No. 19-123

IN THE

Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF OF CHURCH-STATE SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are Church-State scholars with expertise in the First Amendment's Religion Clauses. They submit this brief to explain how Establishment Clause and Free Exercise Clause principles and precedents prevent this Court from exempting Petitioner Catholic Social Services (CSS) from Respondents' nondiscrimination policy. Amici make no arguments as to whether this Court should retain *Employment Division v. Smith*, 494 U.S. 872 (1990); the remedy CSS seeks is off-limits regardless of what standard applies to its free exercise claim. A full list of amici is attached as an appendix.

SUMMARY OF ARGUMENT

I. Religious liberty is a core constitutional commitment. But just as the Constitution protects the rights of individuals to profess and practice their faith, it also constrains how far government may go to accommodate religious objectors. Religious "accommodation," this Court has declared, "is not a principle without limits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994).

One of those limits is what we call "the third-party harm rule." That rule—rooted in both the Establishment Clause and the Free Exercise Clause—prohibits the government from exempting religious

[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

objectors from public laws when doing so will unduly harm identifiable third parties.[2] Forcing someone to shoulder the costs of another's religious commitments amounts to a tax that favors a particular religion, infringing non-adherents' freedom of conscience and undermining their equal standing, in violation of the Religion Clauses.

Accordingly, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Time and again this Court has done just that, assessing third-party harms when deciding whether an existing government accommodation violates the Establishment Clause and whether the Free Exercise Clause requires the government to fashion a new one. The third-party harm rule has played a central role in the Court's precedents even when the Court has applied strict scrutiny to review burdens on religious exercise, both in pre-*Smith* First Amendment cases like *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972), and in cases arising from statutes that are more protective of religious exercise than *Smith*, like the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Put bluntly: The third-party harm principle arose long before *Employment Division v.*

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[2] *See generally* Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 Ky. L.J. 781 (2018); Nelson Tebbe, *Religious Freedom in an Egalitarian Age* 49-70 (2017); Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. 343 (2014).

Smith, 494 U.S. 872 (1990), and will survive even if *Smith* does not.

II. The third-party harm rule applies to this case and prevents this Court from granting CSS the exemption it seeks. CSS wants an exemption so it can refuse to serve same-sex couples as it carries out a vital public function as a government contractor, in violation of the terms of its contract. That exemption would shift significant harms—both material and dignitary—onto prospective LGBTQ foster parents as well as children in the foster care system. Petitioners and their amici are wrong to deny the existence and constitutional significance of these harms, which are both more severe and different in kind than the harm that flows from denying the exemption.

III. To say that the CSS exemption would unconstitutionally shift burdens to third parties is not to say that the government may never grant religious accommodations that come with third-party costs. The third-party harm doctrine has limits. It does not prevent the government from protecting a religious institution's right to control its leadership and membership, even when doing so will significantly burden others. *E.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The doctrine also permits accommodations whose costs are slight, diffuse, or uncertain. And it does not prevent courts from redressing discrete instances of anti-religious animus. The exemption CSS seeks, however, does not fit into any of those exceptions. It will inflict substantial harm on a discrete group of citizens in the absence of any infringement of CSS's institutional independence and any discriminatory treatment.

ARGUMENT

I. Both Religion Clauses Prohibit Exemptions That Significantly Burden Third Parties.

The Constitution's commitment to religious liberty protects more than the right of adherents to profess and practice their faith. It also protects the right of non-adherents to be free from the costs and consequences of others' religious commitments. In this Court's words, "[religious] accommodation is not a principle without limits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994). "[T]he Religion Clauses," this Court has explained, "give[] no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (quoting Judge Learned Hand in *Otten v. Balt. & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). Religious accommodations that significantly burden others do just that, in violation of both the Establishment Clause and the Free Exercise Clause.

A. The Establishment Clause bars exemptions that harm others.

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *see Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070 (U.S. July 24, 2020) (Kavanaugh, J., dissenting from the denial of application for injunctive relief) ("[A] religious organization may seek an

exemption in court … *to the extent* available under federal or state law and *permissible under the Establishment Clause*." (emphasis added)).

The Establishment Clause limits accommodations in several ways, but here we focus on just one—the third-party harm rule, which holds that government may not accommodate religious citizens by shifting meaningful costs onto third parties, that is, discrete individuals as distinct from government or the public at large. This rule is rooted in the values animating the Establishment Clause, as well as this Court's cases applying it.

1. The Establishment Clause protects liberty of conscience and ensures the equal standing of religious believers and non-believers alike. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, *Non-believers*, Presbyterians, or the members of any other faith, because of their faith, *or lack of it*, from receiving the benefits of public welfare legislation" (emphasis added)).

When governments accommodate religious believers in ways that burden others, they "impose the [objector's] religious faith on" those others. *United States v. Lee*, 455 U.S. 252, 261 (1982). Such accommodations, even when sought in the name of freedom

and equality, can themselves become forms of coercion and subordination.

James Madison recognized as much when he objected to Virginia's assessment bill, which proposed a tax in support of churches. Madison knew that forcing some to bear the costs of others' religious exercise impinges on their liberty of conscience and "degrades [them] from the equal rank of Citizens." Schwartzman, Tebbe & Schragger, *Costs of Conscience*, *supra*, 785 (quoting James Madison's *Memorial and Remonstrance Against Religious Assessments*); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2258 n.3 (2020) (Madison viewed the bill as "violat[ing] equality by subjecting some to peculiar burdens" (quoting *Memorial and Remonstrance*)). What was true of taxation in support of churches is no less true of the exemptions that excuse believers from regulations by burdening non-believers, as religious exemptions that shift meaningful costs on third parties are "the regulatory equivalent of taxing non-adherents to support the faithful." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2408 (2020) (Ginsburg, J., dissenting) (quotation marks and citation omitted); *see id.* at 2396 (Alito, J., concurring) (acknowledging that "the remedy for a RFRA problem cannot violate the Constitution").

2. In *Estate of Thornton v. Caldor*, the Court put the third-party harm principle into practice. There, applying the Establishment Clause, the Court struck down a statute that required employers to permit employees to take their Sabbath off from work. 472 U.S. at 710-11. The statute "t[ook] no account of the convenience or interests of the employer or those of other

employees who do not observe a Sabbath;" the religious observer could take the day off even if doing so "would cause the employer substantial economic burdens" or "require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 709-10. "This unyielding weighting in favor of Sabbath observers over all other interests," the Court explained, "contravenes a fundamental principle of the Religion Clauses"—that the faithful may not insist that "others … conform their conduct to [their] own religious necessities." *Id.* at 710 (quoting Judge Learned Hand in *Otten*, 205 F.2d at 61).

In *Cutter v. Wilkinson*, this Court again confirmed that a religious accommodation "must be measured so that it does not override other significant interests." 544 U.S. at 722. *Cutter* upheld RLUIPA, a law that prohibits substantial burdens on the religious practice of institutionalized persons unless the government's policy is the least restrictive means of advancing a compelling interest, against a facial challenge under the Establishment Clause. The Court rejected the constitutional challenge only because it interpreted RLUIPA as incorporating the third-party harm doctrine: In "applying RLUIPA," the Court emphasized, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720 (citing *Caldor*, 472 U.S. 703).

B. The Free Exercise Clause bars exemptions that harm others.

The third-party harm doctrine is also firmly rooted in this Court's free exercise cases, which recognize that granting cost-shifting accommodations unconstitutionally "impose[s] the [objector's] religious faith on" those who do not subscribe to the same beliefs. *Lee*, 455 U.S. at 261; *cf.* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins."). Accordingly, in both rejecting and accepting religious liberty claims, this Court has disapproved of religious exemptions that shift meaningful costs to identifiable non-adherents. That includes cases, both constitutional and statutory, in which the Court applied the kind of heightened scrutiny Petitioners urge here.

1. *United States v. Lee* is the leading case. *Lee* held that requiring an Amish employer to pay social security taxes on behalf of his employees, over his religious objection, did not violate the Free Exercise Clause. The Court made clear the "conflict between the [plaintiff's] faith and the obligations imposed" by the law was not its only concern; the "consequences of allowing religiously based exemptions" were also central to its analysis. 455 U.S. at 257, 259. The consequences there included reducing employees' social security benefits, a form of cost-shifting the Court concluded would "impose the employer's religious faith on the employees." *Id.* at 261; *see also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 304-05 (1985) (rejecting claim for religious exemption from Fair Labor Standards Act's protections that

would harm business's employees and competitors). Importantly, *Lee* rejected the free exercise claim even though the Court applied heightened scrutiny to the government's action. *Id.* at 257-58.

2.a. The Court has also shown its concern with cost-shifting accommodations when vindicating religious liberty claims, even under standards more protective of religious exercise than that of *Smith*.

Consider *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The absence of third-party harm was central to the Court's holding that the Free Exercise Clause required the government to exempt Amish children from a compulsory education law: "[A]ccommodating the religious objections of the Amish," the Court stressed, "will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society." *Id.* at 234. The Court insisted that "[t]his case … is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred," *id.* at 230, a point of contrast the *Lee* Court later seized on when denying the free exercise claim there. 455 U.S. at 259-60.

The absence of third-party harm was also critical in *Sherbert v. Verner*, 374 U.S. 398 (1963). There, the Court held that the Free Exercise Clause required the state to extend "unemployment benefits to Sabbatarians in common with Sunday worshippers." *Id.* at 409. But critically, the *Sherbert* exception did not burden

any identifiable individuals; instead, the minimal cost of exempting the small number of seventh-day observers was borne by the public at large. This kind of diffuse cost to the unemployment system raises no constitutional concern. *Infra* § III.B.

b. This Court's statutory cases further confirm that the propriety of a religious exemption turns on whether it shifts significant costs to identifiable individuals.

For instance, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 85 (1977), the Court rejected an employee's argument that his employer violated Title VII by failing to accommodate his request for Saturdays off for Sabbath observance. Title VII requires employers to "reasonably accommodate" employees' religious practice, but *Hardison*'s requested accommodation went too far: Granting it would "deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *Id.* at 81. The Court's conclusion that Title VII did not protect the employee obviated the need to decide whether, as the employer had argued, an interpretation of Title VII that required a more burdensome accommodation would violate the Establishment Clause. *Id.* at 70.[3] While some Justices have suggested that *Hardison*'s view that Title VII

[3] For a more thorough discussion of the Establishment Clause implications of *Trans World*, see Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, in *Law, Religion, and Health in the United States* 220-22 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017).

requires only accommodations that pose no more than a "de minimis burden" is inconsistent with the statute, *Patterson v. Walgreen Co.*, 140 S. Ct. 685, 685-86 (2020) (Alito, J., concurring in the denial of certiorari), Title VII's plain language—allowing employers to deny accommodations that pose an "undue hardship"—is perfectly consistent with the third-party harm principle.

More recently, this Court has granted accommodations under RLUIPA and RFRA only after assuring itself that third parties would not be harmed. For instance, in *Holt v. Hobbs*, 574 U.S. 352 (2015), the Court granted an exemption from a prison's grooming policy to an inmate who wished to grow a beard for religious reasons, where doing so would not impose any significant cost on the prison or other prisoners. *See id.* at 369; *id.* at 370 (Ginsburg, J., concurring) ("accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief").

This Court's cases addressing the Affordable Care Act's contraceptive mandate likewise embrace the third-party harm doctrine. The Court granted exemptions to religious objectors in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014), but only after noting that "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero." *Id.* And it granted an exemption in another case because that exemption would not "affect[] the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Wheaton Coll. v. Burwell*, 134

S. Ct. 2806, 2807 (2014); *see also Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (remanding to afford the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage"). *Hobby Lobby* indeed reaffirmed that the third-party harm principle is constitutional in nature, relying on *Cutter* (the Establishment Clause case) for the proposition that "[i]t is certainly true that in applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.'" 573 U.S. at 729 n.37 (quoting *Cutter*, 544 U.S. at 720).[4]

Together, these cases show that even if the Court were to abandon *Smith* and strictly scrutinize generally applicable laws that burden religious exercise, the third-party harm principle they espouse would still limit religious exemptions that hurt third parties.

II. The CSS Exemption Would Significantly Burden Third Parties.

The accommodation CSS seeks violates the third-party harm rule, as this Court has described and applied it. CSS asks this Court to exempt it from

[4] The Court's recent decision in *Little Sisters of the Poor* in no way abrogated the third-party harm principle, for no constitutional argument for or against the exemption was presented by the parties. 140 S. Ct. at 2382 n.10; *id.* at 2396 n.13 (Alito, J., concurring).

Philadelphia's nondiscrimination policy. Specifically, CSS seeks an exemption that would allow it to refuse to work with same-sex couples who wish to foster children in the state's care. Pet. App. 79a. Such an exemption would impose substantial harms on third parties. Those harms are both tangible and intangible, and they afflict potential LGBTQ foster parents and children in foster care in ways this Court has repeatedly recognized are deeply problematic. Petitioners and their amici can deny these harms only by overlooking the practical barriers and social stigma that come when the government allows its contractors to deny LGBTQ persons equal access to important services.

A. The CSS exemption would substantially harm LGBTQ adults.

The CSS exemption would inflict substantial harm on LGBTQ adults, both material and dignitary in nature.

Petitioners and their amici deny that the exemption would do any harm. They insist that allowing CSS to deny foster care services to same-sex couples does not hurt anyone because "no same-sex couple had even approached CSS," Petr. Br. 41, and because "other child-placing agencies are willing and available to perform" services for same-sex couples, Br. for Nebraska 30; *see also* Br. for 76 U.S. Senators & House Members 16-19 (similar).

These arguments fundamentally misunderstand the problem with the CSS exemption. It does not matter that no same-sex couple has yet approached CSS, or that other agencies are available, because the

relevant injury is not losing the chance to foster through CSS in particular. Instead, the harm is the denial of equal access to the foster care system and the practical barriers (a material injury) and stigma (a dignitary injury) that come along with that denial.[5] *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018) (material and dignitary harms flow from exemptions to nondiscrimination law); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (same); *see also* Tebbe, *Religious Freedom in an Egalitarian Age*, *supra*, 73 ("[O]fficials cannot accommodate religious actors in ways that harm the equal standing of all citizens before their government and in relation to each another"). As this Court has said, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," that "denial of equal treatment" is a cognizable injury, whether or not the members are eventually able to obtain the benefit. *N.E. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). After all, if CSS had turned away Black parents because of their race, no one would say that those parents—and the children they would foster—suffer no injury just because another agency could serve them. So too with same-sex couples.

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[5] Other faith-based agencies have rejected same-sex couples who seek to become foster parents. *E.g.*, *Rogers v. HHS*, No. 6:19-cv-1567, ECF 81 at 9-10 (D.S.C. May 8, 2020); *Marouf v. Azar*, 391 F. Supp. 3d 23, 25 (D.D.C. 2019). For them, the rejection is an additional injury.

1. Material harm to same-sex couples.

Allowing foster agencies to discriminate against same-sex couples makes it harder for those couples to participate in the foster care system. That is a substantial tangible injury. *See Masterpiece*, 138 S. Ct. at 1727 ("[I]t is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.").

First, the CSS exemption would reduce the number of agencies open to same-sex couples. As a result of that reduced access, same-sex applicants might not find matches at the same rate or speed as other applicants.[6]

Second, allowing agencies to turn away same-sex couples would force those couples to incur additional costs—in the form of time, money, and emotional toll—to identify agencies that *are* willing to work with them. *See* Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 Ala. C.R. & C.L. L. Rev. 129, 156 (2015) ("Religious refusals raise economic costs for

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[6] *See* Ruth G. McRoy et al., *Barriers and Success Factors in Adoption from Foster Care: Perspectives of Lesbian and Gay Families*, AdoptUSKids 2 (2010), https://tinyurl.com/y58q3msk (LGBT families who reported discrimination in the foster and adoption process also reported delays in getting matched with a child); Lori A. Kinkler & Abbie E. Goldberg, *Working With What We've Got: Perceptions of Barriers and Supports Among Small-Metropolitan Same-Sex Adopting Couples*, 60 Family Relations 387, 393 (2011), https://tinyurl.com/y3vuqxou (similar).

same-sex couples, most obviously in the form of search costs.").[7] This Court has long recognized that, even when other options are available, heightened search costs are a cognizable harm. After all, the employer in *Caldor* could have found other employees to stand in for the Sabbath-observing employee, and any employees who did not wish to take his place could have looked for employment elsewhere. Yet the Court nonetheless held that it was unconstitutional to force the "employer and others [to] adjust their affairs" and incur these additional costs to accommodate the religious objector. 472 U.S. at 709.

Petitioners and their amici focus on Philadelphia, but this case will affect the foster care system nationwide. In places where alternatives are not as readily available as they are in Philadelphia, the practical barriers same-sex couples face will be even greater.[8] In South Carolina, for instance, a religious agency that has been allowed to deny service to same-sex couples is the largest in the state, responsible for 15% of foster care placements. *Rogers*, No. 6:19-cv-1567, ECF 81 at 6-7, 22. In Michigan, "the ability of faith-based agencies to employ religious criteria as a basis to turn away same-sex couples erects at least a 20% barrier" to same-sex couples fostering a child. *Dumont v. Lyon*, 341 F. Supp. 3d 706, 722 (E.D. Mich. 2018). And even in Philadelphia, granting CSS an exemption from the nondiscrimination policy may prompt additional

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[7] *See* Kinkler & Goldberg, *supra*, 393 ("same-sex couples often … were forced to conduct time-consuming searches for gay-friendly agencies").

[8] *See* Kinkler & Goldberg, *supra*, 393.

agencies, who had believed such an exemption was out of reach, to claim it for themselves.

2. Dignitary harm to LGBTQ individuals.

a. The CSS exemption would injure LGBTQ adults in other ways, as well: It would "ha[ve] the effect of teaching that gays and lesbians are unequal in important respects." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

This Court has long recognized that antidiscrimination laws protect more than just material interests: Their "fundamental object [is] to vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Jaycees*, 468 U.S. at 625 (citation omitted).

"[G]ay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," *Masterpiece*, 138 S. Ct. at 1727, but the CSS exemption treats them in just that way. As *Masterpiece* made clear, expanding exemptions to nondiscrimination laws beyond a very narrow band—specifically, beyond the decision of clergy about which marriages to solemnize—would "result[] in a community-wide stigma." *Id.*

Once again, it is no defense that other agencies remain willing to work with LGBTQ applicants. After all, the dignitary harm in *Masterpiece* did not disappear just because the same-sex couple there could have (and indeed did) procure a cake elsewhere. JA 184-85, *Masterpiece*, No. 16-111.

b. The dignitary injury is aggravated because CSS would discriminate against LGBTQ persons while performing a core government function under a delegation of state authority.

CSS is not simply asking to be left alone to support foster children as it wishes, free of government regulation. Nor is CSS "assert[ing] a right to *participate* in a government benefit program without having to disavow its religious character." *Trinity Lutheran*, 137 S. Ct. at 2022 (emphasis added). Rather, CSS is asserting the right to *run* a government program according to its religious criteria; that is, it seeks to discriminate when it acts on behalf of the state. *See* 55 Pa. Code § 3700.61 ("The Department *delegates its authority* under Article IX of the Public Welfare Code (62 P.S. §§ 901-922) to inspect and approve foster families to an approved [Foster Family Care Agency]." (emphasis added)); Pet. App. 57a-61a (describing CSS's services contract with the government); Petr. Br. 5-6 (recognizing that it is the government's duty to find homes for neglected and abused children); *see also New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 164 (2d Cir. 2020) (citing the fact that CSS's relationship with Philadelphia is "contractual and compensatory" as a significant factor distinguishing CSS's free exercise claim from others).

Allowing CSS to discriminate against LGBTQ people while performing the government's duties to care for children in need "put[s] the imprimatur of the State itself on an exclusion that … demeans" LGBTQ people and denies them equal standing in the political community. *Obergefell*, 135 S. Ct. at 2602; *see Corp. of Presiding Bishop of Church of Jesus Christ of Latter-*

day Saints v. Amos, 483 U.S. 327, 337 n.15 (1987) (explaining that the *Caldor* exemption was unconstitutional because "Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees").[9]

The dignitary injury discrimination inflicts is so significant that avoiding it is a constitutional command. *Masterpiece*, 138 S. Ct. at 1727. That injury, along with the accompanying material harm, is at least grave enough that the government has a compelling interest in preventing it. *Contra* Petr. Br. 33-34; Br. for Nebraska 31.[10] As this Court explained in *Jaycees*, the government has a compelling interest in enforcing bans of sex discrimination, 468 U.S. at 625-26, and discrimination against LGBTQ people is discrimination on the basis of sex, *see Bostock v. Clayton*

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[9] CSS's role as a government contractor creates two additional constitutional problems with the exemption it seeks. First, allowing CSS to exercise "important, discretionary governmental powers" on the basis of religious criteria amounts to a "fusion of governmental and religious functions" in violation of the Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982). Second, one amicus has argued that allowing CSS to discriminate against foster parents violates the Equal Protection Clause. *See* Lawrence Sager & Nelson Tebbe, *The Missing Equal Protection Argument in* Fulton, Balkinization (July 29, 2020), https://tinyurl.com/y4uwdhks.

[10] While the Religion Clauses prohibit exemptions even where third-party harms fall short of those the government has a compelling interest in preventing, *see* Schwartzman, Tebbe & Schragger, *Costs of Conscience*, *supra*, 796-97, the harms at issue here meet that higher standard.

County, 140 S. Ct. 1731, 1737 (2020). The government's interest is no less compelling just because CSS objects to the nondiscrimination rule on religious grounds. Indeed, in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 n.5 (1968), this Court rejected as "patently frivolous" the argument that enforcement of the 1964 Civil Rights Act's nondiscrimination provision violated a religious objector's free exercise rights at a time when *Sherbert*'s strict-scrutiny standard applied to such claims.

c. Petitioners' amici try in two ways to minimize the dignitary harm the CSS exemption inflicts. Neither attempt succeeds.

First, they downplay the dignitary harm by arguing that CSS is acting on longstanding, well-known, and well-meaning religious beliefs and "so people would not be surprised by its policies." Br. for Nebraska 32. But *Obergefell* made clear that even "long … held," "good faith" opposition based on "decent and honorable religious … premises," when channeled through the state, "demeans" and "stigmatizes" LGBTQ couples and "diminish[es] their personhood." 135 S. Ct. at 2594, 2602. *Masterpiece* further confirmed that same-sex couples can be stigmatized even when refusals to serve them reflect "deep and sincere religious beliefs" and are "understandable" in some respects. 138 S. Ct. at 1728. Whether LGBTQ people would be "surprised" by CSS's position is irrelevant for the additional reason that the injury extends beyond subjective feelings of hurt and humiliation—whether anticipated or not—to a fundamental altering of the relationship between LGBTQ people and their government. *See* Elizabeth S.

Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503, 1524 (2000).

Second, Petitioners' amici try to shift the focus to the dignitary harm they say CSS suffers from *not* receiving the exemption. *E.g.*, Br. for Nebraska 32-33. We do not deny that CSS is sincerely aggrieved by application of the nondiscrimination rule and may feel that its faith has been "impugn[ed]." *Id.* at 32. But from a constitutional perspective, CSS's injury is different in kind from the injury experienced by the LGBTQ applicants. That is because Philadelphia's nondiscrimination rule does not single out CSS—or any other organization that shares its religious values—for special disfavor because of who they are or what they believe. *Contra* Petr. Br. 22 ("Philadelphia has imposed special disabilities on CSS because of its religious beliefs."). Rather, Philadelphia's nondiscrimination rule prohibits exclusionary *practices* and does so across the board, whether those practices are religiously or secularly motivated. *Infra* § III.C. Because CSS is burdened by a civil rights law that applies to everyone, it is not being disfavored because of its religion and its equal citizenship is not diminished. *See* Tebbe, *Religious Freedom in an Egalitarian Age*, *supra*, 118.

B. The CSS exemption would substantially harm children.

The CSS exemption does not just hurt prospective same-sex foster parents. Children also suffer when foster agencies are allowed to discriminate against same-sex couples.

a. First, the CSS exemption deprives needy children of qualified families by shrinking the pool of potential foster parents. *See* Pet. App. 130a; JA 268. Same-sex couples are much more likely to foster and adopt children than different-sex couples are.[11] As this Court noted in *Obergefell*, gay and lesbian people create "loving and nurturing homes" for "hundreds of thousands of children." 135 S. Ct. at 2600. Allowing CSS to exclude them will hurt the children CSS is responsible for placing, lowering their odds of finding a match.

Other foster children will be hurt, too. When couples know that agencies can refuse to work with them because they are LGBTQ, they may be more reluctant to participate in the foster care system at all, even if there are agencies out there who would work with them.[12] That is especially true in communities where agencies opposed to working with same-sex couples predominate. *See supra* 16. And even couples who are not dissuaded at the outset may run out of resources

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[11] Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children*, Williams Institute (2018), https://tinyurl.com/y28mrspx (same-sex couples with children seven times more likely than opposite-sex couples with children to foster or adopt).

[12] In states with religious exemptions, prospective parents "understandably become discouraged about finding a welcoming agency and choose to abandon their efforts" before being matched with a child. Frank J. Bewkes et al., *Welcoming All Families: Discrimination Against LGBTQ Foster and Adoptive Parents Hurts Children*, Center for American Progress ¶ 52 (2018), https://tinyurl.com/ycltubn2.

(material or mental) to keep up the effort after they have been turned away.

The stakes are especially high for children of color, who are overrepresented in the child welfare system.[13] Because LGBTQ foster and adoptive parents are more likely to foster and adopt children with historically lower placements rates—such as children of color, as well as large sibling sets and children with special needs—reducing LGBTQ access to foster and adoption programs will likely disparately impact these already vulnerable foster children.[14]

The consequences are similarly serious for LGBTQ youth, who are likewise disproportionately represented in the foster care system[15] and are more

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[13] U.S. Dep't of Health & Human Servs., Admin. on Children, Youth & Families, Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare* (2016), https://tinyurl.com/y3a4yr8r (African American children constituted 13.8% of the 2014 U.S. child population but 22.6% of the child welfare system; for Native American children, the rates were 0.9% and 1.3%, respectively.).

[14] Family Equality, *Response to Notice of Proposed Rule Making (NPRM), RIN 0991-AC16* at 11 (Dec. 19, 2019), https://tinyurl.com/yy4ll24r; *see also* David M. Brodzinsky, *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians*, Evan B. Donaldson Adoption Institute 22 (2011), https://tinyurl.com/y55mxdcn (60.1% of same-sex adoptions were transracial).

[15] Christina Wilson Remlin et al., *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* Children's Rights, Lambda Legal & Ctr. for the Study of Soc. Policy 2 (2017), https://tinyurl.com/y52m8yjn (LGBTQ youth make up 25% of child welfare system population).

likely to be treated poorly by that system.[16] Barring same-sex couples from fostering deprives these vulnerable youth of parents who are especially well positioned to boost their "[i]dentity development, self-concept, self-esteem, [and] self-efficacy"—all critical to their wellbeing.[17]

The CSS exemption also increases the risk that LGBTQ children will be placed in homes that are not accepting of them—or worse. Placing children in family foster homes or under the care of providers who condone discrimination undermines their wellbeing.[18]

What is more, when government facilitates discrimination against LGBTQ adults, it "sends … a very strong signal" to LGBTQ youth "that their rights are not protected and [their government] do[esn't] care about them" and "won't support [their] rights as an adult." JA 280-81. This dignitary injury is even worse for LGBTQ youth than it is for LGBTQ adults: The "eras[ure]" wrought by religious exemptions that deny or deter LGBTQ people from seeking or receiving goods and services "is particularly dangerous" for

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[16] Human Rights Campaign, *LGBTQ Youth in the Foster Care System* 3, https://tinyurl.com/y3r8gt9k (last visited Aug. 19, 2020).

[17] U.S. Dep't of Health & Human Servs., Admin. on Children, Youth & Families, *Information Memorandum ACYF-CB-IM-12-04* (2012), https://tinyurl.com/y5wxlejl.

[18] Youth Law Center, *Response to Request for Public Comments on Proposed Regulation RIN 0991-AC16* at 3 (Dec. 19, 2019), https://tinyurl.com/y5ee5w28.

LGBTQ youth because it affects them just as they "are developing a sense of agency."[19]

b. Petitioners' amici are wrong that *denying* the CSS the exemption is what hurts children. *E.g.*, Br. for Nebraska 31; Br. for 76 U.S. Senators & House Members 16-17.

The district court found, based on record evidence, that CSS's decision to close intake "has had little or no effect on the operation of Philadelphia's foster care system." Pet. App. 66a, 128a; *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (appellate courts may set aside only clearly erroneous factual findings). Other agencies, including faith-based organizations like Bethany Christian Services that oppose same-sex marriage but are willing to abide by the city's nondiscrimination rule, have met the system's needs. Pet. App. 39a, 103a. And even if, hypothetically, enough agencies withdrew to affect children, the government could increase funding to existing agencies, encourage new organizations to step in, or perform the needed services itself.

Philadelphia's foster children can still benefit from CSS's efforts specifically. The foster parents that CSS has certified can transfer to other agencies, Pet. App. 127a, and CSS itself can continue to support needy children in other important ways. After all, CSS's multimillion-dollar contract to provide case management services and congregate care homes for

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[19] Human Rights Watch, *"All We Want is Equality": Religious Exemptions and Discrimination Against LGBT People in the United States* 33 (2018), https://tinyurl.com/y5rvcx7u.

the city's foster children remains in place. Pet. App. 16a, 187a; JA 208-09, 505. And CSS can still arrange private adoptions and support children through other charitable efforts, including "recruit[ing], train[ing], and support[ing]" foster parents for other agencies to certify. Petr. Br. 5; *see* Catholic Social Services: Adoption, http://adoption-phl.org (last visited Aug. 19, 2020). So it is simply not the case that "Philadelphia is attempting to exclude CSS from its historical ministry of caring for foster children." Petr. Br. 51; *see also* CLS Br. 23 ("Philadelphia has entirely barred CSS from its religiously motivated work of helping children in need, unless CSS surrenders its conscience concerning the nature of marriage.").

III. No Exception To The Third-Party Harm Rule Justifies The CSS Exemption.

The third-party harm rule limits how far government (including courts) may go to accommodate religious practice. But it is not without limits of its own. None of those limits, however, applies here.

A. The Constitution does not bar cost-shifting exemptions that protect a religious institution's internal governance, but Philadelphia has not impinged on CSS's internal governance.

1. Cost-shifting exemptions from neutral, generally applicable laws may be permissible when they are necessary to protect a religious institution's internal governance. As this Court noted recently, the First Amendment "does not mean that religious institutions enjoy a general immunity from secular laws,

but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

Accordingly, this Court has recognized that third parties can be made to bear the costs of exemptions—specifically, exemptions from employment nondiscrimination laws—when such exemptions safeguard a religious institution's ability to select individuals who perform important religious duties, *see id.* at 2066 (religious-instruction teachers); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 191-92 (2012) (same), and shape its internal organization, *Amos*, 483 U.S. at 339 (nonprofit facility run by church could require employees to be church members). Those efforts are central to the religious community's ability to constitute itself. And so relief from laws that frustrate them are necessary to preserve "the independence of religious institutions," *Our Lady of Guadalupe School*, 140 S. Ct. at 2055, and therefore override the prohibition on third-party harms.[20]

2. The CSS exemption is not about protecting the organization's institutional independence, for CSS does not seek the exemption so it may choose its leaders or define and reproduce itself as a religious

[20] For more on the relationship between these cases and the third-party harm principle, see Schwartzman, Tebbe & Schragger, *Costs of Conscience*, *supra*, 792-94, and Micah Schwartzman, Richard Schragger & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling* Amos *and* Cutter, Balkinization (Dec. 9, 2013), https://tinyurl.com/y4wu9xkh.

community, free from government intrusion. Rather, although no one doubts CSS's religious objections are sincerely held, there is no avoiding the consequences of its position: CSS seeks to use the power of the state to define the families others would make.

The importance of this point cannot be overstated. CSS's status as a government contractor not only magnifies the harm of granting the exemption (*supra* 18-20), it also minimizes CSS's interests in obtaining it. Further still, it shows CSS's free exercise rights are not burdened *at all*.

To be sure, CSS considers performance of its foster-care contract part of its "religious ministry," Petr. Br. 32, and "religious mission," JA 165. But unlike the exemptions this Court has granted in the past, the CSS exemption is not aimed at "*alleviating* significant governmental *interference* with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 339 (emphasis added); *see* Petr. Br. 5-6 (acknowledging "CSS has no preexisting right to determine the fate of" foster children). CSS does not need the exemption so it may "decide for [itself], free from state interference, matters of church government as well as those of faith and doctrine," because the city's policy in no way intrudes on those matters. *Our Lady of Guadalupe School*, 140 S. Ct. at 2055; *id.* at 2060 (referring to the "intrusion" and "interference" the "First Amendment outlaws"). Nor does CSS need the exemption to continue to support child welfare. *Supra* 26. Instead, CSS is claiming the right to use the delegated authority of the government to impose its religious vision on others. Blocking CSS from doing that in no way encroaches on the

independence of religious institutions the First Amendment protects, and the third-party harm principle therefore applies.

3. Indeed, by enforcing the neutral terms of its contracts, Philadelphia has not burdened CSS's religious exercise at all. No one is entitled to exercise the power of the state according to his own religious precepts. *See Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-17 (2013) (citing instances in which the government could constitutionally decline to subsidize certain constitutionally protected activity); *cf. Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (the First Amendment does not protect government employees' speech in their official capacities). A party is not burdened when it is "simply not the beneficiary of something that [the] law does not provide." *Little Sisters of the Poor*, 140 S. Ct. at 2396 (Alito, J., concurring).

B. The Constitution does not prohibit exemptions that impose only insignificant, uncertain, or diffuse costs, but the CSS exemption will significantly burden a discrete group.

As our earlier discussion (at 9-12) explains, religious accommodations that impose slight, speculative, or diffuse costs do not fall afoul of the third-party harm principle. The exemption in *Sherbert*, which allowed Saturday Sabbath observers to collect

unemployment benefits despite not meeting eligibility requirements, was constitutional because its costs were spread across the wide swath of the public contributing to the unemployment insurance program. 374 U.S. at 408. The exemption in *Yoder* was permissible because it was "highly speculative" that any children would be hurt. 406 U.S. at 224. And the prisoner in *Holt v. Hobbs* could grow his half-inch beard without hurting anyone. *Supra* 11.

This limit on the third-party harm principle should assuage those amici who worry that denying the CSS exemption will lead to tragic and indefensible results, as in the case of Mary Stinemetz—a Jehovah's Witness who died after her state's Medicaid administrators denied her request for a bloodless transplant that would accord with her religious beliefs. *E.g.*, Bruderhof Br. 9; LDS Br. 5; CLS Br. 2-3. Stinemetz could have been accommodated consistent with the third-party harm rule, because the costs would have been borne by the public, via her government insurer. *See* Tebbe, Schwartzman & Schragger, *How Much May Religious Accommodations Burden Others*, *supra*, 218-19, 228; Tebbe, *Religious Freedom in an Egalitarian Age*, *supra*, 61. As we have explained (§ II), that is not true of the CSS exemption—its costs are substantial and certain and fall on a discrete set of individuals: would-be LGBTQ foster parents and children in the foster care system.

C. Government may—and sometimes must—remedy religious discrimination but Philadelphia has not discriminated against CSS because of its religion.

The third-party harm rule does not mean that government may never remedy instances of religious discrimination. But in enforcing its nondiscrimination policy, Philadelphia has not discriminated against CSS. And even if it had, a general cost-shifting exemption would not be the appropriate remedy.

1. As others have explained, Philadelphia has not discriminated against CSS because of its religious status or beliefs. *See generally* Resp. Br. 28-43; Intervenor-Respondents' Br. 28-41.

For one, Philadelphia did not stop contracting with CSS because of "what [CSS] is"—a religious institution. *Trinity Lutheran*, 137 S. Ct. at 2023. Philadelphia terminated the contract because of what CSS would do—violate the nondiscrimination requirement of that contract by turning away same-sex couples. Pet. App. 39a. Unlike the government actors in *Espinoza* and *Trinity Lutheran*, then, the city did not "discriminate[] based on religious status." *Espinoza*, 140 S. Ct. at 2257; *contra* Petr. Br. 22.

Nor did Philadelphia target CSS because of its religious-based beliefs about marriage. *Contra* Petr. Br. 22-24. The city's willingness to maintain its community-umbrella contract with CSS and to continue to contract for foster-care services with Bethany Christian, a religious organization that opposes same-sex marriage, proves as much. *Supra* 25-26. And as

Respondents and Intervenor-Respondents have explained, the various comments and actions of city officials Petitioners point to are either irrelevant or innocuous. Resp. Br. 39-43; Intervenor-Respondents' Br. 31-33; *see* Pet. App. 94a, 97a-99a (district court finding that the mayor had no involvement in the decision to stop contracting with CSS and that other comments did not display animus).

Finally, Philadelphia has not enforced the nondiscrimination requirement selectively, exempting others from it while applying it to CSS. *Contra* Petr. Br. 25-26; U.S. Br. 21-23; *see* Resp. Br. 28-35; Intervenor-Respondents' Br. 30-31, 33-41. The district court found that "[t]here is no evidence in the record to show that [the city's Department of Human Services] has granted any secular exemption to the requirement that its foster care agencies provide their services to all comers." Pet. App. 100a. The "purported secular exemptions to which Plaintiffs point," the court found, "are not, in fact, exemptions" to the nondiscrimination requirement. Pet. App. 100a-101a. Far from being "reverse-engineered" to target CSS, Petr. Br. 17, that policy is longstanding, dating back to the 1980s. Pet. App. 86a; JA 146, 298.

2. Even if this Court were to find—contrary to the record—that Philadelphia did unconstitutionally target CSS, a general, cost-shifting exemption would still not be justified.

The question is whether CSS is entitled to an exemption going forward. This Court has long recognized that, even when government action is motivated by a discriminatory purpose, the decision can still

stand if the government would have made the same decision absent that discriminatory purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *see also* Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 Harv. L. Rev. 133, 153-54 (2018). In other words, past animus does not forever bar enforcement of otherwise neutral rules.

Here, it is impossible to say that Philadelphia's current insistence that CSS follow its generally applicable, categorical nondiscrimination requirement is "inexplicable by anything but animus." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (citation omitted). Philadelphia has many good reasons—indeed, compelling reasons, *supra* 19-20; Intervenor-Respondents' Br. 44-51—to insist that those who carry out its duties do not discriminate.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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