

August 20, 2020

ATTORNEY GENERAL RAOUL DEFENDS NONDISCRIMINATION LAWS AND THE RIGHTS OF SAME-SEX COUPLES TO BE FOSTER PARENTS

Chicago — Attorney General Kwame Raoul today joined a coalition of 22 attorneys general in filing a brief with the U.S. Supreme Court in support of the city of Philadelphia’s nondiscrimination law and the right of same-sex couples to be foster parents.

In [the brief](#), filed in *Fulton v. Pennsylvania*, Raoul and the coalition argue that Philadelphia is entitled to require its own publicly-contracted foster care agencies to follow the city’s nondiscrimination law and consider all qualified families seeking to care for children in need, without regard to prospective foster parents’ race, religion, or sexual orientation.

“Vulnerable children in the foster care system deserve as many opportunities as possible to find a loving home,” Raoul said. “I am committed to ensuring that all Americans are protected against discrimination, which includes ensuring all qualified families have the opportunity to welcome a foster child, regardless of what they look like, how they worship, or who they love.”

Raoul and the coalition filed the amicus brief in support of the city and its nondiscrimination policy in a lawsuit brought by a city contractor seeking to be exempt from the policy because of its religious objection to considering same-sex couples as prospective foster care parents. In 2019, the 3rd Circuit unanimously rejected the foster care provider’s arguments that the First Amendment requires granting such exemptions.

The brief argues that the government is entitled to pursue policies that best serve its residents’ needs in providing government-funded services, including policies that prohibit discrimination to provide vulnerable children with as many opportunities as possible to find loving homes. The brief argues that such requirements do not violate private contractors’ rights to free exercise of religion or free speech, because the nondiscrimination requirements apply only to the work such organizations choose to undertake as government contractors, and private organizations remain free to exercise their beliefs and rights to free speech outside the scope of that work.

Raoul and the coalition assert that states share an interest in ensuring that all their residents have equal access to government services, including foster care services provided by government contractors. The brief further states “to ensure the welfare of every child in state custody, we welcome all qualified prospective foster parents who volunteer to open their homes, including LGBTQ individuals and same-sex couples.” According to the brief, nondiscrimination policies like Philadelphia’s are critical to the states in carrying out their obligations to vulnerable children, as they ensure the deepest possible pool of welcoming foster families while preventing the grave harms caused by discrimination against prospective foster families.

Joining Raoul in today’s brief are the attorneys general of California, Connecticut, the District of Columbia, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

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 MASSACHUSETTS,
CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, THE DISTRICT OF COLUMBIA,
HAWAI'I, ILLINOIS, MAINE, MARYLAND,
MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY,
NEW MEXICO, NEW YORK, NORTH CAROLINA,
OREGON, RHODE ISLAND, VERMONT, VIRGINIA,
WASHINGTON, AND WISCONSIN AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTERESTS OF *AMICI CURIAE*

Amici States—Massachusetts, California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, as well as the District of Columbia—share an interest in ensuring that all our residents have equal access to government services, including in the many instances when we contract with private organizations to provide those services. Foster care services, in particular, are among the most critical we provide, caring for and supporting some of our most vulnerable children. To secure the welfare of children in state custody, we welcome all qualified prospective foster parents who volunteer to open their homes, including LGBTQ individuals and same-sex couples. Accordingly, nondiscrimination laws and policies at the state or local level in many of the *Amici* States prohibit rejecting prospective foster parents based on race, religion, sexual orientation, and other factors unrelated to their ability to provide much-needed care for children.

Amici States also, of course, share an interest in protecting our residents’ rights to free exercise of their religious beliefs and to freedom of speech. In our experience, protecting our residents’ rights is entirely compatible with requiring nondiscrimination in the provision of government-contracted services. Such requirements do not regulate private conduct but instead set standards for government contractors when they are providing government-funded services. Although some organizations with religious objections

to same-sex marriage have declined to continue their contracts to provide foster care services in our States, many organizations with religious affiliations have continued, and even those that have declined to perform these particular services continue to make tremendous contributions to our communities, including as government contractors providing other services to youth in foster care. Moreover, all of these organizations remain free to exercise their religious faith in word and deed outside of their voluntary roles as government contractors.

To preserve the ability of state and local governments to ensure our child welfare systems welcome all qualified foster parents and that our contractors not discriminate in the provision of government-funded services, the *Amici* States urge the Court to affirm the decision below declining to require Philadelphia to exempt its own foster care contractor from Philadelphia's nondiscrimination ordinance.

SUMMARY OF THE ARGUMENT

This Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), rested on its longstanding recognition that permitting individuals to excuse themselves from neutral, generally applicable laws because of conflict with religious practices would be "in effect to permit every citizen to become a law unto himself." *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)). Accepting petitioners' position here would go one step further and in effect permit every citizen to become a *government* unto himself: in contracting for the

provision of services to residents, the government would be required to contract with private parties despite their refusal to comply with a neutral, generally applicable requirement prescribing the very services to be performed under the public contract.

No precedent from this Court, whether before or after *Employment Division v. Smith*, countenances such a result. Requiring government contractors to abide by a nondiscrimination policy in the course of performing government-funded services they voluntarily contracted to provide does not contravene the Free Exercise Clause's prohibition on denying a generally available benefit solely because of religious status or belief; the requirement to serve all eligible residents regardless of their race, religion, sexual orientation, or other factors irrelevant to eligibility pertains only to the contracted-for services themselves and does not exclude any contractors from bidding for the contract if they wish. Nor does such a requirement amount to an unconstitutional condition or compelled speech. Rather, the government is entitled to spend its funds and pursue its own legitimate policies to serve residents' needs, and private entities are not entitled to government subsidization of the exercise of their religious beliefs or right to free speech within the scope of government-funded work they choose to undertake. Any ruling to the contrary would untenably tie the government's hands in ordering its own operations in our religiously diverse society.

Permitting state and local governments to enforce nondiscrimination policies is particularly important to the States in carrying out our obligations to the vulnerable children in our care. Our state and local

governments frequently rely on contracts with knowledgeable, community-based providers to deliver crucial foster care and other services to these children. Nondiscrimination requirements best serve these children by ensuring the deepest possible pool of welcoming foster families and precluding harms to children caused when prospective foster placements are rejected for reasons unrelated to the child's needs, while also preventing the dignitary and social harms caused by discrimination against prospective foster parents. And our experience shows that nondiscrimination requirements are fully consistent with maintaining sufficient private organizations with the expertise to provide foster care services. Most such organizations—religious and otherwise—readily comply with nondiscrimination requirements in foster care contracts, and our state and local governments continue to contract with diverse religious organizations to provide services of many kinds to children and other vulnerable residents.

ARGUMENT

I. The First Amendment Does Not Require Governments to Use Contractors Who Refuse to Provide the Contracted Services on a Nondiscriminatory Basis.

Petitioners have attempted to frame this case as a vehicle for overruling *Employment Division v. Smith* in favor of applying strict scrutiny to all neutral, generally applicable laws whenever they come into conflict with a person's religious beliefs. *See* Pet. Br. 37-52. But this case does not concern a government's use of its police power to regulate private conduct, as

was at issue in *Smith* and in so many of this Court's Free Exercise Clause precedents, *see Smith*, 494 U.S. at 876-82. Rather, it concerns a government contract to provide federally- and state-mandated services in exchange for taxpayer funds. Petitioners seek to compel Philadelphia to enter into a contract to provide foster care services despite the organization's unwillingness to comply with a nondiscrimination requirement applicable to all foster care contractors in performing their contracts and providing the contracted services. The First Amendment does not tie the government's hands in this way.

The States and our local governments are “vested with the responsibility of protecting the health, safety, and welfare of [our] citizens.” *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). In carrying out this responsibility, we rely extensively on contracts with private for-profit and non-profit organizations to provide a variety of important governmental benefits and services to our constituents. From garbage collection and road construction to sheltering the homeless and COVID-19 contact tracing, these contracts can concern nearly every aspect of state and local government services.¹ And contracts with

¹ *See, e.g.*, United States of Care, *State of COVID-19 Contact Tracing in the U.S.*, at 3 (May 8, 2020), <https://tinyurl.com/y3on954c> (describing States' contracting with non-profit and for-profit entities to rapidly scale up their contact tracing efforts). Municipalities report that, on average, 30% of governmental services are delivered through non-profit or for-profit organizations. *See* International City/County Management Association, *2017 Alternative Service Delivery*

community-based organizations, including those with religious affiliations, play a particularly important role in the States' provision of human services to our residents. Indeed, in many of our States, a substantial portion or even the majority of the dollars spent by government social service agencies responsible for areas like child welfare, developmental services, and mental health services are paid to contracted private service providers.² Nationally, more than 80% of states contract out foster care recruitment, residential treatment, and family preservation services in at least some of their counties.³

Survey: Summary of Survey Results 10-13 (June 2019), <https://tinyurl.com/y367674f>; Mildred E. Warner & Austin Aldag, *Results of ICMA's 2017 Alternative Service Delivery Survey*, 2018 ICMA Annual Conference, at 3 (Sept. 2018), <https://tinyurl.com/y4g7opgk>.

² See, e.g., Mass. Comptroller's Office, CTHRU Spending: Executive Office of Health & Human Services Broken Down by Object Class Within Department of Developmental Services, <https://tinyurl.com/yy4a74h5> (data as of Aug. 18, 2020) (showing that \$1.77 billion or 81% of Massachusetts's Department of Developmental Services' spending went to contracted service providers in 2020 fiscal year); Mass. Comptroller's Office, CTHRU Spending: Executive Office of Health & Human Services Broken Down by Object Class Within Department of Children and Families, <https://tinyurl.com/y2yc9yz5> (data as of Aug. 18, 2020) (same for 58% of Department of Children and Families' spending); Mass. Comptroller's Office, CTHRU Spending: Executive Office of Health & Human Services Broken Down by Object Class Within Department of Mental Health, <https://tinyurl.com/y27t4bah> (data as of Aug. 18, 2020) (same for 66% of Department of Mental Health's spending).

³ U.S. Dep't of Health & Human Services, *National Survey of Child and Adolescent Well-Being State Child Welfare Agency*

Not one of this Court’s Free Exercise Clause precedents, whether before or after *Smith*, holds or even suggests that, in entering such contracts to provide government-funded services, the government is precluded from imposing and enforcing neutral, generally applicable contract requirements—let alone a requirement simply that the contracted-for services be provided to all eligible residents regardless of factors such as race, religion, or sexual orientation. Such requirements do not transgress the Constitution’s prohibition on “denying a generally available benefit solely on account of religious identity,” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017), because they do not exclude potential government contractors based on their status as a religious organization or because of their faith. Unlike laws denying a benefit “based on religious status,” *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2257 (2020), such nondiscrimination requirements permit any qualified entity, regardless of religious status or beliefs, to contract to provide the particular government-funded services if wishing to do so. Rather than prescribing *who* may perform the contracted-for government services, these requirements simply declare *what* services must be performed.

The Court’s precedents governing employees’ and contractors’ free speech rights confirm the

Survey: Report 18 (2001), <https://tinyurl.com/y475xc9b>. More recent data suggest that the rate of contracting for child welfare services has increased since this national survey. See Rebecca Wells et al., *Trends in Local Public Child Welfare Agencies 1999–2009*, 38 *Child. & Youth Servs. Rev.* 93, 96 (2014) (finding contracting rates increased from 1999-2009).

government's authority to direct the activities of its contractors in the course of providing contracted services. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

The same need exists for government control of its contractors. *See Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 677-78 (1996) (adopting "framework for government employee [speech] cases" for those involving "independent contractors"); *see also NASA v. Nelson*, 562 U.S. 134, 150 (2011) (rejecting contractors' argument that "because they are contract employees and not civil servants, the Government's broad authority in managing its affairs should apply with diminished force" in case challenging background checks on privacy grounds, because "the Government's interest as 'proprietor' in managing its operations does not turn on such formalities" (citation omitted)). Requirements for government contractors' speech in carrying out the public contract "do[] not infringe any liberties the [contractor] might have enjoyed as a private citizen" and "simply reflect[] the exercise of . . . control over what the [government] itself has commissioned or created." *Garcetti*, 547 U.S. at 421-22 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). Outside of their contracted duties, government contractors, like government employees, may, of course, speak about their beliefs and views on issues of public concern. *See id.* at 422. But this protection "does not invest them

with a right to perform their jobs however they see fit.”
Id.

In other constitutional contexts as well, the Court has recognized the necessity of distinguishing between the States as regulators of private conduct and the States acting in their proprietary capacity. In applying the Equal Protection Clause, for example, this Court has “long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operation.’” *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 598 (2008) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)) (rejecting the existence of “class-of-one” equal protection claims in public employment); *see also, e.g., Cafeteria & Restaurant Workers*, 367 U.S. at 895-97 (recognizing only limited procedural due process rights where “the governmental function operating here was not the power to regulate or license . . . but, rather, as proprietor, to manage the internal operation of an important federal military establishment”); *United Haulers*, 550 U.S. at 331-32 (recognizing in the dormant Commerce Clause context that “[c]ompelling reasons” require treating state and local laws “differently” when they concern the operation of government services themselves, as opposed to simply favoring in-state private businesses). These precedents stem from due regard for “the nature of the government’s mission”: “Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible.” *Engquist*, 553 U.S. at 598

(quoting *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality opinion)). So too here, where Philadelphia, like jurisdictions across the country, hires government contractors to “achiev[e] its goals as effectively and efficiently as possible.” *Waters*, 511 U.S. at 675.

Even in the context of general government spending that is not directly in service of the government’s own operations, the Court has recognized that the States and federal government are entitled to “insist[] that public funds be spent for the purposes for which they were authorized” and may limit grantees’ use of public funds to subsidize speech on particular subjects, while “leav[ing] the grantee unfettered in its other activities.” *Rust v. Sullivan*, 500 U.S. 173, 196 (1991). Such insistence does not impose an unconstitutional condition, the Court has explained, because the “unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” *Id.* at 197.

The same distinction applies here. Philadelphia is entitled to determine the parameters of the very services that it contracts out, reflecting its own judgment regarding how best to meet its residents’ needs, and the City has chosen to require that its contractors not discriminate on the basis of factors such as religion, race, or sexual orientation in providing the contracted-for services. But private parties who choose to contract to deliver those services

remain free to express their views regarding same-sex marriage or any other topic outside of the scope of their work as government contractors. *See Rust*, 500 U.S. at 199 n.5 (noting that funding recipient was “in no way compelled to operate a Title X project; to avoid the force of the regulations, it [could] simply decline the subsidy”).

For similar reasons, adherence to such a nondiscrimination requirement does not amount to compelled speech. Philadelphia is not dictating what religious organizations can or cannot say; rather, it is simply requiring that, if an organization chooses to bid for a foster-care contract, it must offer services equally to all. Governments may impose conditions on their spending programs, even when they “may affect the recipient’s exercise of its First Amendment rights,” so long as the condition is limited to speech within the program being funded. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214-15, 217 (2013). As the courts below found, certification of prospective foster parents is within the scope of the services that Philadelphia contracted with the organizations to carry out. Pet. App. 42a, 57a-58a, 75a-76a. If Catholic Social Services or any other agency does not wish to comply with Philadelphia’s nondiscrimination requirements in writing certifications for certain prospective foster parents, they are free to decline the government contract. *Agency for Int’l Dev.*, 570 U.S. at 214. Simply put, government contractors do not have a First Amendment right to refuse to write documents they have contracted to write. *Cf. Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2473 (2018) (“Of course, if the speech in question is part of an employee’s official

duties, the employer may insist that the employee deliver any lawful message.” (citing *Garcetti*, 547 U.S. at 421-22)).

To be sure, in pursuing their proprietary interests, the States cannot exclude religious entities from government contracts “because of [their] religious status.” *Espinoza*, 140 S. Ct. at 2255; *see also Trinity Lutheran*, 137 S. Ct. at 2021. But Philadelphia—with its long history of choosing to contract with religious organizations including Catholic Social Services, *see* Pet. App. 15a, 255a-256a—is not excluding contractors because they are religious or because of their beliefs; the City is just insisting that its contractors actually perform the services that the City wishes to contract out. And such nondiscrimination requirements—which serve the plainly legitimate government interest of ensuring that government-contracted services are offered to all residents regardless of factors such as race, religion, or sexual orientation—bear no relation to laws motivated by anti-religion animus, such as the law targeting Santeria in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Accepting petitioners’ invitation to apply strict scrutiny to neutral, generally applicable terms in government contracts that conflict with the religious beliefs of contractors who voluntarily choose to enter into them would undermine the States’ abilities to effectively provide services to our residents. Just as “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief,” *Smith*, 494 U.S. at 880 (quoting

United States v. Lee, 455 U.S. 252, 260 (1982)), so too would government be severely hampered in its operations if every contract term were subject to the most rigorous constitutional scrutiny. Many such terms—for example, requirements that construction on normally busy highways be performed on weekends, that properly prescribed medications be administered to adults or children in state custody, or, as here, that taxpayer-funded services be offered to all eligible members of the public—might conflict with some potential contractors’ religious views. But “government simply could not operate if it were required to satisfy every citizen’s religious needs and desires,” *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 452 (1988), particularly when managing its own operations. In providing foster care services in particular, as described further below, Part II.C, *infra*, it would pose an untenable burden on the States and harm children in our care to require the States to attempt to determine in advance the full array of our contractors’ potential religious objections to carrying out our contracts’ terms; then contract with a further, redundant set of contractors, who themselves may have pertinent religious views; and then ultimately stand by as public contractors refuse to consider prospective foster parents who may perfectly suit a child’s needs, solely on the basis of the prospective parents’ religion, sexual orientation, or other factor unrelated to parenting ability.

It is no answer to suggest that governments could simply forgo reliance on contractors altogether. Doing so would also hinder our ability to carry out our “responsibility of protecting the health, safety, and

welfare” of our residents, *United Haulers*, 550 U.S. at 342, particularly when providing the critical human services in which community-based organizations play an especially important role. Such organizations, including those with religious affiliations, often possess an “intimate knowledge of a community” and can serve as a “bridge” between government agencies and the constituents they aim to serve. Jennifer Alexander & Renée Nank, *Public–Nonprofit Partnership: Realizing the New Public Service*, 41 Admin. & Soc’y 364, 382 (2009). Eliminating government contracting in public services would preclude us from partnering with these organizations that are positioned to help us most effectively carry out our responsibility to promote the welfare of our residents.

In sum, petitioners’ arguments ignore the context in which this case arises—a government contract to provide taxpayer-funded services—and the constitutionally significant distinctions between the government’s management of its own operations and its regulation of private conduct. The First Amendment simply does not entitle voluntary government contractors to dictate the terms under which they provide important government services, nor disable the States from ensuring that all of our residents are served equally.

II. Nondiscrimination Requirements Are Particularly Important in the Context of Foster Care Contracts.

The States possess the solemn duty to care for children who cannot remain safely at home. Foster

parents are critically important partners in fulfilling this role, giving children in state custody a family to nurture and raise them until they can safely return to their families of origin or be adopted. States often contract with private agencies to recruit, train, and support foster parents so that loving homes are available to meet the needs of each individual foster child.

State contractors' discrimination against potential foster parents not only harms such prospective caregivers, but also hinders the States' efforts to fulfill their obligations to our most vulnerable children. Nondiscrimination requirements ensure that States can recruit and retain a broad pool of qualified foster parents to meet the needs of all of the foster children in our care. Mandated exemptions to nondiscrimination requirements, by contrast, would harm foster children by allowing for decision-making based on factors unrelated to the best interests of children and would implicate the States in the infliction of the serious dignitary harms caused by discrimination. And the *Amici* States' experience shows that, while nondiscrimination requirements may cause some organizations to opt out of certain state contracts, a wealth of community-based organizations—faith-based and secular—continue to partner with us to meet the varied and complex needs of children in our custody.

A. The States Have a Unique Role in Providing for the Welfare of Children.

Society's "transcendent interest in protecting the welfare of children" extends to the States, which each

bear “an independent interest in the well-being of its youth[.]” *Ginsberg v. New York*, 390 U.S. 629, 640 (1968) (quotation omitted). When “parental control falters,” the State has the grave responsibility to “play its part as *parens patriae*” and provide for the well-being of a child. *Schall v. Martin*, 467 U.S. 253, 265 (1984). To carry out this responsibility, each State has long administered a child welfare system for children who cannot remain safely with their parents.⁴

States are charged with protecting the best interests of these children and limiting the trauma they suffer: trauma caused by abusive and neglectful family situations, then compounded by the trauma of being removed from their homes and parents. *See, e.g.*, Mass. Gen. Laws ch. 119, § 1 (“The health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child.”). States’ foster care systems place children in private families, rather than institutional settings, whenever possible. *See, e.g.*, Mass. Gen. Laws ch. 119, § 32; *see also* 42 U.S.C. § 675(5)(A) (federal funds available

⁴ Massachusetts, for example, first passed a law in 1866 authorizing state judges to order a child deemed to have been neglected to an “institution of instruction or other place that may be assigned.” *See* An Act Concerning the Care and Education of Neglected Children, 1866 Mass. Acts Ch. 283. Since at least 1954, the Commonwealth has had a broad policy through its child welfare system to “insure the rights of any child to sound health and normal physical, mental, spiritual and moral development,” including by “assur[ing] good substitute care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.” An Act Relative to the Care and Protection of Children, 1954 Mass. Acts Ch. 646 (codified at Mass. Gen. Laws ch. 119, § 1).

where States ensure the “most family like” setting for foster children).

In providing foster care, state and local governments are responsible for recruiting, training, supporting, and overseeing individuals who take on the vitally important role of foster parent. *See, e.g.*, Mass. Gen. Laws ch. 119, §§ 22, 23; 110 Mass. Code Regs. §§ 7.100, 7.104, 7.107. Like Pennsylvania, many states operate these child welfare systems in part through their counties or municipalities.⁵ Contracts for child welfare services like the one at issue in this case are also very common, as states have long relied on private community-based organizations for their experience, expertise, and local networks.⁶

**B. Nondiscrimination Requirements
Ensure a Broad and Diverse Pool of
Qualified Foster Parents to Provide for
the Individual Needs of Foster Children.**

Preventing discrimination in child welfare services ensures the States are able to place children with foster parents who can best meet their particular needs. The alternative both inflicts harm on qualified prospective foster parents and harms children, because the optimal foster family (or even a suitable

⁵ *See* Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., *State vs. County Administration of Child Welfare Services* (2018), <https://tinyurl.com/y6s2wcxy>.

⁶ *See* Alexander & Nank, *supra* page 14, at 382; *see generally* Office of the Asst. Sec’y for Planning and Evaluation, U.S. Dep’t of Health & Human Servs., *Preparing Effective Contracts in Privatized Child Welfare Systems* (2008), <https://tinyurl.com/y2lrgt98>.

one) might not be available to a child at the moment that the child most needs it.

A broad and diverse pool of foster parents is critical to meeting each child's needs. In determining the best placement for a child, the States and their contracted agencies are obliged to take into account a variety of child-specific factors set out in state law based on each state's determination of best practices in child welfare. Such factors range from the proximity of the foster home to the child's family or school to the foster parents' capacity to meet the child's specific needs and attributes of the foster family that may benefit the child. *See, e.g.*, Mass. Gen. Laws ch. 119, § 33 ("In placing a child in family home care, the department, or any private charitable or child-care agency, shall consider all factors relevant to the child's physical, mental and moral health."); 110 Mass. Code Regs. § 7.101. To carry out this responsibility to our children, we cannot afford to turn away—or permit our contractors to turn away—qualified families from the pool of prospective foster parents due to characteristics like race, religion, or sexual orientation that are unrelated to parenting ability or suitability as determined by the criteria our states have set.

Allowing government contractors to discriminate not only threatens to diminish our pool of prospective foster parents but also involves the government in causing grave social and dignitary harms. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984). In forbidding discrimination, state and local governments prevent the "humiliation, frustration, and embarrassment that a person must surely feel when" excluded from services or activities otherwise

available to the public. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 872, at 16 (1964)); see also *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Discriminatory exclusion from government benefits and services is particularly injurious, because it “put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). And, in the context of foster care services, discrimination inflicts such social and dignitary harms on prospective foster parents who have made the deeply personal decision to welcome a vulnerable child into their home.

To prevent these harms and to secure the best possible resources for our children, state and local governments have enacted long-standing nondiscrimination requirements in statutes and regulations governing the child welfare system, including by prohibiting discrimination against prospective foster or adoptive parents. See, e.g., Ariz. Admin. Code §§ R21-6-201, R21-6-401, R21-6-402; Cal. Welf. & Inst. Code §§ 16001.9(a)(23), 16013(a); Cal. Code Regs. tit. 22, § 89317; Conn. Gen. Stat. § 46a-81i; D.C. Mun. Regs. tit. 29, § 6003; 110 Mass. Code Regs. § 1.09(3); Md. Code Regs. 07.01.03.03; Mich. Comp. Laws § 722.124e, 124f; N.J. Admin. Code § 3A:51-1.5; N.Y. Comp. Codes R. & Regs. tit. 18 § 441.24; 14-1 R.I. Code R. § 100.0140; Wis. Admin. Code DCF § 56.04(6). Pursuant to such laws and policies, many state and local governments include nondiscrimination provisions in their contracts similar to the requirement at issue in this case. For example, the

standard contract for foster care and other social service providers in Massachusetts requires that contractors not discriminate in the delivery of services based on race, national origin, age, sex, religion, disability, or sexual orientation.⁷

States depend on these nondiscrimination requirements to assemble a diverse pool of foster parents from which to draw in meeting the individualized needs of foster children. Discrimination based on sexual orientation, in particular, would diminish the extraordinary contributions of LGBTQ foster and adoptive parents to children in our States. In many jurisdictions, same-sex couples constitute a significant portion of those who volunteer to become foster or adoptive parents. In the United States overall, same-sex couples are more than seven times more likely than different-sex couples to be raising a foster child or adopted child, and more than 24% of same-sex couples are raising adopted or foster children.⁸ And in Massachusetts, for example, same-sex parents were involved in between 15 and 28 percent of adoptions of foster children

⁷ Commonwealth of Massachusetts, *Commonwealth Terms and Conditions for Human and Social Services* ¶ 10 (issued Oct. 25, 2019), <https://tinyurl.com/yykenuyn>; see also, e.g., Conn. Gen. Stat. § 4a-60a (requiring that state contracts contain a provision prohibiting discrimination in performance of the contract on these same grounds, among others); Los Angeles Dep't of Children & Family Servs. & Probation Dep't, *Foster Care Placement Services Master Contract, County of Los Angeles* ¶ 24.0 (issued Jan. 17, 2018), <https://tinyurl.com/y5f4pa8d>.

⁸ See Shoshanna K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?*, The Williams Institute, 3 (July 2018), <https://tinyurl.com/y28mrspX>.

facilitated over a ten-year period by the Massachusetts Adoption Resource Exchange, which serves as the bridge connecting the state child welfare agency, contracted adoption agencies, and adults interested in adoption.⁹ Full inclusion of LGBTQ people in the pool of foster parents thus maximizes the number of safe and loving homes available to foster children.

Including LGBTQ people as foster parents also increases the likelihood of finding a supportive home for LGBTQ foster youth, who are greatly overrepresented in the foster care population. LGBTQ youth are twice as likely to be in foster care as their non-LGBTQ counterparts.¹⁰ Many of these youth have been abused, neglected, or abandoned by their birth parents because of their LGBTQ identity. One study found that an estimated 12 percent of LGBTQ foster youth aged 17 to 21 had run away from or were kicked out of their home or foster placement because of their sexual orientation or gender identity.¹¹ Foster

⁹ Information provided by the Massachusetts Adoption Resource Exchange on September 19, 2018.

¹⁰ See Bianca D.M. Wilson & Angeliki A. Kastanis, *Sexual and Gender Minority Disproportionality and Disparities in Child Welfare: A Population-based Study*, 58 *Child. & Youth Servs. Rev.* 11, 11 (2015) (estimating that 19.1 percent of foster youth aged 12 to 21 identify as LGBTQ, compared to 8.3 percent of the general population); Alan J. Dettlaff et al., *Lesbian, Gay, and Bisexual (LGB) Youth Within in Welfare: Prevalence, Risk and Outcomes*, 80 *Child Abuse & Neglect* 183, 191 (2018) (similar results).

¹¹ See Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and*

youth experience discrimination based on their perceived sexual orientation, gender identity, or gender expression at remarkably high levels,¹² and sometimes this discrimination can occur within the foster care system. In one study, LGBTQ youth were “more than twice as likely [as non-LGBTQ youth] to report that the foster system treated them ‘not very well.’”¹³

Consistent with best practices in child welfare,¹⁴ the States must ensure that foster youth are placed with foster parents who will respect and support them, including respecting their sexual orientation or gender identity. *See, e.g.*, 110 Mass. Code Regs. § 7.104(1)(d)

Disparities in Los Angeles, The Williams Institute 34–35 (Aug. 2014), <https://tinyurl.com/y2tyrsaf>; *see also* Dettlaff et al., *supra* note 10, at 191 (noting that LGB youth involved in the child welfare system were significantly more likely to report having run away from home in the last six months than their non-LGB counterparts).

¹² *See* Wilson et al., *supra* note 11, at 35 (documenting that 18.5 percent of all foster youth and 37.7 percent of LGBTQ foster youth reported discrimination on this basis in all domains of their life in the prior year).

¹³ *Id.* at 40.

¹⁴ *See* Shannan Wilber et al., Child Welfare League of America, *Best Practice Guidelines: Serving LGBT Youth in Out-of-home Care* 43 (2006), <https://tinyurl.com/y6m6shej> (“[Child welfare] agencies should take affirmative steps to recruit caregivers, providers, and staff members who share the agency’s goal of providing excellent care to all youth in the agency’s custody—including LGBT youth. As part of the effort to increase LGBT-friendly resources, when recruiting foster parents, agencies should intentionally reach out to LGBT families and communities, inclusive faith communities, and community organizations whose members embrace diversity and inclusion.”).

(prospective foster or adoptive parents must demonstrate they will “support[] and respect[] a child’s sexual orientation or gender identity”); Wash. Admin. Code § 388-148-1520(7) (foster families must “connect a child with resources that meet[] a child’s needs regarding race, religion, culture, sexual orientation and gender identity”). A sufficient pool of placement families who will be welcoming of LGBTQ youth is therefore essential to securing for the children in our care the support that they need.

Antidiscrimination policies further this goal by eliminating a barrier to foster parentage by same-sex couples, who are likely to be open to caring for and supportive of LGBTQ foster youth.¹⁵ Prohibiting discrimination on the basis of sexual orientation in foster care services thus encourages the participation of an important group of prospective foster parents in

¹⁵ Child welfare guidelines do not mechanically assume that LGBTQ parents will be best suited to raise LGBTQ or other foster youth; however, in an individual case-by-case analysis, a potential parent’s experience with sexual orientation or gender identity might be relevant to a young person’s needs. See Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., *Working with Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Families in Foster Care and Adoption – Bulletin for Professionals* 6 (Sept. 2016), <https://tinyurl.com/y2vos6j2>. Such diversity can also benefit non-LGBTQ foster youth; for example, some LGBTQ foster and adoptive parents report that, because of adversities that they have faced as LGBTQ people, they can better relate to their adopted children’s “feelings of differentness.” Ruth G. McRoy & Susan Ayers-Lopez, *Barriers and Success Factors in Adoption from Foster Care: Perspectives of Lesbian and Gay Families, Executive Summary*, AdoptUSKids 3 (Oct. 2010), <https://tinyurl.com/y4lg2wdo>.

the States' efforts to provide for the many children in need of foster care.

C. Mandating Exemptions to Nondiscrimination Requirements in Foster Care Would Harm Foster Children, Prospective Foster Parents, and the States.

If state and local governments were required to exempt contractors with religious objections from generally applicable nondiscrimination requirements, government contractors providing foster care services to state-supervised children would refuse to consider some prospective foster parents seeking to care for these children in need. Attaining such a right to refuse is petitioners' very goal. *See* Pet. Br. 36-37. Such refusals have occurred—including refusals not only on the basis of prospective foster parents' sexual orientation, but also their religious beliefs¹⁶—and

¹⁶ *See, e.g., Maddonna v. U.S. Dep't of Health & Human Servs.*, 6:19-cv-03551-TMC, Order, ECF No. 43, at 8-10 (D.S.C. Aug. 10, 2020) (state-contracted agency rejected Catholic family that sought to volunteer to work with foster children—with the hope of becoming foster parents—based on their religious beliefs); *Marouf v. Azar*, 391 F. Supp. 3d 23, 28 (D.D.C. 2019) (federally contracted agency advised same-sex couple that they could not foster a child because they did not “mirror the holy family”); *Rogers v. U.S. Dep't of Health & Human Servs.*, ___ F. Supp. 3d ___, No. 6:19-cv-01567-TMC, 2020 WL 4743162, at *3-4 (D.S.C. May 8, 2020) (state-contracted agency rejected Unitarian, same-sex prospective foster parents because they didn't “share [the agency's] beliefs”); Defs.' Resp. to Mot. for Prelim. Inj., *Catholic Charities W. Mich. v. Mich. Dep't of Health & Human Servs.*, No. 2:19-cv-11661-DPH-DRG, ECF No. 22, at 4-5 (E.D.

doubtless would occur with greater frequency if the States were required to exempt contractors from nondiscrimination requirements. The result would be multifaceted harms to children, prospective foster parents, and the States themselves.

Under such a regime, the States could not guarantee that their agencies would follow best practices and legal requirements that safeguard the welfare of foster children. Such exceptions would create a risk in every case that excluding parents for a particular child solely on the basis of sexual orientation or another protected classification may deny the child the match best suited to his or her needs, contrary to the state mandates to focus on the best interest of the child.

In some cases, the harms to children may be severe indeed. For example, in Michigan, a foster care placement agency with a religious objection to working with same-sex couples refused to place a child with a sibling because the sibling lived with a same-sex couple.¹⁷ Such separation of siblings is contrary to generally accepted child welfare best practices to maintain close sibling connections—because they improve foster children’s behavior, mental health, school performance, and the likelihood of achieving permanency and stability—as well as contrary to the

Mich. July 24, 2019) (state-contracted agency refused to work with two same-sex couples despite contract terms to the contrary).

¹⁷ Defs.’ Resp. to Mot. for Prelim. Inj., *Catholic Charities W. Mich.*, *supra* note 16, at 5.

federal requirement that reasonable efforts be made to place siblings together, 42 U.S.C. § 671(a)(31).¹⁸

The States' crucial pool of prospective foster parents, too, would be harmed. Petitioners err in suggesting that discriminatory policies are inconsequential because alternative agencies exist to provide home studies to prospective LGBTQ foster parents. *See* Pet. Br. 9, 36-37. Such a regime would inflict serious social and dignitary harms on LGBTQ people, and, even where alternate agencies exist, encountering such discrimination might well discourage prospective foster parents from seeking out another agency after experiencing a painful rejection.

Moreover, petitioners are simply incorrect as a factual matter that alternative agencies always exist or would always forestall any harm to children. Particularly in less densely populated parts of our States, it may not be possible or practical to enter into contracts with more than one agency to provide these services. In such areas, we must rely on the agency with which we contract to provide the services that are required by the contract, including by considering all eligible prospective foster parents.

Furthermore, even where multiple agencies provide services in a geographical area, some may have unique specialties. For example, some agencies have developed extensive experience providing family-based treatment foster care (also known as

¹⁸ *See* Child Welfare Info. Gateway, U.S. Dep't of Health & Human Servs., *Sibling Issues in Foster Care and Adoption – Bulletin for Professionals* (June 2019), <https://tinyurl.com/ofma2za>.

“therapeutic foster care”) to children who might otherwise require residential care because of their heightened needs.¹⁹ A national network of treatment foster care agencies, the Family Focused Treatment Association, has 470 member organizations across the United States and Canada that provide services to 50,000 children and adolescents each year who would otherwise be placed in institutional settings.²⁰ If an agency that provides such specialized care refuses to work with certain foster parents based on the parents’ religion, sexual orientation, or some other protected classification, prospective parents who might otherwise be perfectly suited to that agency’s area of expertise would be excluded from providing care to children in need.

And it would be an untenable burden to require the States to build in a redundancy of contracted service-providers to accommodate choices by their own contractors to discriminate in the provision of foster care services. Building such redundancy would be extremely logistically burdensome, if not impossible. Among other problems, such a system would seem to require the government to surmise would-be contractors’ religious beliefs or expressly ask them to disclose any religious disagreements with contract

¹⁹ See Philip A. Fisher & Kathryn S. Gilliam, *Multidimensional Treatment Foster Care: An Alternative to Residential Treatment for High Risk Children and Adolescents*, 21 *Intervencion Psicosocial* 195 (2012), <https://tinyurl.com/y2rqxchs> (describing the benefits of multidimensional treatment foster care in a family-based setting as an alternative to residential care).

²⁰ See Family Focused Treatment Association, *Introducing the New FFTA*, <https://tinyurl.com/yxlo7byg>.

provisions, in order to determine where redundancy was required and ascertain that contractors brought on to create needed redundancy do not in fact have overlapping religious objections. Even then, the government could not account in advance for unforeseen circumstances creating a religious conflict for a contractor.

Requiring the States to grant public contractors religious exemptions to nondiscrimination provisions would also require the States to acknowledge and even incorporate contractors' discriminatory practices into both the public contracts themselves and other government activities. To ensure all residents were served, state and local social service agencies would need to create mechanisms by which residents could learn where they would be able to receive services—mechanisms that would explicitly or implicitly steer particular residents to particular contractors, based solely on protected characteristics of the person. Some states would likely be impelled to publish lists detailing where prospective foster parents were welcome, depending not only on their sexual orientation but also potentially based on their religion, ethnicity, or other characteristics wholly unrelated to their ability to nurture a child in need. Such a system harkens back to state-sponsored segregation in a manner that is anathema to our constitutional commitment to provide equal protection of the laws to all of our residents in the provision of state benefits and services. *See, e.g., Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954).

D. State Foster Care Systems Have Continued to Operate Effectively Under Nondiscrimination Requirements, with Continued Participation by Faith-Based Organizations.

Our experience is inconsistent with petitioners' claims that enforcement of antidiscrimination requirements threatens to harm foster children. *See* Pet. Br. 11-12. In the *Amici* States, the vast majority of foster care and adoptive services providers, including faith-based organizations, readily comply with inclusionary policies that disallow discrimination in these services, and we continue to contract with a diverse array of community-based organizations—with and without religious affiliations—to provide our child welfare services. In some States, a few organizations have discontinued offering public foster care or adoptive services, because recruiting, certifying, or otherwise working with same-sex couples would in their view violate their religious beliefs. Just as when contractors opt out of renewing their contracts for other reasons, these decisions have not had an adverse impact on either children in state custody or state and local governments' ability to administer child welfare systems. Indeed, because many other government-contracted services do not pose the same conflict for these organizations, we have often continued to contract with these same organizations to support our children and families, consistent with both our governmental needs and requirements and the mission and expertise of each organization.

Massachusetts's experience is illustrative. In 2006, the Catholic Charitable Bureau of the Archdiocese of Boston ("Catholic Charities Boston") was handling more adoptions of foster children than any other private agency in the Commonwealth when it halted adoption services, citing its religious objections to complying with the Commonwealth's nondiscrimination law.²¹ In response to Catholic Charities Boston's decision, a network of other agencies filled the gap in services. In the years that followed, the percentage of eligible foster children placed for adoption remained unchanged: For the two years prior to Catholic Charities Boston's decision to withdraw, the average percentage of such children placed for adoption was 72 percent; for the two years after, the average was 73 percent.²² Thus, although Massachusetts and its contracted agencies had to make adjustments as happens whenever contractors cease providing foster care services for any reason, services to children continued unaffected.

The experience in Illinois was similar. In 2011, Catholic Charities organizations affiliated with four dioceses in Illinois ("Catholic Charities Illinois") ceased providing foster care and adoption services due to religious objections to state requirements prohibiting discrimination based on sexual

²¹ See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, Boston Globe (Mar. 11, 2006), <https://tinyurl.com/ya75dprs>.

²² Information on file with the Massachusetts Department of Children and Families (provided September 20, 2018).

orientation.²³ At the time, Catholic Charities Illinois oversaw the cases of 2,000 children.²⁴ The State developed a transition plan that included both new and existing organizations, including faith-based agencies; in one diocese, for example, a new organization was formed to assume all the existing cases and “to . . . provide a seamless transition for children.”²⁵

The suggestion of some of petitioners’ *amici* that Illinois’s prohibition on discrimination in foster care caused a precipitous decline in foster homes is not supported by the data. *Cf.* Br. for Coal. for Jewish Values et. al. 26-27; Br. for Nebraska et. al. 17. While the number of non-relative foster homes in Illinois indeed decreased between 2012 and 2017, such declines were not unique to Illinois.²⁶ Moreover, while

²³ Kevin Eckstrom, *Catholic Charities Loses Same-Sex Couple Adoption Fight in Illinois*, Religion News Service (Aug. 20, 2011, updated Oct. 20, 2011), <https://tinyurl.com/y3ux9g8e>; *see also Catholic Charities of the Diocese of Springfield v. State*, No. 2011-MR-254, 2011 WL 3655016 (Ill. Cir. Ct. Aug. 18, 2011) (finding that the organizations did not have a legally recognized protected property interest in the renewal of its contracts and the state could refuse to renew the contracts).

²⁴ *See* Manya A. Brachyear, *Three Dioceses Drop Foster Care Lawsuit*, Chi. Trib. (Nov. 15, 2011), <https://tinyurl.com/yy4cc4lq>.

²⁵ *Id.*

²⁶ *See* John Kelly, *Imprint Report: At Least 25 States Have Lost Foster Care Capacity Since 2012*, The Imprint (Oct. 31, 2017), <https://tinyurl.com/y636m2fq>; The Chronicle of Social Change, *Foster Care Housing Crisis* 14 (Oct. 31, 2017), <https://tinyurl.com/y55tg8vz>; *State Population Totals and Components of Change: 2010-2019*, U.S. CENSUS BUREAU, Annual

Illinois did see an overall decrease in foster homes from 2012 to 2019, almost two-thirds of the observed drop occurred after 2017, many years after Catholic Charities Illinois ceased providing foster care services.²⁷ And, notably, this greater drop after 2017 followed amendments to Illinois’s child welfare statutes that placed greater emphasis on family placements starting in 2015 and 2016.²⁸ In Illinois’s experience, there was no shortage of capable providers available to meet the needs of children when Catholic Charities Illinois ceased its foster-care services.

The Catholic Charities Archdiocese of Washington (“Catholic Charities D.C.”) also ceased providing foster care and adoption services due to similar religious objections, and there too, services were transitioned to

Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019 (NST-EST2019-01), <https://tinyurl.com/y666hoe7> (last updated Dec. 30, 2019) (providing total 2017 population by state used for per capita calculations).

²⁷ See The Chronicle of Social Change, *Who Cares: A National Count of Foster Homes and Families, Non-Relative Homes 2012-2019*, <https://tinyurl.com/yxw94wq9> (data as of July 22, 2020).

²⁸ See, e.g., 2015 Ill. Legis. Serv. P.A. 99-340 (West) (effective Jan. 1, 2016) (newly requiring “notice to all adult grandparents and other adult relatives of the child” at outset of state custody and documentation of efforts to give such notice); 2014 Ill. Legis. Serv. P.A. 98-846 (West) (effective Jan. 1, 2015) (broadening definition of “relative” to include “fictive kin,” meaning “any individual, unrelated by birth or marriage, who is shown to have close personal or emotional ties with the child or the child’s family prior to the child’s placement with the individual”).

other agencies.²⁹ At the time, Catholic Charities D.C. warned that services for tens of thousands of people were at risk if it were required not to discriminate against same-sex couples.³⁰ Despite having “sounded alarms” about the potential closure of its social services programs, Catholic Charities D.C. transferred its foster care program to another provider without incident.³¹

As the experiences of Massachusetts, Illinois, and the District of Columbia thus demonstrate, state and local governments have had no shortage of community organizations willing and able to provide nondiscriminatory foster care services and welcome a broad pool of foster parents. Moreover, even with respect to those organizations that have ceased accepting certain government contracts due to religious objections to working with same-sex couples in the organizations’ capacity as foster-care contractors, government agencies have continued to contract with these organizations where they can meet government agencies’ contract requirements, and in many cases these organizations continue to provide services to children in the child welfare system. Examples of such continued partnerships include petitioner Catholic Social Services itself: Philadelphia

²⁹ See Michelle Boorstein, *Citing Same-sex Marriage Bill, Washington Archdiocese Ends Foster-care Program*, Wash. Post (Feb. 17, 2010), <https://tinyurl.com/yzyvdra>; Tim Craig & Michelle Boorstein, *Catholic Church Gives D.C. Ultimatum on Same-sex Marriage Issue*, Wash. Post (Nov. 12, 2009), <https://tinyurl.com/yjqb7d7>.

³⁰ See Craig & Boorstein, *supra* note 29.

³¹ See Boorstein, *supra* note 29.

continues to contract with the organization to provide case management services for youth in the foster care system and congregate care homes, work that comprises the overwhelming majority of Philadelphia's city-contracted child welfare services. Pet. App. 16a, 187a; JA 208-09, 505.

In the *Amici* States, too, state and local government agencies continue to contract with organizations that have a religious objection to working with same-sex couples seeking to foster or adopt children, in contexts where those organizations' religious beliefs do not conflict with the government's contracting needs. In Massachusetts, for example, Catholic Charities Boston continues to hold state contracts providing a range of social services, including in the child welfare system; it received approximately half of its revenue in fiscal year 2019 from Massachusetts and other governmental agencies; and its percentage of funding from government sources remains relatively unchanged from the period just before it stopped offering public adoption services.³² Similarly, Catholic Charities D.C. received over \$3 million in the District's 2018-2019 fiscal year for case management services, an amount consistent with what it received before ceasing to provide public

³² See Catholic Charitable Bureau of the Archdiocese of Boston, Inc., *FY19 Combined Financial Statements*, at 4 (Nov. 6, 2019), <https://tinyurl.com/yxn62lgc>; Patricia Wen, *Catholic Charities Pulls Out of Adoption*, Boston Globe (Mar. 10, 2006), <https://tinyurl.com/yy8egczb> (noting that 54% of Catholic Charities Boston's revenue came from government contracts).

adoption services.³³ And Catholic Charities organizations in Illinois had state contracts in the 2020 fiscal year totaling almost \$90 million in various areas, including human services, child welfare, and elder services.³⁴

In sum, when state and local governments choose to adopt nondiscrimination requirements in contracting to provide child welfare services, they benefit both children in need of foster care and prospective foster parents who volunteer to provide this care—all without precluding religious organizations from continuing to serve our residents and contribute to our communities in myriad ways.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

³³ See D.C. Office of Contracting and Procurement, Contract Details, Contract No. CW29496, <https://tinyurl.com/yxjn4g4e>; Craig & Boorstein, *supra* note 29 (reporting a D.C. Council member’s statement that Catholic Charities Washington D.C. received about \$8.2 million in city contracts over the three years from 2006 through 2008).

³⁴ State of Ill. Comptroller, *State Contracts*, <https://tinyurl.com/y4lumq54> (data as of July 17, 2020).

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