No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL., PETITIONERS

v.

CITY OF PHILADELPHIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amicus Curiae the American Bar Association (ABA) is the largest voluntary association of lawyers in the world. The ABA is committed to eliminating bias, enhancing diversity, and advancing the rule of law throughout the United States and around the world.

The ABA has significant experience in both child welfare law and First Amendment issues. The ABA

[1] The parties have consented to the filing of this brief, either by blanket consent filed with the Clerk or individual consent. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Center on Children and the Law, which has promoted access to justice for children and families since 1978, is a thought leader in the child welfare field, which encompasses foster care placement and foster parent licensing. Throughout the country, the Center collaborates with state and local government agencies responsible for caring for children in foster care. The primary goal for most children in foster care is reunification between a child and birth family. Other case goals include guardianship and adoption. The Center works with these government agencies to promote children's best interests both while in care and when safely exiting foster care to reunification, guardianship, adoption, or other permanency options. The Center also works to elevate legal representation quality for all parties in child welfare cases, and partners with the judicial community and others to ensure the child welfare court system meets children and families' needs.

The ABA has long advocated that the State exercise its responsibility to care for foster children in a diligent, fair manner. To promote the best interests of children, the ABA has also long advocated policies that ensure there is no invidious discrimination in the administration of foster care systems that would be adverse to the interests of children in foster care. As such, the ABA opposes laws, regulations, and rules or practices that discriminate against Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) individuals in the exercise of the fundamental right to parent, Am. Bar Ass'n, Report Recommending the Adoption of Resolution 113 (2019), opposes legislation that prohibits, limits, or restricts placement into foster care of any child on the basis of sexual orientation of the proposed foster parent, Am.

Bar Ass'n, Report Recommending the Adoption of Resolution 102 (2006), and supports enactment of laws and public policies that provide that sexual orientation shall not be a bar to adoption when adoption is in the best interest of the child, Am. Bar Ass'n, Report Recommending the Adoption of Resolution 109B (1999).

SUMMARY OF THE ARGUMENT

In administering its foster care program, the City of Philadelphia has barred discrimination in the identification of prospective foster families on the basis of factors that are irrelevant to potential foster parents' suitability, including their sexual orientation. The City achieves at least two important and distinct aims through this policy. First, the City ensures that the foster children in its care, particularly those from more vulnerable populations, have the best chance of finding suitable and loving homes. Second, the City furthers its additional interest in avoiding exposing same-sex couples to the harms associated with unequal treatment in City programs carried out with City funds.

The City's decision to hold its contractual partners to its nondiscrimination policies falls squarely within the scope of its program, and is consistent with this Court's holdings in *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U.S. 205 (2013) (*AOSI*), and other cases concerning the government's ability to attach conditions to participation in government programs that are germane to the programs themselves. Allowing a private agency that has voluntarily contracted with the City to violate the City's nondiscrimination policy while it is performing a governmental function, directly hinders central goals of the City's foster care program,

which is to serve the best interests of children, and to do so without subjecting historically marginalized groups to further harm in the context of a City funded program.

A ruling in favor of petitioners would not only be adverse to the City's determination that its policy is in the interests of the children in its care, but also potentially subject minority groups, including religious minorities, to adverse treatment in the administration of government programs, whenever the governmental entity administers the program through private contractors. By weakening the protections a governmental entity can afford minorities in the administration of governmental programs, petitioners' arguments would ultimately harm both religious minorities and others who depend on predictability in the administration of those programs, including the children in foster care whose interests should be the central focus of this case.

ARGUMENT

I. The City Is Permitted To Insist That Private Entities Contracting To Carry Out Government Programs Comply With Conditions Central To Those Programs

A. The City of Philadelphia permissibly requires parties contracting to perform foster care services on behalf of the City to comply with the program's terms, including not to exclude suitable foster parents on the basis of characteristics unrelated to child welfare, such as sexual orientation

As the U.S. Department of Health and Human Services recently explained, "[f]oster care exists to protect

children from abuse or neglect occurring in their own homes." Dep't of Health & Human Servs., ACYF-CB-IM-20-06, *Foster Care as a Support to Families* 3 (Apr. 29, 2020). Foster care is intended to be a temporary situation, and state and local governments are encouraged to structure their foster care programs "as a support for families in a way that mitigates the trauma of removal for the child and parents, expedites safe and successful reunification, and improves parent and child well-being outcomes." *Id.* at 1.

As part of the foster care system, Pennsylvania, like every other state, has an obligation to act in the best interests of the children in its custody. See, *e.g.*, 11 Pa. Cons. Stat. § 2633. The Commonwealth of Pennsylvania has "charged individual county agencies with the duty of establishing a system to address the well-being of these children consistent with the best interests of each child." Pet. App. 56a. Each locality therefore has a legal responsibility to administer local foster programs in a manner that fulfills the State's duty of care to act in the best interests of children in foster care.

The City of Philadelphia, through a highly regulated state process, takes children who have suffered abuse or neglect into the City's custody, and requires that private parties performing government functions pursuant to contract assess potential foster parents against a range of detailed criteria to ensure that children are fostered in loving and supportive homes. See 23 Pa. Cons. Stat. § 6344(d); 55 Pa. Code § 3700.62 *et seq.* Since the 1950s, the City has contracted with private agencies to help carry out the City's foster care obligations in a manner that safeguards and promotes the interests of these children. Each private agency must be licensed by Pennsylvania,

and must comply with the State's child welfare laws and regulations. See 23 Pa. Cons. Stat. § 6344. The City partially outsources this governmental function due to resource constraints, and in order to ensure that the large number of children in foster care each receive the appropriate level of care. The City's contracts with these private foster care agencies call for the agencies to "recruit, screen, train, and provide certified resource care homes" that meet the standards of eligibility established by Pennsylvania Law." Pet. App. 76a (internal citations and quotations omitted).

The City's foster program incorporates the City's Fair Practices Ordinance (the FPO). The FPO prohibits providers of public accommodations from denying them to an individual or otherwise discriminating based on the individual's protected characteristics, including sexual orientation. Phila. Code § 9-1106. The City's Services Contract includes this prohibition, thereby ensuring that private foster agencies, in performing under the Contract, do not turn away an otherwise qualified foster parent on the basis of the individual's protected characteristics.[2]

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[2] The Services Contract reads (Supp. J.A. 18-19), in pertinent part:

> This Contract is entered into under the terms of the Charter [and] the Fair Practices Ordinance (Chapter 9-1100 of the Code) * * *. Provider shall not discriminate or permit discrimination against any individual because of race, color, religion or national origin. Nor shall Provider discriminate or permit discrimination against individuals in * * * public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or

The City has good reason for including these protections in its contracts with foster care agencies: "optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults." Am. Bar Ass'n, Report Recommending the Adoption of Resolution 102, at 2 (2006) (citing Press Release, Am. Psychiatric Ass'n, Adoption and Co-Parenting of Children by Same-Sex Couples, Release No. 0246 (Dec. 13, 2002)). Studies by leaders in the medical and child development field have shown that same-sex couples are equally capable as different-sex parents of raising and caring for children, and that same-sex and different-sex couples display no difference as to parenting skills, attitudes, or emotional health. See Am. Bar Ass'n, Report Recommending the Adoption of Resolution 113, at 7 (2019) (citing Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159 (Apr. 2001); Abbie E. Goldberg & JuliAnna Z. Smith, *Predictors of Parenting Stress in Lesbian, Gay, and Heterosexual Adoptive Parents During Early Parenthood*, 28 J. Family Psychology 125 (Apr. 2014)). In short, social science studies confirm that "when compared with heterosexual adults, sexual minority adults have not been found to substantially differ in their parenting approaches or efficacy in ways that negatively affect children." Am. Psychiatric Ass'n, *Resolution on*

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preference in the treatment of a person on the basis of * * * sex, sexual orientation, gender identity, * * * marital status, * * * familiar [sic] status, * * * or engage in any other act or practice made unlawful under the Charter * * *.

Sexual Orientation, Gender Identity (SOGI), Parents and their Children 1 (2020).

The City has developed protections to help ensure that, consistent with social science research and best practices, the City's limited funds are used to welcome all suitable families, thereby opening as many doors as possible for children in need of good homes. Turning away suitable parents runs counter to the interests of children in foster care, and therefore to the purpose of the City's foster care program. "[R]estricting the number of potential loving homes on the basis of sexual orientation" reduces the likelihood of a child being placed in a safe, secure, and lasting environment and is therefore "arbitrary and harmful to the most vulnerable children." Am. Bar Ass'n, Report Recommending the Adoption of Resolution 113, at 1, 5-6 (2019) (noting LGBT parents are approximately seven times more likely to be raising adopted or foster children). The City therefore requires that private agencies that contract to fulfill these governmental functions on behalf of the City comply with the nondiscrimination provisions of the contract, which extend to sexual orientation and gender identity.

This nondiscrimination policy is also important because foster care licensing agencies typically interact with and have a responsibility to place youth in care. LGBTQ youth comprise a disproportionately large segment of the foster care population, see Am. Bar Ass'n, Report Recommending the Adoption of Resolution 104B, at 2 (2007), and if a licensing agency were permitted to discriminate against same-sex couples, the agency could also fail to support and affirm youth gender identity and sexual orientation in placement decisions. As a group of young adults who have experienced foster care

recently explained, "[w]ithout protections, young people like us will be placed in homes that reject who we are, who we love, and what we believe." Letter from The LGBTQIA+ & Two Spirit Foster Alumni & Advocate Team to Alex Azar & Jennifer Moughalian, Secretary and Acting Assistant Secretary for Financial Resources, Dep't of Health & Human Servs. (Dec. 3, 2019), https://www.familyequality.org/wp-content/uploads/2019/12/LGBTQIA-Two-Spirit-Foster-Alumni-Advocate-Team-Letter-to-HHS-12.3.19-1.pdf. These youth already face a high risk of discrimination, abuse, and rejection from families. Such harm puts them at higher risk of mental health challenges, substance abuse, and entry into the juvenile justice system.

Similarly, licensing agencies in Philadelphia are responsible for certifying relative caregivers who seek to become licensed to care for children in foster care consistent with federal and state laws that prioritize kin placements. See 42 U.S.C. § 671 (states must "consider giving preference to an adult relative over a non-related caregiver when determining placement for a child, provided that the relative caregiver meets all relevant State child protection standards"). If licensing agencies were permitted to deny certification for same-sex couples who are otherwise suitable foster parents, that discrimination would also apply to same-sex kin caregivers, and limit the child's placement options with extended family members in contravention of federal and state placement goals. Similarly, licensing agencies in some states may also interact with birth parents in facilitating the child's placement and exit from foster care. Permitting agencies to discriminate against same-sex foster parents could have implications for discrimination

against LGBTQ birth families in ways that interfere with reunification goals for a child.

In short, the City's nondiscrimination policy is core to the program in question, ensuring not only that the City identify the largest number of homes possible for foster children, but also that the interests of these children are served in finding ***suitable*** placements for them. Allowing discrimination would "hurt[] families in a multitude of ways. It deprives foster children of a safe and stable environment to grow. It deprives those awaiting adoption [and those adopting] of the strong familial relationship to which they are entitled." Am. Bar Ass'n, Report Recommending The Adoption of Resolution 113, at 7 (2019). The City may permissibly determine that it is unwilling to elevate "the personal beliefs of a child services agency or its workers" over the needs of the children in its care. *Id.* at 5.

B. In addition to protecting the interests of children, the City's nondiscrimination policy furthers the City's permissible policy goal of eliminating unequal treatment of LGBTQ couples in the context of the City's own programs

Separate and apart from its desire to ensure that otherwise qualified foster parents are not turned away on the basis of their protected characteristics, the City also has an independent policy goal to eliminate discrimination against LGBTQ couples, including those who seek to become foster parents. It is permissible for the City, consistent with its desire to protect the dignity of LGBTQ Americans—a value that has been recognized as

significant by this Court on numerous occasions, including as recently as last term—to insist that a private agency, if it seeks to avail itself of the City's funds and provide a government function, comply with the City's express nondiscrimination policy.

The City's policy is founded in a recognition that "denial [] of equal access to public establishments" and services creates a "deprivation of personal dignity," *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964), and a desire to ensure that the foster care system it administers does not expose same-sex couples to potential humiliation and the stigma that they are somehow unfit to parent, every time they seek to become a foster parent, see, *e.g.*, *Obergefell* v. *Hodges*, 576 U.S. 644, 646 (2015). The City's policy ensures that prospective LGBTQ foster parents do not face the particularly harmful stigma of being rejected as potential foster parents, based solely on their protected characteristics, by the City or another party that bears the imprimatur and public funding of the State.[3] In demonstrating the LGTBQ foster parents are worthy of equal treatment,

[3] Notably, while the amicus brief from the United States suggests that the City's decision to terminate a contract with Catholic Social Services (CSS) caused similar harm to individual foster parents who held licenses through CSS, this is not an apt comparison. U.S. Amicus Br. 30. The providers referenced in the Solicitor General's brief are not stigmatized based on their identity, and are free to work with an alternate agency that agrees to comply with City policy; by contrast, prospective LGBTQ couples that are turned away necessarily are stigmatized, as they receive the message that a State-funded party believes they are somehow lesser or that their marriage is invalid.

the City also preserves the dignity of LGTBQ children in the City's care.

By adopting its policy of nondiscrimination against LGBTQ persons in carrying out governmental services, whether directly or through its agents, the City adheres to a fundamental precept rooted in the Fourteenth Amendment's Equal Protection Clause. See, *e.g.*, *United States* v. *Windsor*, 570 U.S. 744, 772 (2013) (differential treatment "demeans" couples "whose moral and sexual choices the Constitution protects"); see also *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020). Regardless, however, of whether the Constitution ***required*** the City to adopt this policy of nondiscrimination as part of its program, there should be no question that the City ***may***, consistent with the Constitution, adopt a policy of nondiscrimination with respect to its own programs, and then require compliance with that policy choice by parties that voluntarily choose to carry out that governmental program. Indeed, even the *Bostock* dissenters recognized the legitimate state interest in respecting the dignity of its citizens. 140 S. Ct. at 1823 (Kavanaugh, J., dissenting) ("[G]ay and lesbian Americans 'cannot be treated as social outcasts or as inferior in dignity and worth.' " (quoting *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018))); see *id.* at 1783-1784 (Alito, J., dissenting) (recognizing the "humane and generous impulse[]" that motivates a desire for "gay, lesbian, or transgender [Americans] * * * to be treated with the dignity, consideration, and fairness that everyone deserves").

While this Court's precedent makes plain that the government may not require private parties accepting

government funding "pledge allegiance to the Government's policy," the government equally plainly may seek to ensure that recipients do not use government funding to "undermine the government's program and confuse its message." *Agency for Int'l Dev't* v. *Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 220 (2013) (*AOSI*). For example, in *Rust* v. *Sullivan*, this Court rejected the argument that "the restrictions on the subsidization of abortion-related speech contained in the regulations [were] impermissible because they condition[ed] the receipt of a benefit * * * on the relinquishment of a constitutional right," observing that "the Government [was] not denying a benefit to anyone, but [] instead simply insisting that public funds be spent for the purposes for which they were authorized." 500 U.S. 173, 196 (1991). Where the government pursues a policy goal through the administration of a public program, it has no obligation to "at the same time fund[] an alternative program [or viewpoint] which seeks to deal with the problem in another way," *id.* at 193, and is empowered to manage its "internal affairs" as it sees fit. *Bowen* v. *Roy*, 476 U.S. 693, 699 (1986).

Here, the City has chosen, as part of the administration of its foster care program, to require same-sex couples be treated equally to different-sex couples. Although this policy of nondiscrimination furthers the City's interest in ensuring optimal outcomes for the children in its care, see pp. 4-10, *supra*, it also furthers an independent value that the City seeks to promote. The Court should reaffirm its longstanding precedent that a governmental entity may choose, in the administration of its public programs, to further its legitimate policy

goals, including the prohibition of demeaning differential treatment.

C. Requiring a private agency to abide by the terms of its contract with the City that are central to the City's program does not violate that party's First Amendment rights

By insisting that city contractors adhere to the terms of their contracts in carrying out the City's obligations to children in its care, Philadelphia is not violating the First Amendment rights of those contractors. Rather, Philadelphia is simply requiring that any private agency—insofar as that private agency ***voluntarily contracts to perform a governmental function*** in the administration of Philadelphia's foster care system—act in compliance with the terms of that contract.

This Court's precedent makes plain that, when private actors choose to accept government funding or carry out government programs, those participants must abide by reasonable conditions that define the scope of the governmental program. "As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds." *AOSI*, 570 U.S. at 214. "The Government can, without violating the Constitution, selectively fund a program, to encourage certain activities it believes to be in the public interest * * * ." *Rust*, 500 U.S. at 193. In the specific context of a First Amendment challenge, the Court has held that the government remains able to require parties to comply with certain conditions if they wish to voluntarily participate in government programs, even "when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *AOSI*, 570 U.S.

at 214; see also *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."). The First Amendment "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (citation omitted). Put another way, while the First Amendment is a powerful shield, protecting from governmental infringement upon core rights absent the most compelling of justifications, this Court's precedent makes clear that the First Amendment is not a sword to force the government to accept private participants' preferred positions when the government administers public programs.

In those cases in which the Court has overturned attempts to attach conditions to government funding, the Court has stressed that the conditions in question compelled private entities to adhere to a governmental policy that "by its very nature affects 'protected conduct *outside the scope of the [government] funded program*.' " *AOSI*, 570 U.S. at 218 (emphasis added); see also *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 542 (2001) (holding that prohibition on lobbying as a condition for funding legal aid group was unconstitutional because the "program was designed to facilitate *private* speech, not to promote a governmental message" (emphasis added)). In other words, the government may not use funding or other participation conditions to disfavor private speech and beliefs unrelated to the government's own objectives, or to arbitrarily punish those with disfavored viewpoints. Nothing in this Court's precedent suggests,

however, that the government may not impose reasonable conditions on carrying out a government program, especially when those conditions are critical to the key governmental objective underlying the program.

Here, far from being "outside the scope of the [government] funded program," *AOSI*, 570 U.S. at 218, the City's policy of nondiscrimination in foster care placement is central to the program's goal of furthering the best interests of the children in the City's custody. The City's requirements do not impose any restrictions on the right of any private party to hold sincerely held, religious viewpoints about same-sex relationships. The City requires only that a private agency comply with City policy when the agency steps outside its role as a private actor and chooses to become an extension of the City, by accepting City funding under a contract to perform City functions. See *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943) (persons who "voluntarily enroll * * * may not on ground[s] of conscience refuse [a government program's] conditions"). Although the First Amendment would protect private agencies from an effort by the City to punish them for disagreeing with the City on issues of LGBTQ equality—conduct which the record here does not reflect—a private agency may not use the First Amendment to force the City to conform to the agency's policy preferences when the agency agrees to support the City's program and to assist in finding stable homes for the children under the City's care.

The City's decision to contract for foster care licensing services only with agencies that do not discriminate furthers the core goals of the City's foster care program.

The City's overriding concern in providing foster services is to act in the best interests of the children for whom the City is responsible to protect and care. See generally Am. Bar Ass'n, Report Recommending the Adoption of Resolution 118 (2019). A key element to serving these interests is to welcome and encourage as many suitable foster parents as possible to open their homes to these children. See Am. Bar Ass'n, Report Recommending the Adoption of Resolution 113, at 1 (2019). As noted on pages 4-10, *supra*, decades of research show same-sex couples are equally capable as different-sex couples of raising and caring for children. The City's determination not to allocate any of its scarce funds toward contractors who would turn away suitable parents directly advances the central purpose of the City's program.

The City is not, here, "seek[ing] to leverage funding to regulate speech outside the contours of the program itself," *AOSI*, 570 U.S. at 214-225, or to affect "protected conduct outside the scope of the [governmentally] funded program." *Rust*, 500 U.S. at 197. Unlike the recipients of government funding in *Velazquez*, for example, who engaged in purely ***private*** representation of indigent clients against the government, petitioners here are performing ***public*** functions on behalf of the government. And, unlike in *Espinoza* v. *Montana Department of Revenue*, 140 S. Ct. 2246, 2262-2263 (2020), in which this Court struck down a no-aid provision that barred state aid to religious schools ***because*** they were religious, the ordinance and policies in the present case prohibit funding to certain private agencies not based on their religious status, but on their refusal to carry out critical terms of the program they have contracted with

the City to perform. In other words, participants in the City's program are prohibited from discriminating on certain bases, regardless of the motivation for that discrimination (religious or non-religious).

The City's policies place no restrictions on private agencies' ability to exercise their right to hold and act upon their religiously-motivated views regarding sexual orientation, outside the context of contracting for the City's own foster care program. Religiously affiliated private agencies remain free to preach about their opposition to same-sex relationships and marriages, and are protected against exclusion from government programs solely on the basis of their religious ***status***, see, *e.g.*, *Espinoza*, 140 S. Ct. at 2261 (2020); see also *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012 (2017). Moreover, the City has not issued a blanket prohibition against religious agencies engaging in public functions. Such agencies remain free to contract with the City in other contexts, where they do not object to performing in compliance with the terms of the contract in question. For example, the City continues to contract with CSS for the provision of other types of services, including case management services for youth in the foster care system, and for the establishment of congregate care homes. See Pet. App. 16a, 187a; J.A. 208-209, 505.

Private agencies must, however, for so long as they choose to perform a public function on behalf of the City, do so in accordance with the City's nondiscrimination policies. The City of Philadelphia "takes custody of children who are removed from their homes," and has a duty to care for and act in the best interests of these children. J.A. 85-86, 352-353, 694. The state ***cannot*** avoid the duty it owes to these children simply by shifting their care to

private custodians. See, *e.g.*, 11 Pa. Cons. Stat. § 2633 (setting forth duties of the State with respect to children in foster care).

This case is not, therefore, one that involves a challenge to "a [private] religious adoption agency declin[ing] to place children with same-sex married couples" or that otherwise may implicate a conflict between public nondiscrimination laws and private religious principles or conduct. *Obergefell*, 576 U.S. at 711-712 (Roberts, C.J., dissenting). By way of illustration, while a private agency like CSS must agree to the City's terms when contracting to help carry out the City's foster care program, CSS's ***private adoption program***, which involves birth parents choosing to place their infants for adoption and CSS assisting to find adoptive parents, see Catholic Social Services: Adoption, http://adoption-phl.org (describing CSS's private adoption services), is unaffected by the City's contractual requirement.

The City's nondiscrimination policies are core to the program in question. The First Amendment does not require that the City adjust its policies, which focus on the best interests of the children in its care, to accommodate the religious beliefs of private parties that choose to seek City funding.

II. An Alternative Ruling Would Have Dramatic Implications, Including For The Protection Of Religious Minorities

If petitioners were granted the power to exempt themselves unilaterally from the City's policy, that power would be equally available to all. Because courts "must not presume" to evaluate "the relative merits of differing religious claims," *Emp. Div.* v. *Smith*, 494 U.S.

872, 887-888 (1990) (quoting *United States* v. *Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)), there would be no principled limit on the types of exemptions that could be sought. Historically, public accommodation laws have prohibited discrimination on the basis of religion, in order to protect religious minorities from differential treatment. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 284 (1964); see also U.S. Const. Amend. I. However, if individuals are permitted to self-exempt from the law's general requirements on the basis of religious principle, legal protections against religious or any other form of discrimination would become empty. Individuals could—invoking a religious command to oppose other religions—claim a right to discriminate in the fulfillment of government contracts against those of other faiths, including the very persons who here seek a right to exclude prospective foster parents on the basis of their sexual orientation. See, *e.g.*, Complaint at 2, *Maddonna* v. *U.S. Dep't of Health & Human Servs.* (D.S.C. Dec. 20, 2019) (No. 6:19-cv-3551-TMC).

Foreseeably, religious claims of exclusion could be brought by other private foster care agencies, similarly positioned to petitioners, that did not wish to assist Muslim or Jewish couples, Christian couples of a different sect, or interfaith couples. At the very least, creating such rights of self-exemption from the terms of public contracts would place a significant burden on government agencies, and this burden could lead such agencies to carry out more programs without private contractors, even when doing so would otherwise be preferable and more efficient. Allowing this substantial uncertainty would be detrimental to the orderly administration of

public programs, but would also be detrimental to, *inter alia*, the children in foster care who rely on these programs for their physical and emotional welfare. See pp. 4-10, *supra*.

The City does not disrespect the religiously motivated views of petitioners simply because it refuses to allow those views to dictate the content of the City's own programs. Especially in a legal system in which the government cannot distinguish among religiously motivated views, the ability of governments to contract for supplying public services would be seriously undermined if any individual could, simply by claiming a religious opposition, insist on an exemption from otherwise valid contractual requirements.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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