No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL., PETITIONERS
v.
CITY OF PHILADELPHIA, ET AL.

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

BRIEF OF HISTORIANS OF CHILD WELFARE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are prominent academic historians who have a particular interest in and are knowledgeable about the history of child welfare in America.[*] *Amici* have taught, conducted research, and published on the history of children and families; the history of child welfare policy, including foster care and adoption; the history of public and private regulation of homes and institutions for children removed from their homes, such as indentures and orphanages; the history of discriminatory policies in the treatment of dependent children and racial, ethnic, and religious minority children; and American cultural, social, political, and legal history from the colonial period

[*] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

through the 20th century. A summary of the qualifications and affiliations of the individual *amici* is provided in an appendix to this brief. *Amici* file this brief solely as individuals and institutional affiliations are given for identification purposes only.

Amici aim to provide the Court with an accurate historical perspective as it considers the legal questions implicated by the City of Philadelphia's regulation of foster care. *Amici* have examined the briefs filed in support of Petitioners, in which some have claimed—relying in part on the work of one *amicus*, Professor Rymph—that the state has historically played a detached, indifferent role in child placement and welfare in this country, and that state regulation of these activities is a relatively modern invention. As historians who have dedicated their careers to the study of these issues, *amici* believe these claims represent an oversimplified and incomplete—and therefore inaccurate—account of the historical evidence.

SUMMARY OF ARGUMENT

Government involvement in and oversight of foster care is not new. Contrary to the narrative advanced by Petitioners and their *amici*, *see, e.g.*, Pet. Br. 4–6; Br. for Nebraska, Arizona, and Ohio 2, 6–7 ("Three States Br."), the state has been involved in child welfare since colonial times, with oversight and regulation of child welfare long treated as a state prerogative. In the past 100 years, government involvement and oversight has grown rapidly, and, as Respondents point out, foster care has become a thoroughly regulated public service. *See* Intervenor-Resp. Br. 11–14; City Resp. Br. 11.

I. Government responsibility for dependent children in this country can be traced to the colonial era. By incorporating the Elizabethan poor laws and the medieval legal doctrine of *parens patriae* into their own laws, the American colonies (and later, states) recognized that government has a responsibility to care for dependent children and safeguard their "best interests." States have long partnered with private organizations, including religious organizations, to care for children deemed to be the government's responsibility. But this partnership came with oversight: Beginning in the 19th century, private organizations were subject to increasing supervision from state authorities to ensure that children in their custody were properly cared for.

II. In the past 100 years, government grew substantially more involved in child placement, developing standards and systems of licensure, not only to ensure the adequate protection of children, but also to attempt to remedy discrimination by private actors. States formed and expanded public child welfare agencies and began requiring foster parents to obtain a license, even when services were delivered or coordinated by private organizations. The passage of the Social Security Act in 1935, which increased governmental funding for child welfare services and resulted in a network of public child welfare agencies in every state, was the final turning point in the Nation's development of a truly public system of child welfare that aspires to equal treatment of all children and families.

ARGUMENT

I. THE GOVERNMENT HAS PLAYED A SUBSTANTIAL ROLE IN OVERSEEING CHILD WELFARE SINCE THE NATION'S FOUNDING

"The problem of dependent children has been a matter of public concern in Pennsylvania since colonial days." Joint State Government Commission, *Child Placement and Adoption* 5 (1951) ("Commission Report"), https://perma.cc/63ZP-8REC; *see also, e.g.*, *Wilder* v. *Sugarman*, 385 F. Supp. 1013, 1019 (S.D.N.Y. 1974) (three-judge court) (noting New York's commitment to "child welfare and placement practices since early colonial days"). In the Nation's earliest days, Pennsylvania, like other colonies, recognized that the state had a responsibility for orphaned, neglected, and abused children, and passed laws taking on that responsibility. In the 19th century, this public commitment manifested in the creation of hundreds of privately run—but publicly chartered and publicly funded—organizations devoted specifically to the needs of children.

1. Contrary to the claims of Petitioners and their *amici*, Pet. Br. 4–6; Three States Br. 2, 6–7; Br. for 76 U.S. Senators and Representatives 4, the government's substantial role in today's child welfare system can be traced to English policies adopted in the colonies in the 17th century. All colonies passed some version of the Elizabethan poor laws, which created a responsibility for the government to care for children in need, and adopted the doctrine of *parens patriae*, which provided the foundation for the state's active role in child welfare and the post-revolutionary creation of the "best interests of the child" standard. These influences laid the basis for today's publicly managed system for caring for dependent children.

a. The Elizabethan Poor Law of 1601 was especially influential in shaping the colonial belief that the government had a responsibility for the welfare of children whose parents could not care for them. The English law made parents legally liable for the support of their children and grandchildren, and children responsible for the care of their needy parents and grandparents. *See* Act for the Relief of the Poor, 1601, 43 Eliz. 1 c. 2 (Eng.). But if family members could not or would not fulfill those responsibilities, the law charged the state with caring for those in need. *Ibid.*

Colonies passed similar laws. In Pennsylvania, for example, the "Great Law," passed in 1682, provided that government officials "should care for any person who fell into a state of poverty, including poor orphans." Commission Report, *supra* at 5. "These first poor laws thus made townships responsible for the care of their poor," including children. *Ibid.* Pennsylvania "was the pioneer of the Middle Colonies in developing legislation regulating the poor," passing a "comprehensive act for the relief of the poor" in 1705, which built upon the Great Law of 1682, and establishing "overseers of the poor" in each township "to collect taxes and subsidize care of the poor." William P. Quigley, *Work or Starve: Colonial American Poor Laws* 31 U.S.F. L. Rev. 35, 51–52 (1996); *see also* Stephanie Hoover, *Pennsylvania Poorhouses: Their History and Records* 2017, https://perma.cc/T798-EX3J. By the middle of the 18th century, the other American colonies had adopted poor laws like Pennsylvania's. Quigley, *supra* at 48–54; *see also* Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, in *A Century of the Juvenile Court* 3, 6–7 (Margaret K. Rosenheim, et al., eds., 2002).

The poor laws, in an endeavor to fund relief for children living in poverty, established a system of apprenticeship called "indenture." Indentures allowed for poor children to be removed from their homes—including over their parents' objection—and placed with families or individuals who promised to maintain and educate the children in return for the children's labor. Timothy A. Hacsi, *From Indenture to Family Foster Care: A Brief History of Child Policing* 74 Child Welfare 162, 164–65 (1995). Indentures became the preferred method of caring for orphans and other dependent children in the 17th and 18th centuries. *Id.* at 165. The indenture system was a response to a general societal "reluctance to provide sufficient aid to keep impoverished families together," which "made it necessary for private agencies and government officials to arrange care for children whose parents [could] not care for them." *Id.* at 163.

The government—often through the court system—was always involved in overseeing indentures. As one Pennsylvania judge opined in rejecting a parent's challenge to the removal and indenture of his son, the state's poor laws "humanely and wisely" conferred on the state the "direction and management of the poor child." *Commonwealth* v. *Jones*, 3 Serg. & Rawle 158, 163 (Pa. 1817); *see also* Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* 265–66 (l985). Although the indenture system permitted private arrangements, such arrangements were also subject to government regulation. For example, states established basic standards of care such as requiring that indentured children be given the rudiments of an education or be taught a trade. *See, e.g.*, *Respublica* v. *Keppele*, 1 Yeates 233, 233 (Pa. 1793) (voiding indenture "by which the infant is bound to serve, and not to learn any trade, occupation,

or labour"); *see also* Grossberg, *Changing Conceptions*, *supra* at 11–12. Overseers of indentured children could also have their authority revoked for cruel treatment, failure to instruct their charges in a trade, and other violations of their parental-like office. *Ibid.* Taken together, these legal protections aimed to secure treatment of children placed in other families that approximated as much as possible the era's ideal of proper parent-child relations.[1]

b. The long-standing doctrine of *parens patriae* also shaped colonial perceptions of the government's responsibility for children. *Parens patriae* literally means "parent of his or her country," Black's Law Dictionary (11th ed. 2019), and in the United States gave rise to an understanding that the government should care for "those who cannot protect themselves," *Late Corp. of Church of Jesus Christ of Latter-day Saints* v. *United States*, 136 U.S. 1, 57 (1890); *see also Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing "the state as parens patriae" may "[act] to guard the general interest in youth's well being"). The medieval legal doctrine was reflected in the common law, which provided that the English sovereign was the guardian of those, including orphans, who could not care for themselves. 3 Wm. Blackstone, *Commentaries* *47.

As adopted by the colonies and post-revolutionary American states, the *parens patriae* doctrine led to broad

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[1] Reality often fell short of this ideal. Such laws were not only subject to varied enforcement, they also did not include the full panoply of rights granted to children of means. For example, children indentured voluntarily could decide whether to accept an indenture, but "child[ren] of the public" could not refuse an indenture once assigned. *State* v. *Brearly*, 5 N.J.L. 555, 560, 563 (N.J. Sup. Ct. 1819).

discretionary authority in judges, overseers of the poor, and other public and private officials when family conflicts or failures rendered children disorderly or dependent and thus in need of care outside of their homes. *See, e.g.*, *Webber* v. *Commonwealth*, 13 A. 427, 427 (Pa. 1888) (noting Pennsylvania constitution of 1790 "gives the care of the [dependent] persons" to supreme and common pleas courts based on doctrine of *parens patriae*). For example, in 1796, the Connecticut Supreme Court invoked the *parens patriae* doctrine to withhold child custody from a father "having no house and very little property, and very irregular in his temper and life." *Nickols* v. *Giles*, 2 Root 461, 462 (Conn. 1796); *see also* Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 Feminist Studies 235, 241–42 (Summer 1983) (discussing case).

State authorities—relying on the backbone of the *parens patriae* framework—were empowered to determine the best interests of children and take action to promote children's welfare in accordance with these interests. After the American Revolution, the "best interests of the child" emerged as a new legal concept born out of the *parens patriae* doctrine. *See Hiller* v. *Fausey*, 904 A.2d 875, 893 (Pa. 2006) (Newman, J., concurring). That concept gave courts "the power, if the best interests of the child require[d] it, to take [the child] away from both parents and commit the custody to a third person." *Dietrich* v. *Anderson*, 43 A.2d 186, 192 (Md. 1945). In other words, courts recognized that the government was "a guardian of all children, and may interfere at any time and in any way to protect and advance their welfare and interests." *Ibid.* As a judge in Georgia declared in an 1836 child custody case: "[T]his legal right of the father to the possession of

his child, must be made subservient to the true interests and safety of the child, and to the [duty] of the State to protect its citizens of whatever age." *In re Toulmin*, 1 Charlton 489, 494–95 (Ga. 1836); *see also Sohier* v. *Massachusetts Gen. Hosp.*, 57 Mass. 483, 497 (1849) (deeming it "indispensable" that the legislature be permitted to act in "[t]he best interest" of "infants . . . who cannot act for themselves").

Building upon each other, the two doctrines of *parens patriae* and the best interests of the child thus created a strong public interest in child welfare which continues to this day. *See* Grossberg, *Changing Conceptions*, *supra* at 6–10; Joel Handler, ed., *Family Law and the Poor: Essays by Jacobus Tenbroek* 32–33 (1974); Elizabeth Pleck, *Domestic Tyranny: The Making of American Social Policy Against Family Violence from Colonial Times to the Present* 7–11 (1987).

2. Beginning in the 19th century, the government's role in child welfare expanded beyond indirect forms of support like the indenture system to include dedicated public funds to create and oversee facilities devoted to caring for children. And given the government's recognized responsibility for its children, even privately run facilities were subject to more systematic government oversight and accountability. States also passed adoption laws that provided standards and structure for the placement of children with adoptive families.

a. Chief among the developments of the 19th century was the creation of a series of public and publicly chartered but privately run facilities devoted specifically to the needs of children. These included orphanages, "Houses of Refuge," and similar institutions, all of which were created "in an effort to rectify the failures of impoverished families; insulate children from a contaminating

social environment; and shape their character by instilling habits of sobriety, industry, and self-discipline." Steven Mintz, *Huck's Raft, A History of American Childhood* 156–57 (2004); *see also id.* at 156–67.

Though orphanages began as largely private institutions, by the end of the 19th century, they had expanded in scope and were regularly both run and funded by states. Orphanages, sometimes called orphan asylums, were first established at the turn of the century, including two Catholic orphanages in Philadelphia, founded in 1798 and 1806.[2] Timothy A. Hacsi, *Second Home, Orphan Asylums and Poor Families in America* (1997). Orphanages, however, "did not become a widespread method of caring for dependent children until the 1830s" as part of an emerging belief that dependent children should be housed separately from poor adults. *Id.* at 11. As the number of orphanages grew in the first half of the 19th century, most

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[2] Petitioners' *amici* observe that the first orphanage in the United States was the "the Ursuline Convent, a Catholic institution, founded in New Orleans in 1727." Three States Br. 7 (quotation omitted). *Amici* overlook, however, that the convent, while accepting some female orphans in its early years, was founded as an instrument of French state policy—based on a treaty between the Compagine des Indes and the Ursuline nuns, approved by King Louis XV—to educate young immigrant women who sought to marry and build lives in Louisiana, thus ensuring the growth of a French colonial outpost that could stave off the threat from the American colonies. *See* Clark Robenstine, *French Colonial Policy and the Education of Women and Minorities: Louisiana in the Early Eighteenth Century*, 32 History of Education Quart. 193, 197–98, 209 (Summer 1992); *see also* Priscilla Ferguson Clement, *Children and Charity: Orphanages in New Orleans, 1817-1914*, 27 Louisiana History 337, 340 n.7 (Autumn 1986) (noting that the convent accepted "some female orphans" but "chiefly as servants to their other pupils").

were private institutions, generally in cities, founded and run by religious organizations. *Id.* at 18, 22–25. After the Civil War orphaned and displaced thousands of children, however, the number of asylums increased dramatically and "public asylums appeared in meaningful numbers for the first time." *Id.* at 27. Pennsylvania joined the ranks in the 1870s when it "opened a number of orphan asylums for the children of Union soldiers who had died in the Civil War." *Id.* at 29. Within the decade, Pennsylvania was housing more than 8,000 orphaned sons and daughters of Union troops. *Ibid.* By the late 19th century, states like New York chartered and funded both private and public institutions, while others like Connecticut relied more heavily on government-funded public orphanages. *Id.* at 29–32. But into the 20th century, almost every state had dual systems of private and public orphanages, which remained the primary placement for dependent children despite rising support for deinstitutionalization and family placements. *Id.* at 32–40.

Houses of Refuge were another example of increasing government involvement in child welfare during the 19th century. New York City established the first House of Refuge in 1824. Pleck, *supra* at 74–75. Others soon followed. *Ibid.* As with orphanages, antebellum reformers argued that these new, specialized institutions would not be dumping grounds for poor children, but rather reformatories that would provide children with the proper environment for individual reformation that was otherwise impossible in the traditional poor-law system. *See, e.g.*, *Ex Parte Crouse*, 4 Whart. 9, 11 (Pa. 1839) ("The House of Refuge is not a prison, but a school."); *see also* Grossberg, *Changing Conceptions*, *supra* at 16–17. Believing that a structured environment could reform children, the found-

ers of Houses of Refuge stressed rigorous discipline, education, and work as the principal means of reformation. Mintz, *supra* at 159–60. Thus, the New York House of Refuge offered those housed within it "such employment as will tend to encourage industry," basic education in "reading, writing, and arithmetic," and instruction in "the nature of their moral and religious obligations." Grossberg, *Changing Conceptions*, *supra* at 17. State and local officials had broad jurisdiction to send criminal, vagrant, neglected, or even unruly children to Houses of Refuge. *Ibid.* Massachusetts was typical in authorizing the mayor, alderman, and overseers of the poor to recommend that any "children who live an idle or dissolute life, whose parents are dead, or if living, from drunkenness, or other vices, neglect to provide any suitable employment, or exercise salutary control over said children" be sentenced to the Boston House of Refuge. *Ibid.*

Although Houses of Refuge, like orphanages, were privately run, they were subject to oversight from state authorities to ensure that children in their custody were properly cared for. One such oversight mechanism was investigations conducted by state legislatures into accusations of abuse and mistreatment filed by state officials and parents. For example, in 1876, the Pennsylvania House of Representatives held a nine-day investigation into abuse at the Philadelphia House of Refuge, addressing claims that the Refuge managers had been imposing certain punishments on the children and forcing them to work without pay. *See* James Kopaczewski, *The Encyclopedia of Greater Philadelphia, House of Refuge*, https://perma.cc/E7GG-87UL; *see also* 2 Grace Abbott, *The Child and the State* 357–61 (1938). The legislature eventually concluded that the managers' actions did not constitute abuse, but the inquiry illustrates the power of states to supervise

both the placement and treatment of children in private institutions. *See also* Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs* 11, 13–14 (Gerald P. Mallon & Peg McCartt Hess, eds., 2005).[3]

Because Houses of Refuge had been chartered by the government to care for children, states dedicated public money to help support the otherwise private institutions, many of which struggled with funding. For example, the Philadelphia House of Refuge was founded in 1826 by Protestant reformers who received public and private funds to create the institution. Negley K. Teeters, *The Early Days of The Philadelphia House of Refuge*, 27 Pennsylvania History 165, 168–72 (April 1960); *see also* Commission Report, *supra* at 9 (noting that "dating back to colonial days, some private agencies and institutions receive biennial lump sum grants from the Commonwealth"). So too with the New York House of Refuge: Although it was privately managed, "the State of New York was involved from the beginning in organizing, funding,

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[3] Parents also lodged allegations against Houses of Refuge in courts, though courts generally reaffirmed the state's authority to place children there. The most influential challenge resulted in a decision by the Pennsylvania Supreme Court rejecting a father's claim that his daughter's placement in the Philadelphia House of Refuge was illegal. *Crouse*, 4 Whart. at 11–12. The court instead held that placement in the House of Refuge was treatment, not punishment, because it was a school, not a prison, and that the public had a right to act when parents failed. Upholding the constitutionality of the child's placement, the court declared: "The infant has been snatched from a course which must have ended in confirmed depravity, and not only is the restraint of her person lawful, but it would be an act of extreme cruelty to release her from it." *Id.* at 12.

establishing [child] commitment procedures, and developing treatment programs." N.Y. State Archives, *The Greatest Reform School in the World, A Guide to the Records of the New York House of Refuge* 4 (1989). Other states authorized refuge managers to use indentures to contract with private businesses to provide work for refuge children, which then paid the institution for their services. Teeters, *supra* at 179–80; Grossberg, *Changing Conceptions*, *supra* at 17–18. In these ways, under the aegis of the state, refuge managers traversed the line between public and private spheres of action and responsibility.

b. Beyond using their authority to create and support child-centered institutions, states in the late 18th and early 19th centuries also sought to create new families for orphaned, neglected, and abused children. They did so first through *ad hoc* and often informal arrangements, and then, in a radical departure in Anglo-American law, by passing adoption laws which provided structure and standards for such arrangements. Britain would not take that step until the 1920s, but in the United States, a commitment to the public's responsibility for child welfare propelled the process forward far earlier. *See* C.M.A. McCauliff, *The First English Adoption Law and its American Precursors*, 16 Seton Hall L. Rev. 656, 676 (1986); *see generally* George Behlmer, *Friends of the Family: The English Home and Its Guardians, 1850-1940* (1999); Ellen Herman, *Kinship by Design: A History of Adoption in the Modern United States* (2008).

At first, legislators granted adoption requests of individual parents by passing private acts altering the domestic status of children. In Massachusetts, the legislature enacted 101 bills between 1781 and 1851. Naomi Cahn, *Perfect Substitutes or the Real Thing*, 52 Duke L.J. 1077,

1104–5 (2003). Vermont did so 300 times between 1804 and 1865. *Ibid.* Most merely changed a child's name, thus finalizing an informal assumption of parent-child relations. One such act explained that the new parent had "supported said child for the five years last past, and still expects to provide for the support and education of the child and to make him heir to your petitioner." Grossberg, *Governing the Hearth*, *supra* at 270. Time-consuming and expensive, these acts constituted the only state-sanctioned means for Americans to formally adopt a child. *See id.* at 268–71.

In the 19th century, state legislatures across the country began enacting laws that tasked courts with overseeing adoption procedures and ensuring that such adoptions were in the children's best interests. Massachusetts was the first to do so in 1851, by enacting a law that created legal bonds between parents and children closely approximating a reproductive family. Act of May 24, 1851, ch. 324, §§ 1-8, 1851 Mass. Acts 815. The act made adoption a legal procedure, and charged the courts with making sure that new parents were of "sufficient ability to bring up the child, and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption should take place." *Id.* § 8; *see also* Grossberg, *Governing the Hearth*, *supra* at 271–72. In 1853, Pennsylvania became the second state to enact such an adoption law, and it even more explicitly championed child welfare by charging the courts with ensuring that the "welfare of such child will be promoted by such adoption." *Id.* at 272. After these initial efforts, adoption spread at a phenomenal rate through the Republic. It quickly displaced other forms of custody transfers, particularly indentures, as the most appealing

way of using government power to realize the family ideal for dependent children.

II. FOSTER CARE DEVELOPED INTO A PUBLIC SERVICE IN THE 20TH CENTURY NOT ONLY TO ENSURE ADEQUATE PROTECTION OF CHILDREN, BUT TO ATTEMPT TO GUARD AGAINST DISCRIMINATION

At the turn of the 20th century, the social and economic change of the Progressive Era forced a reevaluation of the role of government in all spheres of American life, leading to even greater state involvement in child welfare. There was an emerging consensus that more vigorous state oversight was necessary not only to ensure adequate protection of children, but to combat discrimination and care for children left behind by private organizations. Reforms initially concentrated on professionalizing child welfare by promulgating standards for care, as well as licensing and increased regulation of child welfare providers. New Deal-era legislation further cemented the government's primary role in child welfare, as federal funds allowed every state to establish a public child welfare agency.

1. Early private efforts to place children in homes rather than institutions—what we know today as "foster care"—came to underscore the need for greater government involvement in child welfare efforts. As one of Petitioners' *amici* notes, Charles Loring Brace, a Protestant minister, believed that dependent children needed "the wholesome effects of family life" in order to thrive. Three States Br. 7 (quoting Catherine Rymph, *Raising Government Children: A History of Foster Care and the American Welfare State* 21 (2017)). Brace thus became an advocate for "placing out" programs, through which children were sent "to live with religious families, mainly in rural

locations," instead of living in orphanages or other institutional settings. *Ibid.* Between 1854 and 1929, Brace's New York Children's Aid Society and other similar "child saving" organizations moved as many as 250,000 children from New York and other eastern cities to the Midwest and West, as well as Canada and Mexico. Stephen O'Connor, *Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed* 149 (2001).

But Brace's so-called "orphan trains," resurrected the abandoned practice of indentures in a new form, as "[c]hildren were expected to pay for their bread and board through their labor." McGowan, *supra* at 15. Black children placed in white homes were often treated as unpaid domestic servants or farmworkers and deprived of education. Megan Birk, *Fostering on the Farm: Child Placement in the Rural Midwest* 58–81 (2015). And although the host families' motivations were understood to be charitable, families were not vetted by the organizations placing children in their care. As a result, many relocated children experienced multiple placements, neglect, and sometimes physical or sexual abuse. *See id.* at 78–104.

Anti-immigrant discrimination was also a significant problem. Brace's efforts, at least initially, focused on moving mainly Catholic immigrant children to Anglo-Protestant farming families. *See generally* O'Connor, *supra*; Marilyn Holt, *The Orphan Trains: Placing Out In America* (1992). In Brace's view, mass relocation of children from what he deemed the "dangerous classes"—especially Irish and Italian immigrants—would salvage their civic and productive potential through religious conversion and agricultural labor "under the influence of the moral and fortunate classes." *See* Charles Loring Brace, *The Dangerous Classes of New York and Twenty Years' Work Among Them* ii (3d ed. 1880). In finding Protestant

foster families for these children, Brace sought "a moral and physical disinfectant—a seed of reform and improvement amid the wilderness of vice and degradation." *Id.* at 95.

Unsurprisingly, parents of displaced children saw Brace's actions differently: Particularly in the Catholic community, Brace and others who purported to "save" children from their families were considered nothing short of kidnappers. *See* John O'Grady, *Catholic Charities in the United States: History and Problems* (1994); Susan S. Walton, *To Preserve the Faith: Catholic Charities in Boston, 1870-1930* (1993). Catholic immigrant communities responded with an energetic wave of asylum- and orphanage-building designed to keep their "own" children from falling into the hands of Protestant child welfare organizations. V. Rev. James Sullivan, *Institutional Care of Children*, in Proceedings, First National Conference of Catholic Charities (Sept. 25–28, 1910). By 1910, Catholic residential institutions had built 322 infant asylums and orphanages serving 70,000 children annually in the United States. *Id.* at 285. In New York City, the Catholic Home Bureau started "placing-out" Catholic children by recruiting foster families of its own.[4]

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[4] The growth of private organizations serving children of particular religions, while combatting some forms of discrimination, left others intact. In New York City, for example, Black and Puerto Rican children and families were for years systematically excluded from foster care placements arranged by private organizations. *See* Memorandum of Welfare Council of New York City, *Care of New York City Children Away From Their Own Homes* (Mar. 19, 1939) (on file with Columbia Univ.); Letter from Justine Wise Polier to Trude Lash of

2. In response to the documented shortcomings of "child saving" programs, state governments, beginning in the 1920s and accelerating in the 1930s, expanded their regulation of child welfare organizations and their systems for placing children with families. Pennsylvania, for example, created its Department of Public Welfare in 1921 and charged it "with the supervision of all agencies and individuals engaged in arranging for the care of children outside their own homes." Commission Report, *supra* at 6; *see also* Act of May. 25, 1921, P.L. 1144, No. 425 (Pa.). As one leading reformer of the era documented, this "state supervision" was "welcomed and even demanded by the best private agencies." Abbott, *supra* at 17–18.

Around this time, states also began formally licensing and inspecting boarding homes, where individual families were paid to foster children. By 1938, 23 states required that boarding homes be licensed, and a further nine required a license to board children under age two. Rymph,

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the Citizens Committee for Children (Nov. 12, 1956) (on file with Columbia Univ.) (describing widespread discrimination against "Negro" and "Puerto Rican" mothers who sought to surrender children for adoption). Even in 1975, over 80 percent of the children cared for by New York's public foster care agency were Black, compared to only a handful of the children cared for by private organizations. *See* Richard Severo, *Church Groups See Danger In Child-Care Bias Lawsuit*, The New York Times, Mar. 16, 1975, at A1. Reform came about via a class action brought by 13-year-old Shirley Wilder, a Black child who, lacking a foster care placement, had been placed in a state reformatory for delinquents. A consent decree required that children be placed in foster care "on a first-come, first-served basis"—without regard to race or religion—and that "a particular religious affiliation would not give [a given] child greater access to a program over other children for whom the program was also appropriate." *Wilder* v. *Bernstein*, 645 F. Supp. 1292, 1305 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988).

supra at 52, 64. Such placements had grown steadily in popularity over alternatives such as institutional and farm placements, where child advocates feared children being exploited for their labor. By 1933, 27 percent of children in out-of-home care were living in boarding homes, up from 10 percent a decade earlier. Rymph, *supra* at 38.

States used the licensing process as a vehicle to implement developing child welfare standards. The Child Welfare League of America, a federation representing both private organizations and public agencies, published its first best practices manual for foster care in 1933. *See* Child Welfare League of America, *Standards for Families Providing Foster Family Care* (1933). The League's best practices included standards for the number of children already in the home, family sleeping arrangements, and the availability of schooling. *Id.* at 11, 16–22.[5] Over time, many states adopted the Child Welfare League's recommended practices as generally applicable state licensure requirements, such that both public agencies and private organizations were required to comply with specified standards and practices in selecting foster families.

The federal government also embraced a greater role in child welfare regulation in the early 20th century. President Theodore Roosevelt presided over the first White House Conference on Children and Youth in 1909. The conference galvanized a coalition of reformers who, after

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[5] Some of these standards have come to be seen as anachronistic, if not discriminatory themselves. For example, both private organizations and public agencies had a longstanding opposition to placing a child in a family where a married woman worked outside the home. *See* Rymph, *supra* at 72, 95, 148; Cornelia M. Ougheltree, *Finding Foster Homes: A Report on the Homefinding Program* 9 (1957).

a lengthy legislative effort, succeeded in establishing the U.S. Children's Bureau in 1912. Congress charged the new federal agency to "investigate and report . . . upon all matters pertaining to the welfare of children and child life among all classes of our people." Act of Apr. 8, 1912, ch. 73, § 2, 37 Stat. 79. The creation of the Children's Bureau "represented the first Congressional recognition that the federal government has a responsibility for the welfare of children." McGowan, *supra* at 21; *see also* Kriste Lindenmeyer, "*A Right to Childhood*": *The U.S. Children's Bureau and Child Welfare, 1912-1946* 9–29 (1997). Unsurprisingly, the creation of a federal agency resulted in calls for federal aid. Rymph, *supra* at 56. Although the Bureau's leaders would eventually be instrumental in increasing federal funding to the states, they were also critical of state governments that engaged in a "reckless policy" of merely passing funds to private organizations without engaging in the more difficult work of establishing public child welfare agencies to supervise those organizations. *Id.* at 58–59; Abbott, *supra* at 15.

3. During and after the Great Depression and the New Deal, both states and the federal government were more active in managing the Nation's child welfare system. Public funding for child welfare programs increased and every state established a public child welfare agency.

As was the case for other charitable organizations, private donations to children's agencies dried up as the Depression persisted. Rymph, *supra* at 53–54. Staff had to be laid off and services cut. The Louisiana Children Home Society, for example, closed in March 1933 for lack of funding, leaving it unable to provide for the needy children it had served. *Id.* at 56. The severity of the economic crisis meant both increases in the need for foster care and a shortage of families in a position to serve. Child welfare

leaders cried out for federal money to develop more public child welfare services to be part of the New Deal. *Id.* at 56–57.

Congress responded in 1935 with the Social Security Act, which made federal funds available to support child welfare services, including burgeoning foster care programs. *See* Pub. L. No. 74-271, 49 Stat. 620 (1935). Title V of the Act authorized the Children's Bureau to work with state public welfare agencies in "establishing, extending, and strengthening" public welfare services "for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent." *Id.* at 633. It also included grants to states for maternal and child welfare and established limited federal funding for "other local child-welfare services." *Ibid.* Amendments to the law in the early 1960s made federal funds available to pay board directly to foster parents of eligible children. *See* Social Security Amendments of 1961, Pub. L. No. 87-64, 75 Stat. 131.

Aided by the newly available federal funding, public agencies expanded rapidly by 1940 and fundamentally altered the balance of operational responsibility between public and private actors. In 1935, only 13 states had systems of county-level public child welfare services. Eleven had no statewide public child welfare agency at all. By the end of 1939, however, every state had a statewide public agency. Rymph, *supra* at 64. The push to expand the number of public child welfare agencies cemented a trend decades in the making: As a member of New York City's Committee on Child Welfare noted in 1944, with the creation of a public child welfare agency in the city, "primary responsibility for care of all children in need of [foster care] rests with the public agency; and the responsibility for supplementing the public agency through specialized

services rest with the private agency." Letter from Alice Nutt to Mildred Arnold (Apr. 25, 1944) (on file with U.S. National Archives).

Later in the 20th century, Congress moved forcefully to remedy past discrimination against Native American children and families. During the Residential School era, between 1879 and the 1970s, many religious groups (often with government support) established boarding schools, often on U.S. military installations, whose explicit purpose was to separate native children from their families, languages, and communities in the name of civilization and assimilation. *See* Margaret Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880-1940* (2011); K. Tsianina Lomawaima et al., eds., *Away from Home: American Indian Boarding School Experiences, 1879-2000* (2000). By 1974, studies showed that a shocking "25-35 percent of all Indian children [were] separated from their families and placed in foster homes, adoptive homes, or institutions." H.R. Rep. No. 1386, 95th Cong., 2nd Sess. 9 (1978). The passage of the Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1901 *et seq.*, embodied not only accountability for the history of native child displacement, but "a Federal policy that, where possible, an Indian child should remain in the Indian community," *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 1386 at 23).

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From the Elizabethan poor laws to state supervision of Houses of Refuge to the establishment of public child welfare agencies, the history of child placement in Amer-

ica is one of continuous government involvement, oversight, and regulation. Foster care in particular has been a focus of state regulation for over a century. Its earliest years demonstrated the potential for abuse and discrimination at the hands of private actors—and underscored the importance of foster care as a government service open to all. That is not to suggest the government has always acted to stamp out discrimination taking place before its eyes. But history shows a Nation aspiring to ensure the well-being of all children, whatever their family or community of origin, by all families capable of offering loving care.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

Megan Birk is an Associate Professor of History at the University of Texas Rio Grande Valley. Her research focuses on 19th and 20th century American history, emphasizing social welfare history, welfare policy development, and child placement. She is the author of *Fostering on the Farm: Child Placement in the Rural Midwest* (2015) which won the Vincent P. DeSantis Prize for Best First Book from the Society for Historians of the Gilded Age and Progressive Era. She is currently finishing a book project about local, institutional public welfare provisions between 1870 and 1960.

Linda Gordon is the Vilas Distinguished Professor Emerita, University of Wisconsin Madison, and University Professor of History at New York University. She has written about family violence and the efforts to protect children from abuse and neglect in *Heroes of Their Own Lives: The Politics and History of Family Violence* (1989), which won the Joan Kelly Prize and was a runner-up for the Los Angeles Times Book Award in History, and *Pitied But Not Entitled: Single Mothers and the History of Welfare 1890–1935*(1995), which examines the origins of Aid to Dependent Children in the Social Security Act and won the Berkshire Prize and the Gustavus Myers Award for best book on human rights. Her book, *The Great Arizona Orphan Abduction* (1999), won the Bancroft Prize for best book in U.S. history.

Michael Grossberg is the Sally M. Reahard Professor in the Department of History at Indiana University Bloomington and Professor at the University's Maurer School of Law. His research focuses on the relationship

between law and social change, particularly the intersection of law and the family. He is currently working on a study of child protection in the United States that will assess issues such as child labor, juvenile justice, school reform, disabilities, and child abuse from the 1870s to the present. The book is forthcoming from Harvard University Press. He is also the co-editor of *Re-Inventing Childhood in the Post World War II World* (2011). His book *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1986) won the American Historical Association's Littleton-Griswold Prize in History of Law and American Society. Grossberg was president of the American Society for Legal History (2013–15) and has been awarded fellowships from Guggenheim Foundation and National Endowment for the Humanities.

Ellen Herman is Professor of History at the University of Oregon and the University's Vice Provost for Academic Affairs and Faculty Co-Director of its Wayne Morse Center for Law and Politics. Her research focuses on modern American history, with special interests in the human sciences, social engineering, and therapeutic culture. Herman is the author of *Kinship by Design: A History of Adoption in the Modern United States* (2008), *The Romance of American Psychology: Political Culture in the Age of Experts* (1995), and *Psychiatry, Psychology, and Homosexuality* (1995). Herman's work has been supported by fellowships at Harvard Law School and Radcliffe's Bunting Institute, as well as a major research grant from the Science and Technology Studies Program of the National Science Foundation.

Kriste Lindenmeyer is University Professor and Dean Emerita at Rutgers University—Camden. During her academic career she was also a professor of history at

the University of Maryland, Baltimore County (UMBC), Tennessee Technological University, and Vanderbilt University. Lindenmeyer was a 2004-05 Fulbright Senior Scholar in Germany, specifically Martin Luther Universistaet-Halle-Wittenberg. Her research focuses on the history of U.S. public policy, especially issues related to children and families. Her publications include *The Greatest Generation Grows Up: Childhood in 1930s* (2005) and *"A Right to Childhood": The U.S. Children's Bureau and Child Welfare, 1912–1946* (1997). She is a founding member and past president of the Society for the History of Children and Youth. Lindenmeyer served as a foster parent while living in Tennessee during the 1990s and has been a member of the Bancroft Foundation Board of Trustees since 2012. Her current research examines the history of citizenship, political participation, and voting rights for American youth.

Steven Mintz is Professor of History at the University of Texas at Austin, and past president of the Society for the History of Childhood and Youth. A specialist in the history of American families, children, and the life course, he is the author and editor of 15 books, including *Huck's Raft: A History of American Childhood* (2004), which received book prizes from the Organization of American Historians, the Association of American Publishers, and the Texas Institute of Letters. He has taught at Columbia, Harvard University Extension, Oberlin College, Pepperdine University, the University of Houston, and Universität-Siegen in Germany, and been a fellow at Stanford's Center for Advanced Study in the Behavioral Sciences and a visiting scholar at Harvard's Center for European Studies.

Catherine Rymph is Professor of History at the University of Missouri. Her research focuses on modern American history, especially welfare policy and women's political history. She is the author of *Raising Government Children: A History of Foster Care and the American Welfare State* (2017), which was named a Choice Outstanding Academic Title, and *Women in the Republican Party: Feminism and Conservatism from Suffrage through the Rise of the New Right* (2006). She is working on a book project involving child refugee policy in the 1930s.