No. 18-2574

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHARONELL FULTON, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, ET AL.,

Defendants-Appellees.

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

BRIEF OF 43 UNITED STATES SENATORS AND MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Miles E. Coleman
NELSON MULLINS RILEY & SCARBOROUGH, LLP
104 S. Main Street
Ninth Floor
Greenville, SC 29601
(864) 373-2300

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a group of 43 United States Senators and Members of the United States House of Representatives.[2] They include members of the Senate Caucus on Foster Youth and the Congressional Caucus on Foster Youth. All of them have long labored to address the challenges facing children in the foster-care system and to encourage policies and legislation to improve those children's lives. *Amici* have sponsored, co-sponsored, and voted for numerous Acts and Resolutions to strengthen and expand foster children's access to loving and qualified homes and to protect the constitutional and statutory rights of child welfare providers and of current and prospective foster and adoptive parents. In addition, *amici* are bound by oath to support and defend the Constitution, and thus have an official interest in this Court's interpretation of the First Amendment, which in turn affects how Congress drafts, considers, and enacts laws.

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[1] The parties' counsel were timely notified of and consented to this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel, made a monetary contribution to the preparation and submission of this brief.

[2] A complete list of the Members of Congress participating as *amici* appears in an appendix to this brief.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's denial of the Plaintiffs-Appellants' Motion for a Preliminary Injunction. There is no dispute that the need for qualified foster homes is at crisis levels. Over 5,000 children in Philadelphia, over 16,000 children in Pennsylvania, and over 437,000 children in the United States are currently in need of foster care. In the face of this overwhelming need, the City of Philadelphia has elected to close one of the city's most successful and prolific foster care agencies and to shun the services of scores of foster parents. The City's decision is unnecessary (as the City has identified no harm it needs to remedy), is contrary to historic and legal precedent, and is a heart-wrenching reduction in the already insufficient pool of available foster homes.

The issue presented by this appeal, when properly understood, is not a difficult one. The question is not whether the Constitution, this Court, or *amici* support, oppose, or are indifferent to the City of Philadelphia's policy of welcoming LGBTQ individuals and couples in adoption and foster care. Indeed, it is undisputed that under Pennsylvania law, LGBTQ people who wish to foster and adopt have the same rights as heterosexual people. Nothing in this lawsuit will alter that state of affairs.

Rather, the issue before this Court is whether the First Amendment will tolerate the City of Philadelphia's decision to pivot from that accommodating stance and quash any child welfare providers who, on the basis of their sincerely held religious beliefs, are unable to certify unmarried and same-sex couples as prospective foster parents. *Amici* believe the First Amendment does not permit the City's hostility.

Religion, marriage, and sexuality are deeply important issues about which Americans hold diverse beliefs. The freedom to form, express, and exercise those beliefs without government coercion is enshrined in the Constitution as a central aspect of each citizen's dignity and self-definition. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593–94 (2015).[3] This freedom of self-determination extends to those who hold the "decent and honorable religious or philosophical" belief that marriage is limited to opposite-sex unions—a belief that can be held "in good faith by reasonable and sincere people." *Id*. at 2602, 2594. A constitutional problem arises only when the State—as it has done

[3] The instant appeal does not involve, challenge, or affect same-sex marriage, a legal question addressed by the Supreme Court in 2015. But *amici* believe the same principals of pluralism, freedom, and accommodation that animated the Court's decision in *Obergefell* likewise mandate accommodation of the religious parents and providers in the instant proceeding.

here—makes a citizen into an "outlaw" or "outcast" for holding a view of marriage contrary to the State. *Id*. at 2600.

A better approach, especially on deeply contested moral issues that implicate constitutional freedoms of belief and behavior, is to "create a society in which both sides can live their own values." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014). This is the approach required by the First Amendment, respectfully urged by *amici*, and best suited to serve children in need.

ARGUMENT

I. There is a long, unbroken, and nationwide history of faith-based providers caring for children in need as an exercise of, and in keeping with, their religious beliefs.

The facts presented by this appeal are not unique nor are they confined to the City of Philadelphia. The animus displayed by the City toward religious foster parents and providers is but one recent example of a state or local government that—whether by ignorance or coercive design—acts as if it cannot both welcome LGBTQ individuals and simultaneously respect and accommodate the First Amendment rights of other foster parents and providers. This hostility ignores the centuries-old tradition of religious child welfare providers, and would significantly *reduce* the supply of qualified homes at a time when the

need is great and the demand is growing.

From before the nation's founding till the present day, care for orphaned, abused, and neglected children was primarily the prerogative of private and religious groups. *See* U.S. Dept. of Health & Human Servs., *History of National Foster Care Month* ("Before the creation of the Children's Bureau in 1912, child welfare and foster care were mainly in the hands of private and religious organizations."), *available at* https://www.childwelfare.gov/fostercaremonth/about/history/ (last visited August 18, 2018); U.S. Dept. of Health & Human Servs., *Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems* (March 2008) ("[C]hild welfare services actually originated in the private sector. [] States and local governments in some parts of the country have relied on child welfare services in the private, voluntary sector since at least the early 1800s."), *available at* https://aspe.hhs.gov/basic-report/evolving-roles-public-and-private-agencies-privatized-child-welfare-systems (last visited August 18, 2018); Susan V. Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1298 (1999) ("Uniquely, foster care had originally been provided by private agencies with public agencies later joining as

partners. It was always a 'privatized' system, never an exclusively public one."); *see also* GEORGE WHITEFIELD'S JOURNALS, 395–404 (Iain Murray, ed., London 1960) (recounting how, beginning in 1740, the renowned colonial-era preacher founded and operated a home for orphaned boys near Savannah, Georgia).

Even in the modern era, state and municipal social services agencies partner with and rely on faith-based child welfare providers. To the best of *amici's* considerable knowledge, such providers (including Catholic Social Services) gladly serve children of every race, color, national origin, creed, disability, sex, political belief, sexual orientation, and gender identity. Without the assistance of these providers, children would be at an even greater risk of remaining in government care, especially when the need for foster families exceeds the limited supply.

For example, according to recent reports, demand for foster homes in South Carolina has outstripped supply by more than a two-to-one ratio, and the situation is growing worse. *See* Angela Davis, *Church, group homes get innovative to address foster care needs*, Greenville Online (March 25, 2017), *available at* https://www.greenvilleonline.com/story/news/local/2017/03/25/church-group-homes-get-innovative-address-

foster-care-needs/99166724/; S.C. Dept. of Social Servs. Homepage ("South Carolina has a critical need for foster families. There are more than 4,000 children in foster care in South Carolina, and we need more than 1,500 foster families to provide loving homes for them."), *available at* https://www.scfamilies.org/ (last visited August 18, 2018). The data indicate a similar increasing demand nationwide. For example, from 2012 to 2016, there was a 10% increase in the number of children in care across the country. *See* U.S. Dept. of Health & Human Servs., AFCARS Report Nos. 20 & 24, *available at* https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf and https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf (last visited August 19, 2018).

The human and financial cost resulting from the understaffed and overworked foster care system is real and tragic. *See*, *e.g.*, *M.F. v. Perry Cnty. Children & Family Servs.*, 725 Fed. App'x 400 (6th Cir. 2018) ("This case involves a tragic situation in which an overworked county Children's Services agency put two children in the small home of family friends, whose live-in grown grandson sexually abused the children. . . . Plaintiffs argue that the agency defendants did not find out about the specific threat of the abuse because of the understaffing and

underfunding of the agency."); Sarah Torre and Ryan T. Anderson, *Protecting the Religious Liberty of Adoption and Foster Care Providers* (Witherspoon Institute, August 1, 2014) (noting that many teens who age out of the foster care system in any given year without the stability and support of a permanent family will rely on government benefits during their adult lives at a cost of over $1 billion per year in average public assistance and support) (citing statistics from the National Council for Adoption), *available at* http://www.thepublicdiscourse.com/2014/08/13623/ (last visited August 21, 2018).

Religious providers and parents play a critical role in developing and providing homes to close this gap. Faith-based providers and networks can tap into faith communities and attract new populations of foster and adoptive parents. In Arkansas, for example, a single religious provider, working with a network of churches who share its religious beliefs and motivations, has helped recruit almost *half* the foster families in the state. *See* Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, The Chronicles of Social Change (Nov. 28, 2017), *available at* https://chronicleofsocialchange.org/featured/arkansas-one-faith-based-group-recruits-almost-half-

foster-homes/28821. That provider, like Catholic Social Services in Philadelphia, refers any families with whom it cannot work to other providers or directly to the state's Division of Child and Family Services. The net effect of such practices is to *expand* the pool of available homes, not to shrink it. All qualified prospective parents are still able to serve—either with another agency or through direct licensure by the state—and faith-based providers are able to recruit homes who otherwise might not volunteer.[4] This gives equal treatment to every person, regardless of faith, race, orientation, or background.

In addition, some religious providers excel at placing children who may have a more difficult time finding homes, including older children, sibling groups, and those with special needs. *See* Shamber Flore, *My Adoption Saved Me*, The Detroit News (March 7, 2018), *available at*

[4] Of the families working with the aforementioned faith-based provider in Arkansas, for example, 36% said they would not have become foster or adoptive parents if they had not been exposed to the organization, and 40% were unsure. *See* Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, J. OF PUB. MANAGEMENT & SOCIAL POLICY, No. 19, Vol. 2, (2013), pp. 176–77; *see also* Maggie Jones, *God Called Them to Adopt. And Adopt. And Adopt.*, The New York Times Magazine (Nov. 14, 2013) ("Of the dozens of evangelical and conservative Christian parents I spoke to, many said that church sermons, Christian radio shows or other Christian campaigns . . . pushed them to adopt.").

https://www.detroitnews.com/story/opinion/2018/03/07/religious-adoption-agencies-aclu/32717127/ (last visited August 19, 2018); Maggie Jones, *God Called Them to Adopt. And Adopt. And Adopt.*, The New York Times Magazine (Nov. 14, 2013) (recounting how Christian families, prompted by their faith and the urging of religious agencies, felt called to adopt multiple foster children, many of whom had special needs).

Religious providers and parents see their charitable work as a religious ministry, and they view the upbringing of children and care of orphans as religious duties. For instance, an oft-repeated teaching in the Jewish Tanakh (first appearing in the Torah, and then repeated in the Nevi'im and the Ketuvim) is that God is deeply and personally concerned with the care of fatherless children. *See, e.g., Deuteronomy* 10:18 ("God executes justice for the fatherless and the widow and loves the sojourner, giving him food and clothing"). This teaching is accepted as sacred by Muslims and Christians, meaning it is scripture to almost 4 billion people—over half of the world's population, and over 80% of Americans. *See* Pew Research Center, *The Future of World Religions: Population Growth Projections, 2010-2050*, Demographic Study (April 2, 2015), *available at* http://www.pewforum.org/2015/04/02/religious-projections

-2010-2050/.

Likewise, in the Christian faith, Scripture and Jesus himself command special care and solicitude be shown to children generally and to the needy and orphans particularly. *See, e.g.*, *Matthew* 18:5–10 ("Whoever receives one such child in my name receives me. . . . See that you do not despise one of these little ones."); *Mark* 10:14–16 ("Let the children come to me; do not hinder them, for to such belongs the kingdom of God."); *James* 1:27 ("Religion that is pure and undefiled before God, the Father, is this: to visit orphans and widows in their affliction.").[5]

Not surprisingly, then, while faith-based child welfare providers serve children of every background and situation, many such providers believe their recruiting and certifying of prospective foster homes is guided

[5] Indeed, religiously-motivated care for unwanted, abused, or orphaned children has been a hallmark of the Christian faith for millennia. *See* Polycarp, *Philippians 6.1* (c. A.D. 110) ("The presbyters, for their part, must be compassionate, merciful to all . . . not neglecting a widow, orphan, or poor person, but always aiming at what in honorable in the sight of God and of people."); *Apology of Aristides the Philosopher* 15 (c. A.D. 125) ("[T]hey love one another; and from widows they do not turn away their esteem; and they deliver the orphan from him who treats him harshly."); Timothy Miller, *The Orphans of Byzantium: Child Welfare in the Christian Empire*, 174–75 (2003) (noting that during the Middle Ages, the Church maintained "group homes large enough to care for and educate all the local children whose parents had left them without guardians.").

by and subject to certain of their long-standing religious convictions, including their beliefs regarding marriage and sexuality. Moreover, these providers have always had the freedom to protect the integrity of their ministry by making associational choices in keeping with their convictions.

The District Court's ruling below fails to reckon with the lengthy and vitally needed tradition of religious believers exercising their faith by providing foster and adoption services—services that are needed now more than ever. Over 16,000 children in Pennsylvania and over 437,000 children in the United States are currently in need of foster care. *See* U.S. Dept. of Health & Human Servs., AFCARS Report State Data Tables 2016, *available at* https://www.acf.hhs.gov/sites/default/files/cb/afcars_state_data_tables_07thru16.xlsx (last visited August 20, 2018). In addition, more than 3,000 children in Pennsylvania and 117,000 across the country await adoption. *Id.* The need far exceeds the supply of available homes, and these children—who come from diverse backgrounds and have diverse needs—are best served by a broad spectrum of providers and parents. Religiously motivated providers and parents have played a critical role in filling this need for centuries from coast to coast, and to drive them out ignores the critical need and the

grave harm to children that would be caused by their loss.

II. State accommodation of religious child welfare providers and parents does not violate the Establishment Clause.

A city or State's accommodation, licensure of, and contracting with faith-based providers and parents is permissible under the Establishment Clause and its state constitutional analogue.[6] As explained more fully below, such partnerships are historically permissible, do not transform private individuals and entities into State actors, and have a legitimate secular purpose that neither advances religion nor excessively entangles the State with it.

A. Government partnership with religious providers of social services is a long-standing and constitutionally permissible practice.

The Supreme Court has recently stated the "Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819

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[6] Pennsylvania's disestablishment provision is found in Article 1, Section 3 of the Pennsylvania Constitution. The state and federal constitutional provisions are sufficiently similar that the same reasoning and analysis applies to both. *See Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366–67 (Pa. 1974); *Haller v. Commonwealth of Pa.*, 693 A.2d 266, 268 n.7 (Pa. Com. Ct. 1997) ("[T]he analysis [of] petitioners' claim under the first amendment to the United States Constitution is 'equally apposite' to their claim raised under article 1, section 3 of the Pennsylvania Constitution.") (citations omitted).

(2014) (internal quotation marks omitted); *accord Hosanna-Tabor* v. *EEOC*, 565 U.S. 171 (2012) (closely examining historical understanding to determine the contours of an Establishment Clause claim). Examined through the lens of history, the permissibility of government partnership with religious social services providers is clear.

State and federal governments have been contracting with religious ministries to provide a variety of services to vulnerable populations for hundreds of years. For instance, almost one of six hospitals in the United States are Catholic, and they fulfill a variety of services for the government and receive reimbursement through government programs like Medicare and Medicaid.[7] There is a similarly well-established history of government partnership with religious child welfare providers:

[7] This practice has a lengthy pedigree and has been upheld by the courts. *See Bradfield v. Roberts*, 175 U.S. 291 (1899) (holding federal contract with a Roman Catholic hospital operated by nuns to serve the poor did not violate the Establishment Clause); Edward Queen, *History, Hysteria, and Hype: Government Contracting with Faith-Based Social Service Agencies*, Religions 2017 ("In the medical field, an 1889 survey of seventeen major hospitals revealed that 12%–13% of their income came from government sources and a 1904 Census Bureau survey estimated that governments provided eight percent of all hospital income nationwide, a figure exceeded in many states. Given that the overwhelming number of private hospitals at that time had been established under the auspices of religious organizations a large portion of this money went to hospitals founded on religious principles.").

> The history of government funding of services provided by private organizations, especially private eleemosynary organizations, is a long one.
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> For example, in 1806 the New York Orphan Asylum, a decidedly Protestant organization, established an orphanage, which, by decade's end, received state monies to support over 200 orphans.
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> Most orphanages during that time were established along religious lines and served orphans of a particular faith. In fact, they were subsidized by New York and other cities for doing exactly that. That both the state government and others recognized this fact is illustrated by the 1863 act of the New York legislature to charter the Roman Catholic Protectory to receive truant, vagrant, and delinquent children whose parents or guardians had requested the courts to commit them to a Catholic establishment rather than to the House of Refuge or other predominantly Protestant institutions.
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> * * *
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> By the beginning of the twentieth century, the use of private non-profit organizations for the provision of services to the orphaned, the sick, and the destitute was widespread throughout the United States.

Queen, *History, Hysteria, and Hype,* Religions 2017 at 4–5.

The federal government's use of religious contractors continues in the present day. For example, a search of USASpending.gov for entities narrowly classified as "religious organizations" turns up over 2,000

contracts in FY2013 alone—and that does not count many more ministries classified as "non-profits." Such ministries provide a variety of important services, including housing and care for homeless veterans, drug prevention programs for youth, comprehensive medical assistance, substance abuse rehabilitation, ministries to prison inmates, and much-needed and well-deserved retreats for service members and their families.

This does not present an Establishment Clause problem. *See Bradfield v. Roberts*, 175 U.S. 291 (1899) (holding federal contract with a Catholic hospital operated by nuns to serve the poor did not violate the Establishment Clause). The Supreme Court "has long recognized that the government . . . may accommodate religious practices without violating the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005). *See also Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 338 (1987) (upholding exemption of religious organizations from antidiscrimination laws, even as to employees such as building engineers, and noting "there is ample room for accommodation of religion under the Establishment Clause").

Furthermore, preventing religious organizations from participating in government programs would create a clear Free Exercise problem.

See Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, at 2025 (June 26, 2017) (holding the state's policy of "expressly denying a qualified religious entity a public benefit solely because of its religious character . . . goes too far" and "violates the Free Exercise Clause"); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (striking down an Army regulation prohibiting on-base child care providers from engaging in religious exercise, holding that even where the Army funded, insured, and owned the facilities, and reimbursed provider costs, the Army's goal of avoiding entanglement with religion was an insufficient basis to encroach on the providers' First Amendment rights).[8] In short, a city or State's licensing of and contracting with faith-based child welfare providers is historically common and

[8] *See also Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Religion Clauses . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004) ("[T]o deny equal treatment to a [religious organization] on the grounds that it conveys religious ideas is to penalize it for being religious. Such unequal treatment is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses."); *Christian Legal Society v. Walker,* 453 F.3d 853 (7th Cir. 2006) (holding a public university erred by revoking a religious student group's status due to its requirement that its student leaders adhere to beliefs and behaviors consistent with its religious tenets).

constitutionally permissible.

B. The provision of child welfare services is not traditionally or exclusively a governmental function, and private parties who provide such services are not State actors.

Intervenors below argued that government accommodation and licensure of religious child welfare providers violates the Establishment Clause by "delegating *a government function* to a religious organization and then allowing that *government function* to be performed using religious criteria." *See* Intervenor's Mem. of Law (ECF No. 28-1) at 11 (emphasis added). As explained below, this argument fails for at least two reasons.

First, Intervenors' argument is premised on the erroneous notion that caring for abused, neglected, or orphaned children is a "government function" that a private party may perform only if the government delegates that task.[9] But adoption and foster care and placement are *not* exclusively (or even especially) government functions.

[9] The primary case upon which Intervenors rely—*Larkin v. Grendel's Den*, 459 U.S. 116 (1982)—is distinguishable on this basis. *Larkin* highlights the fact that an unconstitutional delegation claim requires the delegation of a function that is a distinctly sovereign role. *See Larkin*, 459 U.S. at 121–22 (noting the suit involved the delegation of a power that "is traditionally a governmental task" that was "ordinarily vested in agencies of government").

See, *e.g.*, *Leshko v. Servis*, 423 F.3d 337, 343 (3d Cir. 2005) ("No aspect of providing care to foster children in Pennsylvania has ever been the exclusive province of the government."); *Milburn v. Anne Arundel Cty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) ("[T]he care of foster children is not traditionally the exclusive prerogative of the State."); *Malachowski v. City of Keene*, 787 F.2d 704, 711 (1st Cir. 1986) (per curiam) ("[C]hild care and placement is not traditionally the exclusive prerogative of the state."); *Marr v. Schofield*, 307 F. Supp. 2d 130, 134 (D. Me. 2004) ("Courts generally have agreed that foster parents do not perform a function that is reserved exclusively to the state."); *see also* Part I, *supra*. Accordingly, foster care and adoption placement are not a "government function," and a city or State's licensure of or contracting with private foster and adoption providers is not a delegation of a governmental task that implicates the Establishment Clause.

Second, Intervenor's "delegation" argument fails because it is premised on the incorrect assumption that religious providers and parents are State actors. *See* Intervenor's Mem. of Law (ECF No. 28-1) at 11 (arguing the delivery of child welfare services by religious providers

violates the Establishment Clause because they are performing a "government function . . . using religious criteria"). An Establishment Clause claim requires state action. But private foster care providers and parents are not transformed into State actors merely by being licensed by or entering a contract with a state or local government. *See*, *e.g.*, *Ismail v. Cnty. of Orange*, 693 Fed. App'x 507, 512 (9th Cir. 2017) (holding foster parents were not state actors); *Leshko*, 423 F.3d 337 (same); *Hall v. Smith*, 497 Fed. App'x 366 (5th Cir. 2012) (holding a private child-placing agency's placement of a child with foster parent was not state action); *Rayburn v. Hogue*, 241 F.3d 1341 (11th Cir. 2001) (holding foster parents who provide services pursuant to contract with the state were not engaged in state action); *Milburn*, 871 F.2d at 479 (same); *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir. 1986) (holding non-profit organization that made foster homes available and provided child placement to court was not engaged in state action); *P.G. v. Ramsey Cnty.*, 141 F. Supp. 2d 1220, 1226 (D. Minn. 2001) (holding foster parents are not state actors); *Letisha A. v. Morgan*, 855 F. Supp. 943 (N.D. Ill. 1994) (holding a private home for abused or neglected children was not engaged in state action); *Pfoltzer v. Cnty. of Fairfax*,

775 F. Supp. 874 (E.D. Va. 1991) (holding foster parents who cared for children under state guidelines were not engaged in state action); *accord Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action."). In sum, the provision of foster care and adoption services is not a "government function," and the delivery of such services by private religious individuals and entities does not constitute the establishment of religion.

C. The Establishment Clause does not prohibit government contracts with religious organizations.

Intervenors below argued that government contracts with religious child welfare providers violates the Establishment Clause by allowing "government funding of religious activity." *See* Intervenor's Mem. of Law (ECF No. 28-1) at 12. But the Supreme Court and lower courts have held that State licensure, regulation of, contracting with, and funding of faith-based social services providers does *not* violate the Establishment Clause. *See*, *e.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988) (holding the direct federal funding of faith-based counseling centers to provide social services did not violate the Establishment Clause, and noting "that this Court has never held that religious institutions are

disabled by the First Amendment from participating in publicly sponsored social welfare programs"); *Stone*, 68 F.3d 973 (holding the Army did not violate the Establishment Clause by providing funding and resources to religious childcare providers who engaging in religious practices during the daycare time).[10]

In *Bowen*, for example, the Supreme Court upheld the constitutionality of a government program that partnered with

[10] The Supreme Court and lower courts have repeatedly reached this conclusion in other contexts too, holding the government does not violate the Establishment Clause when it provides official recognition, benefits, and funds to religious groups on the same basis as to secular groups. *See Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality op.) (holding the provision of public funds to private elementary and secondary schools—including sectarian ones—was permissible under the Establishment Clause); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 842–44 (1995) (holding a public university's provision of facilities and services to a religious group on the same bases as to secular groups does not violate the Establishment Clause); *Bd. of Educ. of Westside Comm. Schl. v. Mergens*, 496 U.S. 226, 247–50 (1990) (holding public school's policy giving official recognition and benefits to a religious student group on the same basis as to secular student groups did not violate the Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (same); *Comm. for Pub. Ed. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (holding state's reimbursement of religious schools for testing and reporting services was permissible under Establishment Clause); *Children's Healthcare is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000) (holding federal statute did not violate Establishment Clause by permitting persons with religious objections to medical care to receive government funding for care rendered at religious nonmedical health care institutions, *i.e.*, Christian Science sanitariums).

organizations "that were affiliated with religious denominations and that had corporate requirements that the organizations abide by religious doctrines" to provide publicly funded social services. *Bowen*, 487 U.S. at 599. The Court reached this holding even though the law "*expressly contemplated* that some of those moneys might go to projects involving religious groups." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 607 (2007) (discussing *Bowen*) (emphasis added). The *Bowen* Court specifically rejected the claim "that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs," *id.* at 608, and noted that a "symbolic link" between the religious organization and the government was not an establishment of religion, *id.* at 613. In short, the provision of government funding to child welfare providers—including religious ones—does not violate the Establishment Clause.

D. Even under the outdated *Lemon* test, the Establishment Clause is not offended by state licensure of and contracting with religious providers and parents.

As noted above, the Supreme Court's recent Establishment Clause precedent has consistently and repeatedly relied on a historically informed analysis rather than the outdated *Lemon* test. *See generally*

Part II.A, *supra*.[11] But even if this Court were to apply the so-called *Lemon* test,[12] the government's licensure of and contracting with religious parents and agencies complies with the Establishment Clause.

First, the government's accommodation of and cooperation with faith-based providers and parents achieves the undoubtedly legitimate "secular purpose" of having as many qualified foster and adoption agencies and homes as possible. *See generally N. Valley Baptist Church v. McMahon*, 696 F. Supp. 518 (E.D. Cal. 1988) (holding a preschool daycare program, established as a religiously-motivated "ministry" to address "physical, spiritual, or emotional" needs was "secular, not

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[11] *See also Town of Greece* v. *Galloway*, 134 S. Ct. at 1819 (declining to apply *Lemon* and instead stating "the Establishment Clause must be interpreted by reference to historical practices and under-standings"); *Hosanna-Tabor*, 565 U.S. 171 (ignoring *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (same). In addition, members of the Supreme Court have repeatedly criticized the *Lemon* test. *See Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 12–23 (2011) (Thomas, J., dissenting); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring); *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality); *Green* v. *Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting).

[12] *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'").

religious, in nature," and thus a state DSS licensing and regulatory scheme applicable to daycares did not raise Establishment Clause concerns), aff'd 893 F.2d 1139 (9th Cir. 1989); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2 (1989) (plurality op.) (noting a state may reasonably conclude "that religious groups generally contribute to the cultural and moral improvement of the community . . . and enhance a desirable pluralism of viewpoint and enterprise.").

Second, the principal effect of accommodating religious providers "neither advances nor inhibits religion." A reasonable observer would see the accommodation as the government's good faith effort to generate the greatest possible number of qualified foster and adoptive homes. This perception would be reinforced by the fact known to any reasonable observer that the Commonwealth of Pennsylvania and the City of Philadelphia and its agencies work with *all* qualified foster and adoptive agencies and homes regardless of the agency's or individual's race, national origin, sexual orientation, gender identity, or religion. *See Mitchell v. Helms*, 530 U.S. 793, 809 (2000) ("If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts

has been done at the behest of the government.").

Third, the government's licensure of and contracting with private religious providers and parents on the same basis and under the same terms as it licenses and contracts with non-religious providers and parents avoids any excessive entanglement with religion. A District Court in California has articulated why state supervision of religious child services providers does not entail the "excessive governmental entanglement with religion" forbidden by *Lemon*:

> Some incidental entanglement between church and state authority is inescapable. . . . The central focus should be on the extent that the state becomes involved in *religious* affairs or doctrine. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970). The state may involve itself . . . in the purely secular affairs of religious organizations. *Id.*
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> * * *
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> The licensing scheme clearly establishes a pervasive regulatory relationship, complete with ongoing monitoring and supervision. That relationship, however, in no manner affects the religious objectives of the Preschool. Rather, the state can and in the past has implemented its licensing scheme without involving itself in any doctrinal matters of the Preschool or the Church. In the context of direct aid programs, even pervasive monitoring schemes are upheld where the state need not assess doctrinal matters to implement the program.

N. Valley Baptist Church, 696 F. Supp. at 534–36. In short, even assuming *Lemon* is still the controlling legal test, state licensure of, contracting with, and accommodation of religious child welfare providers and parents does not run afoul of the Establishment Clause.

III. Children in need of loving homes are best served by State accommodation of religious providers and parents and the resulting increase in the number of available homes.

The facts underlying this appeal present a bitter irony. In the name of inclusion, the City of Philadelphia and its agencies have shut down a sizeable child welfare provider and rejected the service of scores if not hundreds of current and potential foster and adoptive parents who partner with these providers, thereby *reducing* the pool of qualified and loving homes available to children in desperate need.

The City has identified no injury that prompted this drastic "remedy" and has identified no harm that would be caused by accommodating these religious providers and parents. The City's decision to shut out certain providers was apparently precipitated by two religious providers' inability to certify same-sex couples as prospective foster parents without violating their doctrinal beliefs regarding marriage, and respectfully referring other applicants to other

providers or directly to the City's Department of Human Services. This practice didn't (and doesn't) prevent anyone from becoming a foster or adoptive parent. It is undisputed that under Pennsylvania law, LGBTQ people who wish to foster and adopt have the same rights and access as heterosexual people. The practices of two religious providers have no effect on those rights, and nothing in this lawsuit will alter those rights.

The Intervenors' attempt to identify an injury caused by the religious providers' practices misses the mark. Intervenors argued below that the religious providers' policy imposed "a significant burden on children, who lose out on qualified families, and the families who are turned away." *See* Intervenor's Mem. of Law (ECF No. 28-1) at 13. This argument is plainly incorrect.

First, there is no evidence—either in the Record, the scholarly literature, or the public domain—that the practice of religious providers in Philadelphia (or elsewhere) of referring same-sex couples to another agency causes a significant inconvenience to the applicants, much less *prevents* them from becoming foster parents. It is not a difficult task to find dozens of other foster care providers in Philadelphia with whom to apply. Indeed, the very first result for the Google search, "Foster

agencies in Philadelphia," is an official City website that encourages the reader to "[b]rowse the list of foster agencies to find the best fit for you," and links to a list of no fewer than 26 licensed foster agencies in the city (two dozen of which will partner with any qualified applicant regardless of his or her creed, sexual orientation, or gender identity). *See* City of Philadelphia Dept. of Human Servs., *Foster Care Licensing Agencies (contracted by Philadelphia DHS)*, *available at* https://www.phila.gov/media/20180705141450/2018-DHS-Foster-care-agency-providers.pdf (last visited August 20, 2018).

Second, there is no evidence—either in the Record, the scholarly literature, or the public domain—that the practice of religious providers in Philadelphia (or elsewhere) of referring same-sex couples to another foster care agency deprives needy children of families or reduces the pool of qualified foster homes. In fact, the literature and social science contains evidence *to the contrary*, namely that religious child welfare providers *expand* the pool of available homes by recruiting from a community of like-minded believers who otherwise likely would not have applied to become foster or adoptive parents. *See* Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruit-*

ment of Foster and Adoptive Parents, J. OF PUB. MANAGEMENT & SOCIAL POLICY, No. 19, Vol. 2, (2013), pp. 176–177 (noting that one religious provider had recruited from likeminded churches nearly half the foster families in the state, 36% of whom said they would not have become foster or adoptive parents had they not been exposed to the organization, and 40% of whom were unsure); Maggie Jones, *God Called Them to Adopt. And Adopt. And Adopt.*, The New York Times Magazine (Nov. 14, 2013) ("Of the dozens of evangelical and conservative Christian parents I spoke to, many said that church sermons, Christian radio shows or other Christian campaigns . . . pushed them to adopt.").

In sum, as noted above, *amici* believe the answer to the legal issue in this appeal—namely, whether the First Amendment protects the rights of religious foster parents and providers to minister in accordance with their sincere religious beliefs—is "yes." And *amici* believe the answer to the practical question—namely, how to create the largest pool of qualified and loving homes for children in need—leads to the same result.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court reverse the District Court's denial of the Plaintiffs-Appellants' Motion for a Preliminary Injunction.

September 4, 2018

Respectfully Submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: s/ Miles E. Coleman
Miles E. Coleman
E-Mail: miles.coleman@nelsonmullins.com
104 South Main Street / 9th Floor
Greenville, SC 29601
(864) 373-2300

Counsel for *Amici Curiae*

APPENDIX A — COMPLETE LIST OF *AMICI CURIAE*

I. United States Senators

Mike Enzi (WY)
Lead Senate *amicus curiae*
Roy Blunch (MO)
John Boozman (AR)
Tom Cotton (AR)
Ted Cruz (TX)
Steve Daines (MT)
Tim Scott (SC)
James M. Inhofe (OK)
James Lankford (OK)
James E. Risch (ID)

II. Members of the United States House of Representatives

Mike Kelly (PA-03)
Lead House *amicus curiae*
Robert B. Aderholt (AL-03)
Jim Banks (IN-03)
Lou Barletta (PA-11)
Diane Black (TN-06)
Kevin Brady (TX-08)
Kevin Cramer (ND-AL)
Jeff Duncan (SC-03)
Neal P. Dunn (FL-02)
Matt Gaetz (FL-01)
Glenn Grothman (WI-06)
Andy Harris, M.D. (MD-01)
Jody B. Hice (GA-10)
Randy Hultgren (IL-14)
Walter B. Jones (NC-03)
Steve King (IA-04)
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Billy Long (MO-07)
Barry Loudermilk (GA-11)
Tom Marino (PA-10)
Mark Meadows (NC-11)
Ralph Norman (SC-05)
Pete Olson (TX-22)
John Ratcliffe (TX-04)
Dana Rohrabacher (CA-48)
Todd Rokita (IN-04)
Keith J. Rothfus (PA-12)
Steve Russell (OK-05)
Steve Scalise (LA-01)
Adrian Smith (NE-03)
Christopher Smith (NJ-04)
Randy K. Weber (TX-14)
Roger Williams (TX-25)

CERTIFICATE OF COMPLIANCE

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Rule 29(a)(5) of the Federal Rules of Appellate Procedure. It contains 6,499 words, excluding the parts of the brief exempted by Federal Rule 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.

3. This brief complies with the electronic filing requirements of Local Rule 25.1. The text of this electronic brief is identical to the text of the paper copies, and the latest version of Windows Defender Security has been run on the file containing the electronic version of this brief and no virus has been detected.

4. Pursuant to Local Rule 28.3(d), undersigned counsel certifies he is a member of the bar of this Court.

September 4, 2018 s/ Miles E. Coleman
Miles E. Coleman
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Appellate CM/ECF system on September 4, 2018, which will automatically send notification and a copy of this motion to the counsel of record for the parties.

September 4, 2018

s/ Miles E. Coleman
Miles E. Coleman
Counsel for *Amici Curiae*