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 *AMICUS CURIAE* NEW YORK STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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Interest of the *Amicus Curiae*[1]

Pursuant to Supreme Court Rule 37.3, the New York State Bar Association ("NYSBA"), as *amicus curiae*, respectfully submits this brief in support of the Respondent.

NYSBA has been the voice of the legal profession in New York State for more than 140 years and is the largest voluntary state bar association in the United States with approximately 70,000 members. Its mission is to shape the development of law and respond to the diverse and ever-changing demands of the legal profession.

Among its many roles, NYSBA develops forward-looking policies relevant to the profession and takes positions in litigation (either as party or amicus) concerning matters of interest to its members and the legal profession as a whole. As part of its mission, NYSBA has a history of taking a stand in promoting equality in the law for LGBTQ people in all aspects of society.

Furthermore, as an association of lawyers, NYSBA has a strong interest in family law and the legal protection of the foster care system. The definition and understanding of what constitutes a family has changed throughout time, and the United States now recognizes

1. All parties to this matter have provided written consent for this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae,* its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

married same-sex couples as a family unit as valid as any other. Foster care provides an opportunity for all families to look after children when their birth parents are poorly positioned to care for their children. Foster care fills the gap to temporarily house vulnerable children in safe, stable environments until they can safely be returned home or adopted. Foster care, therefore, is a critical public service, and qualified foster families willing to welcome foster children into their homes should be supported and encouraged to do so. NYSBA takes its responsibility to represent the interests of the LGBTQ community, family law practitioners, as well as the foster case system, most seriously.

Summary of the Argument

Under *Smith*, the Free Exercise Clause of the First Amendment is not offended when the government enacts a neutral, generally applicable law that has an incidental effect on religious belief or expression. The instant case concerns whether the City of Philadelphia infringed Catholic Social Service's ("CSS") Free Exercise rights when it enforced its neutral, generally applicable antidiscrimination requirements for all government contractors and denied them a taxpayer funded government contract for failing to comply with its Fair Practices Ordinance,[2] which prohibits discrimination on the basis of sexual orientation in certifying foster families. Given that the City of Philadelphia's antidiscrimination ordinance, first enacted in 1982, and its contractual antidiscrimination requirement are neutral, generally applicable obligations, the Court should affirm the Third Circuit's ruling and uphold the Court's decision in *Smith*.

2. *See* Philadelphia Code § 9-1106.

There are vital issues at stake in this case. The first is the long-standing legal value of *stare decisis* and adherence to precedent. The Court's holding in *Smith* has added clarity to Free Exercise jurisprudence, and has been heavily relied upon and cited in subsequent decisions. *Smith* creates an administrable rule that the First Amendment is not offended if a prohibition or requirement by the government is a neutral, generally applicable, and otherwise valid provision that is at odds with a particular individual or group's religious belief. Reversing *Smith* would call into question the well-established principle that neutral, generally applicable laws prohibiting discrimination can survive a Free Exercise challenge. The State of New York has a strong reliance interest in retaining the *Smith* standard, as many State and local laws, including antidiscrimination laws, in New York would be rendered ineffective if they were subject to case-by-case exemptions for any individual or group's religious or moral convictions.

There also would be societal consequences if *Smith* were reversed. Currently, there is a shortage of qualified foster families for the 437,000 children currently in the foster care system.[3] LGBTQ couples represent a critical mass of foster parents, and antidiscrimination ordinances like the one in Philadelphia ensure that all qualified foster families can foster children. Discriminating against qualified LGBTQ families is antithetical to the core goal of foster care: to provide a safe, stable home that is in the best interests of the child.

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3. U.S. Department of Health and Human Services, Administration for Children and Families, The AFCARS Report (No. 26) (Aug. 22, 2019).

Failure to affirm the court below would deal a distinct blow to legal certainty with attendant detriment to public policy interests. Overruling the District Court's denial of a preliminary injunction, and granting CSS's request to force the City of Philadelphia to renew a contract for public services without requiring compliance with the provisions of the Fair Practices Ordinance, would be highly unusual in these circumstances, and would disregard the public consequences of granting such relief.

NYSBA urges the Court to affirm the decision of the Third Circuit because the City of Philadelphia's antidiscrimination ordinance, as a neutral law of general applicability, does not infringe upon CSS's Free Exercise rights under the First Amendment. *Smith* should be followed in this case, as any shift away from the reliance interest in *Smith* will further exacerbate the foster care crisis in the United States by denying qualified same-sex couples the ability to foster children solely based on their sexual orientation. Finally, the requested remedy is highly unusual and this Court should not create a precedent of allowing equitable relief when all of the factors required for its grant have not been met.

Argument

I. *Smith* Should Continue to Guide Free Exercise Decisions Under the First Amendment to the United States Constitution

A. *Stare Decisis* Promotes a Consistent and Accurate View of the Free Exercise Clause

The Court has long recognized the inherent legal value of *stare decisis*. *Payne v. Tennessee*, 501 U.S. 808,

827 (1991). As Chief Justice Roberts noted last term in *June Medical Services LLC v. Russo*, adherence to precedent has practical and jurisprudential benefits. *June Medical*, No. 18-1323, slip op. at 3 (U.S. June 29, 2020) (Roberts, C.J., concurring). From a practical standpoint, *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018), quoting *Payne v. Tennessee*, 501 U.S. at 827. From a jurisprudential standpoint, *stare decisis* prevents courts from exercising power arbitrarily, or in a discretionary fashion better suited for the legislative or executive branches. *June Medical*, slip op. at 3 (Roberts, C.J., concurring).

The Court has long recognized that "[w]hile *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged to bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (quotations omitted). More recently, the Court has reiterated that it "will not overturn a past decision unless there are strong grounds for doing so." *Janus,* 138 S. Ct. 2448, 2478 (2018). To determine whether such grounds exist, the Court traditionally has used four criteria: "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos v. Louisiana*, No. 18-5924, slip op. at 20 (U.S. Apr. 20, 2020); *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

At times, the Court has also considered the importance of the administrability of precedent, subsequent factual developments, and the age of the precedent. *June Medical*, slip op. at 3 (Roberts, C.J., concurring); *Ramos*, slip op. at 7 (Kavanaugh, J., concurring).

In any of these formulations, the relevant criteria counsel the retention of *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* was not "grievously or egregiously wrong," has not caused "significant negative jurisprudential or real-world consequences," and has engendered strong reliance interests. *Ramos*, slip op. at 7-8 (Kavanaugh, J., concurring). To the contrary, it has added much-needed clarity and administrability to Free Exercise jurisprudence over thirty years, and should be retained.

B. *Smith* should not be Overturned

Smith was correctly decided, and reflects the most accurate reading of the Free Exercise Clause. As Justice Scalia pointed out in *Smith*, it is not necessary to read the words "prohibiting the free exercise [of religion]" to include the enforcement of neutral, generally applicable laws that are at odds with an individual or group's religious beliefs. *Smith* 494 U.S. at 878. It is just as logical to read the provision to say that if a prohibition or requirement is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id*. *Smith* recognizes that the First Amendment "excludes all 'governmental regulation of religious *beliefs* as such,'" which means the government "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false,

impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Id.* at 877, quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citations omitted). *Smith* holds that the First Amendment does not, however, require the government to justify laws that incidentally affect religious believers. The understanding of the Free Exercise Clause reflected in *Smith* is neither "outside the realm of permissible interpretation" nor "demonstrably erroneous," *Ramos*, slip op. at 2-3 (Thomas, J., concurring in the judgment), and should not be disturbed.

Furthermore, *Smith* is consistent with other jurisprudence, preserving a balance between the Free Exercise Clause and the Establishment Clause. It ensures government neutrality with regard to religion, such that lawmakers "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Court has found that government entities can create accommodations for religious exercise, as Congress, state legislatures, and municipal governments have done in the past. *See Cutter v. Wilkinson*, 544 U.S. 709, 713-714 (2005). In doing so, it has recognized "room for play in the joints" between the Free Exercise and Establishment Clauses. *Id.* at 713, quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004). Yet it has also recognized that "[a]t some point, accommodation may devolve into an unlawful fostering of religion.'" *Id.* at 714, quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-335 (1987); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992). The instant case goes far beyond cases like *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017), in which a generally available

benefit was denied to a religious organization solely on the basis of its religious identity. It instead involves religious organizations asserting a right to governmental contracts whether or not they will comply with the neutral and generally applicable terms of those contracts. Reversing *Smith* and compelling such accommodations would eliminate the discretion and flexibility that have historically protected both the Free Exercise Clause and Establishment Clause.

For decades, antidiscrimination laws around the nation have relied on the fundamental premises that have underpinned the holding in *Smith*. While the instant case involves discrimination based on sexual orientation or gender identity, similar cases would quickly arise involving discrimination based on race, sex, religion, nationality, disability, and other categories protected by federal, state, and municipal antidiscrimination protections. Reversing *Smith* would call into question the well-established pre-existing principle that neutral, generally applicable laws prohibiting discrimination can survive a Free Exercise challenge. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018), citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968). Moreover, reversing *Smith* would create difficulty insofar as the Free Exercise Clause not only protects those who practice religion, but those who practice no religion at all. *See McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring). If the Free Exercise Clause compels states to fund organizations that discriminate against particular groups in assertion of religious belief, it equally compels states to fund organizations that are

avowedly secular and decline to serve those who practice a particular religion or any religion at all. *Smith* ensures that governmental entities can enforce neutral, generally applicable antidiscrimination laws that protect religious observers as well as other groups.

While the instant case and many other cases being currently litigated focus on antidiscrimination law, reversing *Smith* would open the door to other challenges as well. As Justice Scalia warned in *Smith*, because Americans hail from a wide range of religious backgrounds and beliefs, "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. The absence of a bright-line rule would give litigants a green light to challenge virtually any neutral, generally applicable law in fields as varied as employment, taxation, zoning, education, health and welfare, criminal law, government benefits, and many other fields. *Smith*, 494 U.S. at 888-889, *See Brief for Professor Eugene Volokh as Amicus Curiae in Support of Neither Party, Sharonell Fulton, et al. v. City of Phila., et al.*, No. 19-123 (U.S. Jun. 2020).

Such a change is neither warranted nor necessary. The Free Exercise Clause has remained robust post-*Smith*. The Court has continued to scrutinize whether lawmakers and other state actors give neutral and respectful consideration to a group or person's religious beliefs. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719. It has allowed religious organizations to designate ministers and retain authority over their hiring

and firing. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). It has allowed religious actors that are willing to comply with state guidelines to receive state funding. *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). It should not go further and allow religious actors to demand state support on their own terms. Such a shift would not protect the free exercise of religion, but would instead function to degrade other constitutional protections and "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878).

C. New York State, and Other Governments, have a Strong Reliance Interest in Keeping *Smith*

The Court should consider that state and municipal governments around the country have relied on the rule established in *Smith* to craft laws that are premised on broad compliance by the public rather than individualized assessments of personal beliefs. *See Randall v. Sorrell*, 548 U.S. 230, 244 (2006). *Smith* has also provided a backdrop for the creation of legislative compromises that advance equality for LGBTQ people while carving out exemptions for religious objectors. *See* N.Y. Dom. Rel. Law §§ 10-a, 10-b (McKinney 2011) (expanding marriage to same-sex couples while exempting religious entities from having to provide goods, services, or facilities for the solemnization of a marriage); Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, N.Y. Times, Mar. 12, 2015 (describing the "Utah compromise" enacting nondiscrimination provisions in

tandem with religious exemptions). Finally, individuals and families have also relied on the rule established in *Smith* in choosing where to live, work, study, and raise families. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992). They have done so assuming that relevant state and municipal laws, including antidiscrimination laws, will be enforceable and are not subject to case-by-case exemptions.

As the Court warned in *Smith*, subjecting generally applicable laws to any individual's religious or moral convictions "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Smith*, 494 U.S. at 888. New York State has an interest in robust antidiscrimination laws that prohibit discrimination based on sexual orientation and gender identity, among other categories. These are among the laws that are most immediately threatened by the potential outcome of the instant case.

A brief survey of New York law illustrates some of the many legal protections that would be jeopardized by a ruling for CSS. Few, if any, of these protections would have force if those who do not wish to follow them could cite their personal beliefs to escape compliance. Objectors could demand exemptions from state laws that prohibit discrimination based on sexual orientation or gender identity or expression—as well as other prohibited grounds of discrimination—in a wide range of fields, including employment, education, housing, public accommodations, credit, insurance, programs for the elderly, ridesharing services, rights for breastfeeding mothers, classification and compensation of state employees, payment of wages,

and administration of veterans' benefits. N.Y. Civ. Rights Law § 40-c (McKinney 2019); N.Y. Civ. Serv. Law §§ 115, 118 (McKinney 2019); N.Y. Educ. Law § 313 (McKinney 2019); N.Y. Elder Law § 213 (McKinney 2019); N.Y. Exec. Law §§ 291 et seq., 350 (McKinney 2019); N.Y. Ins. Law §§ 2607, 3216, 3221, 3243, 4303, 4330 (McKinney 2020); N.Y. Lab. Law § 194 (McKinney 2019); N.Y. Pub. Auth. Law § 3 (McKinney 2020); N.Y. Pub. Health Law § 2505-a (McKinney 2016); N.Y. Veh. & Traf. Law § 1696 (McKinney 2017).

A ruling in favor of CSS would also open the door to challenges by state employees. New York State expects certain state officials to administer laws protecting against discrimination based on sexual orientation or gender identity and expression (as well as other characteristics), regardless of that person's religious beliefs. It tasks the attorney general with pursuing civil proceedings and criminal charges for discrimination based on sexual orientation and gender identity and expression and other grounds. N.Y. Exec. Law § 63 (McKinney 2019). It requires that municipal human rights commissions address complaints based on sexual orientation or gender identity or expression and other grounds. N.Y. Gen. Mun. Law §§ 239-q, 239-r (McKinney 2019). It prohibits discrimination based on sex, sexual orientation, and other grounds in employment by public benefit corporations like the Roosevelt Island Operating Corporation. N.Y. Pub. Auth. Law § 2799-gggg (McKinney 2019). The state has an interest in ensuring that these and other entities, like its grantees and those who administer its programs, do not perpetuate historically prevalent discrimination.

A ruling weakening municipal antidiscrimination protections would additionally threaten a range of state programs that aim to promote diversity, inclusion, and respect. New York law requires that civility education include content on tolerance, respect, and dignity, including based on race, weight, national origin, ethnicity, religion, religious practices, mental or physical abilities, sexual orientation, gender, and sex. N.Y. Educ. Law § 801-a (McKinney 2013). It prohibits bullying and harassment as well as discrimination based on these grounds in schools. N.Y. Educ. Law § 10 et seq. (McKinney 2019). It bans conversion therapy, by making it a form of professional misconduct for a mental health professional to try to change a minor's sexual orientation or gender identity or expression. N.Y. Educ. Law §§ 6531-a, 6509-e (McKinney 2019). It ensures that college and university campuses recognize and address sexual assault, dating violence, domestic violence, and stalking regardless of sexual orientation or gender identity or expression. N.Y. Educ. Law. § 6440 et seq. (McKinney 2015). And it establishes training to ensure that those who work with elderly adults are aware of the challenges facing LGBTQ seniors and have tools to support them effectively. N.Y. Elder Law § 202 (McKinney 2020). The efficacy of these programs would be significantly impaired if entities that administer or are expected to comply with them can opt out of their requirements.

Finally, it is not far-fetched to imagine objectors contesting the application of civil and criminal laws that address bias-related violence based on a person's race, color, national origin, ancestry, gender, gender expression, religion, religious practice, age, disability, or sexual orientation. N.Y. Civ. Rights Law § 79-n (McKinney

2020); N.Y. Penal Law § 485.05 (McKinney 2019). New York law prohibits harassment or threats based on these characteristics as aggravated harassment in the first or second degree, N.Y. Penal Law §§ 240.30, 240.31 (McKinney 2019), and prohibits defendants from using the discovery of sexual orientation or gender identity or expression as an affirmative defense for murder, N.Y. Penal Law §§ 125.25, 125.26, 125.27 (McKinney 2019). In New York State, targeting a person based on race, color, national origin, ancestry, gender, gender identity or expression, religion, religious practice, age, disability, or sexual orientation can also be relevant to a charge of domestic terrorism motivated by hate in the first or second degree. N.Y. Penal Law §§ 490.27, 490.28 (McKinney 2020). While New York could certainly prosecute individuals for crimes of violence, one can easily imagine individuals who oppose same-sex activity or transgender identity on religious grounds objecting to the application of penalty enhancements for acting on those beliefs.

Compelling exemptions to antidiscrimination protections would decimate the efficacy and administrability of these protections. They represent a small portion of the laws that would be jeopardized by a First Amendment that is used as a sword, not a shield, to compel exemptions from neutral, generally applicable laws. If the First Amendment compels governments to fund and support contractors that discriminate based on sexual orientation or gender identity and expression—or other characteristics as to which discrimination is prohibited—because of their religious conviction, it becomes difficult to distinguish cases where government employees wish to discriminate based on sexual orientation or gender identity and expression—or other grounds—because of their religious

conviction. The Free Exercise Clause cannot, and should not, compel such a result. *See, e.g.*, *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015).

Over the past thirty years, *Smith* has lent administrative clarity and predictability to the Court's Free Exercise jurisprudence, and shielded courts from excessive entanglement with religion. This is a core value of long-standing Free Exercise jurisprudence and should be maintained by this Court going forward.

II. The Consequences of Reversal Will Have the Most Impact on Our Most Vulnerable

A. LGBTQ Families Play a Crucial Role in America's Foster Care System

If the Third Circuit's decision is not affirmed, the consequences will fall most heavily on our nation's foster care system and, more specifically, on the more than 437,000 children currently in foster care across the United States. U.S. Department of Health and Human Services, Administration for Children and Families, The AFCARS Report (No. 26) (Aug. 22, 2019). While the First Amendment prohibits laws that interfere with the free exercise of religion, this goal cannot be accomplished by establishing a system of discrimination that disenfranchises those who are among our most vulnerable–namely, America's foster children.

Today, as has been the case for several decades, there are many same-sex families who play an integral role in our nation's foster care system. Given the biological restrictions on a same-sex couple's ability to conceive

a child of their own, many same-sex couples open their homes to foster children (including adopting children out of foster care) as a means to build their families. In fact, as of 2016, there are more than 24,000 LGBTQ couples fostering children in the United States. Shoshana K. Goldberg, et al., *How Many Same-Sex Couples in the U.S. are Raising Children?*, The Williams Institute, UCLA School of Law (July 2018). Out of all male same-sex households in the country, an estimated 4.5% have one or more foster children (approximately 15,570 households); out of all female same-sex households in the country, an estimated 2.4% have one or more foster children (approximately 8,616 households). *Id.* Compare that to the number of different-sex households in this country who are fostering children–only 0.4%. *Id*. The importance of LGBTQ families to our nation's foster care system cannot be overlooked; same-sex couples provide safe, stable, loving homes for tens of thousands of foster children every year.

If successful on appeal, not only would CSS be permitted to skirt an otherwise generally applicable policy of antidiscrimination against same-sex foster parents within the City of Philadelphia, but such a decision would function as a license for other religious-affiliated organizations across Pennsylvania and across the country to adopt similar policies of discrimination against LGBTQ couples. In the City of Philadelphia alone, there are at least three other foster care placement agencies that are religious-affiliated,[4] out of a total of 25 placement agencies. *See* City of Philadelphia, Department of

4. Bethanna, Jewish Family & Children's Services of Greater Philadelphia, and Methodist Services.

Human Services, Foster Care Licensing Agencies.[5] In the Commonwealth of Pennsylvania at large, there are a total of 138 foster care placement agencies, of which 72 are religious-affiliated – meaning that approximately 52% of Pennsylvania's foster care placement agencies have some type of religious affiliation. *See id.* If the Third Circuit's decision is not affirmed, all 72 of these agencies would possibly be permitted to adopt policies declining to work with same-sex foster families simply because they do not approve of their sexual orientation.

Furthermore, this decision would not only impact foster families in Pennsylvania, but rather, will reverberate to every other state and locality across the nation where foster care services are provided, including within the State of New York. In New York alone there are a total of 66 private foster care placement agencies who function in a role similar to CSS. *See* New York State Office of Children and Family Services, Become a Foster Parent,[6] *see also* Adoptive and Foster Family Coalition of New York.[7] These 66 placement agencies, in conjunction with local social services departments, serve all 15,820 of New York's foster children. *Id.* Of these 66 agencies, approximately 18 are religious-affiliated (or 27%). *Id.* In some counties in New York (*i.e.,* Jefferson County, Saratoga County, Montgomery County), there are no secular foster care placement agencies outside of the local department of

5. *Available at*: https://www.phila.gov/media/20190710120952/DHS_Philadelphia_Foster_Care_Agencies_041119.pdf

6. *Available at*: https://ocfs.ny.gov/main/fostercare/default.asp

7. *Available at:* https://affcny.org/services-in-ny/foster-care-agencies-in-new-york-state/

social services, meaning that those counties *only contract with religious-affiliated agencies. Id.*

When you look at these numbers on a national scale, the potential impact of the Court's decision in this case becomes stark: if CSS is granted permission to ignore an otherwise generally applicable policy of anti-discrimination for Philadelphia foster families, and if other agencies are similarly allowed to ignore otherwise generally applicable policies of anti-discrimination across the entire nation, there will be fewer agencies that are willing to certify couples and an increased potential for discrimination against couples due to their race, sexual orientation, or any number of protected categories. With fewer agencies certifying foster families, there will be fewer families available to provide homes for foster children. It goes without saying that such a result would have a disastrous impact on America's already struggling foster care system.

B. Congress Has Shown a Desire at the Federal Level to Increase, not Decrease, the Number of Foster Families Willing to Care for America's Foster Children

Over the last decade, this country has seen a massive decline in the number of families seeking to foster children, with a corresponding increase in the number children needing foster homes – colloquially known as America's "foster care crisis." Since 2012, when the number of children in foster care fell to a low of approximately 397,000 children, there has been a steady increase in that number, with more than 437,000 children in foster care today. U.S. Department of Health and Human Services, Administration for Children and Families, The

AFCARS Report (No. 20) (Nov. 1, 2013); U.S. Department of Health and Human Services, Administration for Children and Families, The AFCARS Report (No. 26) (Aug. 22, 2019). It is accepted, by both parties to this case, that there are not enough available homes to accommodate either the demand or need for foster care.

To combat this growing foster care crisis, Congress passed the Family First Prevention Services Act ("FFPSA") in February 2018 as part of the 2018 Bipartisan Budget Act. Family First Prevention Services Act, H.R. 1892, 115th Cong. (2018). The FFPSA was designed to overhaul federal child welfare financing by changing the way Title IV-E funds could be spent by the states. While the FFPSA's initial objective was to divert federal funding to be used for preventative services to keep at-risk youth *out* of foster care, its secondary purpose was to curtail the use of "congregate care facilities" (*i.e.,* group homes) in favor of placing children in family foster homes. A "family foster home" is defined as a family that has been licensed or certified by a state or state-sponsored agency to provide care for foster children.[8] Pursuant to the FFPSA, a state is now only eligible to receive federal foster care funding for a child if the child is placed in a family foster home within two weeks of entering the foster care system.[9] Research has shown that children who are housed in congregate care facilities (as opposed to family foster homes) are more likely to drop out of high school, commit crimes, and develop mental health problems. *See, e.g.,* The

8. CSS is one such state-sponsored agency that certifies families as meeting the state's requirements to serve as family foster homes.

9. Subject to various statutory exceptions for hard-to-place children.

ANNIE E. CASEY FOUND., RIGHTSIZING CONGREGATE CARE: A POWERFUL FIRST STEP IN TRANSFORMING CHILD WELFARE SYSTEMS (Jan. 1, 2009); *see also* Emily Wax-Thibodeaux, *We are Just Destroying These Kids: The Foster Children Growing Up Inside Detention Centers*, WASH. POST, Dec. 30, 2019.

It was the intent of Congress, by enacting the FFPSA, to incentivize foster care agencies to place children in family foster homes. In CSS's brief, they cite to the "chronic shortage" of available foster homes, calling it a "national problem." CSS reminds us that, in Philadelphia alone, the city's Department of Human Services "sent out an urgent plea for 300 new foster homes" due to a shortage of quality foster homes available to place all of Philadelphia's 5,000 foster children. Despite this admitted "shortage" in approved foster families, the petitioners ask this Court to condone a policy which would give religious-affiliated placement agencies carte blanche to discriminate against potential foster families based simply on their sexual orientation. Not only is such a policy impermissibly discriminatory, but it is completely contrary to the best interests of our nation's foster children, the Congressional intent behind the FFPSA, and the petitioner's own stated intentions of combatting the nation's foster care crisis by encouraging *more* families to consider fostering children.

III. The Requested Remedy is Unusual and Improper for this Case

The procedural posture of this case is also critical. The United States Court of Appeals for the Third Circuit affirmed the District Court's denial of a requested preliminary injunction. Specifically, CSS requested that the District Court issue an "injunction forcing the City to

renew a public services contract with a particular private party," without including the requirements or provisions of the generally applicable antidiscrimination law, which are contained in the standard contract with all other agencies. (Pet. App. 25a n.8)

This would be an extraordinary remedy, regardless of the arguments above. As noted by Chief Justice Roberts, a party seeking a preliminary injunction must establish not only that it is likely to succeed on the merits, but also that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008); *see also Munaf v. Geren,* 553 U.S. 674, 689-690 (2008); *Amoco Production Co. v. Gambell,* 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 311-312 (1982).

A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf,* 553 U.S., at 689-690. In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co.,* 480 U.S., at 542. "In exercising their sound discretion, Courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982); *see also Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 500 (1941).

After a three-day hearing, the District Court below made a finding that it would be inappropriate to issue an equitable remedy in this case given the extraordinary remedy that was requested. It would be highly improper

to grant the relief requested, as the balance of equities does not tip in favor of the petitioner and the public consequences of allowing this particular remedy would result in a federally-sanctioned policy of sexual orientation discrimination at the expense of America's most vulnerable population – foster children.

A. CSS's Policy, Being Impermissibly Discriminatory, Cannot be Seen as Being Equitable, Nor as Being in the Public Interest, and if Enacted Would Result in Serious Negative Public Consequences

CSS argues that, because Philadelphia has other, secular, foster care placement agencies, this policy does no real harm, since same-sex couples can simply seek certification from one of Philadelphia's other foster care placement agencies. This rationale is flawed, however, for a number of important reasons. As already mentioned, in many states and localities outside of Philadelphia (including the Commonwealth of Pennsylvania at large), a significant number of foster care placements are made by religious organizations, so CSS's "use a different agency" logic does not work nationwide. This is particularly true where there is no "different agency" available in rural areas across the country, including in New York. If people anticipate that they may be treated poorly, they tend to avoid potentially discriminatory situations. American Psychological Association, Discrimination: What it is, and How we Cope (Oct. 31, 2019). If the Court were to issue a decision holding that foster care placement agencies are permitted to discriminate against same-sex couples it would almost certainly discourage large numbers of same-sex couples from considering foster care. This

would expressly go against the interest the public has in expanding the availability of foster homes.

Empirical research has consistently shown that children who are raised in households headed by same-sex couples are as mentally, emotionally, and psychologically healthy and well-adjusted as children raised by heterosexual couples. Elizabeth Short et al., Lesbian, Gay, Bisexual and Transgender (LGBTQ) Parented Families: A Literature Review Prepared for The Australian Psychological Society (Aug. 2007); *see also* Canadian Psychological Association, Marriage of Same-Sex Couples – 2006 Position Statement (2006). Indeed "studies reveal that children raised in same-sex parent families fare just as well as children raised in different-sex parent families across a wide spectrum of child well-being measures: academic performance, cognitive development, social development, psychological health, early sexual activity, and substance abuse." Manning, Wendy et al., Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Psychological Associations Amicus Brief (2014). This concept has been recognized by several Federal Circuit Courts. *See e.g.*, *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014) ("[g]ay couples, no less than straight couples, are capable of sharing [loving, committed] relationships. And gay couples, no less than straight couples, are capable of raising children and providing stable families for them"). In fact, when this Court was deciding *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015), the American Psychological Association, along with a host of other psychological associations,[10] submitted an

10. Kentucky Psychological Association, Ohio Psychological Association, American Psychiatric Association, American Academy

amicus brief explaining that scientific evidence "strongly supports" the conclusion that "gay men and lesbians form stable, committed relationships that are equivalent to heterosexual relationships in essential respects; that same-sex couples are no less fit than heterosexual parents to raise children, and their children are no less psychologically healthy and well-adjusted."[11] This means that CSS cannot possibly justify its policy by an alleged concern for the well-being of children, nor is the public interest served when the well-being of children is not maximized.

If CSS is successful in challenging the constitutionality of Philadelphia's Fair Practices Ordinance, it could also have the affect of calling into question hundreds of other state statutes and local ordinances nationwide as they relate to antidiscrimination policies for foster care and adoption agencies. Currently, 30 states and Puerto

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of Pediatrics, American Association for Marriage and Family Therapy, Michigan Association for Marriage and Family Therapy, National Association of Social Workers, National Association of Social Workers Tennessee Chapter, National Association of Social Workers Michigan Chapter, National Association of Social Workers Kentucky Chapter, National Association of Social Workers Ohio Chapter, American Psychoanalytic Association, American Academy of Family Physicians, and American Medical Association.

11. *Available at*: https://web.archive.org/web/20190412074914/https://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_American_Psychological_Association.pdf. For a full recitation of the current state of scientific and professional knowledge concerning sexual orientation and families, please see Brief of the American Psychological Associations as *amicus curiae*.

Rico have some form of state statute, regulation and/or agency policy that prohibits discrimination in foster care based on sexual orientation.[12] 25 of those 30 states also expressly prohibit discrimination based on gender identity when screening prospective foster parents.[13] In New York, foster care placement agencies are prohibited from discriminating against prospective foster parents on the basis of sexual orientation or gender identity or expression. *See* 18 NYCRR 441.24. If this Court were to determine that Philadelphia's Fair Practice Ordinance infringes on CSS's right to free exercise of religion, it would have the potential to decimate other neutral, generally applicable antidiscrimination policies across the country, including in New York.

To combat our nation's ever-expanding foster care crisis and to safeguard the best interests of America's foster children, this Court must encourage policies that

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12. Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Puerto Rico, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin. Movement Advancement Project, Foster and Adoption Laws, *available at*: https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

13. California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia. Movement Advancement Project, Foster and Adoption Laws, *available at:* https://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

welcome all competent and willing families to participate in the foster care process. When balancing the "public consequences in employing the extraordinary remedy of injunction," *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982), and considering that the public consequences of allowing this particular remedy would result in a federally-sanctioned policy of sexual orientation discrimination at the expense of foster children, it is difficult to understand how the public consequences test has been met. The requested remedy is improper, and this Court should uphold the decisions of the courts below that found accordingly.

Conclusion

As Justice Scalia correctly noted in *Smith*, it is incorrect to read the words "prohibiting the free exercise [of religion]" to include the enforcement of neutral, generally applicable laws that are at odds with an individual's religious beliefs. To read otherwise would only unnecessarily and improperly entangle the Free Exercise Clause in unconstitutional jurisprudence.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018), quoting *Payne v. Tennessee*, 501 U.S. at 827. The understanding of the Free Exercise Clause reflected in *Smith* is neither "outside the realm of permissible interpretation" nor "demonstrably erroneous," *Ramos*, slip op. at 2-3 (Thomas, J., concurring in the judgment), and should not be disturbed.

If overruled, the consequences to America's foster children could be vast, in direct contradiction to the recent express intent of Congress. The potential impact, particularly to New York's foster care system, does not comport with a proper reading of the First Amendment to the United States Constitution. Nor does the remedy requested by the plaintiffs comport with accepted standards for equitable relief.

This Court should affirm the decision of the United States Court of Appeals for the Third Circuit.

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