

No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

V.

CITY OF PHILADELPHIA, ET AL.

Respondents.

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

**Brief *Amici Curiae* of the United States
Conference of Catholic Bishops and
Pennsylvania Catholic Conference
in Support of Petitioners**

ERIC N. KNiffin

Counsel of Record

Lewis Roca Rothgerber Christie LLP

90 S. Cascade Ave.

Suite 1100

Colorado Springs, CO 80903

ekniffin@lrrc.com

(719) 386-3000

Counsel for *Amici Curiae*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. Respondents and the Court Below Mistakenly Assert That Caring for Orphans and Other Vulnerable Children Is Just Another “Public Service” or “Public Function.”	5
A. The Decision Below	5
B. Respondents’ Briefs in Opposition.....	6
II. From Its Earliest Days to the Present, the Catholic Church Has Been at the Forefront of Placing Orphans and Other Vulnerable Children with Families.....	8
A. Examples from the Early Church.....	9
B. Examples from the Church in the United States.....	12
1. St. Elizabeth Ann Seton and the Sisters of Charity	13
2. Mother Joseph of the Sisters of Providence	14
3. St. Frances Cabrini	14
4. Father Flanagan and Boys Town ...	15

III. The Catholic Church's Care for Orphans Is Rooted in the Bible and Church Teaching....	15
A. The Bible Calls Catholics to Care for Orphans.	16
B. From the Second Century A.D. to Pope Francis, the Church's Leaders and Saints Have Stressed the Religious Duty to Care for Orphans.	17
CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Am. Legion v. Am. Humanist Ass'n,</i> 139 S. Ct. 2067 (2019)	9
<i>Fulton v. City of Philadelphia,</i> 320 F.Supp.3d 661 (E.D. Pa. 2018).....	6
<i>Fulton v. City of Philadelphia,</i> 922 F. 3d 140 (3d Cir. 2019).....	3, 6
<i>Town of Greece, N.Y. v. Galloway,</i> 572 U.S. 565 (2014)	9
Transcript of Oral Argument, <i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.</i> , 565 U.S. 171 (2012) (No. 10-533).....	4, 8

OTHER AUTHORITIES

Architect of the Capitol, <i>National Statuary Hall Collection by Location</i>	14
Aristides the Philosopher, <i>Apology</i> (c. 125 A.D.) 9 <i>The Ante-Nicene Fathers: Translations of the Writings of the Fathers Down to A.D. 325</i> 514 (A. Roberts and J. Donaldson eds., 1885)	10
Carol K. Coburn, <i>Spirited Lives: How Nuns Shaped Catholic Culture and American Life, 1836-1920</i> (Univ. of N.C. Press 1999).....	13
Catholic News Agency, <i>St. Vincent de Paul</i>	18

David Z. Nowell, Dirty Faith: Bringing the Love of Christ to the Least of These (Bethany House Pub. 2014)	18
<i>Didascalia Apostolorum</i> (c. 230 A.D.) (R. Hugh Connolly trans., Clarendon Press 1929)	12
Dorothy M. Brown, The Poor Belong to Us: Catholic Charities and American Welfare (Harvard Univ. Press 1997)	13
Emmitsburg Area Historical Society, <i>A Short History of the Sisters of Charity</i>	14
Father Flanagan League Society of Devotion, <i>Father Flanagan's Story</i>	15
Ignatius of Antioch, <i>Epistle to the Smyrnaeans</i> (c. A.D. 106), 1 <i>Ante-Nicene Fathers</i> 89	11
Judith Evans Grubbs, <i>Infant Exposure and Infanticide</i> , The Oxford Hb. of Childhood and Educ. in the Classical World (Dec. 2013)	10
Justin Martyr, <i>First Apology</i> (c. 155 A.D.), 1 <i>Ante-Nicene Fathers</i> 186	11
Michael R. Heinlein, <i>St. Frances Xavier Cabrini: A Saint for Immigrants</i> , Simply Catholic.....	15
Polycarp, <i>Epistle to the Philippians</i> (c. A.D. 110), 1 <i>Ante-Nicene Fathers</i> 34	12
Pope Francis, Apostolic Exhortation <i>Amoris Laetitia</i> (2016).....	19
Pope St. John Paul II, Address of the Holy Father John Paul II to the Meeting of the	

Adoptive Families Organized by the Missionaries of Charity (Sept. 5, 2000)	19
Pope St. John Paul II, <i>Evangelium Vitae</i> (1995).....	19
Providence Health, <i>Pioneer, Leader, Woman of Faith</i>	14
Robert P. Maloney, <i>Welcoming the Stranger, St. Vincent de Paul and the Homeless</i> , 4 J. of Vincentian Social Action 73 (2019)	18
Sisters of Charity of New York, <i>Our History</i>	13
Suzy Farren, <i>The Sisters Knew a Child Needs a Home</i> , J. of the Cath. Health Ass'n of the U.S. (June 2011)	13, 14
The National Shrine of St. Elizabeth Ann Seton, <i>Full Biography of St. Elizabeth Ann Seton</i>	13
The New American Bible (USCCB 2002)	17
USCCB, <i>Issues and Action: An Equal Playing Field for People of Faith</i>	2
USCCB, <i>Issues and Action: Discrimination Against Catholic Adoption Services</i>	2
USCCB, <i>Issues and Action: Pastoral Care to Immigrants and Refugees</i>	2
USCCB, <i>Marriage and Religious Freedom: Current Threats</i> (Feb. 2019).....	2
W.V. Harris, <i>Child-Exposure in the Roman Empire</i> , 84 The J. of Roman Studies 1 (1994).....	10

- Yifat Monnickendam, *The Exposed Child: Transplanting Roman Law into Late Antique Jewish and Christian Legal Discourse*, 59 Am. J. Legal Hist. 1 (2019) 10

INTERESTS OF AMICI CURIAE¹

The United States Conference of Catholic Bishops (USCCB) is an assembly of the hierarchy of the United States and the U.S. Virgin Islands who jointly exercise certain pastoral functions on behalf of the Christian faithful of the United States. The purpose of the Conference is to promote the greater good which the Church offers humankind, especially through forms and programs of the apostolate fittingly adapted to the circumstances of time and place. This purpose is drawn from the universal law of the Church and applies to the episcopal conferences which are established all over the world for the same purpose.

The bishops themselves constitute the membership of the Conference. The Conference is organized as a corporation in the District of Columbia. Its purposes under civil law are: "To unify, coordinate, encourage, promote and carry on Catholic activities in the United States; to organize and conduct religious, charitable and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to enter into and promote by education, publication and direction the objects of its being."

The Conference advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents

¹ All parties have consented to the filing of this amici brief. No counsel for any party authored any part of this brief and no person or entity other than the amici funded its preparation or submission.

and children, the sanctity of life, and the nature of marriage. The Conference’s interest in religious freedom and the rights of faith-based organizations and their adherents often motivates its participation as amicus in this Court.

The Conference submits this brief because it raises the important question whether churches and other religious organizations can continue to provide critical human services, as organized communities of religious adherents have done for centuries, without surrendering their religious beliefs. The Conference is also motivated by its awareness that the conflicts at issue here are not unique to this case but similar to those playing out between Catholic apostolates and civil authorities across the country.²

The Pennsylvania Catholic Conference (PCC) is an association composed of the eight Latin Rite Roman Catholic Dioceses of Pennsylvania and the two Byzantine Rite Catholic Dioceses whose territories include the Commonwealth of Pennsylvania. The Conference was organized in 1960 in order to represent the views of the Catholic Dioceses of Pennsylvania on matters of public policy of interest to the Church, and to give witness to spiritual values in public affairs.

² See, e.g., USCCB, *Issues and Action: Discrimination Against Catholic Adoption Services*, <https://bit.ly/3dtyt4K> (last visited June 1, 2020); USCCB, *Issues and Action: Pastoral Care to Immigrants and Refugees*, <https://bit.ly/3coTfBc> (last visited June 1, 2020); USCCB, *Issues and Action: An Equal Playing Field for People of Faith*, <https://bit.ly/36Wm1Ii> (last visited June 1, 2020); USCCB, *Marriage and Religious Freedom: Current Threats* (Feb. 2019), <https://bit.ly/3eMauxV>.

The Roman Catholic Archdiocese of Philadelphia is a constituent member of the PCC. The issue of whether a municipality, as a political subdivision of the Commonwealth of Pennsylvania, should impose a substantial burden on the exercise of a fundamental aspect of church ministry is one of common interest to each and every Catholic Diocese within the Commonwealth.

SUMMARY OF ARGUMENT

The USCCB and the Pennsylvania Catholic Conference offer this brief to shed light on one of the underlying issues in this case:

Is placing abused and neglected children with foster families still an important religious activity in Philadelphia, or was it reduced to just another secular government function as the result of the City's oversight?

Catholic Social Services has testified that it understands its work with foster children as “an important religious ministry” and that the City of Philadelphia’s efforts to block it from serving in this manner burden its religious liberty. Pet.Br. 32. But the Third Circuit dismissed this claim in the decision below, framing foster care as “essentially a public service.” *Fulton v. City of Philadelphia*, 922 F. 3d 140, 160 (3d Cir. 2019).

Respondents took this rhetoric and ran with it. The briefs filed by the City Respondents and Intervenor-Respondents in opposition to Catholic Social Services’ petition for certiorari use “public service” or “public function” 29 times. Intervenor-Respondents use the decision below to cast Catholic Social Services as just another “government contractor,” suggesting that the

contracts at issue here have no more religious significance than contracts for “road maintenance” or “corrections.” Int’r-Resps.Cert.Opp.Br. 26. They argue that facilitating foster care placements is just another “public service program that CSS is free to undertake, or not, as it chooses.” *Id.* at 14.

This argument is eerily reminiscent of a position the Equal Employment Opportunity Commission (EEOC) took in *Hosanna-Tabor*: that the First Amendment’s Religion Clauses do not apply when a church “decide[s] to open its doors to the public to provide [a] socially beneficial service . . . for a fee, in compliance with State . . . laws.”³ In other words, the EEOC claimed that though educating children might be a religious function in the abstract, it loses that status when church schools became fee-based and subject to government oversight.

The Court was right in *Hosanna-Tabor* to unanimously reject the EEOC’s attempt to frame K-12 education as a secular activity. So too here. The Court should reject Respondents’ claim that foster care placements stopped being a religious exercise in Philadelphia when it became a City-managed “public service.”

This either-or, all-or-nothing approach is incompatible with this Court’s Religion Clauses jurisprudence. It also flies in the face of common sense. It cannot be that an activity, traditionally undertaken by religious groups for religious reasons, loses all religious liberty protections as soon as

³ Transcript of Oral Argument at 35:15-18, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (No. 10-553).

government encompasses it within a regulatory framework.

Petitioners' opening brief shows that the Catholic Church has been helping orphans and other vulnerable children in Philadelphia for more than 200 years. Pet.Br. 3-6. The USCCB and PCC offer this brief to complement Petitioners' brief with additional historical background as to the central role that the Catholic Church has played in caring for orphans around the world and here in the United States. This brief also demonstrates that the Catholic Church's commitment to this ministry flows from Scripture and Church teaching, from the early church fathers through Pope Francis.

This historical and theological overview shows why the decision below, which would prevent Catholic Social Services from continuing to exercise this ministry to the children of Philadelphia, presents such a substantial burden to Catholic Social Services' religious exercise.

The USCCB and PCC urge the Court to keep these considerations in mind as it hears this case.

ARGUMENT

I. Respondents and the Court Below Mistakenly Assert That Caring for Orphans and Other Vulnerable Children Is Just Another “Public Service” or “Public Function.”

A. The Decision Below

The decision below claims that foster care is “essentially a public service.” *Fulton v. City of Philadelphia*, 922 F. 3d 140, 160 (3d Cir. 2019). The

Third Circuit repeated this assertion three times in the context of rejecting Catholic Social Services' compelled speech claim, *id.* at 160-61, and again in concluding that the City of Philadelphia has a "paramount public interest" in "[d]eterring" Catholic Social Services from placing foster children consistent with its religious principles, *id.* at 165.

The claim that Catholic Social Services' foster care ministry is just another "public service" is not only erroneous, it is also unsupported by the record. Nothing in the decision below explains how the Third Circuit reached this conclusion. Nor is there anything probative in the district court's decision, outside its conclusion that "CSS's provision of services meets the definition of public accommodations" under Philadelphia's Fair Practices Ordinance. *Fulton v. City of Philadelphia*, 320 F.Supp.3d 661, 679 (E.D. Pa. 2018).

B. Respondents' Briefs in Opposition

Respondents pounced on the Third Circuit's phrasing and made it an important theme in their briefs in opposition to Catholic Social Services' petition for certiorari.

The City Respondents' brief rewrote the question presented to replace "participate in the foster care system" with "voluntarily contract with the government to perform a public function." City.Resps.Cert.Opp.Br. i. Their brief invokes "public service" and "public function" a combined sixteen times, including three times in the brief's final paragraph:

The care of abused and neglected children in Pennsylvania is a **public function**. If CSS

wishes to voluntarily contract with the City to assist in the discharge of that **public function**, the City does not burden CSS's First Amendment rights by requiring it to comply with key requirements bearing directly and exclusively on the administration of the City's programs—including the City's rules for who receives these taxpayer-funded **public services**.

Id. at 31 (emphases added).

Intervenor-Respondents followed suit, invoking “public service” and “public function” thirteen times, including three times in the brief’s first three paragraphs. Int’r-Resps.Cert.Opp.Br. 1-2. In this frame, Intervenor-Respondents cast Catholic Social Services as just another “government contractor,” suggesting that the contracts at issue here have no more religious significance than contracts for “road maintenance” or “corrections.” *Id.* at 26. Based on this characterization, Intervenor-Respondents claim that facilitating foster care placements is just another “public service program that CSS is free to undertake, or not, as it chooses.” *Id.* at 14.

Respondents’ opposition briefs reveal what they see as the logical conclusion of the Third Circuit’s characterization of Catholic Social Services’ ministry as just another “public service.” They argue that because the City of Philadelphia has recently taken primary responsibility for placing children in foster homes, this activity is now a “public service.” Respondents contend that once civil government begins to regulate an activity and “contracts out for such services,” that activity is no longer “the exercise

of religious belief,” and therefore no longer the subject of religious liberty protections. *Id.* at 31.

This Court heard a similar line of argument in the *Hosanna-Tabor* case, where the EEOC contended that the First Amendment’s Religion Clauses do not apply when a church “decide[s] to open its doors to the public to provide [a] socially beneficial service, of educating children for a fee, in compliance with State compulsory education laws.”⁴ Justice Scalia called the EEOC’s position “extraordinary,” and Justice Kagan found it “amazing.” *Id.* at 36:1, 38:4.

The Court unanimously rejected the EEOC’s arguments in *Hosanna-Tabor*, and should reject Intervenor-Respondents’ attempt to resurrect that line of argument here. It cannot be the case that an activity, traditionally undertaken by religious groups for religious reasons, loses all religious liberty protections when it is performed for a fee and subject to government oversight.

II. From Its Earliest Days to the Present, the Catholic Church Has Been at the Forefront of Placing Orphans and Other Vulnerable Children with Families.

In whatever sense foster care might today be a “public service,” it cannot be the case that the government can so easily deprive the Catholic Church of the opportunity to continue a ministry that has been a core part of its identity for nearly 2,000 years.

⁴ Transcript of Oral Argument at 35:15-18, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (No. 10-553).

This Court has cautioned that, when deciding matters at the intersection of church and state, courts must take into account “historical practices and understandings.” *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087 (2019) (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 566 (2014)). The First Amendment must be understood in light of “religion’s role in society.” *Ibid.*

The EEOC’s argument in *Hosanna-Tabor* was jarring because it took no account of history. It did not reflect either the central role that education plays in any religious tradition or the central role that religious groups have played in educating children—in the past and continuing today.

Similar historical considerations weigh against Respondents’ “public service” argument in this case. Petitioners’ opening brief shows that the Catholic Church has served Philadelphia children for more than two centuries. Pet.Br. 3-6. But to truly understand the Catholic Church’s commitment to caring for orphaned and neglected children, one must look back to the Church’s earliest days.

A. Examples from the Early Church

Caring for the orphan and the marginalized has been part of the Catholic Church’s fundamental makeup from the very beginning. The Church was born in the shadow of the Roman Empire, in which it was both common and legal for parents to abandon unwanted children through exposure.⁵ Some children

⁵ W.V. Harris, *Child-Exposure in the Roman Empire*, 84 The J. of Roman Studies 1 (1994), <https://doi.org/10.2307/300867>; Yifat Monnickendam, *The Exposed Child: Transplanting Roman Law*

were abandoned in public places, in hopes that others would take them up, but others were left on remote mountaintops, dung heaps, or garbage piles.⁶

Documents from the Church's earliest years demonstrate that, within this context, Christians became renowned for their care for these abandoned children.

Aristides, a philosopher, presented an apology (or explanation) of the new Christian faith to the Roman emperor Hadrian in 125 A.D. After describing some Christian beliefs, he offered an account of some of the practices that set Christians apart:

[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.

Aristides the Philosopher, *Apology* XV (c. 125 A.D.).⁷

About thirty years later, Justin Martyr offered a similar account to the Roman emperor Antoninus Pius:

And those who are well off and are willing to do so give as much as each desires, and the money thus collected is deposited with the bishop, who takes care of the orphans and widows, and those who are in straits through sickness or any

into Late Antique Jewish and Christian Legal Discourse, 59 Am. J. Legal Hist. 1, 2 (2019), <https://doi.org/10.1093/ajlh/njy030>.

⁶ Judith Evans Grubbs, *Infant Exposure and Infanticide*, The Oxford Hb. of Childhood and Educ. in the Classical World (Dec. 2013), <https://doi.org/10.1093/oxfordhb/9780199781546.013.004>.

⁷ 9 *The Ante-Nicene Fathers: Translations of the Writings of the Fathers Down to A.D. 325* 514 (A. Roberts and J. Donaldson eds., 1885) ("Anti-Nicene Fathers"), <https://bit.ly/2zPVbFt>.

other cause, and those in prison, and our visitors from other parts—in short, he looks after all who are in need.

Justin Martyr, *First Apology* 67 (c. 155 A.D.), 1 *Ante-Nicene Fathers* 186.

The care for the most vulnerable, including orphans, was not just a mark that separated Christians from Roman pagans; it was also a mark the early church used to identify the truly faithful within their midst and as a qualification for Church office:

Now note well those who hold heretical opinions about the grace of Jesus Christ that came to us; note how contrary they are to the mind of God. They have no concern for love, none for the widow, none for the orphan, none for the oppressed, none for the prisoner or the one released, none for the hungry or thirsty.

Ignatius of Antioch, *Epistle to the Smyrnaeans* 6.2 (c. A.D. 106), 1 *Ante-Nicene Fathers* 89.

The presbyters, for their part, must be compassionate and merciful to all, bringing back those that wander, visiting all the sick, and not neglecting the widow, the orphan, or the poor, but always “providing for that which is becoming in the sight of God and man.”

Polycarp, *Epistle to the Philippians* 6.1 (c. A.D. 110), 1 *Ante-Nicene Fathers* 34 (quoting Rom. 12:17).

The *Didascalia Apostolorum*, a manual of Christian practice written around 230 A.D., admonishes all Christians to care for widows and

orphans.⁸ But the early church also emphasized the leadership role bishops were to play in this service:

As good stewards of God [cf. 1 Peter 4:10], therefore, dispense well, according to the command, those things that are given and accrue to the Church, to orphans and widows and to those who are in distress and to strangers, as knowing that you have God who will require an account at your hands, who delivered this stewardship unto you. Divide and give therefore to all who are in want.

Id. at XIII.

B. Examples from the Church in the United States

Throughout the centuries, some of the Catholic Church's greatest saints and religious orders are known for their devotion to caring for orphans and other children in need. Most relevant here is the enormous role that the Catholic Church—most specifically its women religious—has played in this ministry throughout American history.⁹

⁸ *Didascalia Apostolorum* VIII (c. 230 A.D.) (R. Hugh Connolly trans., Clarendon Press 1929), <https://bit.ly/3gCkZFL>.

⁹ See generally Suzy Farren, *The Sisters Knew a Child Needs a Home*, J. of the Cath. Health Ass'n of the U.S. (June 2011), <https://bit.ly/3gHIMnI>; Dorothy M. Brown, *The Poor Belong to Us: Catholic Charities and American Welfare* (Harvard Univ. Press 1997); Carol K. Coburn, *Spirited Lives: How Nuns Shaped Catholic Culture and American Life, 1836-1920* (Univ. of N.C. Press 1999).

1. St. Elizabeth Ann Seton and the Sisters of Charity

St. Elizabeth Ann Seton was born in New York City two years before the American Revolution. After her husband died of tuberculosis in 1803, she entered the religious life and founded the first American congregation of religious sisters, the Sisters of Charity.

In 1814, Mother Seton dispatched sisters from their motherhouse in Emmitsburg, Maryland, to Philadelphia, where they established St. Joseph's Asylum, one of the first Catholic orphanages in the United States.¹⁰ In 1817, Mother Seton sent three sisters to New York City to begin the Roman Catholic Orphan Asylum.¹¹ Before long, the Sisters of Charity had opened orphanages and other charitable institutions in cities all along the East Coast. The Sisters of Charity also followed the Western migration, opening orphanages in Cincinnati and St. Louis.¹²

In the wake of the Civil War, the number of “foundlings” grew tremendously. The Sisters of Charity responded by contacting priests in the South and Midwest to identify families that sought a child.

¹⁰ The National Shrine of St. Elizabeth Ann Seton, *Full Biography of St. Elizabeth Ann Seton* 6, <https://bit.ly/2XIgK2w> (last visited June 1, 2020).

¹¹ Sisters of Charity of New York, *Our History*, <https://bit.ly/3dqnGbl> (last visited June 1, 2020).

¹² Emmitsburg Area Historical Society, *A Short History of the Sisters of Charity*, <https://bit.ly/2XOxuoZ> (last visited June 1, 2020).

By 1884, the Sisters of Charity’s “orphan train” had helped more than 60,000 children find loving homes.¹³

2. Mother Joseph of the Sisters of Providence

Mother Joseph of the Sisters of Providence is one of only nine women honored in the Statuary Hall in the United States Capitol.¹⁴ In 1856, Mother Joseph travelled from Montreal to the Washington Territory to tend to the unmet needs on the frontier. Under her leadership, the Sisters of Providence opened more than 30 hospitals, schools, and homes for orphans, the elderly, and the sick across Washington, Oregon, Idaho, Montana, and southern British Columbia.¹⁵

3. St. Frances Cabrini

St. Frances Cabrini is the Catholic Church’s patron saint of immigrants. Though she suffered from frail health her entire life, she was a remarkable leader and entrepreneur from the time she founded her religious order at the age of 24.

In 1889, Mother Cabrini answered Pope Leo XIII’s call to leave her native Italy for New York to help care for the growing Italian immigrant community. Over the next 28 years she founded 67 schools, hospitals, and orphanages in Chicago, New Orleans,

¹³ Suzy Farren, *The Sisters Knew a Child Needs a Home*, J. of the Cath. Health Ass’n of the U.S. (June 2011), <https://bit.ly/3gHIMnI>.

¹⁴ Architect of the Capitol, *National Statuary Hall Collection by Location*, <https://bit.ly/36RGnCw> (last visited June 1, 2020).

¹⁵ Providence Health, *Pioneer, Leader, Woman of Faith*, <https://bit.ly/3cm6X7J> (last visited June 1, 2020).

Philadelphia, Los Angeles, Seattle, Denver, and other U.S. cities.¹⁶

4. Father Flanagan and Boys Town

In 1917, Father Flanagan opened a home for seven abandoned and troubled boys near Omaha, Nebraska. Assisted by several School Sisters of Notre Dame and a group of laywomen volunteers, the next year that number grew to 100. Father Flanagan took in boys that many had dismissed as beyond help and gave them the kind of care, attention, and patience they would have received from devoted parents.

Omaha's juvenile court was impressed with Father Flanagan's work and kept sending troubled boys his way. Father Flanagan needed larger facilities and in 1921 purchased Overlook Farm, which he soon renamed Boys Town. Under Father Flanagan's direction, Boys Town grew into a large community where boys could receive an education and learn a trade. By the end of his life, more than 6,000 youth had come under his direct care.¹⁷

III. The Catholic Church's Care for Orphans Is Rooted in the Bible and Church Teaching.

As shown above, the Catholic Church has been dedicated to caring for vulnerable children for nearly 2,000 years. It has undertaken this work not only as a public service, but as a religious activity, motivated by Holy Scripture and Church teaching. What follows

¹⁶ Michael R. Heinlein, *St. Frances Xavier Cabrini: A Saint for Immigrants*, Simply Catholic, <https://bit.ly/2Y3R6FZ> (last visited June 1, 2020).

¹⁷ Father Flanagan League Society of Devotion, *Father Flanagan's Story*, <https://bit.ly/3dAbntj> (last visited June 1, 2020).

here is a small sampling of the religious teaching that has driven the Catholic Church’s work with orphans and other vulnerable children through the ages, including Catholic Social Services’ work placing foster children.

This brief survey helps show why Catholic Social Services sees its ministry of foster care placement as “the work of Jesus.” Pet.Br. 3 (quoting Pet.App. 201a). It also underscores the irreparable harm Catholic Social Services would suffer were the City of Philadelphia allowed to make it illegal for Catholic Social Services to continue its foster care ministry. See J.A. 168 (CSS “would be breaking the law if [it] tried to provide foster-care services without a contract.”).

A. The Bible Calls Catholics to Care for Orphans.

The Catholic Church’s commitment to helping children in need is rooted first of all in Holy Scripture. The Old and New Testaments repeatedly affirm that God cares about orphaned children and calls His people to care for them:

You shall not wrong any widow or orphan. If ever you wrong them and they cry out to me, I will surely listen to their cry.

Exodus 22:21-22.¹⁸

Cursed be anyone who deprives the resident alien, the orphan or the widow of justice!

Deuteronomy 27:19.

¹⁸ Biblical quotations taken from The New American Bible (USCCB 2002).

Make justice your aim: redress the wronged,
hear the orphan's plea, defend the widow.

Isaiah 1:17.

Thus says the LORD of hosts: Judge with true justice, and show kindness and compassion toward each other. Do not oppress the widow or the orphan, the resident alien or the poor; do not plot evil against one another in your hearts.

Zechariah 7:9-10.

Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction and to keep oneself unstained by the world.

James 1:27.

B. From the Second Century A.D. to Pope Francis, the Church's Leaders and Saints Have Stressed the Religious Duty to Care for Orphans.

This biblical theme has been repeated in Church teaching through the centuries. In the burgeoning Christian movement, the early church fathers consistently and conspicuously exhorted Christians to be faithful to Scripture's demand that Christians care for orphans. Virtually every early writing on Christian conduct stressed the importance of caring for children without parents. Eusebius, the Apostolic Constitutions, Lactantius, Ignatius of Antioch, Polycarp, Justin Martyr, and many others called the early church to this ministry.¹⁹

¹⁹ David Z. Nowell, *Dirty Faith: Bringing the Love of Christ to the Least of These 70* (Bethany House Pub. 2014).

St. Elizabeth Ann Seton's order, the Sisters of Charity, was based on another congregation by the same name that was founded by St. Vincent de Paul, a French priest who is remembered as the Catholic Church's patron saint of charitable work.²⁰ St. Vincent said the following about what would inspire the Sisters of Charity to care for orphaned and abandoned children:

They will reflect that their ministry is to serve the Infant Jesus in the person of each baby they are raising, and in this they have the honor of doing what the Blessed Virgin did to her dear Son, since He affirms that the service rendered to the least of His people is rendered to Himself. In accordance with that, they will do their utmost to raise these poor children with as much attention and respect as if it were to the very person of Our Lord.²¹

The Catholic Church continues this teaching tradition into the present. Pope Saint John Paul II, in his encyclical *Evangelium Vitae* (The Gospel of Life), urged the Church to care for foster children:

A particularly significant expression of solidarity between families is a willingness to adopt or take in children abandoned by their parents or in situations of serious hardship. True parental love is ready to go beyond the bonds of flesh and blood in order to accept

²⁰ Catholic News Agency, *St. Vincent de Paul*, <https://bit.ly/36Otc5a> (last visited June 1, 2020).

²¹ Robert P. Maloney, *Welcoming the Stranger, St. Vincent de Paul and the Homeless*, 4 J. of Vincentian Social Action 73, 74 (2019), <https://bit.ly/3eFqqSt>.

children from other families, offering them whatever is necessary for their well-being and full development.”²²

More recently, Pope Francis echoed this theme in his Apostolic Exhortation, *Amoris Laetitia* (The Joy of Love):

The choice of adoption and foster care expresses a particular kind of fruitfulness in the marriage experience. . . . They make people aware that children, whether natural, adoptive or taken in foster care, are persons in their own right who need to be accepted, loved and cared for, and not just brought into this world.²³

The Catholic Church serves orphans through adoption and foster care not simply because it cares about children, but because it is compelled to do this work—out of obedience to God’s Word, and in response to God’s love toward mankind. The Church’s theological commitment, present from its inception, to providing this privileged form of ministry helps illustrate the irreparable harm that the Church would suffer should it be blocked from continuing to do so.

²² Pope St. John Paul II, *Evangelium Vitae*, ¶93 (1995). See also Pope St. John Paul II, Address of the Holy Father John Paul II to the Meeting of the Adoptive Families Organized by the Missionaries of Charity (Sept. 5, 2000) (“To adopt a child is a great work of love. When it is done, much is given, but much is also received. It is a true exchange of gifts.”).

²³ Pope Francis, Apostolic Exhortation *Amoris Laetitia*, ¶180 (2016).

CONCLUSION

Across the centuries and up to today, across the world and in the United States, the Catholic Church has been at the forefront of caring for orphans by placing them in loving homes. This history, and the theological basis that animates it, together make clear that providing foster care represents a core religious exercise for Catholics. Although this ministry also serves the common good, and is often carried out in cooperation with government, these considerations do not reduce this ministry to a “public function” like picking up garbage or paving roads. To the extent that the decision below or the arguments of Respondents rely on so deeply flawed a premise, they should be rejected.

The USCCB and PCC urge the Court to keep the Catholic Church’s religious obligation to care for orphans in mind as it resolves the issues in this case.

Respectfully submitted,

ERIC N. KNIFFIN
Counsel of Record
Lewis Roca Rothgerber Christie LLP
90 S. Cascade Ave.
Suite 1100
Colorado Springs, CO 80903
ekniffin@lrrc.com
(719) 386-3000

Counsel for *Amici Curiae*
June 3, 2020