No. 19-123

In The
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

On Writ Of Certiorari To
The United States Court of Appeals
For The Third Circuit

BRIEF OF ADL (ANTI-DEFAMATION LEAGUE) AND OTHER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

[Additional Amici Listed On Inside Cover]

ARNOLD & PORTER KAYE SCHOLER LLP
GILBERT R. SEROTA
Gilbert.Serota@arnoldporter.com
Counsel of Record
BENJAMIN T. HALBIG
Three Embarcadero Center
10th Floor
San Francisco, CA 94111

ADL (ANTI-DEFAMATION LEAGUE)
-STEVEN M. FREEMAN
DAVID BARKEY
AMY FEINMAN
KAREN LEVIT
605 Third Avenue
New York, NY 10158

attorneys For Amici Curiae

Additional Amici Curiae

BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE • INTERFAITH ALLIANCE FOUNDATION • JAPANESE AMERICAN CITIZENS LEAGUE • JEWISH WOMEN INTERNATIONAL • KESHET • NATIONAL COUNCIL OF JEWISH WOMEN • OCA - ASIAN PACIFIC AMERICAN ADVOCATES • PEOPLE FOR THE AMERICAN WAY FOUNDATION • THE SIKH COALITION • T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS • TEXAS IMPACT • TEXAS INTERFAITH CENTER FOR PUBLIC POLICY

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INTEREST OF AMICI [1]

Amici curiae are a diverse group of religious and religiously affiliated civil rights and cultural organizations that advocate for religious freedom, tolerance, equality and justice for all. *Amici* have a strong interest in this case due to their commitment to religious liberty, civil rights, and equal protection of law. Identity and Interest Statements of particular *amici* can be found in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether the Free Exercise Clause of the First Amendment requires that a foster care agency providing services under a city contract must be exempt from the Philadelphia's anti-discrimination law so that it may refuse to consider same-sex couples as foster parents because of its religious opposition to same-sex marriage. The organizations submitting this amicus brief, led by ADL (Anti-Defamation League), are strong advocates for religious freedom. They are also strong advocates for the fair, just, and equal treatment of all. They believe that the First Amendment is a shield which protects religious belief and practice, not a sword allowing religion to thwart the rights of third parties and undermine the protection of a city's anti-discrimination laws.

As discussed in the sections below, Petitioners' demand for a religious exemption from the City of Philadelphia's

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[1] Written consent to this brief has been granted by all parties. 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 its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

anti-discrimination law should be rejected. It is not mandated by the Free Exercise Clause because that ordinance is a neutral and generally applicable prohibition of discriminatory practices, whether motivated by religion or other reasons.

The exemption demanded by Petitioners would have dire public policy consequences. It would open the door to a wide variety of demands for religious-based exceptions to the enforcement of anti-discrimination laws. It would harm not only same-sex couples, but also sanction discrimination based on religious identity, including against religious minorities. It would restrict access to taxpayer-funded services provided by private, religiously-affiliated agencies, such as food banks, health care clinics, and homeless shelters. As a result, it would undermine the effectiveness of legislation adopted throughout the country designed to promote justice, equality, and fair treatment to all.

Philadelphia's Fair Practices Ordinance, which bars discrimination in public accommodations based on religion, ethnicity, race, and sexual orientation is identical to dozens of laws enacted by cities and states across our nation. Neither those anti-discrimination prohibitions nor efforts by cities to investigate and enforce them can reasonably be construed as targeting a religion or a religious belief or practice. The "hostility" evident in those laws and their enforcement, if any, is not toward religion, but toward discrimination against protected categories of people. As such, these general and neutral laws are not subject to a strict scrutiny standard of review.

Even if the Court were to analyze the application of these anti-discrimination requirements to Petitioners under a "strict scrutiny" standard, they would nonetheless pass muster. There is a compelling need for statutory protection of members of marginalized communities who

have historically experienced widespread and extreme discrimination. Bias in consideration as foster or adoptive parents is just one example of such discrimination, which has extended to employment, housing, and goods and services, and which has harmed religious minorities as well as the LGBTQ+ community.

Amici disagree with the contention that permitting agencies to refuse to serve same-sex couples so long as they refer them to another agency is a "less restrictive means" of furthering this government interest. The injury these couples suffer occurs at the moment that they are denied fair consideration as foster parents on the basis of their sexual orientation. Being told that another agency will consider them does not cure the harm.

Petitioners' argument that a referral to another agency avoids or cures such harm misconstrues the concept of "less restrictive means." This Court has held that any such "means" must be consistent with the achievement of the public policy goal of the law in question and must avoid harm to third parties. The argument advanced in this case fails to meet this standard.

The mandatory exemption for religious-based discrimination sought by Petitioners would effectively require cities and states to condone the very acts they seek to prohibit through anti-discrimination laws and ordinances. The protection afforded to vulnerable religious and other minorities by such laws and ordinances would no longer be certain and predictable, but uncertain and dependent on case-by-case determinations about the nature and origins of religious objections and the scope of exemption applied in any particular case.

For these reasons, as more fully explained below, *amici* urge the Court to affirm the judgment below.

ARGUMENT

I.
AN EXEMPTION FOR FAITH-BASED VIOLATIONS WOULD HARM RELIGIOUS LIBERTY

Anti-discrimination laws, such as Philadelphia's Fair Practices Ordinance, have advanced this country's commitment to equality and justice for all people. They serve an important purpose consistent with public policy: protection against discrimination in the provision of goods and services to the public, regardless of whether the discrimination has its roots in secular or religious motives.

These laws have changed the course of American history and made major strides in reversing centuries of discrimination and oppression against religious minorities. As early as the first meeting of Europeans in present-day America, a group of Spanish citizens massacred a colony of French Protestants seeking religious freedom because the colonists "were scattering the odious Lutheran doctrine in these Provinces." Kenneth C. Davis, *America's True History of Religious Tolerance*, Smithsonian Mag. (Oct. 2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/.

The Puritans, who themselves came to our shores to escape religious persecution, in turn founded "a theocracy that brooked no dissent, religious or political." *Id.* Catholics and other non-Puritans were banned from the colonies. *Id.* In New York, Catholics were constitutionally barred from public office. *Id.* Maryland granted Catholics full civil rights but did not extend those same rights to Jews. *Id.*

In 1844, anti-Catholic and anti-immigrant sentiment in Philadelphia led to the Bible Riots. Two Catholic churches were destroyed and at least twenty people were killed. *Id.*

Persecution and targeting of religious minorities persist to this day. In 2019, the American Jewish community experienced the highest level of anti-Semitism ever recorded,[2] and the American Muslim community suffered over 500 attacks in the first six months of the year.[3]

Anti-discrimination ordinances and statutes have been widely adopted throughout the country, in part as a response to persistent discrimination in the provision of goods and services. These laws are general and neutral in character, and there is no evidence that they were adopted with any intent to target religion. To the contrary, such laws are efforts to *protect* religious minorities and other vulnerable groups.

State and local governments should not be required to provide special treatment to religious organizations by allowing those organizations to discriminate in providing goods or services to the public or when administering a public service, when non-religious organizations providing the same goods or services are bound not to discriminate.

A mandatory exemption for religious-based objections would open the door not only to discrimination against same-sex couples, but also religious minorities and members of other marginalized groups. It would go beyond just foster care and would extend to a wide array of public services offered by private agencies, such as food

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[2] ADL, *Antisemitic Incidents Hit All-Time High in 2019* (May 12, 2020) https://www.adl.org/news/press-releases/antisemitic-incidents-hit-all-time-high-in-2019.

[3] Kelly Weill, *More Than 500 Attacks on Muslims in America This Year*, Daily Beast (May 21, 2019), https://www.thedailybeast.com/more-than-500-attacks-on-muslims-in-america-this-year.

banks, homeless shelters, or health care clinics. It is doubtful that there would be a rationale for limiting the exemption to *taxpayer-funded* services. Private businesses with religious objections to serving certain classes of people also would claim to be exempted from compliance with anti-discrimination laws and prohibitions.

"Religious liberty was never intended to give one religion dominion over other religions or a veto power of the civil rights and civil liberties of others." U.S. Comm'n on Civil Rights, Peaceful Coexistence: *Reconciling Nondiscrimination Principles with Civil Liberties,* at 29 (2016) [hereinafter 2016 Report of U.S. Comm'n on Civil Rights], https://www.usccr. gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF.[4]

The harm that will be caused to prospective foster parents by mandating religious exemptions under the circumstances presented by the case at bar is not merely theoretical. Numerous religious foster care agencies have publicly stated their intention to deny services based not only on the foster parents' sexual orientation but also on the basis of their religious affiliation. As of 2016, at least five state legislatures were considering limiting the rights of same sex couples and individuals to adopt children or provide foster care. 2016 Report of U.S. Comm'n on Civil Rights, *supra*, at 32, 37.

Discrimination in the provision of foster and adoptive care is not limited to sexual orientation. In South Carolina,

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[4] Petitioners cite the dissenting opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) and imply that this dispute is the inevitable consequence of that decision. Pet. Br. at 20. That, however, is not the case. Philadelphia's prohibition on discrimination based on sexual orientation preceded *Obergefell,* and this Court struck down state attempts to deny application of non-discrimination laws to LGBT citizens as a denial of equal protection a decade before *Obergefell*. *Romer v. Evans*, 517 U.S. 620 (1996).

for example, a Jewish woman sought to mentor local children in foster care through the Miracle Hill organization after having been a foster parent in Florida for ten years. She was refused an application, however, for the sole reason that she "did not share the organization's Christian beliefs."[5] That same agency refused to work with a prospective foster parent because of her Catholic faith.[6] Another Jewish family was barred from consideration by Miracle Hill and vividly described its exclusionary policies in a 2019 magazine article.[7]

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[5] *See* Angelia Davis, *Scrutiny of Miracle Hill's Faith Based Approach Reaches New Level*, Greenville News (March 1, 2018), https://www.greenvilleonline.com.

[6] Americans United for Separation of Church and State, *Maddonna v. Department of Health & Human Services: Case Background*, https://www.au.org/tags/maddonna-v-dept-of-health-and-human-services.

[7] "This publicly subsidized foster program is unwilling to place children with Jewish, Catholic, Muslim, Buddhist, Hindu, atheist and agnostic would-be parents. Their initial screening form, now available online, asks for the contact information of your pastor and that you testify to your salvation in the text box provided." Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, (Feb. 5, 2019, 5:46 p.m.), https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish.

Foster care agencies in, Georgia[8], Nebraska[9] and Texas[10] impose religious requirements on prospective parents and explicitly state that they will not work with individuals or couples who do not adhere to those requirements.

Broadly applied exemptions based on religious belief would put at issue hard fought legal and legislative victories against prejudice and discrimination. Cases from courts across the country show that, but for civil rights protections like Philadelphia's Fair Practices Ordinance, members of minority faiths would suffer discrimination without recourse.

A similar law, Minnesota's Human Rights Act, has been held to bar a health club from allowing "only born-again Christians. . . to be managers or assistant managers" and from "question[ing] prospective employees about marital status and religion," and "terminat[ing] employees because of a difference in religious beliefs." The gym owners in that case sought to defend their actions because of their "religious belief that they are forbidden by God, as set forth in the Bible, to work with 'unbelievers.'" *Minn. ex*

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[8] FaithBridge Foster Care, Foster Parent Requirements, https://www.faithbridgefostercare.org/blog/2017/11/1460/ (last visited July 30, 2020) (requiring foster parent applicants to "[b]e an active member of a local, Christian church, and demonstrate a commitment to Jesus Christ in your daily life and in your home").

[9] Christian Heritage, Foster Parent Inquiry Form, https://www.chne.org/foster_care/contact.html (last visited August 14, 2020) (A response is required for the question "[d]o you attend church").

[10] 1Hope for Kids, Foster Care Qualifications, https://1hopeforkids.org/foster-care-and-adoption (last visited August 14, 2020) (Requires a "foster/adopt parent . . . to [d]emonstrate a lifestyle that embraces the basic tenets of the Christian faith, including involvement in a local church").

rel. McLure v. Sports & Health Club, Inc., 370 N.W. 2d 844, 846-47 (Minn. 1985).

California's public accommodations anti-discrimination law has been held to prohibit a hotel owner from closing a poolside social event after the owner discovered it was hosted by a Jewish group. The owner claimed that her family would cut off funding for the hotel if they learned she allowed Jews on the property. She directed her staff to forcibly remove Jews from the premises. *Paletz v. Adaya*, No.B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014).

An identical law in Connecticut was held to bar a restaurant owner from refusing to serve food to a Muslim family by ordering his staff, in front of a 12-year old guest, "not to serve 'these people' any food." *Khedr v. IHOP Rests., LLC*, 197 F. Supp. 3d 384, 385 (D. Conn. 2016).

In *Nappi v. Holland Christian Home Association*, No. 11-cv-2832 (CCC-JBC), 2015 WL 5023007 (D.N.J. Aug. 21, 2015), the Court found a Title VII violation when a Catholic maintenance worker was terminated after being harassed by Protestant and Reformed Christian co-workers who called Catholicism a "Mickey Mouse religion" and denigrated Catholics for worshiping saints.

The Seventh Circuit found an analogous Title VII violation by Court employees in Illinois, who harassed and shunned a Muslim child-care attendant who wore a hijab to work. *Huri v. Office of the Chief Judge of the Circuit Court*, 804 F. 3d 826 (7th Cir. 2015).

The Ninth Circuit rejected a Free Exercise defense by a company that constructively discharged an atheist worker because the owners believed that "God required them to share the Gospel with all of their employees." *EEOC v. Townley Engineering and Manuf. Co.,* 859 F. 2d 610, 620 (9th Cir. 1988).

These cases demonstrate that religious minorities continue to face widespread discrimination and that courts enforce anti-discrimination laws even when a business or agency defends its discriminatory actions based on religious beliefs. Opening the door to faith-based exemptions from these laws would harm religious freedom by undermining their effectiveness and promoting discrimination instead of discouraging it.

II.
PHILADELPHIA'S ANTI-DISCRIMINATION REQUIREMENTS SHOULD NOT BE SUBJECT TO STRICT SCRUTINY BECAUSE THEY ARE NEUTRAL AND DO NOT TARGET RELIGION OR RELIGIOUS BELIEF.

A central question in this case is the standard of review that the Court must apply when faced with a religious-based objection to an anti-discrimination law. Petitioners' assertion that strict scrutiny should apply to Philadelphia's application of its anti-discrimination laws is erroneous and would undermine important protections for religious and other vulnerable minorities.

The strict scrutiny standard applies to laws whose object is "to infringe upon or restrict practices because of their religious motivation . . . ." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The Court imposes a "strict scrutiny" standard, when the law in question imposes "special disabilities" based on religious identity or status. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254-57 (2020).

Strict scrutiny does not apply to laws that are neutral and of general applicability. That standard should not be applied to Philadelphia's Fair Practices Ordinance or to the dozens of similar statutes throughout the country. Such a law "need not be justified by a compelling governmental

interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 608 U.S. at 531.

"[A] valid and neutral law of general applicability" is not subject to challenge under the Free Exercise Clause even if it "proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J. concurring))[11]. *See also South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (limitations on religious worship due to Covid-19 shelter in place orders "appear consistent with the Free Exercise Clause" where the facts show that "[s]imilar or more severe restrictions apply to comparable secular gatherings"); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability . . ."") (internal quotation marks and citation omitted); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006) ("[T]he Free Exercise Clause . . . does not prohibit governments from burdening religious practices through generally applicable laws. ").[12]

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[11] *Smith* is compelling precedent that this Court should not overrule based on the circumstances presented here. *See June Medical Services v. Russo*, 140 S. Ct. 2103, 2134-35 (2020) (Roberts, C.J. concurring).

[12] The position of *amici* is not inconsistent with either *Hosanna-Tabor*, 565 U.S. 171 or *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). While both of these cases uphold religious exemptions to laws of general application (ADA in *Hosanna* and Title

(. . . continued)

As observed in *Smith*, this Court has "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." 494 U.S. at 878-79. To the extent *Smith* rejects the strict scrutiny of laws of general application that protect vulnerable minorities from discrimination, this Court should reject Petitioners' argument that it should be modified or overturned.

III.
ADOPTION, INVESTIGATION, AND ENFORCEMENT OF ANTI-DISCRIMINATION LAWS SHOULD NOT BE CONSIDERED TARGETTING OF RELIGION OR RELIGIOUS PRACTICE SUFFICIENT TO TRIGGER STRICT SCRUTINY.

Petitioners seek to impose a strict scrutiny standard of review based on the nature of the law in question and on Philadelphia's investigation of CSS, its attempt to convince CSS to comply with the law, and its ultimate decision to terminate CSS's foster care contract in order to protect Philadelphians from discrimination. Reliance on these facts to impose strict scrutiny should be rejected.

As neither the nature of the law adopted by Philadelphia nor its investigation and enforcement practices target petitioners' religious beliefs or practices, they do not trigger a strict scrutiny review.

VII in *Amos*), neither of these cases involved an exemption allowing religious beliefs to harm third parties. Instead, each case involved "internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 188. Petitioners here do not assert that the question of discrimination at issue arose from or is confined to internal church affairs.

A. The Law in Question Cannot be Characterized As Targeting Religion, Religious Belief or Religious Practices.

The language of Philadelphia's Fair Practices Ordinance cannot fairly be characterized as in any way targeting religion, religious belief, or religious practice. That Ordinance prohibits discrimination on the basis of "race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, disability, marital status, familial status, or domestic or sexual violence victim status" in the delivery of City services or the provision of public accommodations. Phila. Code. § 9-1106(1)

Anti-discrimination statutes such as the Ordinance are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination . . . ." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 572 (1995). They are "content and viewpoint neutral." *Christian Legal Soc'y v. Hastings*, 561 U.S. 661, 699 (2010) (Stevens, J. concurring).

Whether applied to protect religious minorities or same sex couples, these laws strike a proper balance. They do not prohibit or impede religious and philosophical belief, but they "do not allow business owners and other actors in the economy to deny protected persons equal access to goods and services . . . ." *Masterpiece Cakeshop*, *Ltd., v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

Petitioners repeatedly cite *Lukumi* as support for their argument that Philadelphia's anti-discrimination laws and contract language target their religious beliefs and require strict scrutiny. In *Lukumi*, however, the city "gerrymandered" a new law designed to impede a specific religious practice by an unpopular religion, while leaving outside the law similar secular practices.

Here the language adopted by Philadelphia in its Fair Practices Ordinance can be found in dozens of similar provisions around the country enacted to prohibit discrimination in the provision of "public accommodation" on the basis of race, religion, ethnicity, and sexual orientation.[13]

Cities as diverse as Fort Worth, Texas[14], Jacksonville, Florida[15], Muncie, Indiana[16], Omaha, Nebraska[17], and Phoenix, Arizona[18], have adopted virtually identical statutes. So, too, have states, such as Iowa[19], Maine[20], Massachusetts[21], Minnesota[22], Nevada[23], New Mexico[24], and Washington.[25]

Philadelphia's adoption of language generally used to prohibit discrimination negates any factual argument or

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[13] Philadelphia defines "public accommodation" to include any business "which solicits or accepts patronage or trade of the public or whose…services, facilities…are extended, offered or otherwise made available to the public." Chapter 9-1100 of the Philadelphia Code, which the District Court found to cover the foster care services offered by Petitioner CSS. *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 679 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019) .

[14] Fort Worth, Tex., City Code § 17-48(a)(1).

[15] Jacksonville, Fla., Code of Ordinances § 406.201.

[16] Muncie, Ind., Code of Ordinances § 34.87.

[17] Omaha Neb., Code of Ordinances, § 13-84.

[18] Phoenix, Ariz., City Code § 18-1.

[19] Iowa Code § 216.7.

[20] Me. Rev. Stat. tit. 5 § 4592.

[21] Mass. Gen. Laws ch. 272 § 98.

[22] Minn. Stat. § 363A.11.

[23] Nev. Rev. Stat. § 651.070.

[24] N.M. Stat. § 28-1-7(F).

[25] Wash Rev. Code § 49.60.215.

legal conclusion that the law at issue here was formulated to target Petitioners based on their religious beliefs. *Lukumi*, therefore, is inapposite.

B. Investigation and Enforcement of Anti-Discrimination Laws Against Religious-Affiliated Entities Should Not Be A Basis for Strict Scrutiny Review.

Petitioners impugn as "hostile" and not "neutral" the City's investigation, negotiation, and consideration of the facts of CSS's blanket refusal to work with same-sex couples which came to light through an investigative journalist's reporting. *See Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 672, 690 (E.D. Pa. 2018), *aff'd* 922 F.3d 140 (3d Cir. 2019) (finding insufficient evidence of targeting CSS on the basis of religious hostility). Petitioners' argument fails to accurately portray the record developed below and raises serious public policy concerns.

The District Court made findings of fact after an evidentiary hearing that Philadelphia did not target CSS because of its religious beliefs and had, in fact, expressed a "preference for continuing their relationship with [Petitioner] CSS" if it would comply with its contract responsibilities. *Id.* at 674.

Petitioners' "hostility" argument attacks Philadelphia's effort to investigate and enforce the law. *See, e.g.,* Pet. Br. at 23-25. That argument represents a threat to good faith investigations by local governments. By its nature, an inquiry about a suspected violation of an anti-discrimination law can almost always be viewed as singling out or even targeting the subject(s) of the investigation.

Governments must be entitled to investigate violations of their anti-discrimination laws, whether the target is a religious or secular institution and whether the violation involves same sex couples or instances of religious discrimination against Hindus, Jews, Muslims or members of other faiths. Anything less would be a violation of their duty to faithfully enforce the law. Cities and states should be able to do so without fear that the investigation itself will be treated as evidence of hostility to the institution being investigated.

Accepting Petitioners' argument that the City's investigation of CSS and efforts to convince it to comply with the law is sufficient evidence of targeting religion so as to avoid application of the prohibition itself would make no sense. It would hamstring a city's right to investigate wrongdoing, including instances of religious discrimination.[26]

The record below shows that the City's refusal to renew CSS's contract did not turn on CSS's religious affiliation, but on its violation of anti-discrimination laws that apply to both religious-based and secular agencies.[27] That does not trigger strict scrutiny review.

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[26] Nor is there evidence in the record that Philadelphia applied its law in a targeted or discriminatory way. The neutral application of its anti-discrimination policy is demonstrated by the facts found below, including that it continues to (1) have a foster care contractual relationship with another agency sharing Petitioners' opposition to same sex marriage, but which was willing to agree not to discriminate in consideration of same sex couples as foster parents, Pet. App. 103A; and (2) provide millions of dollars of taxpayer funds to Petitioner CSS for child welfare services distinct from foster care. Pet. App. 16a., 187a; JA 208-09, 505.

[27] Petitioners argue that the city's allowance of certain exemptions

(. . . continued)

Petitioners also seek strict scrutiny review by repeatedly citing *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), and arguing that the City is using its "contracting and funding authority to exclude a disfavored religious actor." Pet. Br. at 22. They are wrong. *Trinity Lutheran,* like the more recent case, *Espinoza v. Montana Dept of Revenue*, 140 S. Ct. 2246, represent a line of cases easily distinguishable from this case and *Smith*. Those cases involve laws that "impose[d] special disabilities on the basis of religious status," *Trinity Lutheran*, 137 S. Ct. at 2015 (citation omitted), such as the denial of a government benefit otherwise available to members of the public because of the recipient's religious activities or beliefs.

In *Trinity Lutheran*, the state barred parochial schools from receiving public funding available to other schools to purchase rubber playground surfaces solely on the basis of the parochial schools' religious character. In *Espinoza,* a state policy prohibited students receiving state scholarship funds from using their scholarship to attend a religiously affiliated school without requiring an individualized assessment of whether such schools would use the funds for religious activities.

In contrast, this case does not involve denial of a governmental benefit otherwise available to members of the public. It involves a discretionary contract between

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from the contract language compels that the court allow their request to turn away same sex couples. The facts presented at the trial on the merits did not show that the city granted exemptions allowing any agency to "refuse its services to all comers in contravention of any fair practices provisions on any foster services contract." *Fulton*, 320 F. Supp. 3d at 689-90. Instead, these examples involved considerations relevant to the best interests of a child during child placement, such as expertise in addressing behavioral issues, foster placements for pregnant youth, and proximity considerations. *Id*.

Philadelphia and a private agency to render foster care services to all Philadelphians.

The ban on discrimination reflected in Philadelphia's Fair Practices Ordinance and incorporated in its contracts is neutral, generally applicable, and uses language virtually identical to statutes adopted throughout the country and implemented to address persistent discrimination against marginalized communities. It applies whether or not the discrimination is motivated by religious belief. The City investigated potential discrimination in violation of the statute, as it was entitled to do. As a result, Philadelphia's Ordinance as applied to Petitioners is not subject to strict scrutiny.

IV.
ANTI-DISCRIMINATION LAWS EMBODY A PUBLIC POLICY OF THE HIGHEST ORDER AND THE 'LESS RESTRICTIVE MEANS' ARGUMENT ADVANCED BY PETITIONERS WOULD CONDONE DISCRIMINATION ON THE BASIS OF RELIGION AND OTHER PROTECTED CATEGORIES.

The neutral and generally applicable nature of the anti-discrimination law at issue in this case does not require application of a strict scrutiny standard of review. However, if this Court were to decide otherwise, the law as applied to CSS would nonetheless survive such analysis.

Even assuming that its adherence to the City's anti-discrimination requirements burdens its religious beliefs or practices, CSS nonetheless concedes that "restrictions on religious exercise [are] permitted only where the government [is] advancing a particularly important interest." Pet. Br. at 46; *see also id.* at 44 (The Free Exercise Clause can be limited where it conflicts with "especially important state interests.").

To satisfy strict scrutiny, a law which burdens religious practice must advance a public interest of the highest order and must be narrowly tailored in pursuit of those interests. *Lukumi*, 508 U.S. at 546. Philadelphia's application of its non-discrimination law to protect same sex couples from being turned away by foster care agencies satisfies those criteria.

A. Combatting Discrimination Is A Public Interest of the Highest Order.

Discrimination, including religiously motivated discrimination, has long plagued our nation. The history described in Section I, *supra*, is just the backdrop of discrimination that continues into the 21st Century.

It is within the memory of many living Americans when overt discrimination limited access of racial and religious minorities to housing, employment, goods, and services. Restaurants and hotels brazenly displayed "Whites Only" or "No Jews" signs. It was not so long ago that deeds to subdivisions prohibited sales to Black people or Jews, and restaurants and bars could freely deny entrance to women.

The U.S. Commission on Civil Rights found that "Civil rights protections ensuring nondiscrimination in the Constitution, laws and policies, are of preeminent importance in American jurisprudence." 2016 Report of U.S. Comm'n on Civil Rights, *supra*, at 25. As the cases cited in Section I demonstrate, this behavior may no longer be pervasive but it certainly still persists. Granting Petitioners' request would constitute a step back towards overt, government-sanctioned discrimination against members of minority faiths and other marginalized groups.

The particular form of discrimination at issue here – by foster care agencies based on religious belief – is well

documented in Philadelphia and across the country. Protection against such discrimination is a necessary part of protecting the rights and dignity of minorities.

In Philadelphia, Bethany Christian Services' used religious criteria led it to turn away a same-sex couple seeking to become foster parents, but it has agreed to comply with the City's anti-discrimination requirements.[28] As shown above, however, foster care or adoption agencies in South Carolina, Georgia, Nebraska, and Texas refuse to work with same-sex couples as foster parents.

It took years of demonstrations, protests, and legislative courage to enact the kinds of laws at issue here that protect religious minorities and members of marginalized communities from discrimination. It cannot reasonably be disputed that discrimination against same sex couples is part of a pervasive problem which the City of Philadelphia has a compelling interest in addressing. It meets the first test imposed by "strict scrutiny" review.

B. Condoning Discrimination Through An Exemption for Petitioners Is Not a Proper "Less Restrictive Means."

Petitioners argue that by refusing to contract with CSS unless it agrees to comply with its non-discrimination policy, Philadelphia has not used the "least restrictive means" of furthering its public policy goals and fails the "strict scrutiny" test. They argue that the fact that CSS adopted a policy of referring same sex couples to one of the other agencies that will consider such couples as foster

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[28] Julia Teruso, *City resumes foster-care work with Bethany Christian Services after it agrees to work with same-sex couples*, Philadelphia Inquirer (June 28, 2018), https://www.inquirer.com/philly/news/foster-care-lgbt-bethany-christian-services-same-sex-philly-lawsuit-catholic-social-services-20180628.html.

parents is sufficient to protect those parents from discrimination. Pet. Br. at 36. They are wrong.

Petitioners' argument misconstrues the concept of "least restrictive means." They concede, by citing *Holt v. Hobbs*, 574 U.S. 352, 365 (2015), that a Court addressing this question must determine whether the proposed means allows the "Government to achieve its goals." "Less restrictive means" have been found where an exception can be granted to accommodate a party's religious conduct without causing harm to third parties. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 731-32 (2014), the only alternatives considered by the Court in its "least restrictive means" analysis was an existing program that would not impede or impose additional costs on women accessing contraceptives.

An analogous question to that raised by Petitioners is whether a landlord should be able to deny consideration of an unmarried couple for housing on religious grounds because other landlords nearby do not engage in such discrimination. In *Smith v. Fair Employment & Housing Commission*, 12 Cal. 4th 1143, 1175 (1996), the California Supreme Court held that a landlord's refusal to rent units to unmarried couples on the basis of her religious beliefs was not protected by RFRA because of the harm inflicted on prospective tenants.

"To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations enjoyed by others . . . [and] deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere." *Id.*; *accord Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (finding that landlord's refusal to rent to unmarried

couples on the basis of religious beliefs "degrades individuals" and "affronts human dignity").

If the Court were to accept Petitioners' argument, there is no limiting principle that would bar other forms of religious-based discrimination. Would a catering company be able to refuse to offer its services to people who wear Kippahs or head scarves because of its religious objection to Jews or Muslims simply by showing that there is another vendor across town who will serve those people? Conversely, would a restaurant owned by Jews or Muslims be permitted to refuse service on religious grounds to a Catholic, Mormon or Protestant?

These circumstances present analogous facts as to those at issue here, because the harm and violation of the anti-discrimination law occurs at the moment of refusal to consider serving the individuals at issue. A denial of goods or services to a protected group followed by a referral to a non-discriminating agency or provider does not achieve the policy goal of protecting vulnerable citizens from discrimination. It fails to avoid harm to the persons protected by the anti-discrimination laws. It is not a "less restrictive means."

V.
MANDATING THE EXEMPTION SOUGHT BY PETITIONERS WOULD VIOLATE THE ESTABLISHMENT CLAUSE.

Freedom of religion is a shield for faith, not a sword to harm third parties. The First Amendment should not be interpreted as a vehicle to require governmental entities to exempt religious-based organizations from compliance with laws applicable to all organizations providing the same service or product to members of the public,

especially where those services are funded by a state or city.

There is no dispute that a government may contract with a religiously-affiliated organization to provide services to the public without violating the Establishment Clause. However, when the government then allows that agency to administer its services by providing disparate treatment to certain classes of individuals on the basis of religious criteria, it has gone too far and endorsed religion in violation of the Establishment Clause. [29]

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Just as the neutrality principle at the heart of the First Amendment prohibits government from singling out religion for disparate treatment, it also prohibits the government from preferring one religion over another or religion over non-religion. *See*, *e.g. Estate of Thornton v. Calder*, 472 U.S. 703, 710 (1985) (Establishment Clause prohibits a law which "advances a particular religious practice"); *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994)("civil power must be exercised in a manner neutral to religion . . ."); *Texas*

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[29] Two recent cases illustrate the Establishment Clause issue raised by government permitting religiously affiliated for foster care agencies to discriminate on the basis of religion. *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018); Order at 31-35, *Maddonna v. U.S. Dep't of Health and Human Servs.*, No. 6:19 cv 03551 (D.S.C. August 10, 2020), https://www.au.org/sites/default/files/2020-08/U.S.%20District%20Court%2C%20S.C.%2C%20Opinion%20Maddonna%20v.%20HHS%208.10.20.pdf. In each case, the District Court found a properly pleaded Establishment Clause claim arising from actions by state and federal exemptions for religious-based foster care agencies administering state programs.

Monthly, Inc. v. Bullock, 489 U.S. 1, 16-17 (1989) (striking down sales tax exemption for religious publications.")

In the case where a religious accommodation is considered, it "must be measured so that it does not override other significant interests," *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), and must not "impose substantial burdens on nonbeneficiaries" *Texas Monthly*, 489 U.S. at18 n.8.

The exemption demanded here fails on both counts. Requiring the exemption to the anti-discrimination laws sought by Petitioners has the effect of favoring a religious belief to the detriment of the protection of third parties. Such a ruling would threaten the fair and equal treatment not only of same sex couples, but religious minorities seeking access to a wide array of services, including food banks, homeless shelters, and health clinics.

When a government chooses to exempt an organization from a law of general application based on the organization's religious beliefs, then it has gone too far. The exemption becomes an endorsement of religious belief that a government may not do without violating the Establishment Clause.

CONCLUSION

This country has made important and demonstrable progress in ensuring fair and equal access to employment, housing, public accommodations and services by religious, ethnic, racial and other minorities. That progress took enormous courage, sacrifice, and decades to achieve.

The anti-discrimination laws enacted by Philadelphia and many other cities and states were milestones in this fight against discrimination and in the advocacy of justice and fair treatment for all. They prohibit discrimination by persons or entities offering or providing services to the

public, whether they are religiously-affiliated or not. They prohibit discrimination whether the source of such discrimination is religion or otherwise. They protect same sex couples as well as religious minorities and members of other marginalized communities.

This Court is now asked to exempt a religious-based organization providing taxpayer-funded services to the public from an anti-discrimination law because of a good faith religious belief. Requiring such an exception for Petitioners in this case would cause a flood of demands for similar exemptions, undermining the efficacy of those laws in safeguarding vulnerable members of the population, including religious minorities and members of other marginalized communities

For the reasons set forth herein, the Free Exercise Clause does not compel such an exception, and the Establishment Clause protects against it. The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

ARNOLD & PORTER KAYE SCHOLER LLP
GILBERT R. SEROTA
COUNSEL OF RECORD
BENJAMIN T. HALBIG
Three Embarcadero Center
10th Floor
San Francisco, CA 94111
Telephone: +1.415.471.3100
Gilbert.Serota@arnoldporter.com
Ben.Halbig@arnoldporter.com

ADL (ANTI-DEFAMATION LEAGUE)
STEVEN M. FREEMAN
DAVID BARKEY
AMY FEINMAN
KAREN LEVIT
605 Third Avenue
New York, NY 10158

Attorneys For Amici Curiae ADL (Anti-Defamation League) and others.

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APPENDIX

APPENDIX

AMICI CURIAE STATEMENTS OF INTEREST

Amicus curiae **ADL (the Anti-Defamation League)** was founded in 1913 in response to an escalating climate of antisemitism and bigotry, and today remains a leading anti-hate organization with the timeless mission to protect the Jewish people and to secure justice and fair treatment for all. To this end, ADL is a steadfast supporter of anti-discrimination laws, as well as the religious liberties guaranteed by both the Establishment and Free Exercise Clauses. ADL staunchly believes that the Free Exercise Clause is a critical means to protect individual religious exercise, but it must not be used as a vehicle to discriminate by enabling some people to impose their religious beliefs on others.

Amicus curiae **Bend the Arc: A Jewish Partnership for Justice** is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunities for Americans.

Amicus curiae **Interfaith Alliance Foundation** is a national non-profit organization committed to championing true religious freedom and strengthening the separation between religion and government. With members from over 75 faith traditions and of no faith, Interfaith Alliance promotes policies that protect personal belief, combat extremism, and ensure that all Americans are treated equally under law.

Amicus curiae **the Japanese American Citizens League ("JACL")** is a national organization whose ongoing mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by

injustice and bigotry. Aware of our responsibilities as the oldest and largest Asian Pacific American civil rights organization, JACL strives to promote a world that honors diversity by respecting values of fairness, equality and social justice.

Amicus curiae **Jewish Women International ("JWI")** is a leading Jewish organization working to empower women and girls by ensuring and protecting their physical safety and economic security, promoting intergenerational leadership, and inspiring community engagement. As a faith-based organization, JWI recognizes the importance of protecting religious liberty, and believes that the constitutional principle of the separation of church and state created by the Establishment Clause and the Free Exercise Clause, is critical to protecting the fundamental rights of all.

Amicus curiae **Keshet** works for the full equality of LGBTQ Jews in Jewish life. We turn values at the heart of Judaism—equality, inclusion, and human dignity—into action in Jewish communities because when we stand by and allow LGBTQ Jews to be excluded, we hold all of Jewish life back from reaching its full potential. We equip Jewish organizations with the tools to build LGBTQ-affirming communities, create spaces for queer Jewish teens to feel valued as queer and Jewish, and mobilize the Jewish community to fight for LGBTQ justice nationwide. Consistent with our mission and our commitment to religious liberty and nondiscrimination, Keshet joins this brief.

Amicus Curiae **the National Council of Jewish Women ("NCJW")** is a grassroots organization of over 90,000 advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and

freedoms. NCJW's Resolutions state that NCJW resolves to work for “Laws and policies that provide equal rights for all regardless of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, gender identity and expression, economic status, immigration status, parenthood status, or medical condition” and for "Laws, policies, and programs that protect every person’s right to make decisions about whether to have or not have children and to birth, adopt, and/ or parent with dignity." Consistent with our Principles and Resolutions, NCJW joins this brief.

Amicus curiae **OCA - Asian Pacific American Advocates (“OCA”)** is a national Asian American and Pacific Islander (“AAPI”) civil rights organization with chapters across the country, including in the greater Philadelphia area. OCA advocates for policies that enhance the social, economic, and political well-being of the AAPI community, some of whom identify as lesbian, gay, bisexual, transgender, or queer. As such, cases that impact the ability of AAPI LGBTQ communities to fully engage in American society are of extreme concern to the organization.

Amicus curiae **People For the American Way Foundation (“PFAWF”)** is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. PFAWF strongly supports the principle of the Free Exercise Clause of the First Amendment as a shield for the free exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to unduly harm others, which also violates the Establishment Clause. This is

particularly problematic when the effort is to excuse violations of anti-discrimination legislation, which is important to protect religious and other minorities.

***Amicus curiae* the Sikh Coalition** is the largest community-based Sikh civil rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community of Sikhism. The Sikh Coalition joins this brief out of the belief that anti-discrimination safeguards are essential for religious, ethnic, and other minority communities.

***Amicus curiae* T'ruah: The Rabbinic Call for Human Rights ("T'ruah")** brings together rabbis and cantors from all streams of Judaism with all members of the Jewish community to act on the Jewish imperative to respect and advance the human rights of all people. T'ruah trains and mobilizes a network of 1,800 rabbis and cantors and their communities to bring Jewish values to life through strategic and meaningful action. As members of a religious minority, T'ruah supports this brief because it believes Petitioners' position, rather than protecting religious freedom, will only serve to restrict it.

***Amici curiae* Texas Impact**, a 501(c)(4) nonprofit corporation, and the **Texas Interfaith Center for Public Policy**, a 501(c)(3) nonprofit corporation, function as a state council of Christian, Jewish, and Muslim religious organizations in Texas that promote public policy consistent with the national positions of our member denominations. Our member denominations have ministries that partner with state government. Texas Impact and the Texas Interfaith Center for Public Policy believe that religious freedom in state services is best

protected when the government does not allow providers to impose religious belief on beneficiaries.