

No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, *ET AL.*,

Petitioners,

vs.

CITY OF PHILADELPHIA, *ET AL.*,

Respondents.

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

**BRIEF OF *AMICUS CURIAE* KIDVOICE IN
SUPPORT OF RESPONDENTS**

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Regulations

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Other Authorities

Allegheny County Department of
Human Services Area Agency on Aging
Office Profile,
[https://www.alleghenycountyanalytics.u
s/wp-content/uploads/2020/08/Office-
Profiles-AAA-2020.pdf](https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Office-
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Allegheny County Department of
Human Services, Office of Behavioral
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[https://www.alleghenycountyanalytics.u
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Profiles-OBH-2020.pdf](https://www.alleghenycountyanalytics.us/wpcontent/uploads/2020/08/Office-
Profiles-OBH-2020.pdf)..... 6

Allegheny County Department of
Human Services, Office of Children,
Youth and Families, Office Profile,
[https://www.alleghenycountyanalytics.u
s/wpcontent/uploads/2020/08/Office-
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Profiles-CYF-2020.pdf)..... 4, 5

Allegheny County Department of
Human Services, Office of Community
Services, Office Profile,
[https://www.alleghenycountyanalytics.u
s/wpcontent/uploads/2020/08/Office-
Profiles-OCS-2020.pdf](https://www.alleghenycountyanalytics.us/wpcontent/uploads/2020/08/Office-
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Allegheny County Department of
Human Services, Office of Intellectual
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Profiles-OID-2020.pdf) 6

Allegheny County Department of
Human Services, Office Profile,
<https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Office-Profiles-DHS.pdf> 5, 6, 12, 14

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**IDENTITY AND INTEREST OF
*AMICUS CURIAE***

KidsVoice (www.kidsvoice.org) is a non-profit organization founded in 1908 as the Legal Aid Society of Pittsburgh.¹ KidsVoice represents more than 3,000 children each year in juvenile court dependency cases in Allegheny County, Pennsylvania. KidsVoice continues to represent clients through age 24 after they leave the child-welfare and foster systems and require help with housing, credit, social security disability, health care access, mental health, intellectual disability and expungement of juvenile court records. These services remove barriers to housing, health care, and employment. Many KidsVoice clients are LGBTQ youth and young adults who require specialized advocacy due to the discrimination and significant challenges they face at home, school, in foster care and with employment.

KidsVoice worked with the states of Connecticut, Louisiana, Wyoming and Colorado, and with Travis County, Texas, to develop child-advocacy offices using the KidsVoice practices and multidisciplinary approach to protect child victims of physical abuse, sexual abuse or neglect. KidsVoice was one of five lead partners—and the only direct service child advocacy organization—on a five-year, \$6 million federal Quality Improvement Center Project for legal representation of abused and neglected children

¹ *Amicus curiae* certifies that no counsel for any party authored this brief in whole or in part, no party or its counsel made any monetary contribution intended to fund the preparation or submission of this brief and that no person or entity other than the *amicus* or its counsel made such a contribution.

Amicus curiae certifies that counsel for the parties have consented to the filing of this brief.

funded by the Children’s Bureau of the United States Department of Health and Human Services.

SUMMARY OF ARGUMENT

The briefs of the parties and other *amici* thoroughly analyze the constitutional issues and effects on LGBTQ youth and foster parents. KidsVoice will not address those issues here. KidsVoice will instead analyze the practical implications of a holding in favor of the petitioners (collectively, “CSS”) on the government’s ability to deliver child-welfare and other social services. While KidsVoice will focus on the effects in Allegheny County, Pennsylvania, those teachings can be extrapolated to the rest of the nation.

Accepting CSS’s invitation to establish a constitutional right of government services contractors to opt out of contract requirements that conflict with their faith would have extraordinary consequences. These consequences go well beyond providers refusing to work with LGBTQ families or others. They would affect government-contracted social services whenever a contracted provider enters a contract then later objects on religious grounds to a contract term. Government contracting agencies and vulnerable children, families and individuals in need of help would face uncertainty and confusion because they would not know what providers would be willing to serve them, provide particular services, or provide services when needed if providers could discriminate, decline to provide specific contracted-for services or decline to provide those services on particular days for religious reasons.

The Allegheny County data and analyses offer specific examples of the disruptions and consequences that would ensue if those who *choose* to enter into government contracts would be deemed to have the

constitutional right to demand that basic terms of those contracts be changed to reflect the contracting parties' beliefs. But government contracting cannot work that way. If government entities establish neutral contract terms that bear a reasonable relationship to legitimate government purposes, those who would seek to do business with the government entities may choose to enter into those contracts—or not to do so if the terms offend their beliefs. But they cannot disrupt those programs by demanding that they be tailored to their own beliefs.

ARGUMENT

I. The requested relief threatens the ability of Pennsylvania county governments to maintain networks of private providers contracted to meet each county's overall human service needs.

Government social-service systems across the United States contract with private service providers to deliver an array of specialized services to vulnerable children and families. Those contracted providers fulfill the government's duty to provide these necessary services to the public that would otherwise be provided by government employees.² Children, parents and families rely upon these providers to follow the government agreements as contracted to deliver critical services to support and protect needy children, families and individuals.

² For example, the delegation of government authority involved in this case is the Pennsylvania regulation indicating that: "The Department delegates its authority under Article IX of the Public Welfare Code (62 P.S. §§ 901-922 to inspect and approve foster families to an approved FFCA." 55 Pa. Code § 3700.61.

Amicus curiae KidsVoice represents more than 3,000 abused and neglected children in Allegheny County Juvenile Court dependency cases each year. This includes advocating for the Allegheny County Office of Children, Youth and Families (“CYF”), the county child-welfare agency, to provide appropriate services to KidsVoice clients and their families. For many individual clients, this involves asking that the Allegheny County Juvenile Court order CYF to provide specific court-ordered services.

A. Allegheny County as a case study in microcosm

The great majority of Allegheny County social services come from contracted providers. In fact, during the fiscal year ending June 30, 2020, CYF contracted with 200 providers to deliver \$244.38 million in contracted child welfare services.³ This means that 79.5 per cent of the total CYF budget of \$307.4 million was paid to contracted providers to deliver government required and paid child welfare services to 18,759 individuals or 95 per cent of the 21,264 overall individuals, 8,478 children and 12,786 adults, receiving CYF services that year.⁴

The \$244.38 million Allegheny County CYF spends is just one piece of the total Allegheny County Department of Human Services (“DHS”) spending on government-contracted social services. In fiscal year 2020, DHS spent \$943.7 million or 89.8 per cent of an overall \$1.051 billion budget on 414 contracts with

³ Allegheny County Department of Human Services, Office of Children, Youth and Families, Office Profile, <https://www.alleghenycountyanalytics.us/wpcontent/uploads/2020/08/Office-Profiles-CYF-2020.pdf>.

⁴ *Id.*

private providers to deliver social services to 200,000 Allegheny County residents.⁵

Including CYF contract providers, the \$943.7 million DHS spent overall on 414 contracts provided services to 125,527 individuals.⁶

Those services for children, adults and families include services for seniors⁷, behavioral health⁸, homeless prevention and homelessness,⁹ substance-

⁵ Allegheny County Department of Human Services, Office Profile, <https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Office-Profiles-DHS.pdf>.

⁶ That 125,527 number totals the individuals reported as receiving contracted services on the DHS Office Profiles for CYF (18,759), the Office of Behavioral Health (67,698), the Office of Intellectual Disability (6,450), the Office of Community Services (9,379) and the Area Agency on Aging (23,241) available at <https://www.alleghenycountyanalytics.us/index.php/dhs-office-profiles/>.

⁷ \$32.77 million or 67.3 per cent of the Area Agency on Aging's \$48.7 million budget was spent on 82 contracted providers to deliver contracted services for seniors to 23,241 individuals or 57 per cent of the overall 40,544 individuals receiving senior services that year. See Allegheny County Department of Human Services Area Agency on Aging Office Profile, <https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Office-Profiles-AAA-2020.pdf>.

⁸ \$132.58 million or 91 per cent of the Office of Behavioral Health's \$145.7 million budget was spent on 92 contracted providers to deliver services to all 100 per cent of the 67,698 individuals receiving the contracted mental health, substance abuse and early intervention services provided by that office See Allegheny County Department of Human Services, Office of Behavioral Health, Office Profile, <https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Office-Profiles-OBH-2020.pdf>.

⁹ \$98.64 million or 91 per cent of the Office of Community Services \$108.4 million budget was spent on 77 contracted pro-

abuse treatment, and services for early intervention, developmental delays, autism and other intellectual disabilities.¹⁰

Faith-based organizations are among the contracted service providers in every part of Allegheny County's DHS system.¹¹ The services provided by these organizations are vital, and these organizations are an important part of the network of providers.

Some of the government-delegated contracted services require the following:

- weekend and evening transportation of children to medical, mental health, tutoring, family visits or other appointments;
- crisis therapeutic teams available 24 hours a day, seven days a week to be dispatched immediately to biological or foster homes to address severe and disruptive emotional situations and to de-escalate crises;

viders to all 100 per cent of the 9,379 individuals receiving services for homelessness, homeless prevention and housing. *See* Allegheny County Department of Human Services, Office of Community Services, Office Profile, <https://www.alleghenycountyanalytics.us/wpcontent/uploads/2020/08/Office-Profiles-OCS-2020.pdf>.

¹⁰ \$10.06 million or 87.7 per cent of the Office of Intellectual Disability \$11.5 million budget was spent on 50 contracted providers to deliver contracted services to all 100% of the 6,450 individuals receiving services for developmental delays, autism and other intellectual disabilities. *See* Allegheny County Department of Human Services, Office of Intellectual Disability, Office Profile, <https://www.alleghenycountyanalytics.us/wpcontent/uploads/2020/08/Office-Profiles-OID-2020.pdf>.

¹¹ Allegheny County Department of Human Services, Office Profile, <https://www.alleghenycountyanalytics.us/wpcontent/uploads/2020/08/Office-Profiles-DHS.pdf>.

- weekend respite foster care one weekend a month to families providing foster care to children with significant medical or therapeutic needs requiring constant, vigilant care;
- weekend and evening supervision of visits by parents with children placed in foster care due to safety concerns;
- food pantry meals served seven days a week, three times a day, including evenings and
- operation of a homeless shelter open seven days a week.

B. Specific examples of harm and of extraordinary practical and public-policy disruptions that would arise were CSS's position to prevail

It would create enormous difficulties if DHS contracted providers could unilaterally rely on their own religious beliefs to disregard specific contract terms and to refuse to provide the services required by contract to all eligible individuals involved in the child welfare, juvenile court and human-services systems.

Allegheny County DHS has for years used a uniform agreement for all social-services contracts. Section 27.A. of that agreement requires all contractors, including faith-based providers, to agree not to discriminate against employees, consumers or anyone on the basis of "race; color; religion; national origin or ancestry; sex; gender identity or expression; sexual

orientation; disability; marital status; familial status; age . . .”¹²

Were the Court to accept CSS’s position, Allegheny County providers would be able to rely on religious bases to dictate changes to government contract requirements such as providing services on evenings, weekends or 24 hours each day. Contractors could object and refuse to honor a contractual obligation to provide services from Friday sundown to Saturday sundown or on Yom Kippur or Rosh Hashanah if a Jewish provider, a Catholic provider on Good Friday, Christmas or Easter, or providers in a great many other faiths with various non-working holidays.¹³ An agency that does not recognize same-sex marriage could refuse to provide contracted crisis-intervention services to a family when the parents are a same-sex couple.

In some cases when a parent is unavailable or unwilling to address a child’s medical needs and consent to medical care, a judge may order appointment of a substitute medical decision-maker, including a foster agency or group home.¹⁴ Were the Court to ac-

¹² <https://www.alleghenycounty.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=6442452759>.

¹³ See Xavier University, Multi Faith Calendar of Religious Holy Days, <https://www.xavier.edu/jesuitresource/online-resources/calendar-religious-holidays-and-observances/index.php#WorkRestrict>.

¹⁴ See *In Re: J.A.*, 107 A.3d 799, 815 (Pa. Super. 2015), determining that substitute medical decision-makers for dependent children in Pennsylvania include those authorized by statute or court rule to be temporary legal custodian “. . . including an individual qualified to receive and care for the child; *an agency or private organization licensed or authorized to receive and care for the child*; or a public agency authorized by law to receive and care for the child.” *Id.* (Emphasis added.)

cept CSS's proposed rule, that medical decision-making role could be contracted to a private foster care or group-home provider for a medically needy or fragile child only to have a provider refuse to provide consent to a necessary blood transfusion based on his faith as a Jehovah's Witness. It would be nearly impossible for the government to address that situation promptly when it developed suddenly or even in the middle of the night or weekend.

A similar problem could arise when a county or state government contracts with organizations to serve as guardians or medical proxies for adults with severe intellectual or physical disabilities and who have no family available, willing or appropriate to do so.

Some providers might object to working with LGBTQ youth at all because of a belief that homosexuality is a sin and a choice individual youth make that should not be condoned nor supported.

It would be harmful to a parent relying on supervised-visitation while working through addiction and anger-management issues to lose bonding and visiting time with a newborn because the contracted supervised-visitation provider or parenting coach objected to delivering services due to a religious observance that day or refused to provide supervised-visitation services or parenting coaching to same-sex parents.

That same parent might receive daily methadone treatment from a provider required by contract to be open seven days a week. If the provider could claim that it need not comply with that important requirement because its religious beliefs required that it not be open on certain days, it would force the parent to find a different methadone clinic on those days

and require Allegheny County to contract with multiple providers and pay for additional staff to help individuals navigate the widely varying practices of the various substance-abuse programs and their bespoke schedules.

Another example might involve a county contract to provide marriage counseling for all Medicaid-eligible families only to have a provider refuse on religious grounds to work with legally married same-sex couples.

Allegheny County typically includes in foster-care agency contracts requirements to provide services such as clothing allotments and transportation to parent visits and medical appointments. Were the Court to accept CSS's position, a faith-based foster agency could refuse on religious grounds to provide transportation on certain days or for visits with same-sex parents or to haircut appointments when providers' religious beliefs do not allow hair cutting or to medical appointments if contracting with a Christian Science-oriented provider whose religious beliefs prioritize spiritual healing of health problems over obtaining medical care and treatment.

The simple remedy for providers that for religious reasons do not wish or intend to deliver the full scope of contracted services is to forgo seeking a contract that includes services they are unwilling to provide.

C. Extrapolating Allegheny County analysis to the nation as a whole

This modest case-study of just one county provides helpful insight into the significant and troubling ramifications of a holding in CSS's favor.

These examples can be extrapolated to other governments in Pennsylvania and across the country. Allegheny County's \$943.7 million spent on 414 contracted DHS providers to deliver services to 200,000 residents is far less than Philadelphia's financial outlay and number of persons served.

Moreover, the problems caused by CSS's sought-after holding would be even greater in jurisdictions in which these burdens would be imposed statewide and not one county at a time as in Pennsylvania. According to the Children's Bureau of the United States Department of Health and Human Services, 40 states have state-wide rather than county-administered child welfare systems: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Tennessee, Utah, Vermont, Washington, West Virginia and Wyoming.¹⁵

¹⁵ Children's Bureau of the Admin. of Children & Families, U.S. Dep't of Health & Human Servs., Child Information Gateway, Fact-Sheet: State v. County Administration of Child Welfare Services (2018), <https://www.childwelfare.gov/pubPDFs/services.pdf>.

Should CSS prevail, any contracted provider with a religious objection could refuse to provide ongoing services in any of the ways described above, leaving local, state and federal governments to reassign and reallocate every “carved out” service. No matter the timing of that decision, there will be thousands of contracts in place nationally, likely for millions of Americans and for billions of dollars if one extrapolates from Allegheny County’s annual \$943.7 million in contracts to 400 providers to serve 200,000 people.¹⁶

II. CSS’s suggested workaround is untenable and unduly burdensome.

CSS suggests that the solution to this problem is for the City to contract with other providers to work with individuals CSS finds it religiously objectionable to serve. Petitioners’ Br. 36. That “carve out” would impose significant burden in terms of government staff hours and costs involved for Allegheny County to determine which of its 414 contracted providers would refuse on religious grounds to provide certain services and then to develop contingency plans and execute contracts for “carve-out services.”

This would not be a once-a-year, single-point-in-time endeavor. Many religious objections would arise throughout the course of any given year. For example, a provider might provide intensive services to a child or adult for months or even years before the child discloses that he is gay or the adult discloses that she is in a same-sex relationship or was just married to a person of the same gender. Or a provider

¹⁶ Allegheny County Department of Human Services, Office Profile, <https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Office-Profiles-DHS.pdf>.

might care for a young person in foster care for years before a serious medical need arose involving medical care to which the provider has a religious objection to consenting.

III. Allowing contractors rather than the government to dictate the terms of government contracts or requests for proposals would undermine government contracting principles and would risk inequitably increasing the costs to taxpayers.

Counties ultimately pay a small percentage of the cost of contracted child-welfare and human services.

Allegheny County paid just six per cent or \$63 million of the \$1.051 billion Allegheny County Department of Human Services expenses in fiscal year 2020. The remainder came from federal and state funds plus \$13.6 million in “other” funds, mostly from private foundations.¹⁷

Many foundation grants are restricted for a particular purpose or have limitations on how those dollars can or cannot be used, including requiring certifications or agreements regarding equal opportunity and non-discrimination.

Some grants are for required purposes, such as increasing placements of teens in foster care instead of group homes or providing increased support to LGBTQ foster youth. Allegheny County could appropriately designate those foundation funds to pay for a contractor’s services when the contract terms were

¹⁷ Allegheny County Department of Human Services, Office Profile, <https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Office-Profiles-DHS.pdf>.

consistent with the restricted purpose of the grant. If the contractor's later refusal to deliver the services as contracted violated the terms and restricted purpose of the grant, the governmental entity would not be able to pay for the contractor's services from the grant funds.

In those circumstances, the county could lose the funds, be subject to audit to prove that all funds were used appropriately or risk losing credibility with the foundation involved and others that might not renew or consider new grants to the county in subsequent years.

For example, the Allegheny County Department of Human Services received a \$500,000 Kresge Foundation grant in 2019 to develop a two-generation model of service delivery of whole family support to parents and children.¹⁸ That grant requires compliance with "all applicable Federal and State statutes and local laws relating to non-discrimination."¹⁹ The grant also prohibits any of the grantee's contractors from engaging in lobbying, electioneering and other activities.²⁰ The grant agreement reserves the right of the foundation to modify, suspend or discontinue payment or the grant agreement if the grantee fails to comply with the grant term.²¹

Thus, governments need to be able to include such non-discrimination provisions in their provider

¹⁸ <https://www.alleghenycountyanalytics.us/wp-content/uploads/2020/08/Kresge-NextGen-Initiative-Grant-Agreement.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

contracts and then enforce them not only because doing so is right and in accord with governmental policy but because doing otherwise would put significant outside funding opportunities at risk.

It helps governments like Allegheny County to avoid that consequence and loss of foundation funding through the standard practice of including non-discrimination agreements in county contracts with all providers.

Moreover, it seems inequitable—

- to require taxpayers to subsidize a provider's discrimination if the county's share of the provider contract cost increases because the provider refuses to follow the county's anti-discrimination requirements or
- to require same-sex couples to join other taxpayers in paying additional taxes to subsidize the loss of funding due to a provider's discrimination—only to have that provider foreclose access by those same-sex couples to the provider's government-delegated and publicly funded certification and support of foster parents.

In addition to risking losing direct foundation or other funds, local and state governments might incur the further costs to accommodate contractors' refusal to deliver services. Those could include hiring additional government-contracting staff to deal with all provider religious objections, identifying other resources to contract with to provide the "carve out" services, paying for those "carve out" contracts and possibly contending with audits of contract expenditures.

CONCLUSION

Decisions regarding how local and state governments contract for social services when delegating government duties to private providers should prioritize meeting the needs of the vulnerable children, families and individuals in need of help, not upon the needs of providers who, if they disagree with contract terms, could choose to forego involvement.

KidsVoice asks that the Court affirm the judgment of the Third Circuit.

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