No. 19-123

IN THE

Supreme Court of the United States

SHARONELL FULTON, *ET AL.*,

Petitioners,

v.

CITY OF PHILADELPHIA, *ET AL.*,

Respondents.

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

Brief of 44 United States Senators and Members of the House of Representatives as *amici curiae* in support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a group of 44 United States Senators and Members of the United States House of Representatives.[2] They include members of the Senate Caucus on Foster Youth and the Congressional Caucus on Foster Youth. All of them have labored long to address the challenges facing children in the foster-care system and to encourage policies and legislation to improve those children's lives.

Amici have sponsored, co-sponsored, and voted for numerous Acts and Resolutions to strengthen and expand foster children's access to loving and qualified homes and to protect the constitutional and statutory rights of child welfare providers and of current and prospective foster and adoptive parents. In addition, *amici* are bound by oath to support and defend the Constitution, and thus have an official interest in this Court's interpretation of the First Amendment, which in turn affects how Congress drafts, considers, and enacts laws.

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. 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] A complete list of the Members of Congress participating as *amici* appears in an appendix to this brief.

SUMMARY OF THE ARGUMENT

This Court should grant certiorari and review and correct the lower courts' rulings that erred both as a matter of law and by imposing grave and needless consequences on foster children and those seeking to serve them. There is no dispute that the need for qualified foster homes is at crisis levels. Over 5,000 children in Philadelphia, over 16,000 children in Pennsylvania, and over 437,000 children in the United States are currently in need of foster care. In the face of this overwhelming need, the City of Philadelphia elected to close one of the city's most successful foster care agencies and to shun the services of scores of foster parents. The City's decision was unnecessary (as the City has identified no harm it needs to remedy), was contrary to historic practices and legal precedent, and was a heart-wrenching reduction in the already insufficient pool of available foster homes.

The issue presented by this appeal, when properly understood, is not a difficult one. The question is not whether the Constitution, this Court, or *amici* support, oppose, or are indifferent to the City of Philadelphia's policy of welcoming LGBTQ individuals and couples in adoption and foster care. Indeed, it is undisputed that under Pennsylvania law (and, to the best of *amici's* knowledge, the law of *every* state), LGBTQ people who wish to foster and adopt have the same rights as heterosexual people. Nothing in this lawsuit will alter that state of affairs.

Rather, the issue before this Court is whether the First Amendment will tolerate the City of Philadelphia's decision to pivot from that accommodating stance and quash any child welfare providers who, on the basis of their sincerely held religious beliefs, are unable to

certify unmarried and same-sex couples as prospective foster parents. *Amici* believe the First Amendment does not permit the City's hostility.

Religion, marriage, and sexuality are deeply important issues about which Americans hold diverse beliefs. The freedom to form, express, and exercise those beliefs without government coercion is enshrined in the Constitution. *See Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2593–94 (2015).[3] This freedom extends to those who hold the "decent and honorable religious or philosophical" belief that marriage is limited to opposite-sex unions—a belief that can be held "in good faith by reasonable and sincere people." *Id.* at 2602, 2594. A constitutional problem arises only when the State—as it has done here—makes a citizen into an "outlaw" or "outcast" for holding a view of marriage contrary to the State. *Id.* at 2600.

A better approach, especially on deeply contested moral issues that implicate constitutional freedoms of belief and behavior, is to "create a society in which both sides can live their own values." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014). This is the approach required by the First Amendment, respectfully urged by *amici*, and best suited to serve children in need.

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[3] The instant petition does not challenge or affect same-sex marriage, a legal question addressed by the Supreme Court in 2015. But *amici* believe the same principals of pluralism, freedom, and accommodation that animated the Court's decision in *Obergefell* likewise mandate accommodation of the religious parents and providers in the instant proceeding.

ARGUMENT

I. There is a long, unbroken, nationwide history of faith-based providers caring for children in need as an exercise of, and in keeping with, their religious beliefs.

The facts presented by this petition are not unique nor are they confined to the City of Philadelphia. The animus displayed by the City toward religious foster parents and providers is but one recent example of a state or local government that—whether by ignorance or coercive design—acts as if it cannot both welcome LGBTQ individuals and simultaneously respect and accommodate the First Amendment rights of other foster parents and providers. This hostility ignores the centuries-old tradition of religious child welfare providers, and would significantly *reduce* the supply of qualified homes at a time when the need is great and the demand is growing.

From before the nation's founding till the present day, care for orphaned, abused, and neglected children was primarily the prerogative of private and religious groups. *See* U.S. Dept. of Health & Human Servs., *History of National Foster Care Month* ("Before the creation of the Children's Bureau in 1912, child welfare and foster care were mainly in the hands of private and religious organizations."), *available at* https://www.childwelfare.gov/fostercaremonth/about/history/ (last visited July 24, 2019); U.S. Dept. of Health & Human Servs., *Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems* (March 2008) ("[C]hild welfare services actually originated in the private sector. [] States and local governments in some parts of the country have relied on child welfare services in the private, voluntary sector since at least

the early 1800s."), *available at* https://aspe.hhs.gov/basic-report/evolving-roles-public-and-private-agencies-privatized-child-welfare-systems (last visited July 24, 2019); Susan V. Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1298 (1999) ("Uniquely, foster care had originally been provided by private agencies with public agencies later joining as partners. It was always a 'privatized' system, never an exclusively public one."); *see also* GEORGE WHITEFIELD'S JOURNALS, 395–404 (Iain Murray, ed., London 1960) (recounting how, beginning in 1740, the renowned colonial-era preacher founded and operated a home for orphaned boys near Savannah, Georgia).

Even in the modern era, state and municipal social services agencies partner with and rely on faith-based child welfare providers. To the best of *amici's* considerable knowledge, such providers (including Catholic Social Services) gladly serve children of every race, color, national origin, creed, disability, sex, political belief, sexual orientation, and gender identity. Without the assistance of these providers, children would be at an even greater risk of remaining in government care, especially when the need for foster families exceeds the limited supply.

For example, according to reports from not long before this suit was filed, demand for foster homes in South Carolina has outstripped supply by more than a two-to-one ratio, and the situation is growing worse. *See* Angela Davis, *Church, group homes get innovative to address foster care needs*, Greenville Online (March 25, 2017), *available at* https://www.greenvilleonline.com/story/news/local/2017/03/25/church-group-homes-get-innovative-address-foster-care-needs/99166724/. The

data indicate a similar increasing demand nationwide. For example, from 2012 to 2016, there was a 10% increase in the number of children in care across the country. *See* U.S. Dept. of Health & Human Servs., AFCARS Report Nos. 20 & 24, *available at* https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf and https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf (last visited July 24, 2019).

The human and financial cost resulting from the understaffed and overworked foster care system is real and tragic. *See*, *e.g.*, *M.F.* v. *Perry Cnty. Children & Family Servs.*, 725 Fed. App'x 400 (6th Cir. 2018) ("This case involves a tragic situation in which an overworked county Children's Services agency put two children in the small home of family friends, whose live-in grown grandson sexually abused the children. . . . Plaintiffs argue that the agency defendants did not find out about the specific threat of the abuse because of the understaffing and underfunding of the agency."); Sarah Torre and Ryan T. Anderson, *Protecting the Religious Liberty of Adoption and Foster Care Providers* (Witherspoon Institute, August 1, 2014) (noting that many teens who age out of the foster care system in any given year without the stability and support of a permanent family will rely on government benefits during their adult lives at a cost of over $1 billion per year in average public assistance and support) (citing statistics from the National Council for Adoption), *available at* http://www.thepublicdiscourse.com/2014/08/13623/ (last visited July 24, 2019).

Religious providers and parents play a critical role in developing and providing homes to close this gap. Faith-based providers and networks can tap into faith

communities and attract new populations of foster and adoptive parents. In Arkansas, for example, a single religious provider, working with a network of churches who share its religious beliefs and motivations, has helped recruit almost *half* the foster families in the state. *See* Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, The Chronicles of Social Change (Nov. 28, 2017), *available at* https://chronicleofsocialchange.org/featured/arkansas-one-faith-based-group-recruits-almost-half-foster-homes/28821. That provider, like Catholic Social Services in Philadelphia, refers any families with whom it cannot work to other providers or directly to the state's Division of Child and Family Services. The net effect of such practices is to *expand* the pool of available homes, not to shrink it. All qualified prospective parents are still able to serve—either with another agency or through direct licensure by the state—and faith-based providers are able to recruit homes who otherwise might not volunteer.[4] This gives equal treatment to every person, regardless of faith, race, orientation, or background.

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[4] Of the families working with the aforementioned faith-based provider in Arkansas, for example, 36% said they would not have become foster or adoptive parents if they had not been exposed to the organization, and 40% were unsure. *See* Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, J. OF PUB. MANAGEMENT & SOCIAL POLICY, No. 19, Vol. 2, (2013), pp. 176–77; *see also* Maggie Jones, *God Called Them to Adopt. And Adopt. And Adopt.*, The New York Times Magazine (Nov. 14, 2013) ("Of the dozens of evangelical and conservative Christian parents I spoke to, many said that church sermons, Christian radio shows or other Christian campaigns . . . pushed them to adopt.").

In addition, some religious providers excel at placing children who may have a more difficult time finding homes, including older children, sibling groups, and those with special needs. *See* Shamber Flore, *My Adoption Saved Me*, The Detroit News (March 7, 2018), *available at* https://www.detroitnews.com/story/opinion/2018/03/07/religious-adoption-agencies-aclu/32717127/ (last visited July 24, 2019); Maggie Jones, *God Called Them to Adopt. And Adopt. And Adopt.*, The New York Times Magazine (Nov. 14, 2013) (recounting how Christian families, prompted by their faith and the urging of religious agencies, felt called to adopt multiple foster children, many of whom had special needs).

Religious providers and parents see their charitable work as a religious ministry, and they view the upbringing of children and care of orphans as religious duties. For instance, an oft-repeated teaching in the Jewish Tanakh (first appearing in the Torah, and then repeated in the Nevi'im and the Ketuvim) is that God is deeply and personally concerned with the care of fatherless children. *See, e.g., Deuteronomy* 10:18 ("God executes justice for the fatherless and the widow and loves the sojourner, giving him food and clothing"). This teaching is accepted as sacred by Muslims and Christians, meaning it is scripture to almost 4 billion people—over half the world's population, and more than 80% of Americans. *See* Pew Research Center, *The Future of World Religions: Population Growth Projections, 2010-2050*, Demographic Study (April 2, 2015), *available at* http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/.

Likewise, in the Christian faith, Scripture and

Jesus himself command special care and solicitude be shown to children generally and to the needy and orphans particularly. *See, e.g.*, *Matthew* 18:5–10 ("Whoever receives one such child in my name receives me. . . . See that you do not despise one of these little ones."); *Mark* 10:14–16 ("Let the children come to me; do not hinder them, for to such belongs the kingdom of God."); *James* 1:27 ("Religion that is pure and undefiled before God, the Father, is this: to visit orphans and widows in their affliction.").[5]

Not surprisingly, then, while faith-based child welfare providers serve children of every background and situation, many such providers believe their recruiting and certifying of prospective foster homes is guided by and subject to certain of their long-standing religious convictions, including their beliefs regarding marriage and sexuality. Moreover, these providers have always had the freedom to protect the integrity of their ministry by making associational choices in keeping with their convictions.

In the instant proceeding, the lower courts' rulings

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[5] Indeed, religiously-motivated care for unwanted, abused, or orphaned children has been a hallmark of the Christian faith for millennia. *See* Polycarp, *Philippians 6.1* (c. A.D. 110) ("The presbyters, for their part, must be compassionate, merciful to all . . . not neglecting a widow, orphan, or poor person, but always aiming at what in honorable in the sight of God and of people."); *Apology of Aristides the Philosopher* 15 (c. A.D. 125) ("[T]hey love one another; and from widows they do not turn away their esteem; and they deliver the orphan from him who treats him harshly."); Timothy Miller, *The Orphans of Byzantium: Child Welfare in the Christian Empire*, 174–75 (2003) (noting that during the Middle Ages, the Church maintained "group homes large enough to care for and educate all the local children whose parents had left them without guardians.").

fail to reckon with the lengthy and vitally needed tradition of religious believers exercising their faith by providing foster and adoption services—services that are needed now more than ever. Over 16,000 children in Pennsylvania and over 437,000 children in the United States are currently in need of foster care. *See* U.S. Dept. of Health & Human Servs., AFCARS Report State Data Tables 2016, *available at* https://www.acf.hhs.gov/sites/default/files/cb/afcars_state_data_tables_07thru16.xlsx (last visited July 24, 2019). In addition, more than 3,000 children in Pennsylvania and 117,000 across the country await adoption. *Id*. The need far exceeds the supply of available homes, and these children—who come from diverse backgrounds and have diverse needs—are best served by a broad spectrum of providers and parents. Religiously motivated providers and parents have played a critical role in filling this need for centuries from coast to coast, and to drive them out ignores the critical need and the grave harm to children that would be caused by their loss.

II. Government partnership with religious social services providers is a permissible, feasible, and historically common practice.

Examined through the lenses of history and contemporary practices, the permissibility and salutary effects of government partnership with religious providers are clear. In the absence of this Court's review and correction of the lower courts' rulings in the instant appeal, however, this mutually-beneficial and long-standing practice will be increasingly challenged, and

the rights of cities, States, and religious providers will be increasingly chilled.[6]

A. Government accommodation of and contracting with religious entities is historically common.

State and federal governments have been contracting with religious ministries to provide a variety of services to vulnerable populations for hundreds of years. For instance, almost one of six hospitals in the United States are Catholic, and they fulfill a variety of services for the government and receive reimbursement through government programs like Medicare and Medicaid.[7] There is a similarly well-established history of government partnership with religious child welfare providers:

> The history of government funding of services provided by private organizations, especially

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[6] Indeed, such challenges are already underway and continue to mount. *See*, *e.g.*, Complaint, *Rogers* v. *U.S. Dep't of Health & Human Servs*., No. 19-01567 (D.S.C. May 30, 2019), ECF No. 1.; Complaint, *Maddonna* v. *U.S. Dep't of Health & Human Servs*., No. 19-00448 (D.S.C. Feb. 15, 2018), ECF No. 1; Complaint, *Marouf* v. *Azar*, No. 18-cv-00378 (D.D.C. Feb. 20, 2018), ECF No.1.

[7] This practice has a lengthy pedigree and has been upheld by the courts. *See Bradfield* v. *Roberts*, 175 U.S. 291 (1899) (holding federal contract with a Roman Catholic hospital operated by nuns to serve the poor did not violate the Establishment Clause); Edward Queen, *History, Hysteria, and Hype: Government Contracting with Faith-Based Social Service Agencies*, Religions 2017 ("In the medical field, an 1889 survey of seventeen major hospitals revealed that 12%–13% of their income came from government sources and a 1904 Census Bureau survey estimated that governments provided eight percent of all hospital income nationwide, a figure exceeded in many states. Given that the overwhelming number of private hospitals at that time had been established under the auspices of religious organizations a large portion of this money went to hospitals founded on religious principles.").

> private eleemosynary organizations, is a long one.
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> For example, in 1806 the New York Orphan Asylum, a decidedly Protestant organization, established an orphanage, which, by decade's end, received state monies to support over 200 orphans.
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> * * *
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> Most orphanages during that time were established along religious lines and served orphans of a particular faith. In fact, they were subsidized by New York and other cities for doing exactly that. That both the state government and others recognized this fact is illustrated by the 1863 act of the New York legislature to charter the Roman Catholic Protectory to receive truant, vagrant, and delinquent children whose parents or guardians had requested the courts to commit them to a Catholic establishment rather than to the House of Refuge or other predominantly Protestant institutions.
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> * * *
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> By the beginning of the twentieth century, the use of private non-profit organizations for the provision of services to the orphaned, the sick, and the destitute was widespread throughout the United States.

Queen, *History, Hysteria, & Hype,* Religions 2017 at 4–5; *see also* pp. 4–5, *supra*. In sum, government licensing

of and contracting with faith-based social services providers was historically common and permissible.

B. Government accommodation of faith-based providers remains feasible and permissible.

The historic practice of accommodating and partnering with faith-based entities is both feasible and permissible today. *See*, *e.g.*, *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (holding the direct federal funding of faith-based counseling centers to provide social services was permissible and noting "that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs").[8]

Such accommodations are, in fact, still practiced today by state and local governments in this very context. The states of South Carolina and Texas, to name but two examples, have recognized the immense value faith-based foster care agencies provide and have found ways to accommodate such providers' beliefs and practices while simultaneously ensuring that *any* qualified person may serve as a foster parent. *See*, *e.g.*, Gov. Henry McMaster's Exec. Order No. 2018-12 (Mar. 13, 2018), *available at* https://governor.

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[8] The federal government's use of religious contractors likewise continues in the present day. For example, a search of USASpending.gov for entities narrowly classified as "religious organizations" turns up over 2,000 contracts in FY2013 alone, and that does not count many more ministries classified as "non-profits." Such ministries provide a variety of important services, including housing and care for homeless veterans, drug prevention programs for youth, comprehensive medical assistance, substance abuse rehabilitation, ministries to prison inmates, and much-needed and well-deserved retreats for service members and their families.

sc.gov/sites/default/files/Documents/Executive-Orders/2018-03-13-FILED-Executive-Order-No-2018-12.pdf; Letter from Texas Atty. Gen. Ken Paxton to U.S. Dept. of Health & Human Servs. (December 17, 2018), *available at* https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2018/Press/Letter%20KP%20to%20HHS%20re%20Title%20IV-E%20Foster%20Care%20Funding%20Waiver%20Final%20Signed.pdf.

Such accommodations are premised in part on the recognition that private faith-based providers are exactly that—private entities who retain their constitutional and statutory rights of association, expression, and religious exercise even when contracting with the government. *See generally Ismail* v. *Cnty. of Orange*, 693 Fed. App'x 507, 512 (9th Cir. 2017) (holding foster parents were not state actors); *Leshko*, 423 F.3d 337 (same); *Hall* v. *Smith*, 497 Fed. App'x 366 (5th Cir. 2012) (holding a private child-placing agency's placement of a child with foster parent was not state action); *Rayburn* v. *Hogue*, 241 F.3d 1341 (11th Cir. 2001) (holding foster parents who provide services pursuant to contract with the state were not engaged in state action); *Milburn*, 871 F.2d at 479 (same); *Malachowski* v. *City of Keene*, 787 F.2d 704 (1st Cir. 1986) (holding non-profit organization that made foster homes available and provided child placement to court was not engaged in state action); *P.G.* v. *Ramsey Cnty.*, 141 F. Supp. 2d 1220, 1226 (D. Minn. 2001) (holding foster parents are not state actors); *Letisha A.* v. *Morgan*, 855 F. Supp. 943 (N.D. Ill. 1994) (holding a private home for abused or neglected children was not engaged in state action); *Pfoltzer* v. *Cnty. of Fairfax*, 775 F. Supp. 874 (E.D. Va. 1991) (holding foster parents who cared for children under state guidelines were not engaged in state

action); *accord Rendell-Baker* v. *Kohn*, 457 U.S. 830, 842 (1982) ("That a private entity performs a function which serves the public does not make its acts state action.").

These accommodations are further premised on the recognition that adoption and foster care and placement are *not* exclusively (or even especially) government functions. *See*, *e.g.*, *Leshko* v. *Servis*, 423 F.3d 337, 343 (3d Cir. 2005) ("No aspect of providing care to foster children in Pennsylvania has ever been the exclusive province of the government."); *Milburn* v. *Anne Arundel Cty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) ("[T]he care of foster children is not traditionally the exclusive prerogative of the State."); *Malachowski* v. *City of Keene*, 787 F.2d 704, 711 (1st Cir. 1986) (per curiam) ("[C]hild care and placement is not traditionally the exclusive prerogative of the state."); *Marr* v. *Schofield*, 307 F. Supp. 2d 130, 134 (D. Me. 2004) ("Courts generally have agreed that foster parents do not perform a function that is reserved exclusively to the state."); *see also* Part I, *supra*.

Such accommodations and partnerships are further premised on the recognition that preventing religious entities from participating in government programs would create a clear Free Exercise problem. *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, at 2025 (June 26, 2017) (holding the state's policy of "expressly denying a qualified religious entity a public benefit solely because of its religious character . . . goes too far" and "violates the Free Exercise Clause"); *Hartmann* v. *Stone*, 68 F.3d 973 (6th Cir. 1995) (striking down an Army regulation prohibiting on-base child care

providers from engaging in religious exercise, holding that even where the Army funded, insured, and owned the facilities, and reimbursed provider costs, the Army's goal of avoiding entanglement with religion was an insufficient basis to encroach on the providers' First Amendment rights).[9] In short, governmental accommodation of and contracting with faith-based providers remains feasible and permissible today.

III. Children in need of loving homes are best served by State accommodation of religious providers and parents and the resulting increase in the number of available homes.

The facts underlying this appeal present a bitter irony. In the name of inclusion, the City of Philadelphia and its agencies have shut down a sizeable child welfare provider and rejected the service of scores if not hundreds of current and potential foster and adoptive parents who partner with these providers, thereby *reducing* the pool of qualified and loving homes available to children in

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[9] *See also Bd. of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Religion Clauses . . . all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004) ("[T]o deny equal treatment to a [religious organization] on the grounds that it conveys religious ideas is to penalize it for being religious. Such unequal treatment is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses."); *Christian Legal Society v. Walker,* 453 F.3d 853 (7th Cir. 2006) (holding a public university erred by revoking a religious student group's status due to its requirement that its student leaders adhere to beliefs and behaviors consistent with its religious tenets).

desperate need.

The City has identified no injury that prompted this drastic "remedy" and has identified no harm that would be caused by accommodating these religious providers and parents. The City's decision to shut out certain providers was apparently precipitated by religious providers' inability to certify same-sex couples as prospective foster parents without violating their doctrinal beliefs regarding marriage, and respectfully referring other applicants to other providers or directly to the City's Department of Human Services. This practice didn't (and doesn't) prevent anyone from becoming a foster or adoptive parent. It is undisputed that under Pennsylvania law, LGBTQ people who wish to foster and adopt have the same rights and access as heterosexual people. The practices of two religious providers have no effect on those rights, and nothing in this lawsuit will alter those rights.

The attempts below to identify an injury caused by the religious providers' practices miss the mark, and the assertion that accommodation of religious providers prevents anyone from fostering or reduces the pool of available homes is plainly incorrect for at least two reasons.

First, there is no evidence—either in the Record, the scholarly literature, or the public domain—that the practice of religious providers in Philadelphia (or elsewhere) of referring same-sex couples to another agency causes a significant inconvenience to the applicants, much less *prevents* them from becoming foster parents. It is not a difficult task to find dozens of other foster care providers in Philadelphia with whom to apply. Indeed, the very first result for the

Google search, "Foster agencies in Philadelphia," is an official City website that encourages the reader to "[b]rowse the list of foster agencies to find the best fit for you," and links to a list of no fewer than 24 licensed foster agencies in the city which will partner with any qualified applicant regardless of his or her creed, sexual orientation, or gender identity. *See* City of Philadelphia Dept. of Human Servs., *Foster Care Licensing Agencies (contracted by Philadelphia DHS)*, *available at* https://www.phila.gov/media/20190710120952/DHS_Philadelphia_Foster_Care_Agencies_041119.pdf (last visited July 24, 2019).

Second, there is no evidence—either in the Record, the scholarly literature, or the public domain—that the practice of religious providers in Philadelphia (or elsewhere) of referring same-sex couples to another foster care agency deprives needy children of families or reduces the pool of qualified foster homes. In fact, the literature and social science contains evidence *to the contrary*, namely that religious child welfare providers *expand* the pool of available homes by recruiting from a community of like-minded believers who otherwise likely would not have applied to become foster or adoptive parents. *See* Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, J. OF PUB. MANAGEMENT & SOCIAL POLICY, No. 19, Vol. 2, (2013), pp. 176–177 (noting that one religious provider had recruited from likeminded churches nearly half the foster families in the state, 36% of whom said they would not have become foster or adoptive parents had they not been exposed to the organization, and 40% of whom were unsure); Maggie Jones, *God Called Them to Adopt. And Adopt. And Adopt.*, The New York Times Magazine

(Nov. 14, 2013) ("Of the dozens of evangelical and conservative Christian parents I spoke to, many said that church sermons, Christian radio shows or other Christian campaigns . . . pushed them to adopt.").

In sum, *amici* believe the answer to the legal issue presented in this proceeding—namely, whether the First Amendment protects the rights of religious foster parents and providers to minister in accordance with their religious beliefs—is "yes." And *amici* believe the answer to the practical, underlying question—namely, how to create the largest pool of qualified and loving homes for children in need—supports and, indeed, requires that answer as well.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court grant the Petition for Certiorari and bring needed clarity and historical consistency to First Amendment jurisprudence in this context.

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August 26, 2019

APPENDIX

APPENDIX — COMPLETE LIST OF *AMICI CURIAE*

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Roy Blunt (MO)
John Boozman (AR)
Mike Braun (IN)
Kevin Cramer (ND)
Ted Cruz (TX)
Steve Daines (MT)
Michael B. Enzi (WY)
Joni Ernst (IA)
Lindsey Graham (SC)
Josh Hawley (MO)
James M. Inhofe (OK)
James Lankford (OK)
James E. Risch (ID)

II. Members of the United States House of Representatives

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Lead House *amicus curiae*
Robert B. Aderholt (AL-03)
Rick Allen (GA-12)
Brian Babin (TX-36)
Jim Banks (IN-03)
Kevin Brady (TX-08)
Ted Budd (NC-13)

Jeff Duncan (SC-03)
Bill Flores (TX-17)
Matt Gaetz (FL-01)
Louie Gohmert (TX-01)
Glenn Grothman (WI-06)
Vicky Hartzler (MO-04)
Jody B. Hice (GA-10)
Clay Higgins (LA-03)
Jim Jordan (OH-04)
Steve King (IA-04)
Doug Lamborn (CO-05)
Debbie Lesko (AZ-08)
Mark Meadows (NC-11)
Ralph Norman (SC-05)
Pete Olson (TX-22)
Bill Posey (FL-08)
Steve Scalise (LA-01)
William Timmons (SC-04)
Tim Walberg (MI-07)
Randy K. Weber (TX-14)
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