No. 19-123

In the
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF OF GALEN BLACK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Galen Black is a believer in the Native American Church and was a co-plaintiff in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (hereinafter "*Smith II*").

In the late 1970s, after his time in the Navy, Black battled alcohol dependency and spent eleven years bouncing between sobriety and addiction. The turning point came when Black enrolled in a treatment center and discovered a program called the "Red Road to Wellbriety." Black credits his nearly forty years of sobriety from alcohol addiction to the Red Road to Wellbriety and the practices of the Native American Church, sweat lodge, and peyote ceremony. Peyote is a drug used during an ancient religious practice that plays a central role in the Native American Church. *Employment Div., Dep't of Human Res. v. Smith*, 485 U.S. 660, 661–62, 667 n.11 (1988) (hereinafter "*Smith I*"). Under Oregon law at that time, peyote was illegal. *Id.* at 662. Peyote is treated like a deity, and "constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost." *Id.* at 667 n.11.

After his recovery, Black became a counselor at the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"). *Id.* at 662. At the time, ADAPT partnered with Oregon as part of an

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[1] *Amicus* states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

initiative to provide substance abuse treatment programs tailored to Native American culture and religion. Black discovered the Native American Church as a result and credits its influence with helping him to maintain his sobriety by looking honestly at the truth of his life.

In 1984, Black and his colleague, Alfred Smith, were fired as counselors at ADAPT for their religiously-motivated ingestion of peyote. Relying upon the fact that they had committed an offense under state law, Oregon denied Black and Smith unemployment benefits. *See id.* at 663–64. Black and Smith challenged this determination under the Free Exercise Clause of the First Amendment to the U.S. Constitution. *Id.* This Court denied Black and Smith's claim because Oregon's prohibition on peyote use was neutral and generally applicable. *Smith II*, 494 U.S. at 878–89.

Oregon later amended its laws and added a religious accommodation for the ingestion of peyote. Or. Rev. Stat. § 475.752(4) (2020). Because Oregon's accommodation is vital to Black's spiritual health, and he attributes his longstanding sobriety to the faith he discovered through a partnership between government and a religious program, he has a strong interest in promoting government's ability to work with religious organizations and individuals to further the public interest.

SUMMARY OF ARGUMENT

This Court has repeatedly recognized that the Establishment Clause is not violated whenever the government works with religious organizations. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017); *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). Indeed, local, state, and federal governments often partner with religious organizations like Catholic Social Services (CSS) to accomplish shared goals. The Establishment Clause permits the City of Philadelphia to work with CSS and other religious organizations to place foster children in loving homes. However, where government disqualifies a religious organization from working with it because of the organization's religious beliefs and identity, such an action would violate the Free Exercise Clause.

The Court must prohibit Philadelphia from acting with "a hostility toward religion that has no place in our Establishment Clause traditions," *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment), and instead require the government to display "respect and tolerance for differing views." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019). Especially in a time when there is a shortage of qualified and effective foster care providers, Philadelphia should not be permitted to prioritize its animus against Catholic orthodoxy over the need to place children in loving homes.

ARGUMENT

I. Philadelphia Can Partner with Religious Agencies Like Catholic Social Services without Violating the Establishment Clause.

Americans have a rich tradition of coming together to provide charitable services for those in need. Local, state, and federal governments often partner with community or religious organizations, whether through government grants, contracts, or other programs, to provide essential community services such as adoption and foster care.[2] *See, e.g.*, *Bowen*, 487 U.S. at 609 (noting the "long history of cooperation and interdependency between governments and charitable or religious organizations"); *Zelman v. Simmons-Harris*, 536 U.S. 639, 667 (2002) (O'Connor, J., concurring) (describing federal support of religiously-affiliated hospitals).

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[2] In recent years, Presidents George W. Bush, Barack Obama, and Donald Trump have all recognized the important role that religious organizations play in providing charitable services. President Bush created the White House Office of Faith-Based and Community Initiatives within the Executive Office of the President. Exec. Order No. 13199 § 1, 66 Fed. Reg. 8,499 (Jan. 29, 2001) ("Faith-based and other community organizations are indispensable in meeting the needs of poor Americans and distressed neighborhoods. Government cannot be replaced by such organizations, but it can and should welcome them as partners."). President Barack Obama continued the initiative, renaming the office the White House Office of Faith-Based and Neighborhood Partnerships. Exec. Order No. 13498, 74 Fed. Reg. 6,533 (Feb. 5, 2009). Donald Trump continues the tradition of working with various community and religious organizations. Exec. Order No. 13831, 83 Fed. Reg. 20,715 (May 3, 2018).

These partnerships are fully consistent with the Establishment Clause. As *Trinity Lutheran* makes clear, the Establishment Clause not only permits governments to fund religious organizations in order to further shared goals such as promoting children's safety, but refusing to partner with religious agencies because of their religious character would likely constitute unlawful religious discrimination in violation of the Free Exercise Clause. *See Trinity Lutheran*, 137 S. Ct. at 2019.

The Establishment Clause may pose limits on government directly funding explicitly religious activities, such as worship or proselytization, but it does not bar government and religious organizations from working together where their interests align to reach a shared goal, such as providing social services like foster care services. *Bowen*, 487 U.S. at 613 (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)) ("Nor does the alignment of the statute and the religious views of the grantees run afoul of our proscription against 'fund[ing] a specifically religious activity in an otherwise substantially secular setting.'").

In the proceedings below, Intervenors argued broadly that the "Establishment Clause forbids the government from delegating a government function to a religious organization and then allowing that government function to be performed using religious criteria." Brief for Intervenors-Appellees Support Center for Child Advocates and Philadelphia Family Pride at 50, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574) (hereinafter

"Intervenors' brief"). However, such a standard is neither workable nor consistent with current Establishment Clause jurisprudence. First, caring for orphans and neglected children has long been the work of religious organizations. Comparatively, the government has only recently become involved. *See e.g.*, *Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019). It is far from accurate to call caring for orphans a "government function." Second, a religious organization's religious beliefs motivate or influence virtually everything they do. Thus, the government will have a difficult time drawing the distinction between what is "religious criteria" and what is not, undoubtedly leading to the violative "pervasively sectarian" analysis.[3] Third, a variety of factors, including religious beliefs, could motivate a decision to recommend not placing a child in a home that uses corporal punishment, for example. Such decisions are not less legitimate merely because the organization's religious beliefs inform them. For this reason (among others), defining a clear, consistent, and nondiscriminatory line between permissible "secular" considerations and impermissible "religious" considerations is practically impossible. Faith is a way of life, not an "on-off" switch, so forcing organizations to bifurcate "secular" and "religious" decisionmaking would effectively bar religious agencies from equally participating in government grants or contracts. In this

[3] The "pervasively sectarian" doctrine, however, "has a shameful pedigree" that a plurality of the U.S. Supreme Court did "not hesitate to disavow" in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (outlining the history of the "pervasively sectarian" doctrine in detail). The plurality ultimately concluded that "[t]his doctrine, born of bigotry, should be buried now." *Id.* at 829.

way, prohibiting partner religious organizations from using "religious standards" to make decisions when carrying out their shared objectives is unworkable.

Furthermore, Intervenors' reliance on *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), is misplaced. There, the Court held that a Massachusetts statute giving churches the power to veto applications for liquor licenses within a 500-foot radius violated the Establishment Clause. *Id.* at 117. The case stands for the proposition that the government cannot abdicate its responsibility by granting religious organizations "standardless" discretion to undertake important, discretionary government powers. *Id.* at 125; *see also Harkness v. Sec'y of the Navy*, 858 F.3d 437, 449–50 (6th Cir. 2017) (distinguishing *Larkin*). It does not go as far as Intervenors' argument that any exercise of discretion coinciding with religious belief is unconstitutional. In the present case, unlike in *Larkin*, CSS does not ask Philadelphia to abdicate any discretionary authority. Indeed, CSS does not have any authority to direct third parties, it is simply one out of many provider options. CSS merely seeks the ability to carry out its mission—to place foster children in loving homes—in a manner consistent with its religious beliefs and identity, just as it has done successfully for over two centuries.

In any event, *Larkin* was decided under the now-discredited *Lemon* test. No historical analysis of the government-religious relationship in that context was conducted, and such an analysis is necessary here.

II. Because of the *Lemon* Test's Limited Utility in this Context, Establishment Clause Claims Instead Should Be Evaluated with Respect to History and Tradition.

Under *American Legion*, the Establishment Clause is meant to be interpreted in light of historical practices and understandings. 139 S. Ct. 2067. The *Lemon* test—which a majority of this Court was unable to affirm, *see id.* at 2089–90 (Breyer, J., concurring); *id.* at 2092 (Kavanaugh, J., concurring); *id.* at 2097 (Thomas, J., concurring); *id.* at 2102 (Gorsuch, J., concurring); *id.* at 2103 (Ginsburg, J., dissenting) —is an especially poor fit here because it ignores the longstanding history of government-religious partnership in providing foster care. For instance, one of the three prongs of *Lemon v. Kurtzman*'s much-criticized[4] framework is whether the government's action endorses, advances, or inhibits religion. 403 U.S. 602, 612–613 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Whenever a religious organization partners with the government, they are both working together to achieve a common goal. It is, thus, axiomatic that these religious partners will always view their work as furthering their religious mission in at least some sense (such as fulfilling their God-given mission to serve the poor and needy).[5] *See Am. Legion*, 139 S. Ct. at 2092

[4] *See Am. Legion*, 139 S. Ct. at 2081 ("The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.").

[5] Typically, this prong is not interpreted quite so broadly. *See Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring) (collecting Establishment Clause cases). Accordingly, while Philadelphia

(Kavanaugh, J., concurring) (explaining that in many government funding cases, the Court has ignored *Lemon* and upheld "government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion").

On the other hand, if the government specifically excluded religious organizations in an effort to avoid such concerns, it would inhibit religion by categorically disadvantaging religious agencies. *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2019 ("[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion."). Either way, the government could be seen as violating *Lemon*'s requirement neither to advance nor to inhibit religion. But this "catch-22" demonstrates just one of the ways *Lemon* fails to provide a workable framework for evaluating Establishment Clause issues. Rather, because "[t]here is no single formula for resolving Establishment Clause challenges[,] . . . [t]he Court must consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish . . . ." *Am. Legion*, 139 S. Ct. at 2090–91 (Breyer, J., concurring).

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partnering with CSS would not fail the *Lemon* test, the confusion the test creates demonstrates that here, as in other contexts, *Lemon* is "not useful." *See Van Orden*, 545 U.S. at 686.

In the present case, the City partners with a wide variety of adoption and foster care agencies to serve a diverse array of needs. Casting a wide net necessarily involves working with organizations that hold different perspectives, including religious perspectives. Rather than choosing winners and losers by prioritizing some worldviews over others, the government should permit any qualified providers—based on objectively neutral criteria—to work with it to accomplish their shared goals. Permitting such a diversity of charitable and philanthropic organizations to come together to serve the community treats religious institutions "equally to comparable secular people, organizations, speech, or activity." *See Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring). Simply put, the government and the religious organization need not share the same orthodoxy in order to work together to further the same goal of child welfare. Far from violating the Establishment Clause, such cooperation is in the highest tradition of religious toleration.

Moreover, the centuries-long tradition of cooperation between government and religious organizations, like the relationship between CSS and Philadelphia, is imbued with a passage of time which "gives rise to a strong presumption of constitutionality." *Am. Legion*, 139 S. Ct. at 2085. An organization like CSS that has served the same community since 1797 certainly possesses a familiarity and value in the community which favors preservation. *Id.* at 2084.

III. Philadelphia's Hostility Toward CSS Because CSS Will Not Alter Its Well-Established Religious Practices Violates the Establishment Clause.

The Court in *American Legion* acknowledges that the government contradicts the Religion Clauses' demand for neutrality if it removes a long-standing monument, symbol, or practice from public view purely because of its enduring and inherent religious identity. *Am. Legion*, 139 S. Ct. at 2084–85 (noting that when the government removes a "religiously expressive monument, symbol, or practice" which has "familiarity and historical significance, removing it may no longer appear neutral"). The same principle of hostility applies when the government "roam[s] the land[] tearing down" centuries-old religious institutions because of their long-standing religious practices. *See id.* at 2084–85.

Forcing a Catholic institution to alter its well-established religious beliefs on marriage "would be seen by many as profoundly disrespectful." *See id.* at 2086. Consequently, because of the long-standing visibility of Philadelphia's relationship with CSS, the City's sudden, public rejection of the partnership with CSS because of its millennia-old religious practices will "no longer appear neutral," but instead will be "evocative, disturbing, and divisive." *See id.* at 2084–85.[6] Especially in light of multiple City officials'

[6] Although *American Legion* was written in a different context, involving an Establishment Clause challenge to a cross-shaped WWI memorial, similar considerations regarding the nature of religious hostility apply.

statements demonstrating overt hostility toward CSS's Catholic beliefs, continuing the City's relationship with CSS is the only way Philadelphia can demonstrate "respect and tolerance for differing views," *see id.* at 2089, rather than "a hostility toward religion that has no place in our Establishment Clause traditions," *see Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment).[7]

In its brief, CSS presented ample evidence of the City's hostility toward its religious beliefs. The City Council passed a resolution directing DHS to change its contracting practices and condemning "discrimination that occurs under the guise of religious freedom." Brief for Petitioners at 9, *Fulton v. City of Philadelphia*, No. 19-123. The Mayor publicly disparaged the Archdiocese, calling Archbishop Chaput's actions "not Christian," and asking Pope Francis "to kick some ass here!" *Id.* at 10. The DHS Commissioner urged CSS to follow "the teachings of Pope Francis," and told it that "'times have changed,' 'attitudes have changed,' and CSS should change its policy because it is 'not 100 years ago.'" *Id.* at 11, 16.

The courts below argued that Philadelphia's preference for certain religious practices was not hostile because the City also closed Bethany Christian

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[7] Evidence of religious targeting or hostility often fits more comfortably in the Free Exercise Clause's framework, *see, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993), but it also implicates core Establishment Clause concerns. After all, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Services, another foster agency not affiliated with the Catholic Church, *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 690–91 (E.D. Pa. July 13, 2018), and because it will work with CSS in other contexts. *Id.* at 674–75. But Philadelphia's "campaign to obliterate" a specific religious practice "evidence[s] hostility," regardless of whether that specific religious practice belongs to one or more religious denominations. *See Am. Legion*, 139 S. Ct. at 2087. Indeed, Philadelphia fully coerced Bethany Christian Services into abandoning its religious practice rather than closing down. *Fulton*, 320 F. Supp. 3d at 690–91 (explaining that after Philadelphia threatened to close Bethany Christian, the organization relented and agreed to alter its longstanding religious practice). This means religious institutions with the same religious practice as CSS are "actually [being] coerced by government conduct," a fundamental hallmark of an unconstitutional establishment of religion. *See Am. Legion*, 139 S. Ct. at 2072 (Thomas, J concurring in judgment).

While Philadelphia purports to concede that CSS's long-held religious beliefs are sincere, *Fulton*, 922 F.3d at 150, it also labeled CSS's religious convictions about marriage as "discrimination that occurs under the guise of religious freedom" and implied that CSS's inability to certify same sex couples is analogous to invidious racial discrimination. *Id.* at 149 (stating that Philadelphia declared that any "agency which violates . . . the Fair Practices Ordinance should have their contract with the City terminated *with all*

deliberate speed.") (emphasis added).[8] Such language also echoes the disparaging language used by a Commissioner against a Christian baker in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018). There, the Commissioner made comments implying that the baker was using his religion to justify discrimination and to hurt others. *Id.* The majority condemned this language as disparaging to religion, as it implies that the baker's religious beliefs are "merely rhetorical" and "even insincere." *Id.*

Given the reality that "for millennia," marriage was understood exclusively as "the union of a man and a woman," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (internal citations omitted); *id.* at 2612–13 (Roberts, J., dissenting), and despite the longstanding relationship between Philadelphia and religious adoption agencies holding this religious belief about marriage, Philadelphia decided only recently to prefer religious denominations that hold nontraditional beliefs on marriage over those that have traditional practices. And as Bethany Christian Services illustrates, an adoption agency's only alternative to adopting the City-sanctioned belief was to close its services. Yet, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Indeed, few starker hallmarks of an established church exist than the government prescribing preferred

[8]By borrowing the notable phrase "with all deliberate speed" from *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), Philadelphia patently analogizes CSS's inability to certify same sex couples to invidious racial segregation.

religious beliefs.[9] As predicted, Philadelphia "compares traditional marriage to laws that denied equal treatment for African-Americans and women" to "stamp out every vestige of dissent." *See Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).[10]

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[9] *See, e.g.*, Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2116–17 (2003).

[10] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), is not analogous. *Cf.* Intervenors' Brief at 31–32, 36. In affirming an award of attorney's fees, the *Newman* court rejected out of hand defendant's argument that a racial integration law "contravened the will of God" because his argument was insincere. *See Newman*, 390 U.S. at 402 n.5; *Newman v. Piggie Park Enters., Inc.*, 377 F.2d 433, 437 (4th Cir. 1967) (directing district court to consider in awarding attorney's fees whether defendant's "numerous defenses" were "presented for purposes of delay and not in good faith"). By contrast, Philadelphia concedes that CSS's religious beliefs regarding traditional marriage are sincere. *Fulton*, 922 F.3d at 150; *see, e.g.*, *Obergefell*, 135 S. Ct. at 2602 (recognizing that many hold the "decent and honorable religious and philosophical" belief that marriage is between one man and one woman); *Masterpiece Cakeshop*, 138 S. Ct. at 1723 (noting that a baker's refusal to bake a cake in celebration of a same-sex wedding was "based on his sincere religious beliefs and convictions"). Relying on a case devoid of Free Exercise analysis, at both the Supreme Court and Circuit Court levels, is especially staggering given the timeframe. *Newman* was decided in 1968, in between *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), two cases broadly considered to be the Supreme Court's high-water mark for constitutional religious liberty protection. A case setting aside a sincere Free Exercise claim at this time would in no way be regulated to a mere footnote in a *per curiam* opinion. Philadelphia's actions vilify religious organizations with traditional beliefs on marriage and coerce them into kneeling at the altar of the prevailing social orthodoxy. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting) ("[The Court's holding] will be used to vilify Americans who are unwilling to assent to the new orthodoxy [of same sex legal marriage].").

Ultimately, if the government can require religious organizations to relinquish core religious beliefs as a condition of participating in a generally available program, *Trinity Lutheran*'s promise is illusory, because imposing a penalty on specific religious beliefs is as discriminatory as imposing a penalty on a general religious identity.[11] *See* 137 S. Ct. at 2019; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (explaining that "prohibit[ing]" a certain religious "perspective" is just as unconstitutional as prohibiting "the general subject matter" of religion); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 225 (2013) (Scalia, J., dissenting) (listing a religious-affiliation contracting condition as clearly unconstitutional). Philadelphia must continue its relationship with CSS to avoid "a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment).

[11] One should not fret that this necessarily means any religious belief prevails against the government. Strict scrutiny provides a check based upon the strength of the government's purported interests. *See e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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