

No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

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

**BRIEF OF *AMICI CURIAE*
THE ANNIE E. CASEY FOUNDATION,
THE RAIKES FOUNDATION, THE CONRAD N.
HILTON FOUNDATION, AND THE REDLICH
HORWITZ FOUNDATION IN SUPPORT OF
RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

The Annie E. Casey Foundation is a private charitable organization dedicated to improving the well-being of our nation's most vulnerable children. For more than 60 years, the Foundation has supported programs and initiatives to secure and sustain lifelong family connections for children and youth in foster care, and for 36 years, the Foundation provided direct foster care and related child welfare services in New England and Maryland. This work, along with the Foundation's system improvement initiatives, direct consulting work with public child welfare agencies, and grant-making, has contributed to significant transformations in these systems and helped to improve outcomes for children and their families.

The Raikes Foundation works across the United States to invest in youth-serving institutions and systems to make them more effective in supporting and empowering young people—especially those who have been most marginalized. The Foundation's efforts have been focused in large part on addressing homelessness for LGBTQ young people, whose traumatic experiences in foster care often include multiples moves from home to home. The

¹ No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amici curiae* and their counsel. Pursuant to Rule 37.3(a), *amici* state that counsel of record for Petitioners and Respondents have consented to the filing of this brief.

Foundation has been a leader on the extensive intersections between youth homelessness and the child welfare system, investing over \$100 million into efforts across the country. Its staff have decades of professional and lived expertise on this topic.

The Conrad N. Hilton Foundation is a private family foundation dedicated to improving the lives of individuals living in poverty and experiencing disadvantage throughout the world. Through its Foster Youth Initiative, the Foundation has granted \$93.4 million to support transition-age foster youth ages 16 to 24 in becoming self-sufficient and thriving adults, with a focus on supporting young people facing the most barriers. The Foundation works with partners to strengthen systems and policies supporting transition-age foster youth, expand and share knowledge within the field, and advance innovative programs. Through its grantmaking and collaboration, the Foundation has supported transformational efforts to recruit and retain quality caregivers.

The Redlich Horwitz Foundation works in New York and across the country to improve foster care policies and practices to keep children, youth and families supported and thriving. The Foundation partners with county and state agencies, the courts, nonprofits, and grassroots advocates to effectuate system change that can be leveraged across the state and nation. Its goals are to expand preventive services, reduce residential placements, improve supports for all foster families, increase community-based services for children and families, and implement other strategies proven to keep families

safely together or expedite the path to permanency through reunification, adoption, and kinship guardianship. Over the last five years, the Foundation has provided technical assistance and grant funding to 24 local departments of social services to strengthen recruitment and retention of foster and adoptive families as a critical strategy to reducing congregate care and increasing permanency.

SUMMARY OF THE ARGUMENT

This case presents issues of critical importance to the City of Philadelphia as it strives to fulfill its legal duty to the vulnerable children in its custody in need of foster families.

The primary issue is whether, in awarding contracts under which the City delegates part of its responsibility to care for abused and neglected children in its charge, the City may require that its contractors not discriminate against same sex couples, even if those contractors raise a religious objection to that contract requirement. The answer to that question must be yes. This Court's cases teach that in seeking government contracts or benefits, religiously-affiliated organizations may constitutionally demand equal treatment, but not preferential treatment. No organization is entitled to a government contract to provide public services on its own terms. And the City has both a legal interest in ensuring that organizations providing services on behalf of the City do not discriminate, and a practical interest in doing so: the need to ensure that the children in its care have access to a wide pool of safe and supportive foster families.

The secondary issue is whether the City's neutral contract requirement not to discriminate somehow masks actual hostility to religion. On this record and under the findings of the courts below, the answer to that question must also be no. Neither the City's practices nor its statements provide evidence that the neutral contract requirement at issue is being administered in a way that penalizes or reflects hostility to religion. The non-discrimination policy at issue does not focus on uniquely religious conduct. Philadelphia has allowed no foster care agency to opt out of the requirement. And the conversations between City officials and Catholic Social Services ("CSS") come nowhere close to showing that CSS or any other religious organization is being specially disfavored.

The Free Exercise Clause counsels in favor of equality in the award and management of government contracts, not preferential treatment for religious organizations. Under this Court's Free Exercise precedents, that should dispose of this case in favor of the City.

BACKGROUND

A. THE EVOLUTION AND STRUCTURE OF THE MODERN FOSTER CARE SYSTEM.

Into the early twentieth century, the care of orphaned and abandoned children in the United States remained largely in the hands of private

charitable and religious organizations.² While state courts occasionally prosecuted child abusers and terminated abusive and neglectful parents' custody, state intervention was sporadic. In the 1910s and 1920s, as private child welfare organizations proliferated, states began to establish juvenile courts, assigning them jurisdiction to intervene in cases of abuse or neglect. By 1919, all but three states had such courts.³

Even as states became more involved in child welfare, most children orphaned, abandoned, or removed from their homes due to abuse or neglect continued to be placed in private orphanages or group homes (what we now call "congregate care").⁴ These institutions generally did not operate under

² John E.B. Myers, *A Short History of Child Protection in America*, 42 *Fam. L.Q.* 449, 451-52 (2008) (hereinafter Myers); Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 *Ohio St. L.J.* 1295, 1301-02 (1999) (hereinafter Mangold); U.S. Dep't of Health and Human Servs. ("HHS"), Admin. for Child. and Fams., Children's Bureau (hereinafter HHS, Children's Bureau), Nat'l Foster Care Month 2020, <https://www.childwelfare.gov/fostercaremonth/about/history/#top> (last visited Aug. 18, 2020).

³ Myers, *supra* note 2, at 451-52.

⁴ HHS, Children's Bureau, A Nat'l Look at the Use of Congregate Care in Child Welfare, 1 (May 13, 2015), https://www.acf.hhs.gov/sites/default/files/cb/cbcongregate_care_brief.pdf.

any regulatory framework until the 1920s and 30s.⁵ States gradually strengthened their departments of welfare and social services, expanding their involvement in the provision of care to orphaned, neglected, or abused children, and regulating private organizations providing such care.⁶

The same period saw a marked shift from congregate care to family foster care as the preferred framework for tending to the needs of children removed from their birth families. This resulted in large part from changed thinking at the federal level. In 1912, the Children’s Bureau, a division of HHS, was founded and began to stress the importance of in-home, family-based foster care.⁷ In 1919, the Bureau published Minimum Standards of Child Welfare, which prioritized providing a “home life” with foster families whenever children could not be cared for by their birth families.⁸ To this day, that priority is reflected in the Children’s Bureau’s goals, which include “[r]educ[ing] placements of

⁵ Mangold, *supra* note 2, at 1302; Myers, *supra* note 2, at 452.

⁶ See Myers, *supra* note 2, at 452–54.

⁷ HHS, Children’s Bureau, Nat’l Foster Care Month 2020, <https://www.childwelfare.gov/fostercaremonth/about/history/#top> (last visited Aug. 18, 2020).

⁸ *Id.*

young children in group homes or institutions”⁹
The federal government has supported the shift to family foster care financially through aid and grant programs, as well as amendments to the Social Security Act.¹⁰

Today, most foster care systems share a common work flow. A state or local child welfare agency takes custody of an abused or neglected child through the juvenile or family court system. The child’s needs are assessed, and the agency considers whether there is a relative with whom the child can be placed (“kinship” placement). If not, the agency attempts to place the child with a foster family that has been recruited, trained, and certified under guidelines established by the state or local agency. Through this process, the majority of children in the care of state and local welfare agencies (78%) are placed with families—either relatives or foster families.¹¹

But state and local responsibility does not cease upon placement of a child with a foster family. Public agencies administer support payments to

⁹ HHS, Children’s Bureau, Child Welfare Outcomes 2016: Report to Cong.: Exec. Summary, i (Sept. 9, 2019), <https://www.acf.hhs.gov/sites/default/files/cb/cwo2016.pdf>.

¹⁰ See Mangold, *supra* n. 2, at 1306–09.

¹¹ HHS, Children’s Bureau, The AFCARS Report (“AFCARS Report”): Preliminary FY 2018 Estimates as of Aug. 22, 2019, No. 26, 1 <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>.

foster families (using funds that may come in part from the federal government).¹² Active case management ensures the placement is serving the child's needs.¹³ The child remains in the custody of the state or local welfare agency, whether living with a foster family or in a congregate care setting, until a court determines the child can return to their birth family, the birth family's parental rights are terminated and the child becomes eligible for adoption, or the child becomes a legal adult.

Nearly all jurisdictions have now partnered with private organizations to some degree in order to provide the services described above, but states and local governments vary greatly in approach and division of labor.¹⁴ A few examples demonstrate the

¹² For example, California administers several programs providing financial support to foster parents, including some specific to relative caregivers. *See* Ca. Dep't of Social Servs., Caregiver Advoc. Network, Payments, <https://www.cdss.ca.gov/inforesources/caregiver-advocacy-network/payments> (last visited Aug. 18, 2020).

¹³ The Children's Bureau describes case management as requiring "frequent, planned contact with the family to assess progress toward goals. Caseworkers communicate and plan with multiple service systems to ensure provision of appropriate services and assess service effectiveness." HHS, Children's Bureau, Fam. Centered Case Plan. & Case Mgmt., <https://www.childwelfare.gov/topics/famcentered/caseworkpractice/caseplanningmgmt/> (last visited Aug. 18, 2020).

¹⁴ HHS, Admin. for Child. & Fams., Info. Mem.: Strengthening Tech. Support for Recruitment, Approval, (continued...)

different ways states and local governments have structured their child welfare systems:

In some states, including Alaska and Hawaii, the entire process remains the province of state employees, from recruitment of foster families to the placement of children with those families.¹⁵

In other states, the responsibilities of recruiting foster families and placing children in foster homes are divided between public and private agencies pursuant to contracts between them—although the contracted tasks vary. For example, New Mexico’s Children, Youth, and Families Department itself certifies families.¹⁶ In Colorado, foster homes can be certified by either county departments or private agencies.¹⁷

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& Retention of Foster Homes, 6 (Feb. 10, 2020),
<https://www.acf.hhs.gov/sites/default/files/cb/im2003.pdf>.

¹⁵ Staff of S. Comm. on Fin., 115th Cong., An Examination of Foster Care in the United States and the Use of Privatization, 47–48, 79–80 (Comm. Print 2017), <https://www.govinfo.gov/content/pkg/CPRT-115SPRT26354/pdf/CPRT-115SPRT26354.pdf>; *see also id.* at 11 (“[O]f the 33 States that responded [to the request for information], 31 use private agencies to provide services to children in foster care and 16 of these States contract with for-profit and non-profit providers.”).

¹⁶ *Id.* at 140.

¹⁷ *Id.* at 64.

At the other end of the spectrum, Florida and Kansas have privatized most of their child welfare services, placing almost all responsibility for recruitment and oversight of foster families, and the placement of children, into the hands of private agencies.¹⁸

In all jurisdictions, however, public child welfare organizations (either state or county) maintain ultimate responsibility and authority over the care of each child in the foster system.¹⁹

While some jurisdictions (like Philadelphia) contract with many private agencies, some do not or cannot, often with significant consequences for prospective foster parents and children. For example, in South Carolina, counties recruit foster parents and place children, but a few private agencies provide overflow foster services. Thus, as one Jewish woman reported, when a county found itself too backlogged to work with her, it referred her to a private agency—but that agency would only serve Protestant Christians, even though the agency

¹⁸ HHS, Off. of the Assistant Sec’y for Plan. & Evaluation, *Evolving Roles of Pub. & Priv. Agencies in Privatized Child Welfare Sys.* 3 (Mar. 1, 2008), <https://aspe.hhs.gov/system/files/pdf/75336/report.pdf>.

¹⁹ Natalie Goodnow, *Backgrounder: The Role of Faith-Based Agencies in Child Welfare*, The Heritage Found., 2 (May 22, 2018), <https://www.heritage.org/sites/default/files/2018-05/BG3320.pdf>.

had “an orphanage full of school-age boys” awaiting foster homes.²⁰ And for several years, that agency was the only option in the applicant’s county (as well as 10 others), thus frustrating her effort to foster a child in desperate need of a home.²¹

Around the country, the inclusion of all qualified families in the foster pool remains paramount, not only to secure temporary placement, but also to give children the opportunity to find their forever families, since over half of the children adopted out of foster care are adopted by their foster parents.²²

B. FOSTER CARE IN PHILADELPHIA.

In Philadelphia, when at-risk children cannot remain in their homes, the City is responsible for finding a foster placement.²³ To assist in finding placements, the City contracts with state-licensed

²⁰ Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, Jewish Telegraphic Agency (Feb. 5, 2019), <https://www.jta.org/2019/02/05/opinion/i-was-barrred-from-becoming-a-foster-parent-because-i-am-jewish>.

²¹ *Id.*

²² The AFCARS Report, *supra* n.11.

²³ ECF No. 20-1 ¶ 8 (Decl. of Kimberly Ali) (“State law requires county children and youth agencies like DHS to develop a plan for the provision of protective services for children, and to provide or purchase those services, including the provision of foster care services for children placed in its care.”).

foster agencies.²⁴ Those agencies, in turn, are responsible for recruiting, training, and certifying prospective foster parents.²⁵

Pennsylvania law sets the criteria under which agencies certify prospective foster parents.²⁶ If a foster family meets these criteria, the agency must certify them.²⁷

After the City determines that placing a child in a foster home is appropriate and assesses the child's needs, the City sends a referral to those agencies with whom it has contracted that can provide the requisite level of care (*e.g.*, for a medically compromised child, agencies that work with families able to meet such needs).²⁸ An agency working with certified foster parents able to meet the child's needs relays that information to Department of Human Service's Central Referral Unit ("CRU"), which must evaluate and approve the proposed placement.²⁹ If there are multiple potential foster homes available,

²⁴ ECF No. 20-6 ¶ 7 (Decl. of Cynthia F. Figueroa). The licensing process is not at issue here.

²⁵ *Id.* ¶ 13; ECF No. 20-1 ¶ 13.

²⁶ ECF No. 20-1 ¶ 13.

²⁷ *Id.* ¶ 16.

²⁸ *Id.* ¶ 25–26.

²⁹ *Id.* ¶ 26.

CRU chooses which one meets the child's best interest.³⁰

In addition to contracting out certification services, the City also contracts with private agencies for case management and the operation of group homes. Indeed, the City continues to contract with CSS to provide both of these services.

C. ALL CHILDREN NEED SAFE AND SUPPORTIVE FOSTER FAMILIES, AND THE NEED IS PARTICULARLY ACUTE FOR LGBTQ YOUTH.

The need for safe, nurturing, and supportive foster families prepared to accept and nurture children of all ages and races, and with different physical and emotional needs, continues to grow. The number of children in the foster care system increased by 11 percent between fiscal year 2012 and fiscal 2017.³¹

LGBTQ children are disproportionately represented in the foster care system. Between

³⁰ *Id.*

³¹ HHS, Children's Bureau, Trends in Foster Care and Adoption: FY 2009 – FY 2018, 2 https://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption_09thru18.pdf (last visited Aug. 18, 2020); HHS, Children's Bureau, Child Welfare Outcomes 2016: Report to Cong.: Exec. Summary, i (Sept. 9, 2019), <https://www.acf.hhs.gov/sites/default/files/cb/cwo2016.pdf> (discussing similar data from 2012 to 2016).

approximately 19% and 34% of youth in the foster care system are LGBTQ, and (like their peers in the system) those children are disproportionately racial and ethnic minorities.³² A recent study of youth in foster care in New York City found that LGBTQ youth are more likely to be placed in group homes and institutions, and less likely to be placed with foster families, than non-LGBTQ youth.³³ Transgender and gender non-conforming youth suffer disproportionately in congregate care settings, where they often face adversity related to their sexual orientation or gender presentation.³⁴

³² B.D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Inst., UCLA Sch. of Law, 6 (2014) (“Disproportionality & Disparities”), https://www.acf.hhs.gov/sites/default/files/cb/pii_rise_lafys_report.pdf; T.G.M. Sandfort, *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care in New York City*, New York City Admin. for Children’s Servs. (forthcoming Sept. 2020).

³³ T.G.M. Sandfort, *supra* n.32.

³⁴ Christina Wilson Remlin et al., *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender Expansive Youth in Out-of-Home Care*, Lambda Legal, 20 (Apr. 2017) (“Placements and provision of services that are inconsistent with a youth’s gender identity can be particularly harmful for that youth, as they can contribute to gender dysphoria, exacerbate other mental health conditions and further complicate an already difficult period of adolescent development.”),

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LGBTQ youth are also particularly likely to experience homelessness—all too often as a result of unsuccessful foster placements. For example, “[i]n New York City, 78% of homeless LGBTQ+ youth were removed or ran away from foster homes because of abuse or discrimination.”³⁵ LGBTQ youth who become homeless rather than remaining in unsafe or non-affirming birth families, foster families, or congregate care placements are over *seven times* more likely than their non-LGBTQ homeless peers to experience sexual violence, over twice as likely to attempt suicide,³⁶ and have twice the rate of early death.³⁷ Thus, placing LGBTQ youth in safe and affirming foster homes is critical, as the wrong placement can have a significant negative impact on these children’s long-term health and well-being. LGBTQ foster parents can be especially supportive and successful placements for youth who have already faced rejection because of their sexual orientation or gender identity.

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https://www.lambdalegal.org/sites/default/files/publications/downloads/tgnc-policy-report_2017_final-web_05-02-17.pdf.

³⁵ *Id.* at 3.

³⁶ *Id.* at 3 (citing Nat’l All. to End Homelessness, (2009)).

³⁷ M. H. Morton, G. M. Samuels, A. Dworsky, & S. Patel, *Missed opportunities: LGBTQ youth homelessness in America*, Chapin Hall at the Univ. of Chicago, 8 (2018), <https://voicesofyouthcount.org/wp-content/uploads/2018/05/VoYC-LGBTQ-Brief-Chapin-Hall-2018.pdf>.

Ensuring that the foster family pool includes LGBTQ parents helps ensure a diversity of options for older children whose preferences are given consideration in making placements. In 2014, the Preventing Sex Trafficking and Strengthening Families Act gave children 14 and older the right to participate in developing their own foster care plans.³⁸ And for older youth with a permanency plan (an assessment and preparation plan for the child's long-term care with their birth family, kin, or a foster or adoptive family), the court must ask the child about their desired outcome at each court hearing.³⁹

Since over half of children adopted out of foster care are adopted by their foster families, considering a child's preference regarding placement (and then adoption, as required in nearly every State) is paramount. A sound foster placement may lead to a permanent loving family, while an unsuccessful placement could well deny the child that opportunity—and lead to homelessness, interaction with the juvenile justice system, and other negative outcomes.⁴⁰ In so many important ways, the certification and placement decisions made by foster

³⁸ 42 U.S.C. § 675a; Pub. Law 113–183, § 113
<https://www.congress.gov/113/plaws/publ183/PLAW-113publ183.pdf>.

³⁹ 42 U.S.C. § 675(5)(C).

⁴⁰ Disproportionality & Disparities, *supra* note 32, at 37–38.

agencies, public and private, dramatically affect the trajectories of these young lives.

D. LGBTQ COUPLES HELP MEET THE HIGH DEMAND FOR FOSTER HOMES, INCLUDING FOR HARDER-TO-PLACE YOUTH.

Notwithstanding the importance of foster care in meeting the needs of youth under government care, and the importance of foster care as a step toward adoption, recruiting and retaining foster families remains difficult. One study found that, between 2011 and 2015, the median length of service for a foster family was just under one year, and only 25% of foster homes were open for more than two years.⁴¹

For years, public foster care agencies have seen LGBTQ families as an underutilized resource. A 2014-16 survey indicated that a significant percentage of same-sex couples were raising children, and found that same sex couples heading households with children were raising adopted or foster children at over seven times the rate of heterosexual couples raising children.⁴² Studies have

⁴¹ Fred Wulczyn et al., *The Dynamics of Foster Home Recruitment and Retention*, The Ctr. for State Child Welfare Data, 9 (Sept. 2018), https://fcda.chapinhall.org/wp-content/uploads/2018/10/Foster-Home-Report-Final_FCDA_October2018.pdf.

⁴² Shoshana K. Golberg & Kerith J. Conron, How Many Same-Sex Couples in the US are Raising Children?, The
(continued...)

consistently shown their capacity to provide good environments, and that gender and sexual orientation have no bearing on their capacity to be excellent parents⁴³—a fact that Petitioners do not contest.⁴⁴

Unsurprisingly, LGBTQ parents also can be particularly receptive to the needs of LGBTQ youth, and may be willing to care for LGBTQ children for whom other potential foster parents are reluctant to

(continued...)

Williams Institute, UCLA Sch. of Law (July 2018), <https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/> (last visited Aug. 18, 2020).

⁴³ *E.g.*, Nat'l Res. Ctr. for Permanency & Fam. Connections, LGBTQ Prospective Foster & Adoptive Fams.: The Homestudy Assessment Process, 1 (Oct. 2012), <https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/83646.pdf?w=+NATIVE%28%27recno%3D83646%27%29&upp=0&rpp=10&r=1&m=1>; *see also* HHS, Children's Bureau, Working with Lesbian, Gay, Bisexual, Transgender, and Question (LGBTQ) Families in Foster Care and Adoption, Child Welfare Information Gateway, 2 (Sept. 2016) ("Working with LGBTQ Families"), https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf (collecting studies).

⁴⁴ Notably, CSS does not assert that same-sex couples are not capable of providing loving, stable homes. Rather, it declines to certify same-sex couples because CSS objects to recognizing the legitimacy of same-sex marriages, which it sees as part of the certification process.

care. LGBTQ parents are also particularly interested in adopting children out of foster care.⁴⁵

In some scenarios, placement with an LGBTQ family may be vital to ensuring that a child has a stable, safe, and affirming home—and thereby dramatically improving the child’s long-term outcome by lessening the chance that they will experience homelessness, or go through multiple placements. Indeed, older youth struggling with their identity may express a preference for placement in an LGBTQ family, and as previously discussed, have the right to have their preferences addressed. In other instances, there may be a kinship relationship between the child and a prospective LGBTQ foster parent, making that prospective foster parent’s ability to participate in the system critical to reunifying the child with family members. And sometimes, non-discrimination requirements may be necessary simply to keep families together. For example, in Michigan, a Catholic foster care organization refused to place a child with the child’s siblings because they were in the care of a same sex couple.⁴⁶

⁴⁵ Working with LGBTQ Families, *supra* n.44, at 4 (detailing advantages of including LGBTQ families as potential foster parents).

⁴⁶ *Catholic Charities West Mich. v. Mich. Dep’t of Health and Human Services*, 2:19-cv-011661, ECF No. 23-4, at 2–11 (E.D. Mich. July 24, 2019).

Perhaps most importantly, *amici* have learned first-hand through their work in the foster care system that LGBTQ parents can provide safe and supportive homes for all types of children, not just LGBTQ or questioning youth. LGBTQ families are notably open to providing homes for children who are difficult to place, whether due to age, behavioral issues, or LGBTQ identity, as well as sibling groups. And LGBTQ families are an excellent resource for other families fostering children who may be questioning or struggling with their sexual orientation. Thus, inclusion of LGBTQ families in the community of certified foster families has profound benefits that go well beyond simply expanding the foster family pool numerically.

Accordingly, like other states and localities struggling to serve children in their care, the City has a strong interest in ensuring that LGBTQ families are not turned away at the door by *any* private organization the City works with, in order to ensure that all children in their care have the opportunity to be placed with a safe and affirming family that can meet their needs.

ARGUMENT

The City of Philadelphia, like many other localities, contracts with private agencies to assist with finding foster placements for children in its care. Among the tasks the City contracts for is certifying potential foster parents. The City requires prospective contractors to agree to provide such certification in a non-discriminatory manner.

The contractual requirement not to discriminate against same-sex couples in the certification process is consistent with many of the best practices identified by *amici*, the federal government, and other authorities on the provision of foster care. Discrimination against same-sex couples at the certification stage of the process undercuts the ability of such couples to provide much-needed foster care, and thus undermines the best interests of children in the foster care system by, among other things, limiting at least some children's opportunities to be placed with a family that can meet their needs.

But whether or not a particular local government chooses to require the agencies with which it contracts not to discriminate, the critical point from a child welfare perspective is that local governments need flexibility and deference in their efforts to meet the needs of children in their care by structuring their relationships with private foster agencies based on local laws, circumstances, and values. This Court should be wary of intruding on those critical efforts.

This is not, in any event, a good case for such intrusion. The issue presented is narrow legally and factually. Legally, the question is simply whether a City *may*, in contracting with an organization to assist it in fulfilling its duties to care for children in its charge, require that the organization not discriminate, notwithstanding religious objections. The question here is *not* whether the Constitution of its own force *requires* religious organizations that provide such services in partnership with local governments to forswear discrimination in the

provision of such services, or for local governments to require that they do. A full airing of those questions would likely require, among other things, detailed consideration of how the local government is fulfilling its own non-discrimination duties, and the private resources available to assist it in doing so.

The issue here is also narrow factually. It involves only the certification of potential foster families to serve children in the City's custody, not some general regulatory regime.⁴⁷ The Court must decide only whether a would-be contractor is *entitled* to a government contract to provide assistance to the City, even though it has made clear that it will not perform the contract by its terms, citing religious beliefs.

As explained below, the Free Exercise Clause may properly be invoked to ensure that a religious organization receives equal treatment in the award of a government contract. But it does not require preferential treatment. It provides no religion-based right to tailor the terms of a public contract to suit its religious needs. For local governments to serve the best interests of the children in their foster care systems, they must have the flexibility to determine how, and with what requirements, to contract with private foster agencies.

⁴⁷ This case does not address, for example, voluntary private adoption. The City does not play any role in that process.

**I. LOCAL GOVERNMENTS MAY REQUIRE
THEIR CONTRACTORS NOT TO
DISCRIMINATE WHEN PROVIDING
FOSTER CARE SERVICES.**

This Court's earliest Free Exercise decision, *Reynolds v. United States*, 98 U.S. 145 (1878), set forth the principle that the Free Exercise clause bars the government from interfering with a religious practitioner's beliefs, but allows it to regulate conduct based on those beliefs. This Court has also held that, so long as a regulation is neutral and generally applicable, that is, imposed across the board on religious and non-religious persons and organizations alike, it is not barred by the Free Exercise Clause. *Emp. Div. v. Smith*, 494 U.S. 872 (1990). Whether *Smith's* formulation of basic principles should be retained, or whether this Court should instead adopt a rule under which conduct justified as part of a religious observance is deemed *constitutionally* exempt from generally applicable laws—similar to the special dispensations statutorily provided by the Religious Freedom Restoration Act—occupies much of the briefing of petitioners and their *amici*.

But this case does not present that issue because it involves no effort to regulate or restrict private, primary conduct. Rather, it involves a religiously-affiliated private contractor's eligibility for, and performance of, a specific local government function—certification of qualified families to provide foster care—under a government contract. No one has heretofore argued that the Free Exercise Clause requires governments to confer on religious organizations, in seeking and performing under a

contract, rights that non-religious organizations would not enjoy. Indeed, to hold that the Free Exercise Clause *requires* (as opposed to allows) the government to award a contract to religious organizations on terms more favorable than available to non-religious organizations, would eviscerate the balance struck by the Religion Clauses—and have far-reaching implications for the ability of local governments to contract in accordance with local laws, goals, and values. For example, a local government that seeks to contract for the provision of food services to schools, and views meat as part of a healthy diet, cannot be under a *constitutional obligation* to contract with an organization unwilling, on religious grounds, to provide meat.

This Court’s decision in *Trinity Lutheran v. Comer*, 137 S.Ct. 2012 (2017), makes clear that the Free Exercise Clause embodies a narrower rule. In connection with dispensing government benefits (and contracts), the Free Exercise Clause may be invoked to ensure equality of treatment, not preferential treatment. In *Trinity Lutheran*, this Court held that disqualifying otherwise eligible recipients from a public benefit (grants for resurfacing playgrounds) “solely because of their religious character ... imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” *Id.* at 2021. The playground at issue was open to the public and available for the same uses as those operated by secular entities. Therefore, the disqualification of the religious institution violated the Free Exercise Clause because that Clause protects against “laws that impose special

disabilities on the basis of religious status.” *Id.* (internal quotation and alterations omitted).

The Court employed the same framework for analysis in *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246 (2020), holding that the application of state law to prohibit families who received state private school scholarships from using them to attend religious schools violated the Free Exercise Clause. The Court explained that the Free Exercise Clause “protects religious observers against unequal treatment’ and against ‘laws that impose special disabilities on the basis of religious status.” *Id.* at 2254 (quoting *Trinity Lutheran*, 137 S.Ct. at 2021). The Court then applied that principle to conclude that denying generally available state scholarship benefits “solely because of the religious character of the school” at which a student intended to use them was “discrimination against religious schools and the families” seeking to attend them that violated the Free Exercise Clause. *Espinoza*, 140 S.Ct. at 2255, 2262.

There is no such discrimination at issue here. The contractual requirement here is imposed on all organizations that certify families under contract with the City, whether secular or religious. CSS has been denied that contract because it has declined to perform by its terms, not “because of [the organization’s] religious character.” *Id.* at 2255. Meanwhile, the City continues to contract with CSS to provide congregate care and case management services for youth in foster care—to the tune of \$17 million annually—without regard to its religious affiliation or its beliefs. Pet. App. 16a, 187a; JA 208-09. And even the particular *conduct* that is

contractually barred and at issue here—discrimination against same-sex couples—is not uniquely associated with religion. Discrimination against same-sex couples may be based on cultural norms or personal beliefs that have nothing to do with religion; indeed, many religions are accepting of same-sex relationships and marriages.

The controlling principles in *Trinity Lutheran* and *Espinoza* apply with even greater force here, given that this is not a case about the provision of a government benefit to all comers, but the entry into a contract to provide specific government services. See *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (“[H]ere the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”). No entity—religious or secular—has a right to be awarded a contract, or to dictate its terms. It would make no sense to award a public contract, through which a government entity seeks to perform an important public function concerning the care of children, to an entity that will not do what the contract requires. Yet Petitioners essentially ask this Court to hold that Philadelphia is *constitutionally required* to do precisely that.

Lyng v. N.w. Indian Cemetery Protective Ass’n., 485 U.S. 439, 439 (1988), is instructive on this point. There, this Court rejected a Free Exercise claim arising from the government’s construction of a road that traversed a site sacred to several Native American tribes. The Court reiterated that the Free Exercise Clause protects only against government action that “penalize[s] religious activity by denying any person an equal share of the rights, benefits,

and privileges enjoyed by other citizens.” *Id.* at 449. The Court so held even after acknowledging that the construction “would interfere significantly with private persons’ ability to pursue spiritual fulfillment according to their own religious beliefs.” *Id.* It explained:

[T]he Free Exercise Clause 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. ... A broad range of government activities ... will always be considered essential to the spiritual well-being of some citizens Others will find the very same activities deeply offensive, and perhaps incompatible with ... the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.

Id. at 451-52 (internal quotation omitted); *see also Bowen v. Roy*, 476 U.S. 693, 699 (1986) (“[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”).

These principles control. The City is not regulating CSS’s activities, religious or otherwise. While the City’s contractual requirement to certify all qualified families (*i.e.*, families found to be physically, emotionally, and otherwise able and willing to safely house and care for foster children) may be at odds with CSS’s religious beliefs, it

remains up to CSS whether to contract with the City to provide these services. A *bona fide* contract requirement that applies across the board to all contractors, does not “penalize” CSS, or deny it “rights, benefits, and privileges enjoyed by other citizens.” *Lyng*, 485 U.S. at 449.⁴⁸

In sum, the Free Exercise Clause cannot be stretched to *require* local governments to grant contracts to organizations that decline to perform those contracts by their terms, whether citing religious objections or not. That basic limitation on the reach of the Free Exercise Clause should be even more clear where the contract at issue involves the delegation of a critical and special governmental responsibility: the care of vulnerable children in the City’s custody. And finally, the Free Exercise Clause should not be construed to *require* a City to grant contractual exemptions from non-discrimination requirements that would (as noted below) apply to the City itself if it chose to perform the contracted task directly.

⁴⁸ Petitioner’s Free Speech claim fails for the same reason: The City is not compelling anyone to say anything, but offering to contract on certain terms. *See Rust*, 500 U.S. at 198-99 (“The same principles apply to petitioners’ claim that the regulations abridge [their] free speech rights The employees’ freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment ... the scope of which is permissibly restricted by the funding authority.”).

II. THE CITY'S NON-DISCRIMINATION REQUIREMENT DOES NOT PENALIZE RELIGIOUS AGENCIES OR REFLECT HOSTILITY TOWARD RELIGION.

Amici agree that even a *facially* neutral contract requirement could violate the Free Exercise Clause if it simply masked an intent to discriminate against religious organizations or practices, or embodied hostility to religion. However, nothing about the City's policy or actions here suggests such hostility. Rather, the City's non-discrimination requirement serves important government interests, does not target a religious practice, and has been implemented in a neutral way, applying equally to secular and religious foster agencies.

A. The City's Non-Discrimination Requirement Serves Important Local Government Interests.

Philadelphia's prohibition of discrimination against same-sex couples in the foster family certification process serves three important government objectives, each belying the notion that its provenance is an intent to disadvantage religious organizations.

First, the elimination of discrimination on the part of those acting on the City's behalf is, in itself, an important governmental objective—particularly given that the City itself is constitutionally prohibited from engaging in such discrimination. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2607-08 (2015). Where the City has enlisted private organizations to perform important governmental functions, it may

properly seek to ensure that those organizations assume the same responsibilities the City would have if it performed the task. The City's inclusion of contract language to that end cannot reasonably be viewed as reflecting a desire to penalize religious organizations, or hostility toward their beliefs.

Second, less abstractly, it does not require a social sciences degree to understand that allowing discrimination against a particular social group has negative practical and psychological effects on members of that social group. The City can justifiably believe that same sex couples ought not suffer the indignity of discrimination when they seek to participate in the City's foster care system, and take steps to prevent that indignity from occurring. Perhaps even more importantly, the City can properly be sensitive to the needs for support and affirmation required by LGBTQ children in its care, whose needs would not be well-served if the City itself allowed discrimination against LGBTQ adults as part of the child welfare system that those children have been thrust into. The City's non-discrimination requirement sends them an important message of respect and inclusion.

Third, the prohibition against discrimination in the City's contracts serves other important practical objectives as well. The City must maintain a large and diverse pool of certified families with whom it can place children with different needs and backgrounds. Many same-sex couples are eager to provide foster care and adopt foster children, and their participation in the system meets the needs of the population being served—which includes

disproportionate numbers of LGBTQ youth. Moreover, in some situations, placement with a same-sex couple will best serve the child's interest. To choose easy examples, there may be a potential kinship placement available with a same-sex couple. Or, LGBTQ children may affirmatively request a same-sex placement. Those placements should be available.

Conversely, the anti-discrimination requirement suggests no latent hostility toward religious practices.⁴⁹ A desire not to recognize the marriage of same sex couples may have a religious foundation for some people, but it might also be grounded in cultural prejudices or even individual distaste. *See Obergefell*, 135 S.Ct. at 2602. The contractual restriction at issue cannot be said to have been targeted at a uniquely religious practice or issue.

B. The City Has Made No Comparable Exceptions to its Requirement That Foster Agencies Certify All Qualified Families.

Even if a contract requirement is, on its face, neutral, its uneven application might provide evidence of hostility to religion. Thus, evidence of

⁴⁹ Were a local government to prohibit, say, the taking of wine with wafers in a group setting, that type of restriction, though phrased in a generally applicable way, would obviously have a religion-specific aim. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561 (1993) (Souter, J., concurring).

hostility to religion might be found if the City denied CSS an exemption from the requirement to certify same sex couples, but granted exemptions to other organizations for other, non-religious, reasons. That has not happened here.⁵⁰

Similarly, it might be possible to draw an inference of hostility if secular exemptions were granted in comparable (albeit not identical) settings, but denied to CSS here. And, indeed, Petitioners suggest that the City recognizes exceptions to its general non-discrimination rule for other than same-sex married couples. The truth, however, is that it does not. Moreover, to give rise to any such inference of hostility, Petitioners would have to show disparate treatment in comparable settings. They cannot.

There is simply no evidence that the City has granted exceptions to its non-discrimination requirement in comparable circumstances—or any circumstances. These so-called “exceptions” are not, in fact, exceptions to the City’s requirement that no private agency may bar otherwise-qualified families from becoming certified to provide foster care based

⁵⁰ Whether a local government *must* permit its contractor to choose not to comply with state and local non-discrimination requirements is a fundamentally different question from that presented in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367 (2020). There, the Court held that the federal government may (not must) grant a religious exemption for contraceptive care from a generally-applicable mandate to provide reproductive healthcare services.

on sexual orientation (or any other protected characteristics). And in any event, these so-called exceptions are not analogous to CSS's practice of refusing to certify same-sex couples to provide foster care.

The Solicitor General and Petitioners refer to (1) decisions made about which family, from the pool of all certified foster families, a child should be matched with at the *placement* stage of the process, and (2) informational referrals, including about agencies that specialize in placing particular types of children (*e.g.*, children with medical issues).

The first of these sets of "exceptions" focuses on the decision to place a child with a certain family based on protected characteristics, such as race or disability. But the placement stage of the fostering process is fundamentally different from the certification stage; the question then becomes which certified family will best meet the particular needs of each child. For example, children with disabilities or medical conditions are best placed with families equipped, due to training or physical accommodations, to care for special needs children, instead of with families that are not. But that is fundamentally different from declining to *certify* that family to provide foster care *at all*, thereby barring them from providing a home to *any* foster child.

It is also fundamentally different to consider race when *placing a particular child with a family*, in order to serve the best interests of that child by accounting for the child's past experiences and background. Again, no family is turned away or

prevented from becoming foster parents based on race. There is no suggestion in the record that the City can or would allow an agency to certify only families of a particular race.

In some instances it might be similarly optimal to place LGBTQ youth with LGBTQ parents, including where the youth expressly states a preference for placement with a same-sex couple. It is not the view of *amici* that placement of LGBTQ youth with same sex couples is preferred, but in an individual case it may be the best placement. In any event, taking sexual orientation and gender identity into consideration at the *placement* stage of the fostering process is fundamentally different from allowing an agency to decline to certify an entire category of eligible families.

The second set of claimed “exceptions” involves so-called “referrals” between foster agencies. But informing a family that wishes to provide foster care for a medically-needy child that another agency is licensed to train such families is fundamentally different from refusing to certify that family. There is no indication in the record below that Philadelphia permits any of its contracted foster care agencies to *decline* to work with and certify an eligible family if that family chooses to proceed with that agency, even after being informed that other agencies might be better suited to assist. Again, the “exceptions” that the government and Petitioners point to are not, in fact, exceptions to the City’s uniform non-discrimination requirement.

Finally, even if the City had established a process through which exceptions to particular contract requirements could be made, no resulting inference of hostility can be drawn. That the City may be able to find accommodations is a good thing. While the way in which the City exercises such power might later, in practice, reveal some hostility to religion, there is no evidence whatsoever suggesting that has happened here.

III. THE CITY'S COMMUNICATIONS WITH CSS DO NOT DEMONSTRATE HOSTILITY TOWARD RELIGION.

Struggling to find actionable hostility toward religion, Petitioners and the Solicitor General invoke *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018), and point to conversations between Commissioner Cynthia Figueroa, who was responsible for overseeing foster care providers for the City, and CSS personnel. The Commissioner's statements do not show anti-religious hostility.

First, context matters. *Masterpiece Cakeshop* focused on hostility to religious motivations reflected in the actions and statements of ostensibly neutral decision-makers in an adjudicative setting. The Court cited the statements of one adjudicatory official comparing the baker's religious objection to same-sex marriage to "despicable ... rhetoric" justifying slavery or the Holocaust, and found that, combined with the "disparate" consideration of the baker's case as compared to the cases of other bakers that had declined to create cakes bearing anti-gay

messages, those statements supported an inference of hostility. *Id.* at 1729-31.

The context here is quite different, involving a discussion by a City official during a meeting with CSS personnel seeking to resolve the parties' contractual dispute. But even if one ignores that critical context, the statements by Commissioner Figueroa come nowhere close to the statements at issue in *Masterpiece Cakeshop*. Commissioner Figueroa attempted to persuade CSS to adjust its position. She grounded her argument in a shared respect for Catholic beliefs, pointing to "the teachings of Pope Frances." She also argued that "times have changed" regarding the treatment of disfavored groups. Pet. App. 305-06a. While those arguments were unpersuasive to CSS, they cannot be equated with anti-religious "hostility," and do not suggest that the anti-discrimination provisions in the City's contracts were a product of that hostility.

While Commissioner Figueroa—not the city council—had authority over the City's foster care contracts, the council's statement that "Philadelphia has laws in place to protect its people from discrimination that occurs under the guise of religious freedom" also cannot be equated with the statement in *Masterpiece Cakeshop* that beliefs disfavoring same-sex marriages are "the most despicable pieces of rhetoric that people can use" 138 S.Ct. at 1729. The district court reasonably viewed the council's statement here as "fall[ing] into [a] grey zone" because, while it could be viewed as having a negative implication, it also "could merely state the well-established legal principle that

religious belief will not excuse compliance with general civil rights laws.” Pet. App. 32a.

In short, governmental agencies must be able to communicate, respectfully but freely, with private entities with whom they contract to provide government services—and particularly for sensitive and important services such as caring for vulnerable children. In the absence of any actual disparate treatment, there is assuredly no basis to find any hostility to religion in the statements cited here.

CONCLUSION

The court should affirm the decision below.

Respectfully submitted,

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