

No. 19-123

In the **Supreme Court of the United States**

SHARONELL FULTON, ET AL., *Petitioners*,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL., *Respondents*.

**On Writ of Certiorari to the United States Court
of Appeals for the Third Circuit**

**Brief of Children’s Rights; Professor Bruce Boyer; Center for Children’s Advocacy; Center on Children and Families; Children and Family Justice Center; Children’s Action Alliance; Children’s Advocacy Institute; Children’s Defense Fund; Children’s Defense Fund—New York; Children’s Law Center of California; Children’s Law Center of Kentucky; Court Appointed Special Advocates of Los Angeles; Professor Michael J. Dale; First Star, Inc.; Harvard Law School Child Advocacy Program; Juvenile Law Center; Lawyers For Children; Legal Counsel for Youth and Children; Legal Services for Children; National Association of Counsel for Children; National Center for Youth Law; New Mexico Advocacy Network; Partners for Our Children; University of Miami Children and Youth Law Clinic; Youth Law Center; Professor C. Colt Anderson; Pastor Susannah Davis; Episcopal Divinity School at Union; Rabbi Steve Gutow; Hon. Ruth W. Messinger; Rabbi Philip Rice; SAJ; Union Theological Seminary as
Amici Curiae Supporting Respondents**

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STATEMENTS OF INTEREST OF
*AMICI CURIAE*¹

I. Child Advocacy Organizations and Individuals

Children’s Rights is a national advocacy non-profit dedicated to improving the lives of vulnerable children in government systems. Children’s Rights has a 25-year track record of using civil rights litigation, policy expertise, and public education to create positive systemic change. Children’s Rights has successfully challenged unnecessary and harmful practices in the over-institutionalization of children in state custody, especially children who already have been traumatized as a result of separation from their homes and families. Children’s Rights has long advocated for the equitable treatment of LGBTQ children in child welfare systems, recognizing that they are often subjected to discriminatory treatment and abuse. Children’s Rights affirms the importance of actively recruiting LGBTQ foster parents, not only to protect them from discrimination, but also because they are an excellent resource for safe and loving homes for all children.

Professor Bruce Boyer teaches at Loyola University of Chicago School of Law, where he serves as Director of the Civitas Child Law Clinic. He has more than thirty years of experience teaching, writing, and litigating in the areas of foster care and adoption, focused on constitutional law, civil rights, and trial

¹ No counsel for a party authored this brief in whole or in part, and no monetary contributions by any persons other than *Amici Curiae* funded the preparation of this brief. *See* Rule of the Supreme Court of the United States 37.6. All parties have consented to the filing of this brief. *See id.* 37(3)(a).

practice skills. He has served as Chair of the ABA's Special Committee on the Unmet Legal Needs of Children, as Program Chair of the Board of the Evan B. Donaldson Adoption Institute, and on the Illinois Supreme Court Commission on Professionalism. His interest in this litigation derives from his focus on improving the effectiveness of child protection courts in achieving just and durable outcomes for at-risk children.

Center for Children's Advocacy (CCA) is a non-profit organization affiliated with the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure that children's voices are heard and that children are afforded legal protections everywhere—community, foster placements, educational institutions, justice system, and child welfare.

Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research, and advocacy for children and their families. CCF's directors and associate directors are experts in

children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth, and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

Children and Family Justice Center (CFJC), part of Northwestern Pritzker School of Law's Bluhm Legal Clinic, was established in 1992 as a legal service provider for children, youth, and families, as well as a research and policy center. Currently, CFJC faculty provide advocacy on policy issues affecting children in the legal system, and legal representation for children convicted of offenses, including in the areas of delinquency, immigration/asylum, and fair sentencing practices. Since 1992, the CFJC has filed numerous briefs as an *amicus curiae* in federal and state supreme courts based on its expertise in the representation of children in the legal system.

Children's Action Alliance (CAA) is an independent voice for Arizona children at the state capitol and in the community. CAA improves children's health, education and security through information and action. CAA works toward a future in which all children have health insurance, no child is raised in poverty and hunger, every child enters school ready to learn and succeed, no child endures the ravages of

abuse and neglect, every child has a place to call home, and struggling teens have the support they need to become responsible adults.

Children’s Advocacy Institute (CAI) is an academic center at the University of San Diego School of Law. It has educated law students in child rights and remedies since 1989, including classes and clinics representing abused children in dependency and delinquency court. It is also a center for child advocacy, with offices in Sacramento and D.C., active in studies and national publications on the status of children, particularly in the child protection area of law. CAI is interested in protecting the rights of all suspect classifications, including children who suffer discrimination based on factors related to sex and gender.

Children’s Defense Fund (CDF) is a national non-profit child advocacy organization dedicated to ensuring a level playing field for all children and to championing policies that lift children out of poverty, protect them from harm, and ensure their access to health care, quality education, and safe communities. For more than four decades, CDF has worked to reform the public child welfare system to strengthen families and ensure every child has the opportunity to thrive. CDF knows discrimination is never in the best interest of children because it is diametrically opposed to the ideals of child welfare.

Children’s Defense Fund—New York (CDF-NY) is dedicated to improving conditions for children, combining research, public education, policy development, community organizing and advocacy. A

recognized authority in the endeavor to protect children and strengthen families, CDF-NY serves as a resource and partner for children, families and organizations throughout New York State.

Children’s Law Center of California is a non-profit, public interest law firm that serves as appointed counsel for children under the jurisdiction of juvenile dependency courts in Los Angeles, Placer, and Sacramento Counties. Children’s Law Center of California is the largest children’s legal services organization in the nation, representing over 33,000 abused and neglected children. Our attorneys provide an unparalleled level of child advocacy expertise to ensure the wellbeing and future success of each child. Children’s Law Center of California is also a driving force in local, state and national policy change and child welfare system reform.

Children’s Law Center of Kentucky (CLC) has worked on behalf of adolescents involved in the juvenile justice and child welfare systems for over 30 years. CLC is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. CLC supports recruitment of LGBTQ foster parents as a means to ensure that children are free from harm and provided with loving homes.

Court Appointed Special Advocates of Los Angeles (CASA/LA) recruits, trains, and supports volunteers to advocate for the best interest of children

in the child welfare system. Our trained and committed CASAs are a crucial support for children—connecting them to services and advocating for their needs. CASA/LA believes children deserve respect, safety, access to supportive adults, and stability. We believe that children in care should have the ability to live with any family who meets these needs. CASA/LA remains committed to equity for LGBTQIA+ people and will always advocate for a child’s right to a stable and healthy home.

Professor Michael J. Dale is a member of the faculty at Nova Southeastern University College of Law in Fort Lauderdale, Florida, where he teaches courses in family law, juvenile law, and in the family and juvenile clinic. Professor Dale was the Executive Director of the Youth Law Center in San Francisco after serving as Attorney in Charge of the Special Litigation Unit of the Juvenile Rights Division of the Legal Aid Society of the City of New York. He has been a practicing lawyer specializing in significant civil rights litigation for 40 years focusing on issues related to children and their families. He is admitted to practice in Arizona, Florida, New Mexico, and New York as well as before the United States Supreme Court and numerous federal appellate and district courts. Professor Dale is the author of over seventy-five articles focusing primarily on juvenile and children’s law topics.

First Star, Inc. is a national 501(c)(3) public charity dedicated to improving life for child victims of abuse and neglect. First Star partners with child welfare agencies, universities, and school districts to

ensure foster youth have the academic, life skills, and adult support needed to successfully transition to higher education and adulthood. Over the last three years nationally, 91 percent of First Star Academy graduates were admitted to colleges and universities. First Star has extensive experience in each of our twelve Academies in working successfully with LGBT foster youth, and in addressing their special challenges where necessary.

Harvard Law School Child Advocacy Program (CAP) is a premier academic program focused on children's rights, primarily in the areas of child welfare (abuse and neglect, foster care, and adoption), education, and juvenile justice. CAP trains students to contribute in their future careers to a better understanding of the rights of children, and to law and policy reform promoting children's rights in the United States and around the world. CAP's Faculty Director, Elizabeth Bartholet, is the Morris Wasserstein Public Interest Professor of Law, and is a leading national authority on child protection, foster care, and adoption law.

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic

equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

Lawyers For Children (LFC) is a not-for-profit legal corporation dedicated to protecting the rights of individual children in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation proceedings. LFC's LGBTQ Rights Project addresses the needs of LGBTQ youth and families by representing individual youth, conducting trainings for practitioners, distributing our You Are Not Alone handbook, coordinating resource referrals, and collaborating with City agencies to develop policies and practices designed to best meet their needs.

Legal Counsel for Youth and Children (LCYC) is a nonprofit civil legal aid organization that improves the well-being of young people by advancing their legal rights. LCYC accomplishes its mission through direct representation, strong community partnerships, and systemic advocacy. LCYC provides holistic, child-centered legal advocacy to young people, from toddlers to 24 years old, in Washington State through four main programs: child welfare, juvenile court, youth and family immigration, and youth homelessness. LCYC knows that the lack of supportive and appropriate placements for LGBTQ+ foster youth has a direct, negative impact on youth safety, mental health, and well-being.

Legal Services for Children (LSC), founded in 1975 as a nonprofit organization, is one of the first nonprofit law firms in the country dedicated to advancing the rights of youth. LSC's mission is to ensure that all children and youth in the San Francisco Bay Area have an opportunity to be raised in a safe environment with equal access to the services and support they need to become healthy and productive young adults. This mission is rooted in the belief that young people need strong families and deserve positive alternatives to unnecessary placement in foster care, juvenile justice facilities, and immigration detention. We provide free legal and social work services to children and youth in abuse and neglect, guardianship, school discipline, immigration, and emancipation proceedings. LSC regularly represents abused and neglected children in child protection proceedings and believes children in the child welfare system have a fundamental right to be free from discrimination on any basis.

National Association of Counsel for Children (NACC), founded in 1977, is a 501(c)(3) non-profit child advocacy and membership association dedicated to advancing the rights, well-being, and opportunities of youth in the child welfare system through access to high-quality legal representation. A multidisciplinary organization, its members include child welfare attorneys, judges, and professionals from the fields of medicine, social work, mental health, and education. NACC's work includes federal and state policy advocacy, the Child Welfare Law Specialist attorney certification program, a robust training and technical assistance arm, and the amicus curiae program. More information can be found at www.naccchildlaw.org.

National Center for Youth Law (NCYL) is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect low-income children's rights and to ensure they have the resources, support, and opportunities necessary for healthy and productive lives. As part of the organization's child welfare advocacy, NCYL works to ensure the safety, stability, and wellbeing of abused and neglected children. Denying children in foster care access to LGBTQ foster and adoptive families—who can and do provide healthy and stable foster and adoptive homes—undermines these efforts.

New Mexico Advocacy Network (NMCAN) partners with young people to build community, promote equity, and lead change. Since 1990, we have been leveraging community partnerships and volunteerism to improve children and youth's experiences in foster care. Today, we have grown to authentically engage young people impacted by the foster care and/or juvenile justice systems to improve their transition to adulthood. Together, we work to: 1. Reduce systemic barriers that negatively impact their lives; 2. Help them learn how to build positive community networks and strengthen their sense of belonging; 3. Access tools to achieve goals related to education, employment, health, housing, and personal finance. NMCAN believes that LGBTQ children and youth in foster care, as well as LGBTQ foster parents, should be treated equitably and protected from discrimination.

Partners for Our Children works to improve the lives of vulnerable children and families in Washington State, especially those touched by the child welfare system. Founded in 2007 to focus new thinking, resources, and expertise on the state's child welfare system, we have since expanded our focus to include all vulnerable children and families, with a clear emphasis on child well-being. At Partners for Our Children, we hold the value of equity in all programs and policies, including for those who identify as LGBTQ. Especially in our advocacy efforts, we champion the equitable treatment of children who identify as LGBTQ and the importance of LGBTQ foster parents who provide loving homes for children.

University of Miami Children and Youth Law Clinic (CYLC) is a legal clinic staffed by faculty and students of the University of Miami School of Law. For the past 25 years, the CYLC has engaged in individual and law reform advocacy to serve the legal needs of vulnerable children, with an emphasis on children in the child welfare system. Many CYLC clients are LGBTQ children who experience serious difficulties in foster care, and a significant focus of our policy advocacy is improving outcomes for these children while in foster care and after their exit from care. CYLC has appeared as amicus curiae in many federal and state cases implicating the constitutional interests of children, including a Florida appellate case striking down the statutory ban on gays and lesbians adopting children out of foster care.

Youth Law Center (YLC) is a national organization, founded in 1978, that advocates to

transform the foster care and juvenile justice systems so that children and youth can thrive. YLC has worked to advance the rights of all young people in foster care and strengthen protections and supports for LGBTQ youth in the system through legislative, policy, and amicus efforts. Because quality parenting is the most important intervention that the child welfare system provides to children in its care, YLC strongly backs efforts to recruit and support foster families able to provide such parenting, including LGBTQ families.

II. Members of the Interfaith Coalition for Children's Rights

Professor C. Colt Anderson is a member of the faculty of the Graduate School of Religion at Fordham University in New York City, where he teaches courses on Catholic theology and spirituality. Professor Anderson was the Dean of the Graduate School of Religion and the Dean of Washington Theological Union in Washington, D.C. The Vatican appointed him to participate in the Apostolic Visitation of the U.S. Seminaries in response to the sexual abuse crisis. Professor Anderson has authored four books, 21 articles, and has worked for over 20 years on issues related to religion, civil rights, and child welfare.

Pastor Susannah Davis serves as the Senior Pastor of Kirkwood United Church of Christ (KUCC) in Atlanta, GA, where "Everyone, Everyone, Everyone is Welcome." This congregation includes a diversity of families, couples, and individuals who celebrate and welcome LGBTQ families and their kids, their foster kids, their adopted kids, their kids, who become their kids, too. KUCC boldly believes that LGBTQ

individuals and couples should most certainly have the right and privilege to participate in the foster/adoption system, offering caring, committed and welcoming homes to children in need of loving parents.

Episcopal Divinity School at Union (EDS at Union) provides Episcopal theological education as the Anglican Studies Program at Union Theological Seminary. EDS at Union trains students called to ordained and lay ministries, preparing them to embrace ministries that reflect what it means to be sanctuary and witness in contemporary society. Carrying on its long history and mission of dismantling racism and working for social justice, EDS at Union is guided by the following core values: faith, social justice, vision, inclusiveness, respect and integrity.

Rabbi Steve Gutow received his Juris Doctorate in 1977 from The University of Texas, is a member of the Texas Bar Association, and practiced with the firm of Gutow, Albach, and Blume. Gutow served on the state Board of the Texas ACLU and as chair of the Dallas Civil Liberties Foundation and is a founding member of the Interfaith Coalition for Children's Rights. Rabbi Gutow served in the 1980s as part of an ad-hoc group that successfully established schools for the children of undocumented residents when Texas prohibited them from attending public schools. From 2015 through 2016, Rabbi Gutow served under President Obama as a member of the President's Advisory Council on Faith-based and Neighborhood Partnerships, which looked at issues related to children, civil liberties, health care, and education.

The Hon. Ruth W. Messinger, President, American Jewish World Service, 1998-2016; currently their Global Ambassador engaging faith leaders and organizations to aid oppressed communities worldwide, promote human rights, and stop violence against women and LGBTQ people. Previously, Ms. Messinger was an elected official in New York City, dealing extensively with the rights of foster children and LGBTQ persons. She is a Social Justice Fellow at the Jewish Theological Seminary and at the Meyerson JCC. She is a founding member of the Interfaith Coalition for Children's Rights.

Rabbi Philip Rice—spiritual leader of Congregation Micah in Brentwood, Tennessee—lives the prophetic call to: “Seek justice, practice mercy and walk humbly.” Advocating for widows, orphans and strangers, he speaks out when rights are denied to young people, women, immigrants, the LGBTQI+ community, as well as other vulnerable groups across the world. He has written critically on the dangers of using Scripture such as the Bible (which was not written in English) as a means to deny others their religious freedoms, and lectures at Belmont and Lipscomb Universities on layers of the biblical text and Jewish methods of study.

SAJ is a diverse synagogue community in New York City where all voices are valued and heard. We believe that all human beings, regardless of race, religion, gender, or sexual orientation deserve respect. Congregants join together in response to current sociopolitical events and engage in actions to foster long-term local, national, and international changes. In

conjunction with allies from other faiths, the most recent social justice work at SAJ centers on immigrant and refugee rights, reproductive rights, hunger and food insecurity, and criminal justice work that is especially focused on the rights of LGBTQ individuals who are incarcerated. At SAJ, Judaism stands for all.

Union Theological Seminary in the City of New York is a seminary and a graduate school of religion, grounded in the Christian tradition and embracing interreligious engagement. Our unique educational programs develop practices of mind and body that encourage compassionate wisdom and foster academic excellence and a commitment to social justice. Union believes that a new interreligious spirituality of radical openness and love is the world's best hope for peace, justice, and planetary flourishing.

SUMMARY OF ARGUMENT

As child advocacy organizations and members of the Interfaith Coalition for Children's Rights focused on representing and protecting children's rights, *Amici Curiae* speak on behalf of the children throughout the nation who will be profoundly and irreparably harmed if the Court adopts the position that government-contracted foster care agencies have a constitutional right to refuse prospective families based solely on religious objections to those families.

Amici Curiae support Respondents as they seek to protect the best interests of children in the foster care system seeking placement with a diverse pool of safe and loving families. Catholic Social Services (CSS), like any other qualified foster care service provider, has the

opportunity to continue its contract with the City of Philadelphia—but it demands the right to do so without complying with the City’s anti-discrimination policy.

Engaging in prohibited discrimination with taxpayer funds while performing a delegated government service intended to benefit children is not in the public interest. Requiring the City to allow CSS to do so by public contract would allow the varied religious viewpoints of contracting private agencies to unilaterally trump compelling governmental and societal policies that prohibit harmful discrimination in public services affecting children.

Here, granting the relief CSS seeks would cause substantial harm to children in the foster care system. Accepting CSS’s claim that government-contracted foster care agencies have a constitutional right to discriminate against qualified families that do not meet the agency’s individual religious standards will hurt children in foster care by unnecessarily reducing the number of safe, stable placements available to them. It would also invite challenges by faith-based government contractors to a wide variety of government laws and policies protecting families and children from discrimination in the provision of government services.

Requiring the City contractually to allow agencies to discriminate based on sexual orientation would also send a harmful message to vulnerable children in foster care—as well as potential LGBTQ foster parents—that the City will not protect them from discrimination. It would directly harm children in foster care by reducing diversity in the pool of

prospective foster parents. And it would harm LGBTQ youth—a demographic disproportionately represented in the foster care system—by telling them that people like them are not worthy of protection.

Finally, *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), sets forth the reasonable, workable framework this Court has used for decades to determine whether a law unconstitutionally targets religious beliefs. Revisiting *Smith* is unnecessary in this case, and to apply strict scrutiny based on religious exercise regardless of neutrality would open the door to challenges to compliance with non-discrimination laws and other neutral policies aimed at protecting the children for whom *Amici Curiae* advocate. Although the City's policy would satisfy strict scrutiny review, the Court need not—and should not—revisit *Smith* here.

ARGUMENT

Petitioners argue their religious beliefs prohibit them from certifying same-sex couples as foster families, and that asking them not to discriminate while contracting with the City burdens their free exercise of religion. But certifying and training foster care parents is a government function. The City's willingness to contract with CSS to provide this government service in exchange for taxpayer dollars does not deprive Petitioners of their right to hold or exercise their religious beliefs as private entities, nor does it single out Petitioners based on their religious status. It merely prevents CSS from performing that delegated government function in a discriminatory manner.

Amici Curiae's concern is with the harmful discrimination in which Petitioners seek to engage while providing a public service. “[E]radicating discrimination” is a compelling state interest, see *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), yet Petitioners seek to compel the City to allow them to discriminate when they provide foster care services on behalf of the City for the general public. Such state-sanctioned discrimination would cause great harm to children in care, to the families seeking to provide safe and diverse placement opportunities, and to the foster care program itself. That concern is particularly heightened here where CSS seeks a categorical license to discriminate against LGBTQ people contrary to the City’s neutral policy.

I. Recognizing a constitutional right for foster care agencies not to comply with the anti-discrimination policies of the governments with which they contract would harm the foster care system and the children it serves.

Petitioners and *amici* supporting them seek to characterize this case as an assault on faith-based foster care services, but that is simply not so. *Amici Curiae*, like the City, respect and value the role that CSS and other faith-based providers play in facilitating public services for children in foster care. See Br. City Resp’ts at 2–3.

This case must be decided within the narrow context in which it arises: May a private entity that voluntarily contracts with a government to perform a delegated, taxpayer-funded public service demand that it be allowed, based on its religious beliefs, to violate

the government's anti-discrimination policy while performing that service for the general public? The answer to that question will have far-reaching implications not just for children in Philadelphia's foster care system, but for any child who benefits from government services delivered through private contractors.

Petitioners seek the extraordinary remedy of a mandatory injunction requiring the City to enter into a contract to allow CSS to perform a taxpayer-funded government function while not complying with the City's anti-discrimination policy. They must establish, *inter alia*, that the balance of equities tips in their favor and that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Amici Curiae* weigh in on these factors because forcing the City to allow exceptions to its anti-discrimination policy in favor of a religious viewpoint will harm the foster care system and the children it serves. It is in the best interest of the public and children to: 1) have a large pool of loving potential foster families; 2) have a diverse pool of foster parents; and 3) avoid the harm that the many LGBTQ youth in foster care will suffer if foster care agencies have a right to discriminate against LGBTQ people while providing public services. The City's anti-discrimination policy serves those important interests.

Allowing CSS a unilateral contractual exemption from the City's neutral anti-discrimination policy sends a harmful and dangerous message to all children in foster care—particularly LGBTQ youth—and to potential foster parents, other foster agencies, and the

City’s taxpayers. It harms the integrity of the foster care program. It tells all Philadelphians that their government is unable to enforce its anti-discrimination policies or protect them from discrimination—and that taxpayer-funded contractors can unilaterally discriminate against certain families by citing individual religious beliefs. The City’s taxpayers certainly have an interest in ensuring that the millions of dollars in public funds CSS receives each year are not being used to allow that government contractor to deny services to some of those very taxpayers. *See Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 685 (E.D. Pa. 2018) (citing the “legitimate interest in ensuring that individuals who pay taxes to fund government contractors are not denied access to those services”), *aff’d*, 922 F.3d 140 (3d Cir. 2019). These public interests served by the City’s anti-discrimination policy also serve the best interests of the children *Amici Curiae* represent.

A. Allowing discrimination against same-sex couples narrows the pool of prospective foster parents, harming both the public and foster children in need of a loving home.

CSS’s refusal to certify same-sex couples as foster parents hurts *all* children because it unnecessarily narrows the pool of prospective parents. As of 2016, there were at least 114,000 same-sex couples in the United States raising children—many of whom became

parents through foster care or adoption.² A January 2019 report estimated that there are 22,340 same-sex couples in Pennsylvania³ and 4,784 in Philadelphia County alone.⁴ Same-sex married couples are nearly 10 times more likely than different-sex married couples to be raising an adopted or foster child.⁵ One in five same-sex couples (21.4 percent) is raising adopted children compared to just 3 percent of different-sex couples, and 2.9 percent of same-sex couples have foster children compared to 0.4 percent of different-sex couples.⁶ Even before the Supreme Court’s landmark decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), same-sex couples were more than three times as likely as

² SHOSHANA K. GOLDBERG & KEITH J. CONRON, WILLIAMS INST.: UCLA SCH. OF L., HOW MANY SAME-SEX COUPLES IN THE U.S. ARE RAISING CHILDREN 1 (July 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>.

³ Angeliki Kastanis et al., *Same-sex Couple and LGBT Demographic Data Interactive*, WILLIAMS INST.: UCLA SCH. OF L. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbtstats/?topic=SS&area=42#density> (follow “LGBT Demographics” hyperlink; choose “same-sex couples” option, then click on Pennsylvania in map).

⁴ *Id.* (follow “LGBT Demographics” hyperlink; choose “same-sex couples” option, then click on Pennsylvania in map, then click “by county,” then click on Philadelphia County).

⁵ GARY J. GATES & TAYLOR N. T. BROWN, WILLIAMS INST.: UCLA SCH. OF L., MARRIAGE AND SAME-SEX COUPLES AFTER OBERGEFELL 4 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-Post-Obergefell-Nov-2015.pdf> (detailing substantial increase in marriages among same-sex couples after *Obergefell*).

⁶ GOLDBERG & CONRON, *supra* note 2 at 1.

different-sex couples to have adopted or fostered children.⁷

Allowing entities that contract with the City to deny same-sex couples the opportunity to foster would come at significant cost not just to the families and children the City serves, but to the foster care system itself. Indeed, a pre-*Obergefell* study concluded that banning LGBTQ families from the foster care system risked displacing thousands of children from the system, and “could add \$87 to \$130 million to foster care system expenditures each year”—including millions of dollars a year for Pennsylvania in particular.⁸ In short, same-sex couples present a tremendous resource of potential safe and loving homes for children that should not be alienated by taxpayer-funded discrimination.

The City’s anti-discrimination policy also helps ensure that services are equally available to LGBTQ people who self-identify as Catholic and who would be willing and available to foster. Twenty percent of the American LGBTQ community identifies as Catholic, not far behind the 25 percent of the non-LGBTQ

⁷ Gary J. Gates, Williams Inst.: UCLA Sch. of L., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 7 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Demo-SS-Couples-US-Mar-2015.pdf>.

⁸ Gary Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, at 19–20 (Ca. Ctr. for Population Res. On-Line Working Paper Ser. No. CCPR-065-07, 2007), <https://escholarship.org/uc/item/3484484b>.

community that identifies as Catholic.⁹ And “fully two-thirds of American Catholics think it is acceptable for same-sex couples to raise children, including 43% who say a gay or lesbian couple with children is just as good as any other kind of family.”¹⁰ *See also* Br. 27 Lay Roman Catholics in Supp. of Resp’ts at 23. Undoubtedly, Catholic LGBTQ families can and do provide an important additional source of qualified and loving homes for children needing foster care placement.

Any action that limits the necessary resource of qualified foster families harms foster children—the very persons the foster care program is designed to assist. Moreover, it jeopardizes children’s right to constitutionally adequate care. Custody of children in state-regulated foster care creates a “special relationship” that triggers substantive due process rights, including children’s right to constitutionally adequate care, the right to personal security and reasonably safe living conditions, and the right to be free from physical and psychological harm. *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (“[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties.”); *see also M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 250 (5th Cir. 2018)

⁹ Frank Newport, *LGBT Population in U.S. Significantly Less Religious*, GALLUP (Aug. 11, 2014), <https://news.gallup.com/poll/174788/lgbt-population-significantly-less-religious.aspx>.

¹⁰ *U.S. Catholics Open to Non-Traditional Families*, PEW RESEARCH CTR. (Sept. 2, 2015), <https://www.pewforum.org/2015/09/02/u-s-catholics-open-to-non-traditional-families>.

(children in foster care have right to “personal security and reasonably safe living conditions” and are “at minimum, entitled to protection from physical abuse and violations of bodily integrity”); *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994) (“[D]ue process extends the right to be free from the infliction of unnecessary harm to children in state-regulated foster homes.”); *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) (children in foster care “have a substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being”), *aff’d sub nom. Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997).

Permitting contract agencies to wield non-merit factors to exclude same-sex couples or other families to whom agencies may have a religious objection from the pool of qualified prospective foster parents would violate these due process rights of children in foster care. Allowing discriminatory practices undermines the availability of suitable family-based settings for children in foster care and puts youth at increased risk of institutional placement. These settings not only are the least preferred under federal child welfare law, but also are often unable to meet children’s needs. Restricting available foster family homes would impede children’s ability to access constitutionally adequate care.

B. Foster children and the general public both benefit from a broad and diverse pool of prospective foster parents, including LGBTQ people.

A parent’s ability to nurture a child’s best interests is informed by a wide variety of factors, including financial stability, emotional and physical health, the quality of family relationships, motives for adoption, total personality, emotional maturity, and feelings about children.¹¹

CSS seeks the right to categorically exclude same-sex couples from certification as foster parents based solely on their sexual orientation. But sexual orientation has no bearing on a parent’s ability to care for a foster or adopted child—gay and straight people make equally good parents.¹²

¹¹ See Joseph Evall, *Sexual Orientation and Adoptive Matching*, 25 FAM. L.Q. 347, 350–51 (1991).

¹² Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164, 175 (2010); Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, PEDIATRICS, Jul. 2010, at 28, 34–35; see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) (“The sexual orientation of an individual does not determine whether that individual can be a good parent. Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.”), *aff’d sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013).

As Justice Kennedy described in *Obergefell*, “many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. . . . Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents.” 576 U.S. at 668 (citations omitted). Justice Kennedy cited this as “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” *Id.*

The medical community takes the same position. According to the American Academy of Pediatrics, “children and adolescents who grow up with gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual” and “there is no evidence that the development of children with lesbian and gay parents is compromised in any significant respect relative to that among children of heterosexual parents in otherwise comparable circumstances.”¹³ And according to a 2020 American Psychological Association resolution opposing “any discrimination based on sexual orientation or gender identity/expression in matters of adoption, child custody and visitation, [and] foster care,” “there is no scientific evidence that parenting ineffectiveness is related to parental sexual orientation or gender identity: sexual and gender minority parents are as likely as cisgender

¹³ Ellen C. Perrin & Benjamin S. Siegel, *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian*, PEDIATRICS, Apr. 2013, e1374, at e1377–78, <http://pediatrics.aappublications.org/content/pediatrics/131/4/e1374.full.pdf>.

heterosexual parents to provide supportive and healthy environments for their children.”¹⁴

Many states fail to maintain a sufficient array of foster families to meet the differing needs of a diverse population of children in foster care. Indeed, the parties agree that thousands of children need placement in stable homes. CSS seeks to participate in the City’s foster care program while reserving the ability to categorically exclude a valuable group of qualified foster parents as caregivers to these children.

But “categorical restrictions” on the pool of foster parents are likely to “significantly interfere with the attainment of a permanent family relationship for parentless children in the state’s care” and “limit[] children’s opportunity to become part of a stable family.”¹⁵ A 2019 study gathering data from hundreds of LGBTQ adults who experienced disruptions in the adoption or foster care process concluded that anti-LGBTQ discrimination “may lead some LGBTQ people to abandon foster care or adoption as a means of

¹⁴ AM. PSYCHOLOGICAL ASSOC., APA RESOLUTION ON SEXUAL ORIENTATION, GENDER IDENTITY (SOGI), PARENTS AND THEIR CHILDREN 3–4 (2020), <https://www.apa.org/about/policy/resolution-sexual-orientation-parents-children.pdf> (summarizing research and resolving that “discrimination against sexual and gender minority parents deprives their children of benefits, rights, and privileges enjoyed by children of cisgender, heterosexual married couples”).

¹⁵ See Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 36–37 (2011) (discussing impact of categorical restrictions on pool of adoptive parents).

building their families.”¹⁶ The study further concluded that religious exemptions—such as the ones sought here by Petitioners—would “only serve to exacerbate the challenges with delays and disruptions that LGBTQ prospective parents are already facing—as well as doing nothing to reduce the number of children waiting for permanent homes,” and that discrimination “undermine[s] permanency planning [for youth in foster care] and ultimately may result in the reduction of the pool of willing or available LGBTQ” foster and adoptive parents.¹⁷

As the district court held in this case, “DHS and Philadelphia have a legitimate interest in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers.” 320 F. Supp. 3d at 685, 703 (E.D. Pa. 2018). And as the Third Circuit confirmed, the City has a compelling interest in eradicating discrimination. *Fulton v. City of Philadelphia*, 922 F.3d 140, 163–64 (3d Cir. 2019). Adopting Petitioners’ argument that they be exempt from the City’s anti-discrimination policy while receiving public funds to provide services to the general public would dramatically undermine the rights and interests of children needing safe and loving homes.

¹⁶ Abbie E. Goldberg et al., *LGBTQ Individuals’ Experiences with Delays & Disruptions in the Foster and Adoption Process*, 106 CHILDREN & YOUTH SERVS. REV. 1, 2–3, 6–8 (2019).

¹⁷ *Id.* at 9–10.

C. Allowing discrimination against same-sex couples harms the many LGBTQ youth in foster care.

Petitioners' challenge particularly undermines the interests of LGBTQ foster children, who suffer higher rates of discrimination and emotional, physical, and sexual abuse while in foster care, and who face worse life outcomes than their non-LGBTQ peers.¹⁸ *See also* Amicus Br. of Lambda Legal et al., as Amici Curiae in Supp. of Resp'ts [hereinafter Lambda Br.]. "These challenges cause many LGBTQ youth to leave or be kicked out of child welfare placements only to wind up homeless, funneled into the juvenile justice system, or both."¹⁹

¹⁸ CHILDREN'S RIGHTS, LAMBDA LEGAL, AND CTR. FOR THE STUDY OF SOC. POL'Y, *SAFE HAVENS: CLOSING THE GAP BETWEEN RECOMMENDED PRACTICE AND REALITY FOR TRANSGENDER AND GENDER-EXPANSIVE YOUTH IN OUT-OF-HOME CARE 3* (2017), https://www.lambdalegal.org/sites/default/files/tgnc-policy-report_2017_final-web_05-02-17.pdf [hereinafter *Safe Havens*]; Allison S. Bohm et al., *Challenges Facing LGBT Youth*, 17 *Geo. J. Gender & L.* 125, 162 (2016) ("Familial rejection is cited as the primary cause of homelessness among LGBT youth.").

¹⁹ Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 *MINN. L. REV.* 2343, 2349 (2019); *see also* ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T HEALTH & HUMAN SERVS., LOG NO. ACYF-CB-IM-11-03, *LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH IN FOSTER CARE 3* (2011), <https://www.stage.acf.hhs.gov/sites/default/files/cb/im1103.pdf> (federal government publication recognizing LGBTQ youth at higher risk for placement instability than their non-LGBTQ peers); AMY DWORSKY ET AL., *MISSED OPPORTUNITIES: PATHWAYS FROM FOSTER CARE TO YOUTH HOMELESSNESS IN AMERICA 8* (Chapin Hill at the Univ. of Chicago 2019), https://www.chapinhill.org/wp-content/uploads/Chapin-Hall_VoYC_Child-Welfare-Brief_2019-FINAL.pdf (detailing LGBTQ youth in foster care's high risk for experiencing homelessness).

LGBTQ youth are disproportionately represented in the child welfare system.²⁰ And yet “[o]nly 9 percent of foster families surveyed said they would accept LGBTQ youth.”²¹ Permitting foster care agencies to thwart the City’s legitimate goal of recruiting as many diverse safe and loving families as possible would be harmful to the children the system is created to protect. Discrimination against same-sex couples does not serve the best interests of LGBTQ children.

If Philadelphia and other cities and states were forced to permit government-contracted agencies to discriminate against same-sex couples based on individual religious viewpoints, it would also harm LGBTQ youth in foster care by sending a message that LGBTQ people are considered unsuitable to provide loving homes. The rejection same-sex couples suffer

²⁰ Laura Baams et al., *LGBTQ Youth in Unstable Housing & Foster Care*, PEDIATRICS, Mar. 2019, e20174211, at 1, <https://pediatrics.aappublications.org/content/pediatrics/143/3/e20174211.full.pdf> (showing 30.4 percent of youth in foster care identify as LGBTQ compared to 11.2 percent of youth not in foster care); FRANK J. BEWKES ET AL., CTR. FOR AM. PROGRESS, WELCOMING ALL FAMILIES: DISCRIMINATION AGAINST LGBTQ FOSTER AND ADOPTIVE PARENTS HURTS CHILDREN 4 (2018), <https://cdn.americanprogress.org/content/uploads/2018/11/19131646/WelcomingAllFamilies.pdf> (“Studies have found that between 19 percent and 23 percent of youth in the U.S. foster care system identify as LGBTQ, meaning that youth are overrepresented in the foster care system by at least a factor of two.”).

²¹ Sarah Warbelow, *LGBT Youth Legal Landscape*, 23 TEMP. POL. & C.R. L. REV. 413, 427 (2014) (citation omitted); *see also* Bohm et al., *supra* note 18, at 162; Safe Havens, *supra* note 18, at 3 (“[W]hile LGBT+ comprise about 5–7% of the overall youth population, they make up almost one-fourth of those in the foster care system . . .”).

when being turned away from a foster care agency trickles down to LGBTQ youth and perpetuates a cycle of stigmatic harm. *See* Lambda Br.

Forcing the City to allow agencies to discriminate would send a loud and powerful message that LGBTQ people are not valued and that the City is unable to protect them from discrimination. That dangerous message will undoubtedly make LGBTQ youth fearful of coming out, of realizing their identity, and of being rejected by the very providers on whom they depend. *See* Lambda Br. Casting LGBTQ people as “other” or unworthy would violate LGBTQ youth’s right to equal treatment under the law as compared to their non-LGBTQ peers. *Id.*; *see also* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (citing “community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations” if a free exercise exception to anti-discrimination laws “were not confined”).

As numerous courts have recognized, stigmatic harm “constitutes an injury in fact.” *Dumont v. Lyon*, 341 F. Supp. 3d 706, 720 (E.D. Mich. 2018) (citation omitted); *see also, e.g., Heckler v. Mathews*, 465 U.S. 728, 739 (1984); *Pietrangelo v. Refresh Club, Inc.*, No. 18-cv-1943 (DLF), 2019 WL 2357379, at *5 (D.D.C. Jun. 4, 2019). “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public. . . .” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J.,

concurring). Granting a constitutional exemption from the City's anti-discrimination policy and requiring the government to permit discrimination based on sexual orientation would only further that stigmatic harm.

II. Abandoning *Smith* would invite challenges to all manner of anti-discrimination laws and policies, increasing the risk of harm to children.

Amici Curiae agree with Respondents and others that this Court should not, and need not, revisit *Smith* (see Br. City Resp'ts at 47; see also Br. United States as Amicus Curiae Supp. Pet'rs at 9, 11), and that even if strict scrutiny were to apply, the City's actions are valid (see Br. City Resp'ts at 47; Br. Intervenor-Resp'ts at 44 & n.14). *Amici Curiae* leave for others to discuss in depth the neutrality and general applicability of the City's anti-discrimination policy. *Amici* are concerned, however, about the broad and negative impact a decision to revisit *Smith* would have not only on children in the foster care system, but also on all children who benefit from government-funded public services provided under government contracts.

Smith provides the proper framework in which to analyze this case. If a challenged law or policy is neutral and generally applicable, then it should not be subject to strict scrutiny. Religious views in this country vary widely, particularly when it comes to marriage and raising children. Neutral government policies that prohibit discrimination against parents on the basis of sexual orientation (or numerous other factors, including race) may not align with a specific religious viewpoint for a variety of reasons that may

well differ from one group to another. *See Smith*, 494 U.S. at 888. Implementing strict scrutiny based on an alleged burden on one religious viewpoint would open a wide door for challenges to “almost every conceivable kind” of neutral law allegedly impacting the free exercise of a particular religion, *see id.* at 888–89, inviting discrimination even among competing religious views about families and child-rearing. This would invite a wide swath of challenges to laws protecting children and LGBTQ people from discrimination, and for the same reasons articulated above would harm the children for whom *Amici Curiae* advocate. The Court should decline to revisit *Smith*.

CONCLUSION

Amici Curiae speak on behalf of thousands of children across the country who go to sleep at night yearning for safe and loving homes. *Amici Curiae* support the involvement of all willing and qualified child welfare agencies seeking to facilitate foster care placements in the best interests of children. But permitting any government-contracted agency to discriminate, contrary to the government’s own policies, against LGBTQ people for religious reasons or otherwise harms the very children the foster care system is designed to protect. Such discrimination also directly undermines the “constellation of benefits” guaranteed to LGBTQ people. *Obergefell*, 576 U.S. at 670. The Court should affirm.

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