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 *AMICI CURIAE* THE INSTITUTE FOR FAITH AND FAMILY AND THE INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS IN SUPPORT OF PETITIONERS

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Deborah J. Dewart
Counsel of Record
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Arthur A. Schulcz, Sr.
Chaplains' Counsel, PLLC
21043 Honeycreeper Pl.
Leesburg, Virginia 20175
(703) 645-4010
art@chaplainscounsel.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICI[1]

The Institute for Faith and Family and The International Conference of Evangelical Chaplain Endorsers, as *amici curiae*, respectfully urge this Court to reverse the decision of the Third Circuit Court of Appeals.

The Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com.

The International Conference of Evangelical Chaplain Endorsers ("ICECE") is a conference of evangelical organizations whose main function is to endorse chaplains to the military, prisons and other restricted access institutions requiring chaplains. ICECE was organized specifically to address issues important to evangelical military chaplains and the military personnel they represent. ICECE's most important mission is the protection and advancement of religious liberty for chaplains and all military personnel.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution broadly guarantees liberty of religion and conscience to citizens and organizations who participate in public life according to their moral, ethical, and religious convictions. It is not quarantined inside the walls of a church sanctuary. But anti-discrimination laws and policies are increasingly deployed as a weapon attacking traditional religious doctrines about the nature of marriage and sexuality. This *discriminatory* approach cuts against the very values anti-discrimination laws are enacted to promote—tolerance, diversity, inclusion, equality. Organizations like Catholic Social Services ("CSS") are excluded from full participation in the public square while the government compels uniformity of thought on controversial social issues. The resulting inequality is alarming.

This Court needs to reaffirm the nation's commitment to religious liberty by reexamining its ruling in *Emp't Div. v. Smith*, 494 U.S. 872 (1990). Religious neutrality is lacking where anti-discrimination laws protect categories defined by conduct that many faith traditions consider immoral. *Smith* falls short of protecting conscientious objectors and even religious organizations unless the political branches craft exemptions. Moreover, *Smith* departed from this Court's longstanding Free Exercise jurisprudence and its time-honored role in protecting religious minorities from majoritarian oppression—the very purpose of the Bill of Rights.

ARGUMENT

I. THE DEFINITION OF "DISCRIMINATION" AND THE SCOPE OF ANTI-DISCRIMINATION LAWS MUST BE EXAMINED IN THE CONTEXT OF RELIGIOUS LIBERTY CONCERNS.

The Third Circuit broadly presupposes a compelling government interest in "eradicating discrimination . . . [a]nd mandating compliance is the least restrictive means of pursuing that interest." *Fulton v. City of Philadelphia*, 922 F.3d 140, 163 (2019). The court states its goal as "minimizing—to zero—the number of establishments that [discriminate]." *Id.* at 164. But "discrimination" must be defined. The scope of the law requires clarity—the categories protected, the places and persons subject to the law. Allegedly even "the mere existence of CSS's discriminatory policy" offends the government's interest. *Id.* This extreme intolerance grates against the interests in tolerance, diversity, inclusion, and equality so often heralded by advocates of expanded anti-discrimination laws. The Free Exercise Clause "strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1139 (1990). But laws that prohibit sexual orientation discrimination tend to demand uniformity of thought on a deeply personal religious subject (marriage), resulting in the exclusion of those who cannot conform.

A. Philadelphia creates intolerance, uniformity, exclusion, and inequality by crushing dissenting viewpoints.

The City of Philadelphia refuses to tolerate disagreement with the government-sanctioned view of marriage. The City vilifies a religious organization "unwilling to assent to the new orthodoxy." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642 (2015) (Alito, J., dissenting). Philadelphia "put[s] the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Id.* at 2602. Chief Justice Roberts anticipated the very conflict now before the Court—"a religious adoption agency declines to place children with same-sex married couples." *Id.* at 2626 (Roberts, C.J., dissenting).

Intolerance. "Tolerance is a two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). Philadelphia's policy "mandates orthodoxy, not anti-discrimination." *Id.* Such intolerance is intolerable in a country devoted to liberty. But in a post-*Obergefell* world, secular ideologies increasingly employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. Liberty collapses in this toxic atmosphere. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 186-188 (1993). The First Amendment protects against government coercion to endorse or subsidize a cause or particular viewpoint. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Va. State Bd. of Educ. v. Barnette*, 319

U.S. 624 (1943); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 575 (1995). But that is exactly what Philadelphia has done.

Uniformity. America has always valued diversity. No government official may "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U. S. at 642. Nor may an official determine what shall be offensive—that would be "the essence of viewpoint discrimination." *See Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017). Philadelphia destroys diversity by demanding uniformity about the nature of marriage. By silencing one side of a hotly contested issue, the City engages in forbidden viewpoint discrimination and improperly lends its power to one side of a *religious* controversy over the nature of marriage. *See Smith*, 494 U.S. at 877 (collecting cases).

No one escapes offense in a free society. This Court has flatly rejected the argument that "[t]he Government has an interest in preventing speech expressing ideas that offend." *Matal v. Tam*, 137 S. Ct. at 1764; *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (even hurtful or outrageous speech is protected). The Third Circuit ruling would virtually ensure the government's ability to freely engage in constitutionally prohibited viewpoint discrimination. As the Sixth Circuit recognized in *Ward*, values-based referrals are a common way to respect all participants in a diverse society rather than stamping out disfavored viewpoints. *Ward v. Polite*, 667 F.3d at 730. Philadelphia may not agree with CSS's doctrine, but the Constitution demands that courts protect a

religious organization's freedom to decide for itself "the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that . . . requires the utterance of a particular message favored by the Government, contravenes this essential right." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 646 (1994).

Freedom of thought undergirds the Bill of Rights. *Schneiderman v. United States*, 320 U.S. 118, 144 (1943). The Constitution protects the right to advance ideological causes and "*the concomitant right to decline to foster such concepts*." *Wooley v. Maynard*, 430 U.S. at 714 (emphasis added). These complementary rights are components of "individual freedom of mind." *Barnette*, 319 U.S. at 637. Philadelphia contravenes "[t]he very purpose of the First Amendment . . . to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

This Court should reaffirm these core constitutional principles. The *Obergefell* majority assured dissenters their First Amendment rights would remain intact (*Obergefell*, 135 S. Ct. at 2607). Instead, that case has triggered multiple threats to the liberty to think, speak, and live according to conscience. Even some LGBT advocates admit that judicial redefinition of marriage may impose a social view not shared by a majority of citizens by creating "a disquieting new breed—a 'right' to a *word*, *an unprecedented notion having inauspicious potential for regulating speech and thought*." Daniel Dunson, *A Right to a Word? The*

Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage, 5 Alb. Govt. L. Rev. 552, 599-600 (2012) (emphasis added). The First Amendment implications are frightening.

Exclusion. Philadelphia punishes CSS for its religious view of marriage by categorically excluding it from participation in the state's foster care system. The Constitution is an inclusive document protecting the life, liberty, religion, and viewpoint of all within its realm. *Inclusion* is trumpeted as a key rationale for anti-discrimination provisions, but Philadelphia *excludes* CSS from serving Pennsylvania's foster families. The Third Circuit ruling enables states to punish persons who hold traditional marriage beliefs by excluding them from full participation in public life. The same was true for pharmacists in Washington forced to provide abortifacient drugs. *Stormans, Inc. v. Wiesman*, 136 S. Ct. 2433, 2434 (2016) (Alito, J., dissenting) ("The dilemma this creates for the Stormans family and others like them is plain: Violate your sincerely held religious beliefs or get out of the pharmacy business.")

CSS "views its foster care work as part of its religious mission and ministry." *Fulton*, 922 F.3d at 147. Ordinarily the government can choose to fund its preferred viewpoint. *Rust v. Sullivan*, 500 U.S. 173 (1991). But here, CSS cannot continue its foster care ministry without government funding. Refusal to sacrifice its religious doctrine leads to categorical exclusion from the program even though "no same-sex couples have approached CSS seeking to become foster parents." *Id.* at 148. Philadelphia compels CSS to

choose between its religious doctrine and participating in the state's foster care, all because it refuses to sacrifice faith on the altar of an agenda it cannot support.

Anti-discrimination laws should provide a shield that promotes inclusion—so that no one is arbitrarily excluded based on irrelevant criteria. Instead, it is used here as a sword that cuts off people of faith and religious organizations. This is one reason for the urgent call to revisit *Smith*. That decision sanctions laws that "make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community"—provided they do not directly target religion. *Smith*, 494 U.S. at 897 (O'Connor, J., concurring).

Inequality. Equality is another common "buzzword." Some use the phrase "marriage equality" to describe *Obergefell*. Legal advocates have not only achieved their goals, but far exceeded them. Same-sex couples enjoy broad legal protection and have a wide array of options for public services—in this case, the many other foster care agencies willing to serve them.

The government may not punish religious doctrine it believes to be false. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944). Philadelphia punishes CSS for adhering to its religious doctrine, creating invidious *inequality*. This blatant viewpoint discrimination is anathema to the First Amendment and ultimately destroys liberty for everyone. "If Americans are going to preserve their civil liberties . . . they will need to develop thicker skin. . . . A society that undercuts civil liberties in pursuit of the 'equality' offered by a

statutory right to be free from all slights will ultimately end up with neither equality nor civil liberties." David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003).

B. Anti-discrimination provisions have expanded to cover more places and protect more groups—complicating the legal analysis and triggering collisions with the First Amendment.

Anti-discrimination policies have ancient roots. Early American laws were carefully crafted with narrow definitions of the people and places regulated. These laws mostly targeted racial discrimination. James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 Vand. L. Rev. 961, 965 (2011). Primary responsibility shifted to the states after this Court invalidated the Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). *The Civil Rights Cases*, 109 U.S. 3 (1883). *See Just Shoot Me,* 64 Vand. L. Rev. at 965 n. 7. Later federal attempts succeeded but again highlighted racial equality. The Civil Rights Act of 1964 "was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public." *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 352 (5th Cir. 1968); *see* Civil Rights Act of 1964, 42 U.S.C. § 2000a.

As anti-discrimination provisions expanded over the years, the potential encroachment on religious liberty increased. The Massachusetts law at issue in *Hurley* was derived from the common law principle

that innkeepers and others in public service could not refuse service without good reason. *Hurley*, 515 U.S. at 571. But like many other states today, Massachusetts had broadened the scope to add more categories and places. *Id*. at 571-572. Such vast expansion of covered categories often occurs with little analysis of the difference between race and newly protected classes—or as to how or when the criteria might be legitimately applied. A current District of Columbia statute, e.g., prohibits discrimination based on "race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual." D.C. Code § 2-1402.31(a); *see Just Shoot Me*, 64 Vand. L. Rev. 961 at 966; *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 n. 2 (2000).

Early anti-discrimination laws narrowly defined "places of public accommodation" in terms of transient lodging, theaters, restaurants, and places of public entertainment. *Just Shoot Me*, 64 Vand. L. Rev. 961 at 966. Eventually these traditional "places" expanded beyond inns and trains to commercial entities and even membership associations—escalating the potential collision with First Amendment rights. *Dale*, 530 U.S. at 657. Even today, federal law remains comparable to common law rather than broadly sweeping in *any* establishment that offers *any* goods or services to the public. 42 U.S.C. § 2000a(b). State and local laws may or may not have exemptions for religious organizations.

Here, Philadelphia has broken into the sanctuary and invaded religious territory where it has no business.

It is hardly "arbitrary" to avoid promoting a cause for reasons of religious conscience. Discrimination is arbitrary where an entire class of persons is excluded based on irrelevant factors. Where widespread refusals deny an entire group access to basic public goods and services—lodging, food, and transportation—protective measures are reasonable. This Court rightly upheld the civil rights legislation Congress passed to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants.

Religious liberty is particularly susceptible to infringement—"advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant." McConnell, *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 187. Political and judicial power can be used to squeeze religious views out of public debate about controversial social issues. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal convictions that shape the way people of faith live their daily lives, privately and in public. Government has no right to legislate a view of sexual morality and then demand that even religious organizations facilitate it.

The clash between anti-discrimination rights and religious liberty places competing cultural values squarely before the courts. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.,* 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Anti-discrimination rights, whether statutory or derived from constitutional principles, may conflict with core religious liberty rights—as they do in this case.

The growing conflict between religion and anti-discrimination principles emerges in many contexts. Protection of one group may alienate another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But protection of private sexual conduct from government intrusion does not trump the First Amendment rights of those who cannot conscientiously endorse it. Philadelphia's policy extends far beyond the "meal at the inn" promised by common law and encroaches on CSS's right to operate a religious ministry and participate in public life free of legal mandates that trample its religious doctrine.

C. A religious organization that follows its core religious doctrine is not engaged in the invidious, irrational, arbitrary discrimination prohibited by constitutional principles and civil right laws.

CSS was informed that its policy of "merely following the teachings of the Catholic Church" is prohibited "discrimination." *Fulton*, 922 F.3d at 148. But its refusal to work with same-sex couples is not the invidious, irrational, arbitrary discrimination that can be legally proscribed. It is hardly "discrimination" to decline to advance a politically charged agenda or to refuse to act against religious conscience. As Justice Alito warned, "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes" but "if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." *Obergefell*, 135 S. Ct. at 2642-43 (Alito, J., dissenting). Philadelphia unquestionably treats CSS as a bigot—and *that* could be construed as invidious discrimination.

Many decisions necessitate selection criteria. Discrimination may or may not be invidious, depending on the context and the identity of the one who discriminates. Employers "discriminate" when they select employees from a pool of applicants. Students experience "discrimination"—admissions, honor rolls, sports teams, or activities requiring a certain grade point average. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). It is impossible to eradicate every form of discrimination. Anti-discrimination policies are reasonable where selection

criteria are truly irrelevant. But when a religious organization sets policies for operating its ministry, religious doctrine is not only relevant but indispensable.

This Court has an opportunity to clarify and strengthen the Constitution's application to public life in the context of anti-discrimination laws. Here, Philadelphia exhibits hostility toward religion by characterizing CSS's religiously motivated policy as unlawful "discrimination." Action motivated by conscience or faith is not arbitrary, irrational, or unreasonable. As this Court warned in the unemployment cases, "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). There is a huge difference between violating a public accommodation law and "simply refusing to endorse a particular message." *Just Shoot Me*, 64 Vand. L. Rev. at 999.

II. THIS COURT SHOULD RECONSIDER *SMITH*, PARTICULARLY IN THE CONTEXT OF ANTI-DISCRIMINATION LAWS THAT ENCOMPASS SEXUAL ORIENTATION AND OTHER CATEGORIES THAT TOUCH RELIGION.

There are times when—as *Smith* suggests (or rather mandates)—the political process can efficiently carve out religious exemptions. But when this Court put its thumb on the scale in the national debate over marriage, it could not lift a finger to relieve the burdens it created. "The majority's decision imposing

same-sex marriage cannot . . . create any such accommodations." *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). This Court *bypassed* the political process by unilaterally redefining marriage but, because of *Smith*, the *entire burden* fell on the political process to protect religious liberty through legislative exemptions. "[T]he People could have considered the religious liberty implications" of redefining marriage, but instead this Court "short-circuit[ed] that process, with potentially ruinous consequences for religious liberty." *Id.* at 2639 (Thomas, J., dissenting).

Smith treats generally applicable laws as "presumptively neutral, with religious accommodations a form of special preference." McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1133. The Free Exercise Clause "at a minimum" applies "if the law at issue *discriminates against some or all religious beliefs* or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (emphasis added). Unfortunately, *Smith* reduced religious liberty to "no more than an antidiscrimination principle." *Id.* at 578 (Blackmun, J., concurring). Philadelphia's policy fails even under that standard, because it indisputably "discriminates against" a specific religious belief.

A. The City's antidiscrimination policy lacks religious neutrality.

The Third Circuit characterized the City's non-discrimination policy as "a neutral, generally applicable law" and concluded that "the religious views of CSS do

not entitle it to an exception from that policy." *Fulton*, 922 F.3d at 147. But there is nothing neutral about a policy that so openly and obviously defies commonly held religious convictions about the nature of marriage.

Anti-discrimination laws covering sexual orientation are increasingly used as a weapon to target traditional *religious* convictions about marriage. The Sixth Circuit warned about the dangers of failing to apply an anti-discrimination policy "in an even-handed, much less a faith-neutral, manner." *Ward v. Polite*, 667 F.3d at 739. Where a policy protects a category defined by conduct that many religious traditions consider sinful, faith-neutral application is virtually impossible. The Third Circuit asked whether the City was "appropriately neutral" or "instead did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs?" *Fulton*, 922 F.3d at 156. More generally, was "religiously motivated conduct . . . treated worse than otherwise similar conduct with secular motives"? *Id.* at 155. But it is not that simple—there is no obvious secular counterpart that can be used to apply the *Smith* analysis in this context. People of faith will inevitably challenge laws forcing them to abandon their core religious convictions about marriage. The government's failure to foresee these religious conflicts parallels the "reckless disregard" standard used in other contexts. Even where the law does not appear to intentionally target religion—or where government officials successfully conceal their hostility—there is a "reckless disregard" for the obvious, inevitable conflicts with religion. Dissenting Justices in *Obergefell* sent a clarion call

about the coming collision. Justice Thomas explained that because marriage is not merely a governmental institution but also a religious institution: "It appears all but inevitable that the two will come into conflict." *Obergefell*, 135 S. Ct. at 2638 (Thomas, J., dissenting). And yet the viewpoint of "good and decent people [who] oppose same-sex marriage as a tenet of faith" is protected and "actually spelled out" in the First Amendment—"unlike the right imagined by the majority." *Id.* at 2625 (Roberts, C.J., dissenting).

The *Obergefell* majority also recognized the religious nature of marriage and promised that "[t]he First Amendment ensures that religious organizations and persons are given proper protection" for the religious principles of marriage "so central to their lives and faiths." *Obergefell*, 135 S. Ct. at 2607. *Masterpiece Cakeshop* further reassured people of faith that the government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). Even "subtle departures from neutrality" are barred. *Gillette v. United States*, 401 U.S. 437, 452 (1971); *see Bowen v. Roy*, 476 U.S. 693, 703 (1986) (the First Amendment prohibits the "covert suppression of particular religious beliefs"); *Lukumi*, 508 U.S. at 534 ("Free Exercise Clause protects against governmental hostility which is masked as well as overt"). Philadelphia's hostility to CSS's religious doctrine is only thinly disguised.

In contrast to the religiously gerrymandered ordinance in *Lukumi*, *Smith* upheld an across-the-board prohibition on a controlled substance, "the epitome of a generally applicable law." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 5 (2016). The Court explained that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-879. But the state is not really "free to regulate" a religious view of marriage and exclude those holding that view from full participation in public life. The First Amendment prohibits this sort of regulation.

The City's policy is not religiously neutral; it "purposefully singles out and targets" a specific religious viewpoint about marriage and imposes "special burdens" on it. *Central Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 186 (2d Cir. 2014). In *Central Rabbinical*, the religious practice of circumcision was "the only presently known conduct" covered by the regulation at issue (*id.* at 191), just as the ordinance in *Lukumi* burdened "almost no one" except one disfavored religious group. *Id.* at 196; *Lukumi*, 508 U.S. at 536. Philadelphia's policy burdens "almost no one" other than those who hold the religious viewpoint that marriage is the union of one man and one woman. Ironically, this *anti-discrimination* policy imposes a substantial burden on religious liberty by *discriminating* against religious doctrine. Even though the policy may not facially target religion, it is not

neutral in its practical operation—the categorical exclusion *only* of religious agencies that hold a traditional view of marriage. *Lukumi*, 508 U.S. at 535-36; *Central Rabbinical Cong.*, 763 F.3d at 194-195.

As the Eleventh Circuit observed, the "exercise of religion is substantially burdened if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (applying RLUIPA to zoning regulation that excluded churches). A substantial burden is "more than a mere inconvenience" and involves "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* Even a law "religiously neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids." *Lukumi*, 508 U.S. at 561 (Souter, J., concurring). Philadelphia's anti-discrimination policy demands that CSS conform its religious viewpoint to state orthodoxy by matching same-sex couples with foster children—"something that religion forbids."

Even using *Smith*'s parameters, the City's conduct is questionable because there is strong evidence of hostility. Commissioner Figueroa, a Jesuit-educated Catholic, suggested "it would be great if CSS could follow the teachings of Pope Francis." *Fulton*, 922 F.3d at 148. The City passed a resolution authorizing investigations of agencies that "discriminate against

prospective LGBTQ foster parents," recommending termination of their contracts "with all deliberate speed," and stating that "the City of Philadelphia has laws in place to protect its people from *discrimination that occurs under the guise of religious freedom . . . .*" *Id*. at 149 (emphasis added).

The results of the City's policy are drastic, not only for CSS but for the families and children of Pennsylvania. As in *Stormans*, where "[s]huttering pharmacies would make *all* of those pharmacies' customers find other sources for *all* of their medications", terminating CSS's foster care services diminishes the availability of care for *all* foster children in the state. *Stormans,* 136 S. Ct. at 2439 (Alito, J., dissenting). This case, like *Stormans*, is an "ominous sign" for religious liberty. *Id*. at 2433.

B. *Smith* departed from this Court's longstanding Free Exercise jurisprudence.

Because the First Amendment is phrased in "absolute terms . . . it is more faithful to the text to confine any implied limitations to those that are indisputably necessary." McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1116. Many early state constitutions reflect this approach by including a "peace and safety" caveat that defines the outer limits of religious liberty—"an early form of the compelling interest test." *Id*. at 1116-1118.

Religious freedom is "an independent liberty" that "occupies a preferred position" in our legal system. *Smith*, 494 U.S. at 895 (O'Connor, J., concurring). Encroachments are justified only by governmental

interests "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Even "neutral, generally applicable" laws may "have the unavoidable potential of putting the believer to a choice between God and government." *Lukumi*, 508 U.S. at 577 (Souter, J., concurring). Religious conduct, "like the belief itself, must be at least presumptively protected by the Free Exercise Clause." *Smith*, 494 U.S. at 893 (O'Connor, J., concurring). At the very least, a generally applicable law that prohibits religiously motivated conduct "implicate[s] First Amendment concerns." *Id.* at 893-894.

After *Smith*, this Court's cases provide "competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands." *Lukumi*, 508 U.S. at 577 (Souter, J., concurring). But in the decades preceding *Smith*, this Court frequently "interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct." *Smith*, 494 U.S. at 895 (O'Connor, J., concurring). Even laws that appear neutral "can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id.* at 901. Past decisions, written "in language hard to read as not foreclosing the *Smith* rule," indicate that "formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality." *Lukumi*, 508 U.S. at 564-565 (Souter, J., concurring). And although religiously motivated action is often subject to the state's broad police powers, "there are areas of conduct . . . beyond the power of the State to control,

even under regulations of general applicability." *Thomas v. Review Bd.*, 450 U.S. at 717.

As past decisions demonstrate, "[p]roof of hostility or discriminatory motivation may be sufficient . . . but the Free Exercise Clause is not confined to actions based on animus." *Shrum v. City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006). The Tenth Circuit noted a number of secular reasons offered for laws restricting religious liberty, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (saving money); *Wisconsin v. Yoder*, 406 U.S. 205 (education); *In re Jenison*, 375 U.S. 14 (1963) (obtaining jurors); *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir.1984), *aff'd sub nom. Jensen v. Quaring*, 472 U.S. 478 (1985) (facilitating traffic enforcement); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (protecting job opportunities). *Id.* at 1144-45. Secular reasons do not rule out the potential for burdens on religious freedom. A substantial burden is present when government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Hobbie*, 480 U.S. at 141; *see also Thomas v. Review Bd.*, 450 U.S. at 717-718. A facially neutral regulation may "nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U. S. at 219-220. The Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 450 (1988).

These pre-*Smith* cases are more consistent with the first draft of the First Amendment, as written by James Madison: "nor shall the full and equal rights of conscience be *in any manner, or on any pretext*, infringed." 1 *Annals of Cong.* 451 (June 8, 1789) (speech by Rep. Madison) (emphasis added). Representative Daniel Carroll of Maryland observed that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 *Annals of Cong.* 757 (Aug. 15, 1789). As a Roman Catholic, Rep. Carroll belonged to a faith tradition that was a minority at the time.

Smith's unfortunate result was to "relegate[] a serious First Amendment value to the barest level of minimum scrutiny." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring), citing *Hobbie*, 480 U.S. at 141-142 (quoting *Bowen v. Roy*, 476 U.S. at 727 (O'Connor, J., concurring in part and dissenting in part)). *Smith*'s rationale is based on predictions that protecting religious liberty from the impact of neutral, generally applicable laws would permit each individual "to become a law unto himself" (citing *Reynolds v. United States*, 98 U.S. 145, 167 (1879)) and thus be "courting anarchy." *Smith*, 494 U.S. at 885, 888. This is short-sighted, because the claimant is not simply free to disobey the law at will but instead must jump several legal hurdles. The burden must be *substantial* and the government has the opportunity to demonstrate a compelling interest. The claimant may need to undergo litigation or even a criminal trial. This is not anarchy—it is due process of law at work.

Smith itself admitted the government may not:

(1) compel affirmation of religious belief (*Torcaso v. Watkins*, 367 U.S. 488 (1961)),

(2) punish the expression of religious doctrines it believes to be false (*United States v. Ballard*, 322 U.S. at 86-88),

(3) impose special disabilities because of religious views or religious status (*McDaniel v. Paty*, 435 U.S. 618 (1978)) or

(4) lend its power to one or the other side in controversies over religious authority or dogma (*Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-452 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-725 (1976)).

Smith, 494 U.S. at 877. Philadelphia violates every one of these core principles with respect to CSS:

(1) Philadelphia compels CSS to participate in an activity it believes is sinful—placing children with same-sex and/or unmarried couples—as a condition of having *any* role in assisting with foster care in Pennsylvania;

(2) Philadelphia punishes CSS's expression of a religious doctrine about marriage that the City believes to be false;

(3) Philadelphia imposes a special disability on CSS or any other agency that shares its religious conviction about the nature of marriage;

(4) Philadelphia lends its power to one side of the ongoing marriage debate—one of the most controversial issues ever debated in America.

These results occur because *Smith* severely restricted religious liberty violations to situations where it is clear the government has intentionally targeted religion. "Under *Smith*, the First Amendment does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs." *Fulton*, 922 F.3d at 165. This approach erodes religious liberty and is contrary to decades of previous case law.

C. *Smith* leaves religious exemptions to the political process—but the very purpose of a Bill of Rights is to protect minorities from majoritarian oppression.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy." *Barnette*, 319 U. S. at 638. Accordingly, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." *Smith*, 494 U.S. at 902

(O'Connor, concurring). In our nation today, the traditional religious view of marriage—one man, one woman—is often viewed with extreme hostility. The compelling interest test ensures that the majority does not run roughshod over citizens and organizations that hold this view. The First Amendment restrains the *legislative branch*—the very entity now charged with protecting religious liberty under *Smith*.

Smith admitted that leaving accommodations to the political process would place religious minorities at a "relative disadvantage" but dismissed that result as the "unavoidable consequence of democratic government." *Smith*, 494 U.S. at 889. *Smith* "leav[es] the Court open to the charge of abandoning its traditional role as protector of minority rights against majoritarian oppression." McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1129. That is contrary to decades of this Court's jurisprudence protecting minority views, not disregarding them. *Dale*, 530 U.S. at 660 ("[T]he fact that [social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."); *Masterpiece Cakeshop,* 138 S. Ct. at 1737-38 (Gorsuch, J., concurring) ("It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom . . . . [I]t is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith.")

D. Peaceful conscientious objectors can be distinguished from those who assert a right to engage in criminal acts.

In *Smith*, Petitioners "contend[ed] that their religious motivation for using peyote places them *beyond the reach of a criminal law* that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons." *Smith*, 494 U.S. at 878 (emphasis added). The Oregon Supreme Court had not considered the criminality of peyote use relevant because the purpose of the "misconduct" provision of Oregon's unemployment law was to "preserve the financial integrity" of the system rather than "to enforce the State's criminal laws." *Smith*, 494 U.S. at 875. According to the state court, that purpose did not justify the burden on religious practices. *Id.*

In earlier cases (*Sherbert*, *Thomas v. Review Bd.*, *Hobbie*), "the conduct at issue . . . was not illegal" and had "nothing to do with an across-the-board criminal prohibition on a particular form of conduct." *Smith*, 494 U.S. at 876, 884. CSS is a conscientious objector seeking to peacefully operate its ministry by placing children in foster homes with a father and mother married to each other. There is nothing unlawful—let alone *criminal*—about such placements. This Court's decision in *Reynolds*, upholding a polygamy conviction, "has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct 'pose[s] some substantial threat to public safety, peace or order.' *Sherbert v. Verner*, 374 U.S. at 403." *Lukumi*, 508 U.S.

at 569 (Souter, J., concurring). CSS does nothing that threatens "public safety, peace or order."

The *Smith* Court concluded that "we cannot afford the luxury of deeming *presumptively* invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Smith*, 494 U.S. at 888. One possible modification of *Smith* is to consider the enforcement of criminal law a presumptively compelling interest, placing a higher burden on the claimant than in cases of conscientious objectors who wish to passively make a referral or decline to participate in a morally objectionable activity.

Liberty of conscience is deeply rooted in American history, as illustrated by many statutory and judicially crafted exemptions. This Court, acknowledging man's "duty to a moral power higher than the State," once quoted the profound statement of Harlan Fiske Stone (later Chief Justice) that "both morals and sound policy require that the state should not violate the conscience of the individual." *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919). Indeed, "nothing short of the self-preservation of the state should warrant its violation," and even then it is questionable "whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." *Id*. It is hazardous for any government to crush the conscience of its citizens. When that happens, it tends to breed a nation of persons who lack *conscience*, forcing religious citizens and even

organizations to set aside conscience or face ruinous penalties.

No American should ever have to choose between allegiance to the state and faithfulness to God to participate in public life. Conscientious objector claims are "very close to the core of religious liberty." Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 565, 611, 615-616 (2006). Prior to *Smith*, many winning cases involved conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61 (1946) (military combat); *Sherbert v. Verner*, 374 U.S. 398 (Sabbath work); *Barnette*, 319 U.S. 624 (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (high school education). Many losing cases involved "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564 (2006). *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921. Unlike the *Smith* plaintiffs, CSS does not seek to commit a criminal act, but to peacefully refer couples to other agencies rather than violate religious doctrine.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. This Court's decision has broad ramifications for all citizens burdened by legal directives to act against conscience. In light of the

high value that courts, legislatures, and state constitutions have historically assigned to conscience and religious liberty, it is incumbent upon this Court to protect the right to live and work according to conscience, and to decline to participate in morally objectionable causes. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. This Court, holding that an alien could not be denied citizenship because of his religious objections to bearing arms, observed that "[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. at 68. We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to eradicate discrimination. People of faith have not forfeited their right to live according to conscience and religious convictions.

Many state constitutions link free exercise to "liberty of conscience." Pennsylvania is one of them: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own *consciences*; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of *conscience* . . . ." Pa. Const. Art. I, § 3 (emphasis added). Yet the word "conscience" appears nowhere in the Third Circuit's decision, and there is no discussion of the concept.

Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968), based on concerns "that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here: Philadelphia requires a religious organization to contravene its religious doctrine by approving relationships it considers immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

E. Religious organizations must be free to operate in accordance with their religious doctrine—not categorically excluded from public life *because of* that doctrine.

CSS is a religious organization with the right to shape its own faith and mission. This Court has always respected the rights of religious organizations, their "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. As this Court reaffirmed more recently, "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*

Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2013).

In *Hosanna*, this Court noted that "the ADA's prohibition on retaliation . . . is a valid and neutral law of general applicability." *Hosanna*, 565 U.S. at 190. But unlike the "outward physical acts" in *Smith*, *Hosanna* implicated "an internal church decision that affects the faith and mission of the church itself." *Id*. The same is true of CSS, a pervasively religious organization, which must be free to determine its doctrine and mission without penalty. The City forcibly truncates CSS's mission to families in the foster care system.

As in *Trinity Lutheran*, where a church was per se excluded from participating in a public program, Philadelphia categorically disqualifies CSS from participating in the state's foster care program because of its *religious* view of marriage. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2017 (2017). ("The Department had a policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program.") The Free Exercise Clause is designed to protect against "unequal treatment" that imposes "special disabilities" on the basis of "religious status." *Lukumi*, 508 U. S. at 533. Here, CSS is treated unequally because of its religious doctrine.

It is also questionable whether CSS, as a religious organization, fits the "public accommodation" mold. Religious organizations are often excluded from that definition, e.g., the Colorado statute in *Masterpiece Cakeshop* broadly defined public accommodations but excluded "a church, synagogue, mosque, or other place

that is principally used for religious purposes. §24-34-601(1)." *Masterpiece Cakeshop*, 138 S. Ct. at 1725. The contract between CSS and the City "incorporated the City's Fair Practices Ordinance, which in part prohibits sexual orientation discrimination in public accommodations." *Fulton*, 922 F.3d at 148. Philadelphia argues "that foster care is a public accommodation" (*id.* at 150) and "CSS has chosen to partner with the government to help provide what is essentially a public service" (*id.* at 161). But the City's choice to serve same-sex couples does not transform a religious organization into a "public accommodation."

The Third Circuit frames the issue as follows: "Did it [the City] have the authority to insist, consistent with the First Amendment and Pennsylvania law, that CSS not discriminate against same-sex couples as a condition of working with it to provide foster care services?" *Fulton*, 922 F.3d at 147. Despite the City's alleged "respect [for CSS's] sincere religious beliefs" (*id.* at 150), CSS's categorical exclusion is tantamount to a requirement that it "officially proclaim[] its support for same-sex marriage." *Fulton*, 922 F.3d at 161. Religious organizations need not be quarantined or disabled from participating in government-financed social welfare programs. *Bowen v. Kendrick,* 487 U.S. 589, 609 (1988); *Roemer v. Bd. of Pub. Works of Md.,* 426 U.S. 736, 746 (1976) ("[T]he State may send a cleric . . . to perform a wholly secular task."). On the contrary, excluding them—or requiring them to violate core religious doctrine—sends a message of "callous indifference." *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). Although Philadelphia does not disqualify all religious organizations per se, it does discriminate

between those that do or do not subscribe to the City's view of marriage. CSS "asserts a right to participate in a government benefit program without having to disavow its religious character." *Trinity Lutheran*, 137 S. Ct. at 2022.

CONCLUSION

Amici curiae urge the Court to reverse the Third Circuit decision and to overrule or substantially modify *Smith*.

Respectfully submitted,

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Deborah J. Dewart
Counsel of Record
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Arthur A. Schulcz, Sr.
Chaplains' Counsel, PLLC
21043 Honeycreeper Pl.
Leesburg, Virginia 20175
(703) 645-4010
art@chaplainscounsel.com

Counsel for Amici Curiae