are successful when plaintiffs show that the enforcement of a law "substantially burdens" activities that are "fundamental to [their] religion" rather than any general activity.[48] Failing to show that the activity is intrinsically related to the religion signifies that the plaintiff has not been denied the reasonable opportunity.[49] Within religious contexts involving services for children, Pennsylvania state courts have recognized that general activities—like daycare services—carried out by religious entities do not classify as "fundamental religious activit[ies]" under the RFPA for a successful claim.[50] The Third Circuit has acknowledged Pennsylvania's interpretation of these non-fundamental religious activities providing services to children in their review of RFPA claims.[51]

III. COURT'S DECISION

In the noted case, the Third Circuit found that the district court did not abuse its discretion in denying CSS's motion for preliminary injunctive relief after recognizing that each of the plaintiff's asserted claims under the First Amendment and the RFPA did not have a reasonable likelihood of succeeding on the merits. The court noted that the City's efforts reflected appropriate and unbiased enforcement of the Ordinance.[52]

The court first held that CSS failed to meet the burden for its Free Exercise Clause claim when it could not show it was treated differently or more severely by the City due to its religion.[53] The court found the City's Ordinance to be sufficiently neutral because it only enforced the non-discriminatory policy when it was violated.[54] In response to CSS's argument that the Ordinance was being selectively enforced because protections for public accommodations had not previously been interpreted to include foster care services under the law, the court explained that the City did not merely take the position "disingenuously"

48. Commonwealth v. Parente, 956 A.2d 1065, 1074 (Pa. Commw. Ct. 2008) (quoting 71 PA. STAT. AND CONS. STAT. ANN. § 2403 (West 2002)).

49. *Id.* at 1074-75.

50. Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough, 920 A.2d 953, 960 (Pa. Commw. Ct. 2007).

51. Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 259 (3d Cir. 2008) (Scirica, C.J., concurring).

52. Fulton v. City of Philadelphia, 922 F.3d 140, 165 (3d Cir. 2019).

53. *Id.* at 156, 159.

54. *Id.* at 159.

to punish CSS.[55] The court further noted the lack of evidence suggesting that any foster care agency had *ever* violated the Ordinance before CSS.[56]

The court then reviewed CSS's Establishment Clause claim, where the plaintiff argued that requiring its organization to work with same-sex couples—in direct conflict with its religious position—at the risk of not continuing their relationship was a form of exclusion by the City.[57] The court noted that, had the City actually attempted to punish CSS for not complying with its own views, it would not have continued working with CSS in various other capacities outside foster care services.[58] Moreover, the court pointed to the City's continued relationship with Bethany Christian, a similar agency that religiously opposed same-sex marriage yet still worked with same-sex couples to comply with neutral, non-discriminatory laws.[59]

Next, the court analyzed CSS's two Freedom of Speech claims separately for compelled speech and speech retaliation.[60] CSS asserted that the City's nondiscrimination law prohibiting it from disqualifying same-sex couples as potential foster parents could be construed as "written endorsements that violate its sincere religious beliefs."[61] However, the court held that the City's imposition on CSS was not constitutionally violative because the City did not force CSS to "adopt the government's views as their own," explaining that the City did not force CSS to announce its acceptance of same-sex marriage as a condition to their contract.[62] Simply requiring the organization to follow nondiscrimination laws did not meet the threshold of endorsement.[63]

The court applied the three-part analysis for CSS's claim concerning speech retaliation, which led to the court finding the organization was unlikely to succeed.[64] As part of its analysis, the court categorically rejected CSS's argument that the City's suspension of its intake services

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55. *Id.* at 157-58.

56. *Id.* at 158 ("[T]he record contains no evidence of any foster care agencies discriminating in ways that would violate the Fair Practices Ordinance prior to this controversy. The issue simply seems not to have come up previously.").

57. *Id.* at 159.

58. *Id.* at 160.

59. *Id.*

60. *Id.*

61. *Id.* (quoting Brief of Appellant at 53, *Fulton*, 922 F.3d 140 (No. 18-2574)).

62. *Id.* at 161.

63. *Id.*

64. *Id.* at 161-62. In order for CSS to prevail on its speech retaliation claim, it "must show that it engaged in constitutionally protected activity, that the government responded with retaliation, and that the protected activity caused the retaliation." *Id.* at 161.

was a form of retaliation taken against it after confirming its inability to work with same-sex couples.[65] The court explained that the City's enforcement of the Ordinance did not qualify as retaliation, as it was just carrying out the general enforcement of a law and not targeting CSS.[66]

Further, the court scrutinized CSS's RFPA claim for the final part of the appeal in accordance with state law.[67] CSS's argument interpreting the selection of foster care parents to be a burdened activity fundamental to its religious practices was found unpersuasive by the court.[68] The court explained that CSS's services involving underprivileged youth may be related to its religion, but the activity itself is not inherent to the Catholic religion within Pennsylvania law.[69] While the activity may aid a religion in performing its mission, it may not be fundamental when the activity is capable of being conducted by religious and secular people alike.[70]

IV. ANALYSIS

While the Third Circuit properly affirmed the district court's denial of injunctive relief for CSS's First Amendment and state claims, the strength of CSS's Free Exercise Clause claim was more visible than the Third Circuit claimed, as it neglected to scrutinize the City's history with the Catholic Church more conscientiously.[71] Given that the Third Circuit was able to conduct an independent review of the claim because of its First Amendment nature without deferring to the district court,[72] the Third Circuit's failure to recognize CSS's sufficient likelihood of success on the Free Exercise claim is particularly jarring.

When CSS argued that the City had never applied the Ordinance to foster care services and suggested that the behavior specifically targeted its organization, the Third Circuit disagreed with CSS's position.[73] In doing so, the court reasoned that there was no indication the City suddenly applied the Ordinance to the foster care context to deliberately punish CSS.[74] In weighing its decision to recognize bias or hostility toward CSS, the court explained that it was not "suspicious" of the City lacking any

65. *Id.* at 162.
66. *Id.*
67. *Id.*
68. *Id.* at 162-63.
69. *Id.* at 163.
70. *Id.*
71. *Id.* at 147.
72. *Id.* at 152.
73. *Id.* at 158-59.
74. *Id.* at 160.

evidence or reason to believe that any foster care agencies were practicing sexual orientation discrimination prohibited by the Ordinance.[75]

The Ordinance was amended in 1982 to prohibit discrimination on the basis of sexual orientation.[76] The City had renewed its annual contract with CSS for nearly forty years while the discrimination provision had been enforceable in Pennsylvania.[77] It is more than feasible to assume the City could have formulated an opinion regarding CSS's adherence to the Ordinance given the Catholic religion's reputation both nationally and locally.[78] By 2017, multiple Catholic Charities located in Massachusetts, Illinois, and the District of Columbia had announced their refusal to work with same-sex couples and subsequent inability to provide foster care services due to enforceable state discrimination laws.[79]

It may be forgivable when only neighboring states are embroiled with the Catholic Church, but a similar excuse is not palatable when the Archdiocese of Philadelphia publicly endorses a local school's decision to terminate a married gay teacher[80] in the face of 23,000 opposing petitions[81] more than two years before the City received the distressing phone call from the *Philadelphia Inquirer*.[82] Nor is it excusable when the same Archdiocese essentially proclaims that LGBTQ+ people do not exist after

75. *Id.* at 158.

76. PHILADELPHIA, PA., CODE §§ 9-1102(e), 9-1106(1) (2016).

77. *Fulton*, 922 F.3d at 147.

78. Bob Smietana, *For Some Pennsylvania Laity, Being Catholic Has Become Embarrassing and Troubling*, RELIGION NEWS SERV. (Feb. 5, 2019), https://www.religionnews.com/2019/02/05/for-some-pennsylvania-laity-being-catholic-has-become-embarrassing-and-troubling/. Only thirty-five percent of the U.S. electorate in 2016 felt that the Catholic Church had a positive relationship with the LGBTQ+ community. Betsy Cooper, Daniel Cox, Rachel Lienesch & Robert P. Jones, Ph.D., *Majority of Americans Oppose Laws Requiring Transgender Individuals to Use Bathrooms Corresponding to Sex at Birth Rather than Gender Identity*, PRRI (Aug. 25, 2016), https://www.prri.org/research/poll-lgbt-transgender-bathroom-bill-presidential-election/. Further, less than half of American Catholics agreed with Pope Francis' positive sentiments regarding same-sex marriage. DANIEL COX & ROBERT P. JONES, PH.D., PRRI & RNS, THE FRANCIS EFFECT? U.S. CATHOLIC ATTITUDES ON POPE FRANCIS, THE CATHOLIC CHURCH, AND AMERICAN POLITICS 8 (2016), https://www.prri.org/wp-content/uploads/2015/08/PRRI-RNS-2015-Survey.pdf.

79. Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 76 (2017).

80. Joan F. Desmond, *A Catholic Mother Reflects on Furor over Philly Teacher in Same-Sex Marriage*, NAT'L CATH. REG. (July 21, 2015), http://www.ncregister.com/daily-news/a-catholic-mother-reflects-on-furor-over-philly-teacher-in-same-sex-marriag.

81. MaryClaire Dale, *Protest over Gay Teacher Fired at Catholic School in Philadelphia*, CHRISTIAN SCI. MONITOR (Aug. 11, 2015), https://www.csmonitor.com/USA/Education/2015/0811/Protest-over-gay-teacher-fired-at-Catholic-school-in-Philadelphia.

82. Fulton v. City of Philadelphia, 922 F.3d 140, 148 (3d Cir. 2019).

CSS's controversy with the City surfaced; the organization's historic, discriminatory perspective has always been unmistakable.[83]

While many governments may only investigate and actively enforce antidiscrimination laws upon notification of a complaint, the City acted independently, as CSS reportedly had never been approached by a same-sex couple to even have the opportunity to discriminate.[84] Certain jurisdictions have upheld the enforcement of laws under a complaint-only procedure,[85] but the City has not explained whether it has a similar restrictive protocol for investigating complaints.[86] By investigating the veracity of the *Philadelphia Inquirer*'s information without such a procedure, the City suggests that it *can* engage with the community in advance.[87] Preventively approaching organizations that inherently make discriminatory statements may more efficiently prevent discrimination against LGBTQ+ individuals in their communities[88] and seem less reactionary.

Furthermore, when the City suddenly interpreted its Ordinance to also apply to foster care services in the effort to prevent CSS's publicly announced discrimination,[89] it was evident that the Third Circuit made a deliberate oversight in not scrutinizing the City's deep awareness of CSS's ideals.[90] The "novel" interpretation of the Ordinance, coincidentally appearing once CSS voiced its discriminatory position,[91] was akin to the dormant law swiftly being enforced against a religious group.[92] Perhaps recognizing the City's half-century blind eye to CSS's potentially unlawful discrimination would not have been dispositive proof of selective enforcement and persecution analogous to *Tenafly*[93] and *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[94] allowing for

83. Trudy Ring, *Philly Archbishop: LGBTQ People Don't Exist*, ADVOCATE (Oct. 6, 2018, 9:31 AM), https://www.advocate.com/religion/2018/10/06/philly-archbishop-lgbtq-people-dont-exist.

84. *Fulton*, 922 F.3d at 148.

85. City of Whitehall v. Moling, 532 N.E.2d 184, 189 (Ohio Ct. App. 1987).

86. *See Fulton*, 922 F.3d at 148.

87. *Id.*

88. *See* Tim Friehe & Avraham Tabbach, *Preventive Enforcement*, 35 INT'L REV. L. & ECON. 1, 9 (2013).

89. *Fulton*, 922 F.3d at 149, 158.

90. *Id.* at 158.

91. *Id.*

92. *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167-68 (3d Cir. 2002).

93. *Id.*

94. Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366-67 (3d Cir. 1999). The Third Circuit held that the Newark Police Department's policy reprimanding officers for refusing to shave their beards for religious reasons while allowing bearded officers with medical exemptions to forego punishment "[could not] survive any degree of heightened scrutiny."

heightened scrutiny. Still, even acknowledging the City's belated enforcement of antidiscrimination laws in dicta might have motivated similarly acting governments.

Although the denial of CSS's request for injunction in the context of foster care services positions the LGBTQ+ community for a much-needed win in a delicate political climate threatening its civil liberties, the "win" is arguably superficial and dangerous. To civil rights scholars, the "structural landscape" of government action exacerbates inequality primarily because "adjudication-based civil rights regimes"[95] are relied upon to address discrimination.[96] The self-congratulatory nature of this case magnifies how minimal effort in simply creating antidiscrimination statutes depreciates when statutory text neglects to include "affirmative duties" demanding enforcement and accountability by governments before a complaint is filed or a newspaper investigates.[97] The court could have recognized how CSS's longstanding, problematic position with same-sex couples should have, realistically, been addressed earlier on by the City.

The Third Circuit had the chance to be more honest about the potential proactive responsibilities governments should have to the LGBTQ+ population, such as addressing the gaps in law enforcement where CSS may have existed merely because they had not formally turned away a same-sex couple yet. Even being "suspicious" of the City would have been an understatement.[98] Instead, the court overlooked the plausibility of selective enforcement in CSS's Free Exercise claim and forewent the necessarily challenging discussion altogether.

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95. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1343 (2012).

96. *Id.* at 1363.

97. *See id.* at 1363-66 (contrasting the ineffectiveness of statutes lacking affirmative language to the more robust enforcement and statute specificity of Title VIII discrimination).

98. Fulton v. City of Philadelphia, 922 F.3d 140, 158 (3d Cir. 2019).

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