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 *AMICUS CURIAE* LAWRENCE G. SAGER SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Lawrence Sager is a teacher and scholar of constitutional law who specializes in the fields of religious liberty and equality. He has taught and written in the field of constitutional law for approximately fifty years, and he has been actively engaged with issues concerning religious liberty and equality for twenty-five years. He submits this brief in the hope of bringing to the attention of the Court an important argument that, although raised below, has not figured centrally in the briefs of the parties before this Court or in the opinions of the courts below.[2] Nor, so far as he is aware, has it been made directly in the briefs of any of the numerous other *amici.* He offers this argument to support an understanding and disposition of this case that will best serve the Constitution.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] The equal protection issue was raised by the City at the trial level and addressed by the District Court, which said that the City has "an interest in avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to * * * discriminat[e] against same-sex-married couples." *Fulton* v. *City of Philadelphia*, 320 F. Supp. 3d 661, 685 (E.D. Pa. 2018); see also City of Philadelphia's Opp. to Mot. for TRO and Prelim. Injunction at 14, *Fulton* (No. 2:18-cv-2075), ECF No. 20. The issue was also raised in the City's briefing before the Third Circuit Court of Appeals. *See* Br. of Appellees at 46, *Fulton* v. *City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574), ECF No. #003113046443.

SUMMARY OF ARGUMENT

Suppose the City of Philadelphia (the City) maintained its contract with Catholic Social Services (CSS) without any anti-discrimination provisions and that CSS, acting on behalf of the City, continued to bar same-sex couples from eligibility as foster care parents. The harm caused by this arrangement would fall, heavily, on LGBTQ people. They would suffer an affront to the equal dignity promised them by *Obergefell* v. *Hodges*, 576 U.S. 644, 681 (2015), a harm that calls to mind the part of the Constitution that is most concerned with avoiding discrimination against and disrespect for vulnerable groups: the Equal Protection Clause of the Fourteenth Amendment.

It is a curiosity of this case as it is presented to the Court that discussion of the constitutional right of same-sex couples to be treated as equals is not featured.[3] The explanation for this may lie in part in the posture of the case: Philadelphia moved proactively to protect the rights of same-sex couples, and merely has to defend itself against the constitutional claims advanced by CSS. It also may lie in the mistaken view that because the discrimination against same-sex couples would come most proximately at the hands of CSS—a private actor—equal protection would not be implicated. But just as the City would be in flagrant violation of the Equal Protection Clause if it were directly to exclude same-sex couples from eligibility as foster care families, so too the City would violate the Clause if it continued to deploy CSS to help discharge

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[3] As noted (*see supra* at n.2), the equal protection issue was raised by the City at the District Court and Court of Appeals levels and addressed by the District Court, although it is not discussed in the Court of Appeals' opinion.

the City's responsibility for vetting foster care families, knowing that CSS was excluding same-sex couples.

If all or almost all foster care agencies with which the City contracted excluded same-sex couples, the City's constitutional responsibility for the situation would be obvious. The City would be choosing a foster care arrangement that fully barred same-sex couples from providing foster care. Such a practice must be unconstitutional, because otherwise a unit of government could evade its obligations of equal treatment by performing important governmental functions through private entities that it could count on to discriminate in ways that the government itself could not. Or a somewhat less sinister community could avoid the costs of its equality obligations by discharging important governmental responsibilities carelessly, without regard for the discriminatory practices of its private actors or for those practices' consequences.

So Philadelphia plainly is constitutionally responsible for the conduct of the foster care agencies acting on its behalf. The only question is whether the City would violate the Constitution by allowing a patchwork of discrimination, with some agencies acting on the City's behalf serving everyone equally while others categorically exclude vulnerable groups. It should be clear that such an arrangement would violate the Constitution. To understand why, suppose that the City were placing foster children without the involvement of private agencies by maintaining a network of municipal offices where couples could apply to be foster parents. And imagine further that, in order to accommodate employees whose religion condemned

same-sex marriage, the City did not accept applications from same-sex couples in several of its offices. This arrangement would surely be unconstitutional. It would place upon a same-sex couple the special burden of finding an appropriate office—a burden that might discourage the would-be parents from seeking a foster placement altogether. The couple might find itself in the wrong government office, seated at the wrong desk, and be sent away because the officials in that office condemned their marriage on religious grounds. The City would be creating two classes of citizens: Same-sex couples who had to take care to choose a child placement office where they would be welcome, and everyone else, who would be welcome in all offices. A shadow of disapproval would fall over all same-sex couples who wanted to serve as foster parents.

Those are the circumstances that would have prevailed in Philadelphia without the City's antidiscrimination policy. CSS was not the only agency that failed to comply with the policy. Another agency, Bethany Christian Services (Bethany), initially also refused to consider same-sex married couples on religious grounds, but it is now certifying such couples because of the City's requirement. Had this case not arisen, Bethany might well have continued its prior practice. Together, CSS and Bethany constitute a non-trivial segment of foster care providers in the City, and they might well be joined by others in excluding same-sex couples in the absence of an equality rule. In other cities, foster care agencies that refuse to deal with same-sex couples do predominate, and their refusal creates significant barriers to foster parenting. The same could come to be true in Philadelphia. The City did not single out CSS in insisting on non-discrimination, and

it surely could not single CSS out for the special privilege of being entitled to discriminate while other religious foster care providers were not.

Same-sex couples in Philadelphia are entitled to "civil marriage on the same terms and conditions," and to the same "rights, benefits, and responsibilities," as opposite-sex couples. *Obergefell*, 576 U.S. at 670, 676; *Pavan* v. *Smith*, 137 S. Ct. 2075, 2078 (2017). They are entitled to be free from the stigma of official acts that signal disapproval, *Lawrence* v. *Texas*, 539 U.S. 558, 575–76 (2003)—to be free, that is, from government practices that "impose a disadvantage, a separate status, and so a stigma." *United States* v. *Windsor*, 570 U.S. 744, 770 (2013). If the City had elected to run its foster care placement process in a way that permitted entities like CSS to close their doors to same-sex couples on the grounds that they were not suitable to care for foster children, it would have frustrated *Obergefell*'s mandate. The City would have been responsible for this loss of rights, both in the sense that it would have caused the loss and in the sense that it had violated the Constitution.

The City, of course, made no such election. It insisted that CSS, Bethany, and every other foster care provider acting on behalf of the City agree not to discriminate. The City had a constitutional obligation to ensure that same-sex couples were treated equally in its foster care screening process, and it undertook to do so. Now the City finds itself charged with violating the Constitution precisely because it did what was constitutionally required.

ARGUMENT

If the City had not proactively required CSS and other agencies working on its behalf in the foster care

process to refrain from discrimination against same-sex couples, the City would have violated the Constitution.

I. If the City did its own vetting of foster care families, the Equal Protection Clause would require that same-sex couples be given full, open, and equal access as foster care family applicants.

A. Same-sex couples and LGBTQ children are constitutionally entitled to equal treatment, free of disadvantage or stigma.

This Court has made clear that members of the LGBTQ community are entitled to "equal dignity in the eyes of the law," *Obergefell*, 576 U.S. at 681, and that the Constitution insists that "exercise of their freedom on terms equal to others * * * be given great weight and respect." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). They are entitled to be free from unequal burdens and from the stigma of official acts that signal disapproval, *Lawrence*, 539 U.S. at 575–76—to be free, that is, from provisions of law that "impose a disadvantage, a separate status, and so a stigma." *Windsor*, 570 U.S. at 770. And nowhere do these propositions have more weight than in the domain of the family and with regard to the interests of loving couples seeking the bond of marriage and a connection to children.

Same-sex couples are entitled to marry, of course. *Obergefell*, 576 U.S. at 681. But beyond that, they are entitled to "civil marriage on the same terms and con-

ditions" and to the same "rights, benefits, and responsibilities" as opposite-sex couples. *Obergefell*, 576 U.S. at 670, 676; *Pavan*, 137 S. Ct. at 2078.

Parenting and children figured importantly in this Court's decision in *Obergefell*. They were part of the "related rights of child rearing, procreation, and education," invoked by the Court as undergirding "the right to marry, establish a home and bring up children." *Obergefell*, 576 U.S. at 667, 668 (internal quotation marks and citation omitted). Children were, in other words, a reason why the right to marry was important for same-sex couples. But the Court was just as concerned—arguably more concerned—with the benefits that state recognition of same-sex marriage would bring to children, conferring "recognition and legal structure to their parents' relationship." 576 U.S. at 668. The Court considered, as well, the reciprocal benefits to children and same-sex couples of adoption and foster care:

> As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Ibid. (citations omitted).

B. If the City chose to do its own foster care placement, any arrangement that targeted and disadvantaged same-sex couples plainly would be unconstitutional.

In light of these fundamental guarantees of equality, it would be unconstitutional for the City, as a response to religious objections to same-sex marriage, to adopt a policy that barred same-sex couples from applying to be foster care parents. That would deny same-sex couples precisely what *Obergefell* guaranteed them.

But suppose that the City instead maintained a number of neighborhood foster care placement offices staffed by City employees. And suppose further that, because some of those employees had personal religious objections to same-sex marriage, the City adopted a rule pursuant to which the applications of same-sex couples would not be accepted in two of the City's offices, where those with religious objections to same-sex marriage would make up the staff. That, too, would violate the equal protection rights of same-sex couples.

Under such a regime, same-sex couples would face tangible harm in the form of increased search costs, which can be decisive on the margins. A couple that approached a government placement office and was turned away might not be able to take additional time off from work, or might lack the resources necessary to pursue the matter further. Forcing that couple out of the pool of prospective foster parents not only would injure the prospective foster parents, but also would deny an important benefit to the children who otherwise would have received crucial and loving parental care from that couple.

Moreover, a policy of "pluralism" among neighborhood offices would entail intolerable dignitary and symbolic harms. The City would be creating two classes of citizens: Same-sex couples who had to take care to choose a child placement office where they would be welcome; and everyone else, who would be welcome in all offices. A shadow of disapproval would fall over same-sex couples. And it is all too easy to imagine a scenario in which two partners of the same sex mistakenly found themselves in the wrong office, seated at the wrong desk, and being sent away because of the religious beliefs of the officials in that office. The situation would be a far cry from one in which equal dignity prevailed.

The constitutional salience of these harms is well captured by the Court's concern for equal dignity in the decisions that culminate in *Obergefell*. It is perhaps made more vivid still if we imagine that there were municipal employees who objected to interracial marriage on religious grounds.[4] Suppose the City permitted two of its neighborhood offices to refuse to

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[4] The hypothetical is not unrealistic; it calls to mind bans on inter-racial marriage and the remarks of the trial judge in *Loving* v. *Virginia*:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving v. *Virginia*, 388 U.S. 1, 3 (1967); see also *Bob Jones University* v. *United States*, 461 U.S. 574, 605 (1983) (upholding revocation of religious institution's tax-exempt status for maintaining a discriminatory anti-miscegenation policy, noting that "[a]lthough a ban on intermarriage or interracial dating applies

serve interracial couples. That arrangement would surely be unconstitutional. So too would be the arrangement considered here.

Courts have correctly recognized that a government office is not permitted to discriminate just because other available offices do not. As the Sixth Circuit explained in a related context, "that's not how constitutional rights work." *Ermold* v. *Davis*, 936 F.3d 429, 436 (6th Cir. 2019). There, Kim Davis, a county clerk in Kentucky, prohibited her office from issuing marriage licenses in the wake of this Court's decision in *Obergefell*. *Id.* at 432. In the resulting litigation, Davis argued that *Obergefell* did not apply to her because other Kentucky offices stood ready to issue marriage licenses to same-sex couples. But the court rejected that claim: "*Obergefell*'s holding applies not just to monolithic governmental entities like Kentucky," *id.* at 436, but also to government offices on the local level. Similarly here, the City may not take a pluralist approach to foster care in which some agencies (such as CSS) adopt constitutionally prohibited screening practices but others do not.

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to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination"). Notably, a significant minority of Americans continue to believe that interracial marriage is "morally wrong." Tim Marcin, *Nearly 20 Percent of Americans Think Interracial Marriage is 'Morally Wrong,' Poll Finds*, Newsweek (Mar. 14, 2018), https://tinyurl.com/y69fr878.

II. Philadelphia may not permit a private agency acting on its behalf to discriminate in assisting the City with foster care services.

Ensuring the welfare of children is a government responsibility and a characteristic government power. Only the government can remove children from parents who are abusive or neglectful. Moreover, the government remains closely involved in the process of assuring adequate care for the child from that point forward, so long as the child remains in the child welfare system. It has ultimate and, in key respects, exclusive authority over vulnerable children.

The City contracts with private agencies to help with certain aspects of its responsibility for child welfare, and it is responsible for any discrimination it knows them to be committing when they fulfill duties that otherwise would be exercised by the City. After all, those private agencies are acting on the City's behalf. If the City were to allow them to exclude same-sex couples from serving as foster parents, it would violate the Equal Protection Clause.

A. Providing for the care of children who are vulnerable to abuse or neglect is a critical governmental responsibility of the Commonwealth of Pennsylvania and the City of Philadelphia.

Pennsylvania, like every other State, has the responsibility to ensure the well-being of abused and neglected children. State law mandates that local authorities—including the Department of Human Services—"shall have the power, and for the purpose of promoting the welfare of children and youth, it shall

be their duty to provide [various] child welfare services," including "to provide in foster family homes * * * adequate substitute care for any child in need of such care." 62 Pa. Stat. § 2305.

In turn, Pennsylvania regulations allow government to delegate authority "to inspect and approve foster families to an approved FFCA," which is a "public or private agency which recruits, approves, supervises and places children with foster families." 55 Pa. Code §§ 3700.4, 3700.61. Although FFCAs are charged with the responsibility of "certifying" applicants as appropriate foster families, no certification is final until it is approved by the government. See*, e.g.*, JA 83-85. At the same time, the State determines what factors will be considered when FFCAs place children (see*, e.g.*, 55 Pa. Code § 3700.64(b)(4)); its regulations strictly govern FFCAs' oversight of foster families (*id.* §§ 3700.62-.69); and FFCAs' approval of foster families and relocation of children is subject to appeal to the State (*id.* §§ 3700.72, 3700.73).

The City enters into contracts that award public funds to FFCAs in exchange for the FFCAs providing the foster care services in accord with these state guidelines. The City's contract with CSS, as was typical, required that CSS comply with all applicable laws and departmental manuals governing their services, provide regular reports to the City, and obtain appropriate certifications from applicants. JA 563, 578, 584-86, 594-95, 596-97.

B. When the City delegates part of its foster care process to private agencies, it retains full constitutional responsibility for that process.

The constitutional landscape confronting the City when it learned that two of its foster care placement providers were discriminating against same-sex couples by flatly refusing to approve them as foster parents was one that made that discrimination especially worrisome. The same-sex couples who were victims of that discrimination were plainly entitled to equal treatment under the Equal Protection Clause, above all with regard to matters of family and child-rearing, and that was precisely what they were being denied. CSS and Bethany were not acting on their own, but on behalf of the City, discharging its responsibility to care for vulnerable children. Were the City to have simply stood by, it would be constitutionally responsible.

To see this clearly, suppose that CSS and Bethany were the only FFCAs in Philadelphia, or that all the FFCAs were committed to the policy of excluding same-sex couples from eligibility as foster parents. These couples would be completely denied the opportunity to provide foster care in the City. Were Philadelphia doing its own foster placement of vulnerable children, such a policy would be in flagrant violation of *Obergefell* and the equal protection principles upon which *Obergefell* rests. See *supra* Section I.B. And surely, Philadelphia could not leave its constitutional obligation of equal treatment behind by delegating its foster-placement responsibilities to a cohort of FFCAs,

all of which it knew would bar access to same-sex couples.[5]

The constitutional logic of the situation has been observed and followed by courts in the analogous situation where prisoners have been given medical care so shoddy as to violate the Eight Amendment, but the state has entrusted the medical care of prisoners—or complete responsibility for the incarceration of prisoners—to a private entity. In such cases, courts have recognized that if a state stands by despite knowing of policies that result in unconscionably inadequate medical care, it bears full responsibility for the constitutional violation. Judge Wood, writing for the Seventh Circuit in such a case, explained that "[t]he County cannot shield itself from § 1983 liability [for violation of the Eighth Amendment] by contracting out its duty to provide medical services. * * * If the County is faced with actual or constructive knowledge that its agents will probably violate constitutional rights, [the County] may not adopt a policy of inaction." *King* v. *Kramer*, 680 F.3d 1013, 1020, 1021 (7th

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[5] Indeed, in other areas of the country, providers that discriminate against same-sex couples predominate—if not monopolize—the market for screening potential foster-care families. See *Marouf* v. *Azar*, 391 F. Supp. 3d 23, 28 (D.D.C. 2019) (noting that apart from Catholic Charities, which excludes same-sex couples, "no other child welfare organizations in the Fort Worth area" had agreements to provide child placement services for unaccompanied refugee children); *Rogers* v. *United States Dep't of Health and Human Servs.*, --- F. Supp. 3d ---, 2020 WL 4743162, at *8 (D.S.C. May 8, 2020) (noting that placement agency that discriminates against same-sex couples and families that are not evangelical Christian "recruits fifteen percent of the foster families in South Carolina"); *id*. at *3 (noting that the agency "is the largest CPA in both the state and the upstate South Carolina region").

Cir. 2012) (internal quotation marks and citation omitted).

The D.C. Circuit similarly found liability on the part of the District of Columbia for constitutional violations in a private prison. "Deliberate indifference," the court wrote, "is determined by analyzing whether the municipality knew or should have known of the risk of constitutional violations, but did not act." *Warren* v. *District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004) (internal quotation marks omitted). Likewise, in one of the earliest and most influential of these decisions involving a private medical services provider, the Eleventh Circuit held that "the county itself remains liable for any constitutional deprivations caused by the policies and customs of the [private provider]." *Ancata* v. *Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985).

These decisions hold that the state is liable when it stands by, knowing that private parties acting on its behalf are departing from the requirement of the Constitution. Here, the City learned that two of its FFCAs, engaged in certifying couples and individuals for foster care placement on the City's behalf, were discriminating against same-sex couples. Under these circumstances, the City would correctly understand itself to be constitutionally responsible for the conduct of CSS and Bethany and for the patchwork of discrimination and fair treatment that was its result. It remains to be observed that this patchwork would be deeply inconsistent with the equal dignity of same-sex married couples and the welfare of LGBTQ children.

C. The harms to same-sex couples and LGBTQ children that would follow from granting CSS and other providers license to discriminate are precisely those against which the Equal Protection Clause is directed.

The Equal Protection Clause is designed to prevent persons from suffering the material and expressive harm attendant on unequal status. Were the City to stand by and permit some of its foster care agencies to categorically exclude same-sex couples as potential foster parents, LGBTQ parents and children alike would bear both material and dignitary harms. Those harms, in salient respects, would resemble those considered earlier in addressing what would happen if the City maintained its own network of foster-care placement offices and flatly refused to accept same-sex applicants in several of those offices.

Beginning with tangible costs, prospective parents who were LGBTQ would have to spend more time and resources to find an accepting agency. Some might be deterred from serving as foster parents altogether. See Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 Ala. C.R. & C.L. L. Rev. 129, 156 (2015) (arguing that LGBTQ citizens who face barriers in the marketplace suffer tangible harm in the form of increased search costs). Depriving same-sex couples access to equal consideration for service as foster parents not only injures those potential applicants, but also frustrates the entire purpose of the government's foster care program. See Frank J. Bewkes, et al., Center for American Progress, *Welcoming All Families*, (Nov. 20, 2018), https://ti-

nyurl.com/ycltubn2 ("Same-sex couples raising children are seven times more likely to be raising a foster child . . . than their different-sex counterparts.").

In addition to those tangible burdens, profound dignitary harms are imposed by a government that allows its foster care agencies to exclude whole categories of parents on the basis of suspect classifications. A same-sex couple that mistakenly submits its application to CSS or Bethany, as opposed to a non-discriminatory FFCA, only to be sent away because of the religious beliefs of the individuals working in that office, would suffer those harms even though other offices would have given them fair consideration. Indeed, through operation of the process, the government would have signaled its willingness to be identified with the discriminatory conduct of agencies to which it delegated the public function of certifying prospective foster-care parents. The inevitable result would be to cast a shadow of disgrace and disapproval over same-sex couples. See *Obergefell*, 576 U.S. at 681 ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

Equally important, such government-condoned discrimination would visit harm on foster children as well. With the number of foster children in the U.S. consistently exceeding the number of prospective foster parents,[6] and same-sex couples disproportionately

[6] See Teresa Wiltz, Pew Charitable Trust, *As Need Grows, States Try to Entice New Foster Parents* (Mar. 1, 2019), https://tinyurl.com/y5mj3vxw (explaining that "there are more children who need foster care, and not enough families to provide it").

serving as foster parents,[7] policies that in practice would frustrate that participation leave fewer loving homes to care for foster children.

And the harms suffered by LGBTQ foster children would be particularly pronounced. Although data is sparse, studies show that between 19% and 30% of foster children identify as LGBTQ.[8] Policies that refuse to consider otherwise-eligible same-sex families limit opportunities for LGBTQ youth to be placed into accepting homes. As Pennsylvania's laws explicitly contemplate, placements must consider the "characteristics of foster children best suited to the foster family." 55 Pa. Code § 3700.64.

Those are the circumstances that would have prevailed in Philadelphia without the City's antidiscrimination policy, and might again prevail if that policy is set aside. Absent the policy, at least two agencies—CSS and Bethany—would have excluded same-sex couples. Together, those agencies constitute a nontrivial segment of foster care providers in the City, and they might be joined by others in the absence of an equality rule. That prospect is not illusory. In other cities, foster care agencies that refuse to deal with same-sex couples do predominate, and they constitute significant barriers to foster parenting. The same could come to be true in Philadelphia. The City did not single out CSS in insisting on nondiscrimination, and

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[7] Shoshana K. Goldberg & Kerith J. Conron, The Williams Institute, *How Many Same-Sex Couples in the U.S. are Raising Children?*, (July 2018), https://tinyurl.com/y28mrspx.

[8] See Laura Baams, et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143 Pediatrics 1, 4 (2019), https://tinyurl.com/y3l52287; Bianca D.M. Wilson, et al., *Sexual and Gender Minority Youth in Foster Care* (Aug. 2014), https://tinyurl.com/yytw8aww.

it surely could not single out CSS for the special privilege of being entitled to discriminate while other religious foster care providers could not.

Three lower courts have already recognized that policies similar to those demanded by petitioners in this case raise serious constitutional questions, and they have indicated that governments face substantial challenges under the Equal Protection Clause when they permit foster care agencies to refuse to consider same-sex couples.

In *Dumont* v. *Lyon*, 341 F. Supp. 3d 706, 713 (E.D. Mich. 2018), the court found that prospective adoptive same-sex couples and individuals plausibly alleged equal protection violations against state officials for "permitting state-contracted and taxpayer-funded child placing agencies" to refuse to process their adoption applications on the basis of religious objections to their sexual orientation. The state officers could not escape potential liability simply on the ground that the immediate cause of exclusion from the program was the action of private providers. *Id.* at 744 ("Plaintiffs allege that 'the State caused [their] injuries by authorizing and failing to prevent the agencies' discrimination in the performance of State contracts."). It was the state's decision to contract with private parties that discriminated on the basis of sexual orientation that was plausibly alleged to violate the Constitution. *Id.* at 745–47.[9]

[9] Following the district court's decision in *Dumont*, Michigan settled the lawsuit and agreed to enforce nondiscrimination policies on the basis of sexual orientation against faith-based foster care agencies with government contracts. *See Buck* v. *Gordon*, 959 F.3d 219, 220–23 (6th Cir. 2020) (detailing procedural history in

The federal government faces similar concerns. In *Rogers* v. *U.S. Department of Health & Human Services*, 2020 WL 4743162, at *16, the district court ruled that prospective foster parents plausibly alleged that both South Carolina and federal officials violated the Equal Protection Clause by exempting a child-placement agency from state and federal non-discrimination policies and regulations. Likewise, in *Marouf*, 391 F. Supp. 3d at 34, the district court expressed significant skepticism that federal agencies could award grants to, and form contracts with, child welfare organizations to provide foster-care placement services for unaccompanied refugees despite knowing that those organizations would exclude same-sex couples from serving as foster-care families.

Although *Dumont*, *Rogers*, and *Marouf* concerned only preliminary orders, they show that respondents' insistence on nondiscriminatory consideration of foster-parent applications avoids significant Equal Protection Clause challenges. The City forestalled a real constitutional risk by acting proactively to ensure that prospective foster families are not subject to invidious discrimination within its child welfare system.

* * * *

Nearly twenty-five years ago, in *Romer* v. *Evans*, 517 U.S. 620 (1996), this Court declared that "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance" is "[c]entral * * * to our Constitution's guarantee of equal protection." 517 U.S. at 633. So too is the principle that the government must give fair consideration to all who seek to provide it assistance on

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subsequent litigation stayed until this Court's resolution of the instant case).

behalf of the common good. The City could not permit its foster-care program to operate in such a way that the "practical effect" would be "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Windsor*, 570 U.S. at 770.

CONCLUSION

The decision of the Third Circuit should be affirmed.

Respectfully submitted,

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