
No. 18-2574

United States Court of Appeals
for the Third Circuit

SHARONELL FULTON ET AL.,
Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT,
DELAWARE, DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, IOWA,
MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK,
OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND
WASHINGTON AS AMICI CURIAE IN SUPPORT OF PHILADELPHIA**

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INTERESTS OF AMICI

The Commonwealth of Massachusetts, with the Commonwealth of Pennsylvania, the District of Columbia, and the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington respectfully submit this *amicus curiae* brief in support of the City of Philadelphia and other Appellees pursuant to Fed. R. App. P. 29.

The *Amici* States share an interest in combatting sexual orientation discrimination, including preventing discrimination in the provision of state services. Foster care services, in particular, are among the most critical we provide, affording care and support to some of our most vulnerable children. 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. Accordingly, in many of the *Amici* States, antidiscrimination laws and policies at the state or local level specifically prohibit rejecting prospective foster parents based on sexual orientation and other factors unrelated to the best interests of children.

To preserve the ability of state and local governments to administer child welfare systems free of discrimination based on sexual orientation, the *Amici* States join the Appellees in urging this Court to affirm the decision below

declining to enter a preliminary injunction requiring Philadelphia to allow its contractors to discriminate against same-sex couples in providing these crucial government services.

ARGUMENT

Like Philadelphia, the *Amici* States have strong and indeed compelling interests in eradicating discrimination generally, and in preventing discrimination in the foster care services we provide in particular. Numerous jurisdictions across the country have enacted antidiscrimination laws like Philadelphia's Fair Practices Ordinance to protect LGBTQ people from discrimination. And many also have policies that specifically prevent discrimination in the child welfare context, recognizing the harms such discrimination inflicts on children and their prospective foster and adoptive parents. These measures ensure that prospective foster parents are not invidiously excluded from the opportunity to open their homes to children in state custody; that such children have the best chance at finding safe and supportive foster parents; and that states fulfill their legal obligations to act in the best interests of children and in accordance with the Constitution.

Appellants and their *amici* argue, in effect, that Catholic Social Services has a First Amendment right to discriminate against prospective same-sex foster parents in carrying out its public contract, and that enforcing Philadelphia's

contractual nondiscrimination provision will harm foster children by causing the organization to discontinue its services. To the contrary, for the reasons expanded upon by Philadelphia in its brief, enforcement of such generally applicable antidiscrimination laws and policies plainly does not violate the First Amendment; private contractors have no constitutional right to dictate the terms of the public services they provide. Moreover, in the *Amici* States' experience, enforcing antidiscrimination requirements has resulted in no shortage of private agencies—including faith-based organizations—to recruit and support loving foster parents for children in state custody. Rather, when a few contractors with religious objections to such requirements have chosen to discontinue providing foster care or adoption services, we have been able to draw on a diverse group of contractors to serve foster parents and children in a nondiscriminatory manner—and we have found other ways to collaborate with these same faith-based organizations to support children and families.

I. Eradicating Discrimination in Foster Care Services Furthers Compelling Government Interests.

Taking responsibility for children's lives when their safety requires it is among the most solemn functions performed by state and local governments. We frequently contract with private community-based organizations to assist with the care and protection of these children, including placing children with foster and adoptive parents. Our interests in redressing discrimination resonate all the more

in the context of these government contracts: to shield people who have come forward to perform one of the most laudable acts in our society from degrading and discouraging treatment; to safeguard the welfare of the children who so need their care; and to meet the government's own obligations to provide public services on a nondiscriminatory basis and act in the best interests of children.¹

A. Foster Care Services Are Critically Important Public Services and, in Many States, Have Long Been Subject to Antidiscrimination Requirements.

Each state is responsible for administering a child welfare system for children who cannot remain safely with their parents. Many states have taken steps to eliminate discrimination in the provision of such public services.

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 must ensure that children are placed in the “most family like” setting, 42 U.S.C. § 675(5)(A), and often rely on foster parents to care for children in state custody. *See, e.g.*, Mass. Gen. Laws ch. 119, § 32 (requiring that children

¹ As the District Court recognized, strict scrutiny does not apply to Appellants' claims. JA 27. The *Amici* States nevertheless respectfully submit that the government interests at issue are compelling.

be placed with private families unless it is in the child’s best interests to be placed in an institution or school to address specific “special care, treatment, or education” needs). Like Pennsylvania, many states operate these child welfare systems in part through their counties or municipalities.²

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. Community-based organizations are often in the best position to do this work on behalf of the government, and contracts for child welfare services like the one at issue in this case are common.³

For years, state and local governments have recognized the importance of preventing discrimination against prospective foster parents based on characteristics that do not relate to parenting ability, including sexual orientation, and have included antidiscrimination requirements in child welfare agencies’ policies and contracts with private organizations. In many states, the first step was

² *See* JA 4; Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., *State vs. County Administration of Child Welfare Services* (2018), <https://www.childwelfare.gov/pubs/factsheets/services/>.

³ *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://aspe.hhs.gov/basic-report/preparing-effective-contracts-privatized-child-welfare-systems>.

to change policies that disadvantaged same-sex couples. For example, in 1990, Massachusetts changed state regulations that had given a preference to married couples (which had thereby excluded all same-sex couples). In changing this policy, state officials noted that excluding same-sex couples had caused “unnecessary fears” about same-sex parenting.⁴ In the years following, Massachusetts formalized its policy of inclusiveness through regulations that explicitly prohibit discrimination against prospective foster or adoptive parents based on sexual orientation. 110 Mass. Code Regs. § 1.09(3).

Many other states have similar antidiscrimination requirements preventing sexual orientation discrimination in the administration of state child welfare systems, including discrimination against foster parents. *See, e.g.*, Cal. Welf. & Inst. Code § 16013(a); Cal. Code Regs. tit. 22, § 89317; Conn. Gen. Stat. § 46a-81i; D.C. Mun. Regs. tit. 29, § 6003; Md. Code Regs. 07.01.03.03; N.J. Admin. Code § 3A:51-1.6; N.Y. Comp. Codes R. & Regs. tit. 18 § 441.24; 14-1 R.I. Code R. § 100.0140.

Pursuant to such laws and policies, many state and local governments include antidiscrimination provisions in their contracts similar to the one at issue in this case. For example, the standard contract for foster care and other human

⁴ Kay Longcope, *Foster-Care Ban on Gays Is Reversed*, Boston Globe (Apr. 5, 1990).

service providers in Massachusetts requires that contractors not discriminate in the delivery of services based on sexual orientation.⁵ *See also, e.g.*, Conn. Gen. Stat. § 4a-60a (requiring that state contracts contain a provision prohibiting discrimination based on sexual orientation in performance of the contract).

B. Ensuring Contractors' Compliance with Antidiscrimination Laws and Contractual Requirements Prevents and Redresses Harmful Discrimination.

“Our society has come to the recognition that [LGBTQ] persons and [same-sex] couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). Accordingly, the *Amici* States recognize the need to protect LGBTQ people from discrimination by both public and private actors. Twenty-three states and the District of Columbia, for example, forbid discrimination based on sexual orientation in public accommodations.⁶ In states without statewide protections, many municipalities have enacted local antidiscrimination laws.⁷

Plainly legitimate (and compelling) interests support the enforcement of such antidiscrimination laws, including in the context of foster care services.

⁵ *Commonwealth Terms and Conditions for Human and Social Services* ¶ 10 (issued Mar. 14, 1997), www.macomptroller.info/comptroller/docs/forms/contracts/termsconditions-hss.doc.

⁶ *See* LGBT Movement Advancement Project, *Non-Discrimination Laws*, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances (data current as of Oct. 4, 2018).

⁷ *See id.*

Requiring states and localities to allow contractors to choose to discriminate—in violation of contractual requirements—would fundamentally undermine these laws, to the detriment of LGBTQ people and vulnerable children.

1. Antidiscrimination Provisions Prevent Serious Social and Dignitary Harms to LGBTQ People.

Discrimination causes serious social and dignitary harms and leads to social fragmentation and conflict. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984). States have an undeniable interest in preventing these harms, including 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 Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). And when such discrimination “becomes enacted law and public policy, the necessary consequence is to put 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).

Here, where government contractors recruit and support foster and adoptive parents, refusing to include same-sex couples denies them the opportunity to welcome foster children into their homes and families, a deeply intimate and personal choice. *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851

(1992) (“[P]ersonal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” *i.e.*, “matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”).⁸ The Texas *Amici* suggest that prospective LGBTQ foster parents will not be harmed by such discrimination because they can find and participate through agencies that do not have religious objections. Br. 6. But the existence of other service providers does not cure the “the deprivation of personal dignity” caused when an LGBTQ person is turned away—or knows that she would be turned away—by a government-sanctioned agency solely on the basis of sexual orientation. *See Heart of Atlanta Motel*, 379 U.S. at 291.

⁸ *Amici* States and many of their municipalities have long protected the equal rights of LGBTQ people and same-sex couples to make decisions about family and child-rearing. *See, e.g., Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (holding that a parent’s sexual orientation was not a sufficient ground to deny custody of a child); *Partanen v. Gallagher*, 59 N.E.3d 1133, 1142-43 (Mass. 2016) (holding that an unwed woman could pursue a parentage claim regarding her non-biological children from her same-sex relationship under a statute written for fathers in unwed different-sex couples).

2. Welcoming a Large Pool of Foster Parents Benefits Foster Children, Especially LGBTQ Youth.

Children come into state custody every day, and it is not always easy to find qualified people who are willing and able to become their foster parents.⁹ Indeed, state and local governments are always in search of new prospective foster parents to care for children in this moment of acute need. In placing a particular child with particular foster parents, we are obliged to take into account a variety of factors: from geographical proximity to family and school, to the prospective foster parents' ability to address a child's particular medical or other needs. *See, e.g.*, 110 Mass. Code Regs. § 7.101. A broad and diverse pool of foster parents is critical to ensuring that we meet each child's needs. We therefore cannot afford to turn away any qualified families from the pool of prospective foster parents—due to their sexual orientation, or any other characteristic unrelated to parenting ability. To allow for such discrimination would mean that the optimal foster family (or even a suitable one) might not be available to a child at the moment that the child most needs it. And discrimination based on sexual orientation, in particular, would diminish the extraordinary contributions of LGBTQ foster and adoptive parents to children in our society.

⁹ *See generally* John Kelly et al., *The Foster Care Housing Crisis*, The Chronicle of Social Change (Oct. 2017), <https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf>.

Many same-sex couples volunteer to become foster or adoptive parents. Already, an estimated 27,000 same-sex couples are raising 58,000 adopted and foster children in the United States.¹⁰ In Massachusetts, in each of the last 10 years, between 15 and 28 percent of adoptions of foster children have involved same-sex parents.¹¹ And there is a “clear consensus” that children living within same-sex parent families fare equally well as children living within different-sex parent families.¹² For example, children in same-sex parent families are equally well-adjusted.¹³ 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 in the foster system also promotes support and affirmation of LGBTQ foster youth—and all youth—and thus enhances our ability

¹⁰ See Gary J. Gates, *Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey*, The Williams Institute 7-8 (Mar. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf>.

¹¹ Information provided by the Massachusetts Adoption Resource Exchange on September 19, 2018.

¹² See Wendy D. Manning et al., *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief*, 33 Population Res. Pol’y Rev. 485, 485-502 (2014). See also *Obergefell*, 135 S. Ct. at 2600 (“Most States have allowed gays and lesbians to adopt . . . and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”) (citations omitted).

¹³ See, e.g., Jennifer T. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 Child Dev. 1886, 1895-97 (2004).

to provide for the best interests of foster children. In pursuing the best interests of a child, child welfare agencies are required to consider all attributes of a prospective 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.”); N.Y. Soc. Serv. § 409-d (services must be “appropriate to meet the assessed needs of the children and families for whom the social services district is or may be responsible”). And this includes the need for foster youth to be supported in their sexual orientation or gender identity. *See, e.g.*, 110 Mass. Code Regs. § 7.104(1)(d) (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”).¹⁴

¹⁴ *See also* Shannan Wilber et al., Child Welfare League of America, *Best Practice Guidelines: Serving LGBT Youth in Out-of-home Care* 43 (2006), <https://familyproject.sfsu.edu/sites/default/files/bestpracticeslgbyouth.pdf> (“[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.”).

LGBTQ youth are greatly overrepresented in the foster care population: their representation in foster care is twice their share of the general youth population.¹⁵ 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.¹⁶ Foster youth experience discrimination based on their perceived sexual orientation, gender identity, or gender expression at remarkably high levels,¹⁷ and sometimes this discrimination can occur within the foster care system. In one

¹⁵ 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).

¹⁶ See Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute 34-35 (Aug. 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf; see also Dettlaff et al., *supra* note 15, 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).

¹⁷ See Wilson et al., *supra* note 16 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).

study, LGBTQ youth were “more than twice as likely [as non-LGBTQ youth] to report that the foster system treated them ‘not very well.’”¹⁸

A sufficient pool of LGBTQ-affirming placement families, including families headed by same-sex couples, is thus essential to ensuring the right fit for foster youth, including the many who are LGBTQ. Antidiscrimination policies further this goal by encouraging foster parentage by same-sex couples, who are likely to be particularly affirming of LGBTQ foster youth and to know how to advocate on their behalf.¹⁹ Such diversity can also benefit non-LGBTQ foster youth as well; 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.”²⁰ Eliminating discrimination on the basis of sexual orientation in foster care services thus

¹⁸ *Id.* at 40.

¹⁹ 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://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf.

²⁰ 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), http://www.nrcdr.org/_assets/files/6-LGBT_Parents_Report_Exec_Sum-final_NewBrandingOctober2013.pdf.

encourages the participation of an important group of prospective foster parents in supporting the many children who sadly find themselves in need of foster care.

3. State and Local Governments Have Additional Interests in Preventing Discrimination in the Provision of Public Services, Including When Those Services Are Provided Through Contractors.

Although this case arises in the foster care context in particular, Appellants' arguments implicate broader government interests in preventing discrimination in the provision of government services, including when those services are provided through private contractors. To allow contractors with religious objections to refuse to serve all residents equally would undermine state and local governments' ability to provide government services on a nondiscriminatory basis and without favoring particular religious beliefs.

In addition to their interest in preventing discrimination based on sexual orientation generally, state and local governments have a particular interest, grounded in constitutional obligations, in providing state services and benefits on an equal basis to all residents. *See, e.g., Obergefell*, 135 S. Ct. at 2605 (holding that states may not deny marital privileges to same-sex couples); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (holding that the Massachusetts Constitution does not allow the denial of marital privileges to same-sex couples). As relevant here, federal and state courts have held, for example, that states may not deny same-sex couples the ability to foster children or adopt

them out of the foster care system. *See, e.g., Campaign for S. Equality v. Miss. Dept. of Human Servs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016); *Stewart v. Heineman*, No. CI13-0003157, 2015 WL 10373602, at *7 (Neb. Dist. Ct. Sept. 15, 2015), *aff'd*, 892 N.W.2d 542 (Neb. 2017); *Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 91 (Fla. Dist. Ct. App. 2010). And one federal court has recently held that a state may run afoul of the U.S. Constitution by “expressly acknowledging and accepting” that certain adoption and foster-care contractors “may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services.” *Dumont v. Lyon*, No. 17-CV-13080, 2018 WL 4385667, at *22-25 (E.D. Mich. Sept. 14, 2018).²¹

Recognizing these constitutional principles as well as other state interests in nondiscrimination described above, many of the *Amici* States have codified requirements that state agencies and their contractors not discriminate on the basis

²¹ In *Dumont*, the court used rational basis review in analyzing the prospective parents’ equal protection claim, 2018 WL 4385667, at *22, but many federal and state courts have applied a higher level of scrutiny to cases involving discrimination based on sexual orientation. *See, e.g., Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd on other grounds*, 570 U.S. 744 (2013); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014). Moreover, in many states, state constitutional provisions have been interpreted to require heightened scrutiny of claims of discrimination based on sexual orientation. *See, e.g., Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431-32 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384, 440-44 (Cal. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998).

of sexual orientation, and that child welfare agencies, in particular, not discriminate. *See, e.g.*, Mass. Exec. Order No. 526 (Feb. 17, 2011) (recognizing the “duty of Government” to safeguard constitutional rights to “freedom and equality for all individuals” in requiring that “[a]ll programs, activities, and services provided . . . or contracted for by the state shall be conducted without unlawful discrimination based on . . . sexual orientation”); *see also supra* at 6 (collecting other examples of antidiscrimination requirements in state-administered child welfare systems).

As Appellants effectively concede, these generally applicable antidiscrimination policies, like Philadelphia’s, are consistent with the Free Exercise Clause. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).²² They do not have as their “object . . . to infringe upon or restrict practices because of their religious motivation,” *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275 (3d Cir. 2007) (quoting *Church of the Lukumi Babalu*

²² As the Texas *Amici* admit, “[n]othing in the record indicates that the competitive grant program, on its face, prefers one religion to another,” Texas Br. 14, and Appellants concede as much as well; their argument hinges on a contention that they were unlawfully targeted for enforcement. *See* Appellants’ Br. 26-30. As Philadelphia ably argues, there was no such unlawful targeting of religious organizations here, where, upon learning of violations from independent reporting, Philadelphia simply sought to enforce its antidiscrimination ordinance and associated contractual requirement applying to all of its foster care service providers. *See* Phila. Br. 26-34.

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)), nor do they “proscribe...particular conduct only or primarily when religiously motivated,” *id.* at 275 (quoting *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 165 (3d Cir. 2002)). Instead, such policies pursue plainly legitimate government aims, and all providers of state services must follow them.²³

The ability to set such terms for government contractors is critically important to providing government services to all for whom they are intended, especially given the prevalent use of contractors to provide public services in a wide variety of areas—from road maintenance to corrections to public health. In the child welfare context in particular, “58 percent of all family preservation services, 42 percent of all residential treatment, and 52 percent of case management services for adoption are contracted out to private agencies.”²⁴ When a government agency contracts out for such services, it does not create a forum for private speech or the exercise of religious belief, but rather a mechanism for fulfilling its obligations to serve the public—for which it must be able to specify

²³ To the extent that following such antidiscrimination laws pursuant to a government contract is untenable for a private organization, the organization is free to choose not to enter into such a contract. *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (“As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient’s exercise of its First Amendment rights.”).

requirements. *See Teen Ranch v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007) (affirming that a private contractor does not have a First Amendment right to adapt government services in accordance with its own religious beliefs). The implication of the ruling that Appellants seek is that the private organizations that provide such services should be able to tailor contractual requirements based on religious belief to serve only those they choose in the particular manner that they choose. Such a framework would at a minimum hinder, and potentially preclude altogether, government agencies' reliance on contractors to deliver services mandated by state law and policy to be provided to all who qualify for them. By contrast, requiring that private contractors follow antidiscrimination laws and policies in carrying out public contracts directly ensures all members of the public are served and prevents the harms caused by discrimination discussed above—harms in which the government would itself be complicit were it to allow such discrimination to occur by its own hired contractors.

Permitting discrimination by government contractors based on religious beliefs also undermines our strong interests in not privileging particular religious preferences in providing government services. “Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.” *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). “The core rationale underlying the Establishment Clause” is to prevent ““a fusion of governmental and

religious functions.” *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 126 (1982) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963)). State constitutions, too, reflect a strong commitment to this antiestablishment principle. In *Locke v. Davey*, for example, the Supreme Court noted that Washington’s Constitution and statutes contained more stringent antiestablishment requirements than the U.S. Constitution and held that Washington had a substantial interest in upholding them. 540 U.S. 712, 722-24 (2004). A religious exemption from generally applicable antidiscrimination laws for contractors providing state services contravenes these antiestablishment principles. *See, e.g., Dumont*, 2018 WL 4385667, at *14-21 (carve-outs allowing certain religious foster care contractors to discriminate may amount to an improper endorsement of religion and improper entanglement between church and state); *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (D. Mass. 2012) (holding that the U.S. Department of Health and Human Services violated the Establishment Clause in permitting a religious organization to limit taxpayer-funded services for human trafficking victims according to religious criteria), *vacated as moot sub nom. ACLU of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

The circumstances here are far afield from *Tenaflly*, relied on by the Texas *Amici* in arguing that antiestablishment principles cannot justify disallowing religious exemptions to generally applicable antidiscrimination requirements.

Tenaflly involved selective enforcement against a religious group because of its religious expression, and this Court found no compelling Establishment Clause interest because the Borough was not being asked to “affirmatively support religion on preferential terms” but rather to fulfill “‘the governmental obligation of neutrality’ toward religion.” 309 F.3d at 175-76 (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963)). Moreover, the Court noted “a vital difference between purely private religiously motivated conduct,” as existed there, and “conduct initiated or sponsored by government.” *Id.* at 177. Here, by contrast, Philadelphia is enforcing an antidiscrimination law incorporated into a contractual provision that applies to all of its foster care contractors and was recently enforced against a different public contractor. *See* JA 29. This is indeed “conduct initiated [and] sponsored by government,” and the ruling Appellants seek would require Philadelphia to make an exemption “affirmatively support[ing] religion on preferential terms.”

In sum, state and local governments have legitimate and even compelling interests in enforcing antidiscrimination laws in the provision of foster care services through private contractors: to protect prospective parents from discrimination; to promote the wellbeing of children; and to ensure that public services are provided to all who qualify, consistent with our laws and constitutional principles.

II. Experience Shows That a Plentiful Range of Private Organizations Will Comply with Antidiscrimination Policies in Providing Foster Care Services, and That the Few Organizations That Will Not Comply Can Still Contribute to the Welfare of Children and Families.

In the *Amici* States, the vast majority of foster care and adoptive services providers, including faith-based organizations, have enthusiastically complied with inclusionary policies that disallow discrimination in these services. But in some *Amici* States, a few organizations have discontinued offering foster care or adoptive services because recruiting, certifying, or otherwise serving same-sex couples would violate their religious beliefs. In our experience, these decisions have not harmed either children in state custody or state and local governments' ability to administer child welfare systems. Moreover, we have found other ways of productively working with these faith-based organizations to support our children and families. Our experience thus is inconsistent with the Appellants' claims that Philadelphia's enforcement of its contractual antidiscrimination requirement threatens irreparable harm, that the balance of the harms favors Appellants, or that a preliminary injunction is necessary to protect the public interest here. *See* Appellants' Br. 64-71.

In Massachusetts, for example, the Catholic Charitable Bureau of the Archdiocese of Boston ("Catholic Charities Boston") halted adoption services in 2006, citing its religious objections to facilitating adoptions by same-sex parents as

required by state law.²⁵ At that time, Catholic Charities Boston handled more adoptions of foster children than any other private agency in Massachusetts.²⁶ A few years later, Catholic Charities Archdiocese of Washington (“Catholic Charities D.C.”) and Catholic Charities organizations affiliated with four dioceses in Illinois (“Catholic Charities Illinois”) similarly ceased providing foster care and adoption services due to religious objections to policies that required them not to discriminate based on sexual orientation.²⁷ At the time, Catholic Charities Illinois oversaw the cases of 2,000 children, and Catholic Charities D.C. warned that it

²⁵ See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, Boston Globe (Mar. 11, 2006), http://archive.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/.

²⁶ *Id.*

²⁷ See Michelle Boorstein, *Citing Same-sex Marriage Bill, Washington Archdiocese Ends Foster-care Program*, Wash. Post (Feb. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021604899.html>; Tim Craig & Michelle Boorstein, *Catholic Church Gives D.C. Ultimatum on Same-sex Marriage Issue*, Wash. Post (Nov. 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111116943.html>; Kevin Eckstrom, *Catholic Charities Loses Same-Sex Couple Adoption Fight in Illinois*, Religion News Service (Aug. 20, 2011, updated Oct. 20, 2011), https://www.huffingtonpost.com/2011/08/20/catholic-charities-illinois-adoption_n_931893.html; 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).

might pull out of providing services for tens of thousands of people if it was required not to discriminate against same-sex couples.²⁸

In each of these instances, other organizations have stepped in to take over Catholic Charities' caseload of foster and adoptive cases. These organizations, like the thirty private foster care agencies in operation in Philadelphia, *see* JA 4, can and do serve a wide range of families, including families of faith. For example, in Massachusetts, when Catholic Charities Boston ceased to provide adoption services, a network of agencies stepped in to fill the gap. In the years that followed, the percentage of foster children placed for adoption (of those who had a service plan goal of adoption) did not decrease. For the two years prior to Catholic Charities' decision to withdraw, the average percentage of such children placed for adoption was 72%; for the two years after, the average was 73%.²⁹ In other words, although the state and their contracted agencies had to make adjustments, widespread chaos did not ensue, and children continued to be placed in similar numbers.

²⁸ See Manya A. Brachyear, *Three Dioceses Drop Foster Care Lawsuit*, Chi. Trib. (Nov. 15, 2011), <http://www.chicagotribune.com/news/ct-xpm-2011-11-15-ct-met-catholic-charities-foster-care-20111115-story.html>; Craig & Boorstein, *supra* note 27.

²⁹ Information provided by the Massachusetts Department of Children and Families on September 20, 2018.

Similar transitions occurred in the District of Columbia and Illinois. Catholic Charities D.C. transferred its foster care program to another provider, with little to no problems, despite the organization having “sounded alarms” about the potential closure of its social services programs.³⁰ In Illinois, under a transition plan developed by the state, an existing child welfare organization agreed to take all of Catholic Charities’ cases based out of one diocese and a separate organization was formed to assume the cases from another diocese, “to...provide a seamless transition for children.”³¹ Other existing foster care service organizations, including faith-based agencies, continued to take new cases in compliance with antidiscrimination requirements. For example, Catholic Social Services of Southern Illinois formed a new faith-based organization to provide nondiscriminatory foster care and adoption services,³² and Lutheran Child and Family Services of Illinois also connects foster children with “welcoming homes and loving caregivers regardless of . . . sexual orientation[.]”³³ As these experiences demonstrate, state and local governments have had no shortage of

³⁰ See Boorstein, *supra* note 27.

³¹ See Brachyear, *supra* note 28.

³² *Id.*; see also Caritas Family Solutions, *History*, <https://caritasfamilysolutions.org/about/history/>.

³³ See Lutheran Child and Family Servs. of Ill., *Foster Care*, <https://www.lcfs.org/foster>.

agencies qualified to provide nondiscriminatory foster care services and to welcome a broad pool of foster parents.

Moreover, organizations that have chosen not to recruit or certify LGBTQ foster or adoptive parents can still serve other functions to improve the lives of foster children and other vulnerable children and adults without violating the organizations' religious beliefs—including as state and local contractors. In the *Amici* States, such organizations offer support services to children in state custody, health care services to the poor, shelter to the homeless, early education and care to our youngest residents, and English language and other classes to immigrants, among other services and programs. In Massachusetts, for example, Catholic Charities continues to hold state contracts when the organization can comply with contractual terms that disallow discrimination based on sexual orientation. In Fiscal Year 2017, Catholic Charities Boston received approximately half of its revenue—more than \$17 million—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 adoption services.³⁴ Similarly, Catholic Charities D.C. received over \$3 million in Fiscal

³⁴ See Catholic Charities Bureau of the Archdiocese of Boston, Inc., *Combined Financial Statements, June 30, 2017 and 2016*, at 3 (Nov. 8, 2017) https://www.ccab.org/sites/default/files/files/FINAL%20Catholic%20Charities%2C%20Inc_%20Financial%20Statements

Year 2017-2018 from the District's Department of Human Services for case management services, an amount consistent with what it received before ceasing to provide adoption services.³⁵ And Catholic Charities organizations in Illinois had state contracts in Fiscal Year 2018 totaling almost \$100 million in various areas of state government, including human services, child welfare, and elder services.³⁶

As evidenced by experience with our own child welfare systems, antidiscrimination provisions thus neither harm children in need of foster care—indeed, they benefit children—nor preclude religious organizations from continuing to contribute positively to children's lives and our communities.

CONCLUSION

For the foregoing reasons, the *Amici* States join in asking the Court to uphold the District Court's decision not to issue a preliminary injunction

%20June%2030%2C%202017.pdf; Patricia Wen, *Catholic Charities Pulls Out of Adoption*, Boston Globe (Mar. 10, 2006), http://archive.boston.com/news/local/massachusetts/articles/2006/03/10/catholic_charities_pulls_out_of_adoption_business/ (noting that 54% of Catholic Charities Boston's revenue came from government contracts).

³⁵ See Wash. D.C. Office of Contracting and Procurement, *Contract Award Details*, http://app.ocp.dc.gov/RUI/information/award/award_detail.asp?award_id=9595; Craig & Boorstein, *supra* note 27 (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).

³⁶ State of Ill. Comptroller, *State Contracts*, <https://illinoiscomptroller.gov/index.cfm/financial-data/state-expenditures/contracts/> (data as of Oct. 3, 2018).

requiring Philadelphia to allow discrimination against same-sex couples in the provision of foster care services.

Respectfully submitted,

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/s/ Elizabeth N. Dewar

Elizabeth N. Dewar

Dated: October 4, 2018

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I hereby certify that on October 4, 2018, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Elizabeth N. Dewar

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Dated: October 4, 2018