No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court for the Third Circuit

BRIEF OF AMICI CURIAE CURRENT AND FORMER STATE LEGISLATORS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amici curiae are current and former state legislators involved in passing and supporting laws in their respective states that protect the ability of faith-based child-placement organizations to function in accordance with their beliefs, while partnering with state and/or local government to provide child welfare services.

The outcome of this case will directly impact these important partnerships and the state laws that amici curiae have crafted, supported, and enacted to protect them. An inability to protect faith-based organizations from local government expurgation will terminate important funding streams from both government and private sources and, as this case demonstrates, exclude these organizations from participation in accordance with their religious calling. In addition, affirmance of the Third Circuit's reasoning and similar opinions in other courts, including the Ninth Circuit,[2] will lead, in many underserviced regions, to systemic collapse of the ability of faith-based organizations to continue to provide foster and orphaned child family care and placement services. Widespread restrictions on these

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[1] Pursuant to SUP. CT. R. 37.2, the parties' counsel were timely notified of and consented to the filing of this brief. Pursuant to SUP. CT. R. 37.6, neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015).

organizations will create unsustainable pressure on the ability to provide these services to a growing population of orphaned and foster children. [3]

Finally, and most importantly, amici curiae implore the Court to consider the impact its decision will have on the primary beneficiaries of these services, orphaned and foster children and the families potentially affected by decisions which effectively give carte blanche authority to exclude faith-based organizations from participating in this important public function.

Amici curiae respectfully request that the Court reverse the Third Circuit's decision and formulate a workable solution that will allow the states to continue to freely work with these faith-based organizations as they do with all other similarly situated organizations so that this critical public service can continue to exist at its full and necessary capacity.

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[3] Chuck Johnson, President and CEO of the non-partisan National Council for Adoption has said that without faith-based adoption organizations "the whole system would collapse on itself." Quoted in Eskridge & Wilson, *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, p. 317 (Cambridge Univ. Press, 2019).

INTRODUCTION

Respondent, the City of Philadelphia (the City), over time, has developed a policy to specifically prohibit and ultimately exclude Petitioner, Catholic Social Services (CSS), from being able to contract with the City to provide the important and worthy service of placing foster children with foster families all because the City disagreed with the religious beliefs of CSS and the exercise of its choice not to offer endorsements for foster care placement with non-married heterosexual and same sex couples.

Although there is a dire need for foster care placement services in Philadelphia, CSS has been working with the City for over 100 years in providing these services, and there are over 30 other entities that also contract with the City, some of whom provide endorsements of and work with same sex couples, the City cancelled the contract with CSS because the City concluded CSS violated its "policy" against discrimination by excluding endorsement of same-sex couples inconsistent with the City's ad hoc policy.

This case asks the Court to consider the right of religious organizations to participate in the necessary societal function of child foster care equally with other organizations that provide similar services. For amici curiae it represents a crucial point in the history of state-based cooperation with these organizations, which have historically provided a critical level of support for these much-needed services.

The role of faith-based organizations in providing social services, including care for orphans, pre-dates

the founding of the United States. Indeed, care for orphans and abandoned children has been commanded by the foundational doctrines of nearly all major religions. Thus, government policies regarding adoption and foster care were first established and then developed in harmony with (not against) the missions of a preexisting and robust number of such organizations.

As the quantity of orphanages waned in the 20th century, faith-based organizations continued to be actively engaged in the child welfare system, providing an important and much needed support network for the government, which included a range of services related to adoption, foster care placement, and family reintegration. This strong, centuries-long tradition of collaboration naturally led to an extensive and necessarily symbiotic relationship between public and private organizations that exists to this day. In many states, including some that are represented by amici curiae, the child placement system simply could not operate without these partnerships.[4]

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[4] Eskridge & Wilson, *supra*. See also *Amicus Curiae* Brief for 10 States and Attorneys General by Governor Matthew G. Bevin of Kentucky in Support of Petitioners' Writ, pp. 10-13 (noting, not only the vital role faith-based organizations play in providing support for foster care services in the several states, but too, the important fact that ensuring that foster care and adoption of orphaned and abandoned children is also a shared societal duty of the highest order) and *Amicus Curiae* Brief for Alliance Defending Freedom, et al., filed in the Third Circuit Court of Appeals, pp. 7-13 (providing extensive evidence for the essential role that faith-based organizations play in supporting government efforts to provide foster care and the importance of these organizations to the nation as a whole).

Prior to this case, and in part taking the lead of Congress itself,[5] which some courts have interpreted[6] as abrogating this Court's "rational basis" test applied to measures aimed at suppressing the free exercise of religious beliefs, many states, including those represented by amici curiae, moved to legislatively protect their longstanding relationship with these organizations. State action was also prompted, in part, in response to persistent efforts to stop these organizations from continuing to perform this important and necessary public function.

Amici curiae represent states that have passed legislation in an attempt to protect the rights of faith-based organizations to be licensed and to contract with the government, while maintaining placement polices that comport with their sincerely held religious or moral beliefs.

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[5] Religious Freedom Restoration Act (RFRA), 42 U.S.C.A. § 2000bb et seq.; Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.A. § 2000cc, et seq.)

[6] See, e.g., *Moorish Sci. Temple of Am., Inc. v. Thompson*, 2016 Ky. App. Unpub. LEXIS 269, * 6 (2016) (citing *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Holt v. Hobbs*, 574 U.S. 352 (2015) and stating that "[w]hile federal courts, for a brief period, applied a standard of review similar to rational basis review to free exercise cases where the challenged law was facially neutral…with the passage of the [RFRA] and its replacement, the [RLUIPA], such a test has been superseded." Citing). "The *Holt* Court applied a more traditional strict scrutiny analysis, signaling a reversion to the pre-*Babalu* and *Smith* application" from prior cases of this Court. *Id.*

These include Kansas,[7] Michigan,[8] North Dakota,[9]

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[7] K.S.A. § 60-5322(b) and (c) (stating, inter alia, that "[n]otwithstanding any other provision of state law, and to the extent allowed by federal law, no child placement agency shall be required to perform, assist, counsel, recommend, consent to, refer or otherwise participate in any placement of a child for foster care or adoption when the proposed placement of such child would violate such agency's sincerely held religious beliefs" and "[n]o child placement agency shall be denied a license, permit or other authorization, or the renewal thereof, or have any such license, permit or other authorization revoked or suspended by any state agency, or any political subdivision of the state solely because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring or otherwise participating in a placement that violates such agency's sincerely held religious beliefs.")

[8] M.C.L.S. § 722.124e (stating, inter alia, that "[p]rivate child placing agencies, including faith-based child placing agencies, have the right to free exercise of religion under both the state and federal constitutions" and "[u]nder well-settled principles of constitutional law, this right includes the freedom to abstain from conduct that conflicts with an agency's sincerely held religious beliefs.") and M.C.L.S. §722.124f(1) and (2) (stating, inter alia, "[i]f the department makes a referral to a child placing agency for foster care case management or adoption services under a contract with the child placing agency, the child placing agency may decide not to accept the referral if the services would conflict with the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency" and "[t]he state or a local unit of government shall not take an adverse action against a child placing agency on the basis that the child placing agency has decided to accept or not accept a referral under subsection (1).")

[9] N.D. Cent. Code, § 50-12-03 (stating, inter alia, "[t]he department of human services may not deny a license because of the applicant's objection to performing, assisting, counseling, recommending, facilitating, referring, or participating in a

Oklahoma,[10] Virginia,[11] South Dakota,[12] Texas,[13] and

placement that violates the applicant's written religious or moral convictions or policies.")

[10] 10A Okl. St. § 1-8-112 (stating, inter alia, "[t]o the extent allowed by federal law, no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies" and the "Department of Human Services shall not deny an application for an initial license or renewal of a license or revoke the license of a private child-placing agency because of the agency's objection to performing, assisting, counseling, recommending, consenting to, referring, or participating in a placement that violates the agency's written religious or moral convictions or policies.")

[11] Va. Code Ann. § 63.2-1709.3 (stating, inter alia, "[t]o the extent allowed by federal law, no private child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies.")

[12] S.D. Codified Laws § 26-6-38 (stating that "[n]o child-placement agency may be required to provide any service that conflicts with, or provide any service under circumstances that conflict with any sincerely-held religious belief or moral conviction of the child-placement agency that shall be contained in a written policy, statement of faith, or other document adhered to by a child-placement agency" and providing "[i]f a child-placement agency declines to provide any services, the child-placement agency shall provide in writing information advising the applicant of the Department of Social Services website and a list of licensed child-placement agencies with contact information.")

[13] Tex. Hum. Res. Code § 45.004 (stating, "[a] governmental entity or any person that contracts with this state or operates

Tennessee.[14]

Amici curiae are also legitimately concerned about the status of this legislation and what standards govern the conduct of their constituents. Lawsuits have been filed against the states either by defenders of religious liberty or by LGBTQ and other civil rights organizations arising out of government interference with foster care placement or adoption services in favor of one or the other side.[15]

Amici curiae respectfully suggest that it is this Court's ultimate responsibility to address the extent, if any, of the government's authority to control the free exercise of religious beliefs and the extent of its power to silence religious expression. This is so, because the judiciary, and ultimately this Court, is the final

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under governmental authority to refer or place children for child welfare services may not discriminate or take any adverse action against a child welfare services provider on the basis, wholly or partly, that the provider: (1) has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with, or under circumstances that conflict with, the provider's sincerely held religious beliefs")

[14] Tenn. Code Ann. § 36-1-147 (stating "[t]o the extent allowed by federal law, no private licensed child-placing agency shall be required to perform, assist, counsel, recommend, consent to, refer, or participate in any placement of a child for foster care or adoption when the proposed placement would violate the agency's written religious or moral convictions or policies.")

[15] See, e.g., *Rogers v. U.S. Dep't of Health and Human Servs.*, No. 6:19-cv-01567 (D. S.C.), filed May 30, 2019; *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich.), filed September 20, 2017); *Buck v. Gordon*, No. 19-cv-00286 (W.D. Mich.), filed July 31, 2019; and *Catholic Charities of West Michigan v. Mich. Dep't of Health & Human Servs.*, No. 2:19-cv-11661 (E.D. Mich. June 26, 2019).

constitutional defense against invidious persecution of all groups who hold firm and sincere religious beliefs and who seek to fulfill the calling of their faith by outwardly expressing those beliefs. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 686 (2010), citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974) and stating this Court is "the final arbiter" whether a public entity has exceeded constitutional constraints and invaded fundamental liberties. The incorporation of the Free Exercise Clause in the Bill of Rights set up the judiciary as the guardian of those rights and defenders of "every assumption of power in the legislative or executive" that sought to "encroach[] upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (J. Gales & Seaton's History) (June 8, 1789). Of course, the Free Exercise of religion is one of these expressly retained rights of the people. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465-72 (1892).

The states were regarded by Madison as even stronger protectors of the people's liberty than the federal government. 1 Annals of Cong. *supra* at 457. See also Cooley, *Constitutional Limitations*, p. 470 (1868) (citing Story, *Commentaries on the Constitution of the United States* § 1879 (abridged ed. 1833) (reprint 1987) and stating the "whole power over the subject of religion is left exclusively to the State governments"). The "same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will also incline it to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants to the preservation of the

public order." *Id*. at 471.

Amici curiae request that the Court reaffirm this principle in light of the tenuous justifications given by the Third Circuit in its approval of local, arbitrary, and ambiguous *ad hoc* policies which have the potential to immediately and irreversibly affect not only the important and critical public service of child foster care within their respective communities, but also to curtail the First Amendment rights of their respective constituencies in a variety of contexts. Indeed, here, the rights of religious expression are threatened by these decisions because the local government's actions may effectively muzzle those organizations who do not fall in line with whatever the expressed policy is at a given time, and even where such policies are, as in this case, developed after the fact to stifle a particular group's conduct. Upon discovering a faith-based organization's actions are governed, in part, by its system of beliefs and convictions which do not align with their own social norms, local officials can now freely refuse to allow participation along with others who provide the same or similar services, unless the organization announces support for the government's message. Given conflicting cases in other circuits, the Third Circuit's and Ninth Circuit's tests now mean there are unpredictable and divergent national "standards" to be considered by states, local governments, faith-based organizations, civil rights groups and families who want to provide foster care.

ARGUMENT

I. Care for Foster Children is a Direct Command of Religious Teaching and a Core Religious Belief and Under the Constitution Such Beliefs Take Precedence Over Government Interference.

Historically, care for orphaned and abandoned children was a responsibility fully accepted and undertaken by religious society. The full measure of spiritual worship and religious doctrine led religious leaders to follow the literal commands of fundamental texts, which, from their origin and across the major faiths dogmatically pronounce that caring for orphaned and abandoned children is an obligation and duty of the highest order.

Care for orphans is commanded repeatedly in the Islamic tradition. Qur'an at 2:215 commands that [w]hatever you spend of good it [to be] for parents and relatives and orphans and the needy and the traveler. And whatever you do of good – indeed, Allah is Knowing of it." Muslim Fostering Project: Report.[16] And, the faith teaches that Allah protects the orphan. Qur'an 93:6 ("Did He not find you an orphan and give [you] refuge?").

The Hebrew Scriptures evidence "profound concern" for widows and orphans including not just

[16]https://www.thefosteringnetwork.org.uk/sites/www.fostering.net/files/content/muslimfosteringprojectreport2019.pdf, accessed on June 1, 2020.

children who are orphaned but also those who are abandoned. Exodus 22:22; Psalm 82:3, Isaiah 1:17; and Hosea 14:3 all charge the Hebrew people to exercise justice and mercy with widows and orphans. *Children, Adults, and Shared Responsibilities: Jewish, Christian and Muslim Perspectives*, edited by Marcia J. Bunge, p. 246 (Cambridge Univ. Press 2012). Perhaps the most prominent exemplar in Hebrew theology is that "one of the tests of Israel's faithfulness came in the person and witness of an orphan." *Id*.

For Christians "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress…. James 1:27. Romans teaches that "all who are led by the Spirit of God are children of God" and "have received the spirit of adoption…." Romans 8:14-15. "Adoption functions as a powerful metaphor for God's activity within humanity. Membership in the family of God – whether for individuals or peoples – comes through Gods' activity that "transcends boundaries and barriers set by biological and ethnic identity." Bunge, *supra* at p. 247.

Madison saw religious obligation as "precedent both in order of time and degree of obligation, to the claims of Civil Society," and "therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society." J. Madison, *Memorial and Remonstrance Against Religious Assessments*, 2 The Writings of James Madison 183, 188 (G. Hunt ed. 1901). Thus, the "dictates of religious faith must take precedence over the laws of the state, even if they are secular and generally applicable." *Id*. A

constitutional constant that is prioritization of the principles of the Free Exercise Clause will always ensure that religious beliefs (whether mainstream or not) will be protected from changing attitudes of society expressed through the representative branches of government.

This understanding of the spiritual calling and the fundamental relationship between religious worship, faith, duty and service in the name of one's religion serves as an elemental backdrop to the fundamental constitutional framework that was established around these principles when the First Amendment was crafted to include the Religion Clauses. Therefore, the latter must be interpreted and applied with an understanding of the former.

Indeed, this Court has previously recognized the primacy of First Amendment freedoms, stating that they are "delicate and vulnerable, as well as supremely precious in our society" and thus "need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Court has repeated this principle more recently, and, at least in terms of one's own personal right to defend these freedoms against encroachment, has recognized their "transcendent value to all society, and not merely to those exercising their rights." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). In approaching the question of a government's right to encroach on these freedoms, the Court has instructed that "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Button*, *supra*. And, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the

Free Exercise Clause" in the first place. *Bowen v. Roy*, 476 U.S. 693, 703 (1986). See also Story, *Commentaries on the Constitution of the United States* §§ 991-992 (abridged ed. 1833) (reprint 1987); Cooley, *Constitutional Limitations*, p. 467 (1868); *McGowan v. Maryland*, 366 U.S. 420, 464 and n. 2 (1961) (opinion of Frankfurter, J.); *Douglas v. Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in result); *Davis v. Beason*, 133 U.S. 333, 342 (1890).

Thus, in approaching the questions in this case, the Court must consider the position of the First Amendment freedoms at stake in terms of their primacy in this nation's constitutional framework.

II. If Any Part of *Employment Division v. Smith*[17] Remains Viable the Third Circuit's Analysis was Woefully Inadequate to Protect the Primacy of Religious Expression Under the Original Understanding of the Free Exercise Clause.

A. Without Following Smith the Government Can Invade Religious Conscience Anytime It Wants.

"The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded" in this Court's opinions. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 523 (1993), citing *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). When addressing any official actions that affect religious practice the Court has committed itself to asking whether those actions "violated the Nation's essential commitment to religious freedom." *Id*. at 524.

The Third Circuit's decision approved the City's actions even though the City failed to perceive, did not understand, or chose to ignore this primary commitment to religious expression. *Id*. The result means that any governmental entity may institute an ad hoc policy specifically targeting and excluding a group on the basis of its religious beliefs or compel it to abide by the policy even though it is against the

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[17] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

group's religious convictions. The City's actions had an impermissible object from their start because they were designed and implemented to interfere with CSS's religious beliefs and actual practices.

Amici curiae disagree with the Third Circuit's analysis because it provides no protection for any group's religious beliefs, much less respect its free exercise thereof. Nothing that the City has done in this case passes constitutional muster. There was no preexisting law, regulation or ordinance, much less one that has been generally and neutrally applied. The City apparently just made up policies specifically targeting CSS once it was made aware of CSS's views from a news report. Rather than analyze the statements made by city officials that were derogatory towards CSS, the Third Circuit simply discounted them as coincidental and irrelevant.

CSS committed no direct act and there is no specific or particular incident that has occurred to prompt the City to circumscribe conduct, yet the City engaged to punish CSS on the premise that if it does act (admittedly merely to refer an unmarried heterosexual couple or a married same-sex couple to another agency), it will act in a manner that violates the City's ad hoc policy. In fact, the City specifically changed its contracts to ensure that "any further contracts" with CSS would explicitly prohibit CSS's religious exercise.

Indeed, there was no conduct on the part of CSS that would justify use of the police power to deter or sanction, which was a critical fact in this Court's decision allowing the state to interfere with religious

practices in *Smith*, 494 U.S. at 878-79 (stating that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.") And, importantly, this Court later qualified *Smith* by holding that "a law that discriminates against religiously motivated conduct *is not neutral*" and that there are many ways to demonstrate that the object or purpose of the law is to suppress or curtail religious conduct. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-34 (1993). The Third Circuit simply refused to engage in the detailed analysis required by this Court's latter instruction by simply concluding that the City's policy *was neutral* and generally applicable.

Untethered from the Constitution's historical protection of a group's ability to express its religious convictions without penalty, so long as that expression does not violate positive law passed under the state's police power and unmoored from any real jurisprudential footings concerning neutrality, the Third Circuit has now sanctioned the type of roving and invidious persecution the First Amendment was expressly designed to guard against.

Now, a freshly implemented "policy" specifically tailored to address some future event on the part of a religious organization will be deemed rational unless the plaintiff can prove that the policy affects it worse than it would have had it been applied to another organization that engaged in the exact same behavior. This flips the required analysis on its head, and is, by definition, *non-neutral*. The Second, Sixth, Seventh, Eighth and Tenth Circuits have taken this Court's

instruction in *Church of Lukumi Babalu Aye* to at least examine the evidence regarding the government's "object and purpose" leading up to its ultimate decision and whether it will apply strict scrutiny.

That specific analysis requires an examination of "among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Church of Lukumi Babalu Aye*, 508 U.S. at 540. These objective factors bear on the question of discriminatory intent. *Id*., citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, n. 24 (1979). None of this analysis was performed in this case by the Third Circuit because if it had been, it would have revealed the following: the City's administrative measures were provoked by a news report that CSS made endorsement decisions on foster care placement based on its religious beliefs concerning marriage; a significant array of the City's resources were then mobilized to investigate and specifically stop CSS's participation in these services; statements were made by the City's officials that were derogatory and directed to CSS's religious views; all of this led to the termination of CSS's participation in the foster care services. On these facts, strict scrutiny, at least, was required to be applied to the City's actions.

Without this analysis, the Third Circuit's approval of the City's implementation of a policy to effectuate a result that it could not justify with any truly

applicable law, opens the door to allow the government to make arbitrary and ambiguous decisions to curtail First Amendment rights of citizens to both the exercise and expression of their religious beliefs in many other circumstances. Indeed, here, the rights of expression are threatened by this decision because the City's conduct effectively muzzles those organizations who do not fall in line with the government's expressed policy. Upon discovering an organization's conduct is governed in part by its system of beliefs and convictions which do not align with its own, the government can refuse to allow participation along with others who provide the same or similar services, unless the organization announces support for the government's message.

This action on the part of the City was undertaken even though the City has only minimally articulated a "policy", and a very ephemeral one at that (not any applicable rule or a law), CSS's practice has had *no discriminatory* effect as there are multiple other agencies and organizations that provide the same contractual services to the City that do allow non-married heterosexual and same sex couples to provide foster care to the City's foster children (and no unmarried heterosexual or same sex couple sought out the CSS's approval), and even though the City (like many other cities and states) is in dire need of the foster care services that CSS has provided to it for over a century.

Moreover, as admitted by the City in this case, it permitted individualized exemptions from its policies, it permitted various categorical exceptions from them, and it altered its policy midstream to prohibit CSS's

participation precisely because of its religious beliefs and practices. The Third Circuit essentially gave the City what it wanted; it approved of the City's decision to reach an outcome through the manipulation of policy targeted at a specific organization because that organization's long held and consistently practiced religious beliefs were, according to the City, antiquated and inconsistent with its own views on society and family life. The City admitted saying to CSS "times have changed" and "attitudes have changed". The Third Circuit's acquiescence in this individualized and targeted action against a group provides other governmental entities with carte blanche to specifically and purposefully adopt policies hostile to a particular group because of its religious beliefs regardless of whether the organization has ever actually done anything discriminatory.

This case is especially significant because the City's actions have effectively prevented CSS (and the individual petitioners who have sought to become foster parents) from facilitating foster care services, which are provided by CSS as a direct result of their faith and adherence to divine command, and explicit action in the performance of their religious duty in following that command.

Justice Alito's dissent in the order denying cert in *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2433-44 (2016), characterized this path down the road of arbitrary and discretionary government curtailment of fundamental constitutional rights as "an ominous sign". *Id.* at 2433.

B. The Third Circuit Did Not Follow the Court's More Recent Jurisprudence Which Returns to the Original Understanding that Free Exercise is Primary in the Required Analysis.

Fortunately, since *Smith*, this Court has turned towards an historical analysis more protective of religious expression. This case presents an opportunity for the Court to apply the significant limitations historically placed on state sponsored measures that purposefully invade religious beliefs and directly interfere with religious practices.

When questioning the government's authority to interfere with religious purpose, this Court has definitively held that the government is bound to respect the spirit and intent of the First Amendment Religion Clauses. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (the government is as incompetent as Congress to enact laws that abridge the liberties guaranteed by the First Amendment).

Just as it is not the concern of the state to pressure groups to engage in worship or religious activity of one nature or another (an affront to the conscience), the very same freedoms are at stake when counterbalanced against state action that purports to disfavor or otherwise penalize one religious group for exercising their beliefs, even, rather, especially, if that group's beliefs are among a minority in contemporary social thought. Indeed, the entire basis for colonization of the New World, and especially Pennsylvania, in the eyes of its namesake, was the desire of a religious minority, the Quakers, to escape

persecution and discrimination for their religious beliefs. William C. Kashatus, *William Penn's Legacy: Religious and Spiritual Diversity*, XXXVII Pennsylvania Heritage Magazine, No. 2 (Spring 2011). It should not be lost on the Court that the very City that has been a symbol of protecting religious and spiritual diversity is now attempting to arbitrarily prohibit the expression of one religion's practice because of its particular beliefs. Arming the government with the ability to do this is the functional equivalent of excluding religious worship and practice, because it prohibits religious organizations from acting on their firmly held religious beliefs based on historical doctrine of their faith.

The original understanding of the priority of religious worship and service in the hierarchy of the fledgling Constitution's First Amendment expressly envisioned direct and affirmative protection of what was seen as a command of the highest order. To force one not to act positively in keeping with his or her faith was to directly require, by government compulsion or penalty, that they disobey God's command. Indeed, theologians and religious leaders view such requirements as a degradation of the holy integrity and identity of the Church through willful disobedience to both God and reason. This Court has thus consistently ruled that the First Amendment "protects a religious group's right to shape its own faith and mission" and gives "special solicitude to the rights of religious organizations." *Hosanna-Tabor Eva* 565 U.S. 171, 188-189 (2012).

The Free Exercise Clause has always been understood to protect religious expression from otherwise lawful measures. Even a constitutional law may not be applied as against persons for whom the law creates a burden on religious belief or practice. *Marsh v. Chambers*, 463 U.S. 783, 803, n. 13 (1983) (internal citations omitted).

CSS's beliefs and practices deprive no one of their constitutional rights. Strict scrutiny review does nothing less than include this consideration. It balances the declaration of free exercise with compelling governmental interests in regulations including those regarding national security, protection of life, and the balancing of the constitutional rights of others. There is no other compelling governmental interest imminently at stake that could be stated against CSS's exercise of its faith through its desired assistance to orphaned and abandoned children and in the facilitation of foster families to practice their own faith and religious duty. CSS is not excluding nonmarried and same sex couples from their right to foster or adopt children, from the right to marry, from public accommodations, from commerce, or from any other aspect of public or private life. CSS's choices derive from a protection of the conscience of its members and their desire not to sin in the eyes of God. This is a wholly internalized expression of what their faith requires and what their God expects of them. A pure act of conscience, even one that is overt and public, and that projects one's own beliefs into the community, is not only not a forbidden act contrary to the constitutional rights of another, but it is in fact prima facie a protected act "based on decent and honorable religious or

philosophical premises". *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). First Amendment rights ensure "proper protection" to teach those beliefs and engage others in "open and searching debate." *Id.* at 2607. It is the free exercise of *religion* that is guaranteed and that guarantee skews in favor of the constitutional claim of CSS as counter-opposed to the government's attempt to infringe upon it. CSS does nothing here to disparage the rights of heterosexual or same-sex couples, nor could it under the proper constitutional framework.

III. Recognizing Petitioner's Primary Constitutional Right to Practice Its Faith through the Service of Foster Care Will Allow States Including Amici Curiae to Continue to Work with and Rely on These Entities for the Critical Function of Providing Foster Care Services.

Must all religious institutions cease activities of this nature if they are stripped of the discretion to make choices in keeping with their faith? If so, how can the states represented by amici curiae and others continue to rely on the expertise and capacity of these organizations to assist in the critical function of caring for foster children?

Child welfare services actually originated in the private sector. Charities provided child protection, institutional placement, and foster homes. Governments gave grants or subsidies, but these programs were privately operated. It was not until the 1930's and continuing through the 1970's that federal social security and public social service

systems, including a child welfare component, emerged.

The extent to which public child welfare agencies relied on privately delivered services has always varied across the country. Rural areas and western states have had less reliance on private sector agencies than other regions. While, nearly all jurisdictions have used the private sector to provide discrete services such as counseling, home visiting, or foster home recruitment, their case management authority was limited. This changed in the 1990's when public child welfare agencies and other social service programs began to expand their reliance on the private, primarily nonprofit, sector.

Amici curiae urge the court to consider that these entities are a necessary part of the fabric of the overall foster care system throughout the country. Their ability to provide this service necessarily alleviates great pressure on the state governments that would otherwise have to rely on taxpayer funded agencies alone to supplant their loss. Government permission or approval (whether state or federal) can be used to effectively deprive certain groups of the ability to practice their faith and express their religious conscience through the performance of important public outreach and services. As is demonstrated in this case, the withdrawal of permission has effectively terminated Petitioners' ability to provide foster care services, which has also led to a cessation of private and public funding. Without this, the ability of the entity to express its religious conscience through the provision of services that it deems spiritually valuable to the entity's core beliefs is stifled.

The Third Circuit's decision provides a roadmap for states, municipalities and other activist organizations to close down faith-based foster and adoption agencies across the country. Many other organizations like CSS are now fighting to keep their doors open so that they can continue to serve the community in accordance with their faith and their beliefs of providing aid and support to those that are less fortunate.

CONCLUSION

Amici curiae, a diverse group, make no judgment about and do not all agree with or adhere to the Petitioners' religious beliefs. Amici share the nearly universally expressed concern of other amici and Petitioners that the "rights of all religious adherents are at stake…." See *Amicus Curiae Brief of Jewish Coalition for Religious Liberty in Support of Petitioners*, p. 2.

"Just as 'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,' see *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018), citing *Matal v. Tam*, 137 S. Ct. 1744 (2017).

Thus, amici curiae are unanimous in agreeing with Petitioners that this case is "an important opportunity for the Court to apply the First Amendment to a post-*Obergefell* system in which same-sex marriage coexists with the "proper protection" owed to "religious organizations" as "they seek to teach the principles [about marriage] that are so fulfilling and so central to their lives and faiths." Petition for Certiorari at 40, citing *Obergefell v Hodges*, 135 S Ct 2584, 2607 (2015).

Contrary to the majority of Circuit Court decisions, the Third and Ninth Circuit rulings thwart the free exercise of religion and freedom of religious

expression by allowing governmental entities to essentially identify, target, and then create discretionary policies out of whole cloth to force religious groups to either abide by those policies even if they conflict with the groups religious beliefs and convictions, or to be prevented from offering what they deem to be (and which often are) critical services to the public at large.

Not only does such government overreach prevent the religious group from realizing its goals of ministry and service by reaching out to assist foster children and families, but it perversely prohibits them from providing what is an essential public service. Moreover, as is demonstrated in this case it threatens the very livelihood and existence of these organizations who rely, at least in part, on government funding. Moreover, forcing the religious organization to abide by the government's policy gives them a Hobson's choice of rejecting the tenets of their faith and convictions, thereby alienating their own members and contributors, or being unable to provide these services at all because refusing to do so results in the government's removal of their authority to function. Indeed, in a real sense, it requires the organization to act in a manner that is directly contrary to divine command.

The First Amendment exists precisely to protect religious groups and organizations from the type of invasive government overreach that forces them to choose to worship in silence rather than be condemned for freely expressing their faith and living out their beliefs.

Amici curiae are also legitimately concerned whether the free exercise of religion for their constituents will continue to be protected and the important public-private partnerships between faith-based foster care and child and family welfare organizations will continue unabated, fulfilling not only the stated religious missions of the faith-based organizations that amici partner with, but also providing a critical public service. In no small way, the Third Circuit's approach allowing local subversion of religious practice and interference with the established and traditional means that these organizations go about expressing their faith, is fundamentally at odds with the democratic process and circumvents legislative legitimacy. If there are to be laws that are neutral, and generally applicable, then those laws should take the form of legislatively vetted enactments that have run the full gauntlet of societal debate. Allowing a city or community to restrict fundamental liberties by spontaneous administrative and bureaucratic post hoc measures is precisely what this Court has repeatedly warned against.

Amici curiae respectfully request the Court to reverse the Third Circuit's decision.

Respectfully submitted,

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Date: June 2, 2020

APPENDIX

APPENDIX – COMPLETE LIST OF AMICI CURIAE

KANSAS

Senator Larry Alley (KS)
Senator Richard Hilderbrand (KS)
Senator Julia Lynn (KS)
Senator Ty Masterson (KS)
Fmr Senator Mark Pilcher-Cook (KS)
Senator Mike Thompson (KS)
Representative Francis Awerkamp (KS)
Representative Emil Bergquist (KS)
Representative Doug Blex (KS)
Representative Jesse Burris (KS)
Representative Michael Capps (KS)
Representative Will Carpenter (KS)
Representative Ken Corbet (KS)
Representative Leo Delperdang (KS)
Fmr Representative Keith Esau (KS)
Representative Renee Erickson (KS)
Representative David French (KS)
Representative Randy Garber (KS)
Representative Cheryl Helmer (KS)
Representative Ron Highland (KS)
Representative Susan Humphries (KS)
Fmr Representative Kevin Jones (KS)
Fmr representative Les Osterman (KS)
Representative Stephen Owens (KS)
Fmr Representative Randy Powell (KS)
Fmr Representative Abraham Rafie (KS)
Representative Bill Rhiley (KS)
Representative Eric Smith (KS)
Representative Barbara Wasinger (KS)
Fmr Representative John Whitmer (KS)
Fmr Representative Chuck Weber (KS)

MICHIGAN

Senator Mike Shirkey, Majority Leader (MI)
Representative Lee Chatfield, Speaker (MI)

OKLAHOMA

Senator Greg Treat, President Pro Tempore (OK)
Fmr Representative Greg Babinec (OK)
Fmr Representative Kevin Calvey (OK)
Fmr Representative Travis Dunlap (OK)
Representative Mark Lepak (OK)

SOUTH DAKOTA

Senator Jack Kolbeck (SD)
Senator Lee Scoenbeck (SD)
Senator Jim Stalzer (SD)
Representative Fred Deutsch (SD)
Representative Jon Hansen (SD)
Representative Steve Haugaard, Speaker (SD)
Fmr Representative Tom Holmes (SD)
Representative Sue Peterson (SD)

TENNESSEE

Senator Mike Bell (TN)
Senator Janice Bowling (TN)
Senator Ferrell Haile (TN)
Senator Joey Hensley (TN)
Senator Mark Pody (TN)
Senator Shane Reeves (TN)
Senator Paul Rose (TN)
Senator Dawn White (TN)

Representative Tim Rudd (TN)

TEXAS

Senator Bryan Hughes (TX)
Senator Charles Perry (TX)
Representative Briscoe Cain (TX)
Representative James Frank (TX)
Representative Gary Gates (TX)
Representative Cody Harris (TX)
Representative Matt Krause (TX)
Representative Candy Noble (TX)
Representative Dennis Paul (TX)
Representative Scott Sanford (TX)
Representative Matt Schaefer (TX)
Representative James White (TX)