

No. 19-123

In The
Supreme Court of the United States

SHARONELL FULTON, ET AL., PETITIONERS

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**BRIEF FOR LUTHERAN CHILD AND FAMILY
SERVICES OF ILLINOIS AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

JOSEPH R. PALMORE
Counsel of Record
ADAM L. SORENSEN
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 572-6782
JPalmore@mofoc.com

Counsel for Amicus Curiae

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**BRIEF FOR LUTHERAN CHILD AND
FAMILY SERVICES OF ILLINOIS
INTEREST OF AMICUS CURIAE¹**

Amicus Lutheran Child and Family Services of Illinois (“LCFS”) is a faith-based provider of child welfare programs in Illinois. It is the state’s largest provider of adoption services and its second largest provider of foster care services. Beginning in 1873 as the German Evangelical Lutheran Orphan Home in Addison, Illinois, LCFS now has more than 300 employees at 14 offices across the state. It is dedicated to creating “a world where all of God’s children have the opportunity for safe, healthy, and meaningful lives.” Amicus believes that nurturing children and strengthening families while serving people of all faiths, races, ethnic backgrounds, sexual orientations, gender expressions, and gender-identifications follow directly from its religious principles. Because of its commitment to self-examination, social justice, robust advocacy, and child welfare, LCFS submits this brief to assist the Court in the resolution of this case.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents ably demonstrate that Philadelphia's non-discrimination requirement does not violate the First Amendment. Amicus supports that position and wishes to explain the vital importance of non-discrimination in the provision of foster care and its significance to many religious child welfare organizations. These policies are not some incidental feature of the foster system. They are central to its purpose. By maximizing the number of available families and preventing harmful prejudice, non-discrimination rules serve the best interests of children. And it would be a mistake to view this case as pitting non-discrimination rules against a monolithic category of religious organizations. Many religious organizations, like amicus, believe that non-discrimination is both an imperative of their faith and a pillar of child welfare.

Preventing discrimination against LGBTQ parents is vital to the central mission of foster care services: promoting the well-being of children and families. LGBTQ youth make up a disproportionately large percentage of children in foster care. That is no accident. Many children are forced from their homes because of their sexual orientation or gender identity. Those same children face a higher risk of abuse within the foster system as well. Depriving LGBTQ youth of the possibility of placement in a large group of potentially affirming foster homes can rob them of urgently needed safety and stability, while sending them a harmful message about their own identities.

The harm from discrimination is not limited to LGBTQ kids. All children in foster care stand to benefit from placement in a stable home. Same-sex parents provide the same benefits as heterosexual parents, while fostering and adopting children at much higher rates. Excluding them thus significantly limits the pool of safe and loving homes for foster children at a time when foster homes are in short supply. Allowing discrimination in the foster system imposes considerable harm on its most vulnerable members while undermining its core purpose. That is why myriad child welfare organizations, including leading accreditation institutions, have adopted formal non-discrimination policies.

Because non-discrimination rules best protect child welfare, they are also core to amicus's religious mission to serve all God's children, including the most vulnerable. Faith-based organizations partner with state and local governments to provide child welfare services throughout the United States. Many state and local governments seek to protect children in foster care and prospective parents from harmful discrimination and harassment. As LCFS's experience in Illinois shows, those laws and policies are fully consistent with the religious values of many participating organizations. They do not prohibit religious groups from providing child welfare services, and they are not motivated by religious animus. To the contrary, non-discrimination rules work *against* all kinds of prejudice, including religiously motivated animus.

ARGUMENT

I. DISCRIMINATION AGAINST PROSPECTIVE PARENTS HARMS CHILDREN IN FOSTER CARE

Non-discrimination policies are vital to protecting children in foster care. Academic studies, child welfare guidelines, and the experiences of myriad foster agencies, religious and secular, all show that those policies serve children’s best interests by maximizing their opportunities for finding a loving and supportive home. Indeed, such policies have become a pillar of child welfare services in the United States and are required by numerous accrediting organizations. All children in foster care benefit from an expanded pool of desperately needed foster parents. And LGBTQ youth in particular stand to benefit from non-discrimination policies, which prevent the spread of harmful prejudice.

A. Discrimination Against LGBTQ Parents Deprives All Children In Foster Care Of Opportunities For Stable Homes

The United States is currently facing “[a]n acute shortage of foster parents.” Editorial Board, *The crisis in foster care*, Wash. Post (Jan. 11, 2020).² The number of children entering foster care increased every year from 2013 to 2016, and has continued at near peak levels since. U.S. Department of Health and Human Services, *Adoption and Foster Care Analysis and*

² https://www.washingtonpost.com/opinions/the-crisis-in-foster-care/2020/01/11/81caa67e-33f6-11ea-a053-dc6d944ba776_story.html.

Reporting System FY 2017 Report 1 (2018).³ But at least half of states saw the capacity of their foster systems drop over a similar period. The Chronicle of Social Change, *The Foster Care Housing Crisis* (2017).⁴

This critical shortage would be worsened by categorically excluding a group of willing foster parents. Indeed, exclusion of same-sex couples would be particularly harmful because they are far more likely than their heterosexual peers to foster and adopt. In 2016, approximately 705,000 households in the United States were headed by same-sex couples, roughly 1.1 percent of all coupled households. Shoshana K. Goldberg & Kerith J. Conron, Williams Institute, *How Many Same-Sex Couples in the U.S. are Raising Children?* (2018) (citing American Community Survey). An estimated 114,000 of those same-sex couples were raising children. *Ibid.* Those same-sex parents were far more likely than their heterosexual counterparts to have adopted or fostered a child. Over 21 percent of same-sex parents were raising an adopted child, compared to just 3 percent of heterosexual parents. And about 3 percent of same-sex couples were raising a foster child, compared to just 0.4 percent of heterosexual parents. *Ibid.*

Those figures illustrate the importance of non-discrimination policies in the provision of foster services. At bottom, non-discrimination policies ensure

³ <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf>.

⁴ <https://imprintnews.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf>.

that foster agencies have access to a significant pool of qualified prospective parents when seeking homes for vulnerable children. As this Court recognized in *Obergefell v. Hodges*, just like heterosexual couples, same-sex couples “create loving, supportive families.” 576 U.S. 644, 668 (2015). And the “overwhelming scholarly consensus” of peer-reviewed research demonstrates that children of same-sex parents do just as well as other children. See Center for the Study of Inequality at Cornell University, *What does the scholarly research say about the well-being of children with gay or lesbian parents?* (2017) (collecting studies).⁵ Prohibiting discrimination thus serves all children in foster care by expanding the pool of available—and urgently needed—foster parents.

It is no answer to say, as petitioners and their amici argue, that non-discrimination policies reduce foster capacity by forcing agencies with religious objections to stop providing services. Such an outcome is not reflected in the record of this case or in LCFS’s experiences in Illinois. The district court here found that “the closure of CSS’s intake of new referrals has had little or no effect on the operation of Philadelphia’s foster care system.” Pet. App. 66a. As LCFS experienced in its home state, Catholic organizations that objected to Illinois’s non-discrimination policies transitioned their foster services to other organizations without any major disruptions. See

⁵ <https://whatweknow.inequality.cornell.edu/wp-content/uploads/2018/04/PDF-Parenting-wellbeing-1.pdf>.

Manya A. Brachear, *Three Dioceses Drop Foster Care Lawsuit*, Chi. Trib. (Nov. 15, 2011).⁶ Other states have successfully managed similar transitions without losing overall capacity. See Br. of Amici Curiae Massachusetts et al. Supporting Philadelphia at 24-25, *Fulton v. Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574).

Nor can the harm caused by allowing some foster agencies to discriminate be ameliorated by forcing LGBTQ parents to seek services from other agencies. Pet. Br. 36. “Prospective parents can be deterred from pursuing foster or adoptive parenting if they believe that they will not be welcomed and respected due to their sexual orientation.” National Resource Center for Adoption et al., *Strategies For Recruiting Lesbian, Gay, Bisexual, and Transgender Foster, Adoptive, and Kinship Families* 6 (2012).⁷ And in many parts of the country, objecting organizations may be the primary or only foster agencies available to LGBTQ parents.

B. Discrimination Against LGBTQ Parents Harms LGBTQ Youth In Foster Care

Discrimination against LGBTQ parents visits another type of harm on foster children—it deprives LGBTQ youth of potentially valuable placements and

⁶ <https://www.chicagotribune.com/news/ct-xpm-2011-11-15-ct-met-catholic-charities-foster-care-20111115-story.html>.

⁷ https://adoptuskids.org/_assets/files/strategies-for-recruiting-LGBT-foster-adoptive-kinship-families.pdf.

sends a harmful signal of disapproval. Preventing these harms to some of society's most vulnerable members is a critical goal of child welfare organizations and, for amicus, a religious imperative.

1. LGBTQ youth make up a disproportionately large percentage of children in foster care

LGBTQ youth make up a disproportionate part of children in foster care. *See* Lambda Legal Defense and Education Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care* 11 (2001). That disproportionate representation is no coincidence. "Because gay, lesbian, and gender-nonconforming adolescents commonly find themselves disapproved of and overtly rejected by their own families, they are more likely to be forced from their homes." *Ibid.* Family rejection has contributed to outsized LGBTQ representation among both children in foster care and homeless youth.

The figures are stark. One recent California survey found that 30.4 percent of youth living in foster care self-identified as LGBTQ, compared to just 11.2 percent of youth overall. *See* Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, *Pediatrics*, Mar. 2019 at 1. Other studies have estimated that approximately 20 percent of youths in the foster system identify as LGBTQ, between two and three times the proportion of the general population. *See* Heidi M. Levitt et al., *How discrimination in*

adoptive, foster, and medical systems harms LGBTQ+ families: Research on the experiences of prospective parents, 32 J. of Gay & Lesbian Soc. Servs. 261 (2020); Bianca D.M. Wilson & Angeliki A. Kastanis, Williams Institute, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* (2014) (estimating that 19.1 percent of foster youth in Los Angeles aged 12 to 21 identify as LGBTQ, compared to less than 8 percent of the general population).

Many LGBTQ youth enter the foster system at least in part because of their sexual orientation or gender identity. One study found that 44 percent of LGBTQ youth in foster care reported that their sexual orientation or gender identity was related to their initial removal from their homes. Jannike Kaasbøll & Veronika Paulsen, *What is known about the LGBTQ perspective in child welfare services? A scoping review protocol*, BMJ Open, Sept. 2019, at 1, 2 (citing Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009)).

Even after entering the foster system, LGBTQ youth face an increased risk of rejection and abuse. One study of LGBTQ youth in New York City's foster system found that 100 percent of LGBTQ youth in the city's group homes reported being verbally harassed and 70 percent reported physical violence on account of their sexual orientation or gender identity. See Randi Feinstein et al., *Justice for All?: A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the*

New York Juvenile Justice System 16 (2001). Nearly 8 in 10 LGBTQ youth were removed or ran away from their foster placements as a result of hostility toward their sexual orientation or gender identity, and more than half spent time living on the streets because they felt “safer” there than in their group or foster home. *Id.* at 16-17.

The vulnerability of LGBTQ youth is by no means limited to the foster system. According to the federal Interagency Working Group on Youth Programs, approximately 20 to 40 percent of all homeless youth identify as LGBT. See youth.gov, *Homelessness & Housing* (citing Laura E. Durso & Gary J. Gates, *Serving Our Youth: Findings from a National Survey of Services Providers Working with Lesbian, Gay, Bisexual and Transgender Youth Who Are Homeless or At Risk of Becoming Homeless* (2012)).⁸ A 2012 study of more than 350 providers working with runaway and homeless youth reported that family rejection resulting from sexual orientation or gender identity was among the top causes of homelessness among LGBTQ youth. Durso & Gates, *supra*, at 4.⁹

These studies and surveys reflect the everyday experiences of child welfare service providers like LCFS across the country: LGBTQ youth are an especially vulnerable part of the foster care population.

⁸ <https://youth.gov/youth-topics/lgbtq-youth/homelessness>.

⁹ <https://escholarship.org/uc/item/80x75033>.

2. *Discrimination against LGBTQ foster parents deprives LGBTQ youth of an important group of affirming homes and sends them a harmful message about their own identities*

Recognizing the urgent needs of LGBTQ youth in foster care, many child welfare organizations, foster associations, and governmental bodies have adopted formal policies urging sensitivity and support. Non-discrimination policies are not some incidental feature of the foster care system. They are now widely recognized by authorities private and public, religious and secular, as essential to child welfare programs.

Like Philadelphia, many state and local governments have recognized the urgent need for LGBTQ youth to be “free from bullying/harassment” and to receive services “affirming of [their] sexual orientation and gender expression.” *See, e.g.,* Illinois Department of Children & Family Services, *LGBTQI+ Youth Rights* (2019). Many governmental bodies have thus developed special guidelines for supporting LGBTQ youth. *See, e.g.,* Illinois Department of Children and Family Services, Procedures 302 Appendix K.

Leading accreditation organizations such as the Council on Accreditation Services for Children and Families also require foster agencies to commit to protecting clients “from discrimination and disrespect” on the basis of “race and ethnicity, military status, age, sexual orientation, gender identity, and developmental level.” Council on Accreditation, *Standards for private*

organizations, Client Rights 1.03 (2020).¹⁰ Likewise, the National Foster Parent Association “encourages and supports establishment of standards, policies, and training programs for foster care providers and professionals based on non-discrimination principles and sensitivity to the sexual orientation of all foster children and youth.” NFPA Position Statement 118.05.¹¹ And the Child Welfare League of America, Donaldson Adoption Institute, North American Council on Adoptable Children, Voice for Adoption, National Center for Adoption and Permanency, Foster Club, and RESOLVE: The National Infertility Association have all adopted the formal position that LGBTQ youth and families benefit from and deserve equal treatment under the law. *See* The Child Welfare League of America et al., *Position Statement on Equality for LGBTQ Families and Youth* (2017).¹²

In the context of parental certification and child placement, these policies protect LGBTQ youth in foster care from two kinds of pernicious harm. First, allowing foster agencies to discriminate against LGBTQ parents deprives LGBTQ youth of many stable homes that are sensitive to their needs and accepting of who they are. To be sure, not every LGBTQ child needs to be placed with LGBTQ foster parents, and LGBTQ parents can and do successfully

¹⁰ <https://coanet.org/standard/cr/1/>.

¹¹ <https://nfpaonline.org/positionstatements#ps118.05>.

¹² <https://www.cwla.org/wp-content/uploads/2017/05/Child-Welfare-Leaders-Position-Statement-LGBTQ-Equality.pdf>.

foster non-LGBTQ children. But some LGBTQ children, particularly those who have been rejected by their families because of their identities or who lack LGBTQ role models, may benefit from placement with LGBTQ foster parents. As the federal Child Welfare Bureau has pointed out, “LGBTQ families bring particular strengths to parenting children in foster care, including an ability to identify with difficult feelings of isolation or a sense of being ‘different.’” Child Welfare Bureau, *Working With Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) Families in Foster Care and Adoption* 4 (2016).¹³

Second, “[t]he adoption of policies that reject LGBTQ+ family placements * * * conveys a[n] injurious message” to LGBTQ youth that there is something wrong with them. Levitt et al., *supra*, at 3. All too often, these children have been forced from their homes because of their sexual orientation or gender identity, and faced further harassment or abuse within the foster system itself. “Indifference to issues of gender and sexual orientation will result in continued psychological and social assaults.” *Busting Out of the Child Welfare Closet: Lesbian, Gay, Bisexual, and Transgender-Affirming Approaches to Child Welfare*, 85 *Child Welfare* 115, 118 (2006).

Non-discrimination policies such as Philadelphia’s are thus not just consistent with widely recognized best practices in foster care. They further the system’s

¹³ https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf.

central goal: protecting the most helpless and vulnerable members of our society from harm.

II. NON-DISCRIMINATION POLICIES ARE CONSISTENT WITH THE GUIDING PRINCIPLES OF MANY FAITH-BASED FOSTER AGENCIES

This case should not be mistaken for an inevitable clash between every religious child welfare organization and government. It is precisely because non-discrimination policies offer children the best opportunities to find safe and supportive homes that such policies are also critical to amicus’s religious mission: serving and protecting children in God’s name.

There can be no legal answer to matters of religious faith. But for amicus, non-discrimination is consistent with—indeed, required by—its Christian faith. Christian traditions recognize “God’s love and presence in the diverse and multicultural world He created,” and “[t]he dignity and value of each individual.” LCFS Values Statement.¹⁴ Lutheran values in particular emphasize “‘love of neighbor,’ unconditional acceptance, God’s Grace, daily renewal, and continual hope.” *Ibid.* For amicus, those values are reflected in non-discrimination policies, which ensure provision of needed services to all people, including the most vulnerable. And compliance with generally applicable laws enacted for the common good is *itself*

¹⁴ [https://www.lcfs.org/wp-content/uploads/2016/04/LCFS-
Stated-Values.pdf](https://www.lcfs.org/wp-content/uploads/2016/04/LCFS-Stated-Values.pdf).

an important virtue in many religious traditions. *See, e.g.,* Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 Mich. L. Rev. 1, 8 (1985). Above all, faith-based organizations such as LCFS are guided by their commitment “[t]o nurture and strengthen children and families in need.” LCFS Values Statement.

Those traditions have led many faith-based organizations to certify LGBTQ foster parents consistent with their religious mission of promoting child welfare. In 2012, LCFS began serving LGBTQ families in compliance with Illinois’s then-new non-discrimination requirements. Before that, LCFS had declined to offer full adoption and foster services to same-sex parents. But after a period of discernment, LCFS decided that its commitment to responsiveness, compassion, justice and mercy, as well as its overriding religious mission of furthering child welfare would be best served by embracing all qualified families—including LGBTQ parents. That decision has provided many benefits to LCFS and the children it serves, including attracting a wider pool of foster parents, affirming the worth of LGBTQ foster children, enhancing community trust, and enabling broader accreditation.

Again, amicus recognizes that petitioners’ faith leads them to different answers to these questions. Every organization must reach its own decision about what services it is comfortable providing. And some faith-based organizations may elect to shift their foster care services to other entities in light of their unwillingness to serve all qualified families. But those

decisions do not lead to the dire consequences petitioners suggest, nor do they preclude any religious organization from participating in the provision of child welfare services. Illinois's experience is instructive. After the state adopted non-discrimination requirements in its foster care contracts, some organizations such as LCFS adopted non-discrimination policies and continued to participate. Others that objected to those policies transitioned their foster services to separate organizations without any major disruptions, while continuing to participate in other child welfare efforts. *See Brachear, supra* note 6.

The choice presented to faith-based child welfare organizations by non-discrimination requirements is just that: a choice. Some faith-based organizations choose to provide all services under the generally applicable terms of government foster care contracts. And that includes agencies with a variety of religious beliefs, including those that believe marriage should be limited to one man and one woman. Indeed, the district court here found that a Philadelphia organization that holds religious beliefs opposed to same-sex marriage continues to contract with the city while abiding by its non-discrimination requirement. Pet. App. 103a.

Other faith-based organizations may choose not to provide the full spectrum of child and family services. But family certification and foster placement are not the only ways for faith-based organizations to promote child welfare through public-private partnerships. Far from it. Many organizations with religious objections

to same-sex marriage provide a variety of child welfare services beyond foster screening and placement that do not implicate non-discrimination policies. For example, Philadelphia continues to contract with Catholic Social Services for the overwhelming majority of child welfare services it provides. Pet. App. 16a, 187a. That reflects LCFS's experience in Illinois, where Catholic organizations that opted to stop providing foster care services continue to play a robust role in the provision of various child welfare services throughout the state.

Those same facts also belie petitioners' claims that Philadelphia's non-discrimination requirement is rooted in religious animus. In Philadelphia and across the country, state and local governments that enact non-discrimination policies continue to contract with religious organizations for child welfare services. Indeed, the district court here specifically rejected the factual basis for petitioners' allegations of animus. *See* Pet. App. 94a, 98a. And neither lower court here found evidence that Philadelphia singled out religious foster agencies in this case. *See* Pet. App. 35a-36a, 39a, 93a-103a.

Far from being the product of religious animus, non-discrimination rules are designed to ensure consistency, fairness, safety, and stability in the provision of foster services. They protect children and prospective parents from all kinds of discrimination, including religious prejudice. In fact, the erosion of non-discrimination policies would lead to more discrimination, including religious discrimination. If petitioners were correct that foster agencies are free to

discriminate against prospective parents if that discrimination is grounded in a sincerely held religious belief, then there would be, for example, nothing to stop an agency from refusing to work with Catholic parents, or interracial couples. See Meg Kinnard, Associated Press, *Lawsuit claims discrimination by foster agency* (Feb. 15, 2019) (describing lawsuit alleging religious discrimination against a Catholic mother by a Protestant foster care agency);¹⁵ *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) (noting that some sects of Christianity “genuinely believe that the Bible forbids interracial dating and marriage”).

Most importantly, non-discrimination is necessary to the effective provision of foster care. It is thus also central to amicus’s religious mission of serving and protecting all God’s children.

¹⁵ <https://apnews.com/ed3ae578ebdb4218a2ed042a90b091c1>.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOSEPH R. PALMORE
Counsel of Record
ADAM L. SORENSEN
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 572-6782
JPalmore@mofa.com
Counsel for Amicus Curiae

AUGUST 20, 2020