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 FOR NEBRASKA, ARIZONA, AND OHIO AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DOUGLAS J. PETERSON
Attorney General of Nebraska
DAVID T. BYDALEK
Chief Deputy Attorney General
JAMES A. CAMPBELL
Solicitor General
Counsel of Record
OFFICE OF THE NEBRASKA ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
jim.campbell@nebraska.gov

Counsel for Amici Curiae

[Additional counsel listed at end of brief]

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT................................... 2

ARGUMENT 5

I. Faith-based organizations, both historically and today, provide essential charitable services for foster children. 5

A. Faith-based organizations throughout our nation's history have always been free to serve foster children...................................... 6

B. Faith-based organizations continue to provide indispensable charitable work caring for foster children. 10

1. Religious organizations excel at recruiting and retaining a diverse pool of high-quality foster parents willing to serve the neediest children..................... 12

2. Many States rely on religious organizations when administering their foster-care programs. 19

II. Philadelphia's ban on Catholic Social Services' foster-care ministry must survive strict scrutiny. 22

III. Philadelphia's ban on Catholic Social Services' foster-care ministry fails strict scrutiny.... 29

A. Philadelphia's nondiscrimination interests do not satisfy strict scrutiny. 29

B. Philadelphia's Establishment Clause interests do not satisfy strict scrutiny............ 34

CONCLUSION.. 38

TABLE OF AUTHORITIES

Cases

American Legion v. *American Humanist Association*,
139 S. Ct. 2067 (2019) 35

Brown v. *Entertainment Merchants Association*,
564 U.S. 786 (2011) 32

Burwell v. *Hobby Lobby Stores, Inc.*,
573 U.S. 682 (2014) 32, 33, 38

Christian Legal Society v. *Martinez*,
561 U.S. 661 (2010) 26

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 29

Cutter v. *Wilkinson*,
544 U.S. 709 (2005) 38

Employment Division v. *Smith*,
494 U.S. 872 (1990) 22, 24

Estate of Thornton v. *Caldor, Inc.*,
472 U.S. 703 (1985) 37

Free Enterprise Fund v. *Public Company Accounting Oversight Board*,
561 U.S. 477 (2010) 27

Gonzales v. *O Centro Espirita Beneficente Uniao do Vegetal*,
546 U.S. 418 (2006) 30, 31, 33

Grutter v. *Bollinger*,
539 U.S. 306 (2003) 31

Hosanna-Tabor Evangelical Lutheran Church & School v. *EEOC*,
565 U.S. 171 (2012) ....passim

Kedroff v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*,
344 U.S. 94 (1952) 23

Larkin v. *Grendel's Den, Inc.*,
459 U.S. 116 (1982) 36, 37

Leshko v. *Servis*,
423 F.3d 337 (3d Cir. 2005)................................... 9

Locke v. *Davey*,
540 U.S. 712 (2004) 28

Loving v. *Virginia*,
388 U.S. 1 (1967) 34

Marsh v. *Chambers*,
463 U.S. 783 (1983) 26, 35

Masterpiece Cakeshop, Ltd. v. *Colorado Civil Rights Commission*,
138 S. Ct. 1719 (2018) ....passim

Mitchell v. *Helms*,
530 U.S. 793 (2000) 36

Obergefell v. *Hodges*,
135 S. Ct. 2584 (2015) 31, 34

Peña-Rodriguez v. *Colorado*,
137 S. Ct. 855 (2017) 33

Serbian Eastern Orthodox Diocese for the United States of America & Canada v. *Milivojevich*,
426 U.S. 696 (1976) 24

Thomas v. *Review Board of the Indiana Employment Security Division*,
450 U.S. 707 (1981) 25

Town of Greece, New York v. *Galloway*,
572 U.S. 565 (2014) 34

Trinity Lutheran Church of Columbia, Inc. v. *Comer*, 137 S. Ct. 2012 (2017) 23, 25, 26, 28

Van Orden v. *Perry*, 545 U.S. 677 (2005) 35

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 30

Zelman v. *Simmons-Harris*, 536 U.S. 639 (2002) 36

Statutes

42 U.S.C. § 2000a(b)... 33

42 U.S.C. § 2000e-1(a).. 33

Ala. Code § 26-10D-5.. 22

Kan. Stat. Ann. § 60-5322.. 22

Miss. Code. Ann. § 11-62-5(2) 22

N.D. Cent. Code § 50-12-07.1................................... 22

Okla. Stat. tit. 10A, § 1-8-112 22

S.D. Codified Laws § 26-6-41 22

Tex. Hum. Res. Code Ann. § 45.004 22

Other Authorities

Anna Claire Vollers, *Religious freedom or taxpayer-funded discrimination? Child welfare bill prompts debate*, Alabama.com (Feb. 8, 2017), bit.ly/3bXGYmK 21

AFCARS Report, U.S. Dep't of Health and Hum. Servs. (2018), bit.ly/2LyUKS4.............................. 10

Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, The Chron. of Soc. Change (Nov. 28, 2017), bit.ly/2T6mP7F 14, 21

Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, *in* Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs (Gerald P. Mallon & Peg McCartt Hess eds., 2005) ... 6, 7, 8

Catherine E. Rymph, Raising Government Children: A History of Foster Care and the American Welfare State (2017) 6, 7

David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. Va. L. Rev. 459 (1999) 7

Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems, U.S. Dep't of Health and Hum. Servs. (March 2008), bit.ly/2T0GMg6 6

Grace Abbott, The Child and the State (1938) 8

Laura Radel et al., Substance Use, the Opioid Epidemic, and the Child Welfare System: Key Findings from a Mixed Methods Study, U.S. Dep't of Health and Hum. Servs. (Mar. 7, 2018), bit.ly/2WUKjxC 11

Legislative Testimony of Steven Roach, Executive Director of Catholic Charities Diocese of Springfield, Illinois, supporting Kansas's Senate Bill 401 (Mar. 20, 2018), bit.ly/2LVtptH 18, 19

LeRoy Ashby, Endangered Children: Dependency, Neglect, and Abuse in American History (1997) 9

Letter from Henry McMaster, Governor of South Carolina, to Steven Wagner, Acting Assistant Secretary of U.S. Admin. for Children and Families (Feb. 27, 2018), bit.ly/3680L1w 20

Letter from Ken Paxton, Attorney General of Texas, to Lynn Johnson, Assistant Secretary of U.S. Admin. for Children and Families (Dec. 17, 2018), bit.ly/2LCnucC 21, 22

Linda Gordon, Child Welfare: A Brief History, bit.ly/3blp4KA.. 7

Manya A. Brachyear, *Three Dioceses Drop Foster Care Lawsuit*, Chi. Trib. (Nov. 15, 2011), bit.ly/3g0cWlz 17

Mary Ellen Cox et al., *Recruitment and Foster Family Services*, 29 J. Sociology & Social Welfare 151 (2002) 12, 13, 16, 18

Mary L. Gautier & Jonathon L. Wiggins, 2014 Annual Survey Final Report, Catholic Charities USA (June 2015), bit.ly/2XigDdY 19

Michael Howell-Moroney, *Faith-Based Partnerships and Foster Parent Satisfaction*, 36 J. Health and Hum. Servs. Admin. 228 (2013) 13, 14, 16, 17

Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, 19 J. of Pub. Mgmt. & Soc. Pol'y 168 (2013)........ 15

Michael Howell-Moroney, *The Empirical Ties between Religious Motivation and Altruism in Foster Parents*, 5 Religions 720 (2014) 12, 18

Naomi Cahn, *Perfect Substitutes or the Real Thing?*,
52 Duke L.J. 1077 (2003) 7, 8

Nebraska Unicameral Judiciary Committee Transcript (Feb. 17, 2016),
bit.ly/3cAdUD2 .... 13, 15, 20

Non-Relative Homes, Who Cares: A National Count of Foster Homes and Families,
bit.ly/3bMboZc 17

Priscilla Ferguson Clement, *Families and Foster Care: Philadelphia in the Late Nineteenth Century*, *in* Growing up in America: Children in Historical Perspective
(N. Ray Hiner & Joseph M. Hawes eds., 1985) 9

Ron Haskins et al., *Keeping Up with the Caseload: How to Recruit and Retain Foster Parents*, Brookings Institution (Apr. 24, 2019),
brook.gs/3fRoeZz... 16

Sandra-Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*,
14 The Future of Children 74 (2004) 13

Shamber Flore, *My Adoption Saved Me*, The Detroit News (Mar. 7, 2018),
bit.ly/3cEOPaj.. 15

Stephen Monsma, Pluralism and Freedom: Faith-based Organizations in a Democratic
Society (2012)... 19, 20

Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*,
60 Ohio St. L.J. 1295 (1999)................................... 6

Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279 (2013) 20

Youth in Care, Who Cares: A National Count of Foster Homes and Families, bit.ly/3dW0fGH 17

INTEREST OF AMICI CURIAE

The Amici States of Nebraska, Arizona, and Ohio operate foster-care programs for needy and neglected children, and they partner with private organizations—including faith-based groups—when carrying out that crucial work.

This case raises critical legal issues surrounding the relationships between States and private religious foster-care organizations. The petitioners' free-exercise claim asks whether local governments may *exclude* those faith-based organizations because of their religious beliefs. And the respondents' Establishment Clause defense asks whether local governments may *include* those groups if they operate according to their religious beliefs. Amici States seek guidance on these issues.

Clarity on the free-exercise question is important. States often face political pressure to end their partnerships with religious foster-care organizations. A clear pronouncement that the Free Exercise Clause forbids States from excluding those groups because of their beliefs will help States respond to those demands.

Equally important is guidance on the Establishment Clause issue. Many States want to keep working with faith-based agencies because their long-standing partnership with those groups is indispensable to the foster care they provide. And many of those States do not want to force religious organizations to violate their beliefs as the cost of continuing their foster-care services. Rejecting the respondents' Establishment Clause arguments would ensure that States may continue their partnerships with faith-

based child-placing agencies. And it would make clear that the Establishment Clause poses no barrier to religious foster-care organizations' operating consistently with their beliefs about marriage.

Amici States seek a ruling based on general principles that will provide national guidance. Decisions turning on factual peculiarities, such as idiosyncratic comments by government officials, are not as helpful in bringing national clarity to important issues of ongoing debate. States and political subdivisions are currently navigating these legal issues, and both the freedom of religious organizations and the welfare of our nation's children are at stake. General guidance is in order.

SUMMARY OF ARGUMENT

Philadelphia is forcing a religious organization to stop charitable work that it has been doing for more than a century and that countless other religious organizations have been doing since our nation's founding. Because there is no compelling reason for this—indeed, all it does is reduce foster-care resources and threaten to undermine the welfare of children—Philadelphia has violated the Free Exercise Clause.

I. Faith-based organizations in America have always been free to care for foster children according to their faith. During colonial times and for a century after the founding, those organizations cared for needy and neglected children with little to no government involvement. When the States began to get more involved in the late 1800s, they did so mostly by funding private organizations—including religious ones—that were already caring for children. It was not until many decades later that the States assumed a more

active role. But even then, they continued to partner with faith-based organizations to provide foster-care services.

Those partnerships continue to this day. Faith-based organizations provide vital resources to States that are heavily burdened by the difficulties facing the modern foster-care system. By appealing to prospective foster parents based on a shared religious calling, faith-based groups have been particularly effective at recruiting foster parents. And by providing strong community support based on a common faith, those organizations have excelled at retaining foster parents for the long haul. In addition, foster parents who work with faith-based agencies tend to perform well, foster more children, and volunteer for some of the most difficult placements.

Given the success of these organizations, many States continue to rely on them. For instance, approximately 30 percent of the child-placing agencies in Nebraska and Alabama are religious groups. And 40 percent of foster parents in Arkansas are recruited through a faith-based organization. Statistics like these show that many States—and the numerous foster children they serve—would face great hardships if religious organizations are excluded from the foster-care system.

II. This background demonstrates why strict scrutiny applies to Catholic Social Services' free-exercise claim. While Catholic Social Services makes a compelling argument that facts peculiar to this case prove a lack of religious neutrality, general principles equally establish that strict scrutiny is the proper standard. In particular, governmental action is suspect—and

must undergo rigorous review—when it excludes a religious organization, because of its beliefs, from carrying out a charitable religious mission that faith-based organizations have been free to pursue throughout our nation's history. Since that is what Philadelphia has done, strict scrutiny applies. Adopting this rule—more so than a decision turning on comments by Philadelphia officials or other idiosyncratic facts in this case—would provide much-needed guidance to States and local subdivisions administering our nation's foster-care system.

III. Facing the rigors of strict scrutiny, Philadelphia has not satisfied that demanding standard. The city asserts an interest in preventing discrimination, but that interest fails under the facts of this case. Catholic Social Services' decision to operate consistently with its religious beliefs causes no tangible harm. Dozens of other agencies are available to evaluate and approve same-sex couples wanting to adopt. The only tangible harm comes from Philadelphia's decision to exclude Catholic Social Services because that reduces foster-care resources and jeopardizes the welfare of children.

Without tangible harm, Philadelphia relies on its desire to shield the dignity of its citizens. But that interest does not override a religious organization's choice not to recognize a same-sex marriage when, as here, that choice is "well understood in our constitutional order as an exercise of religion." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). Catholic Social Services declines to recognize same-sex marriages only when choosing foster-parent partners for its foster-care

ministry. The group otherwise provides its charitable services to LGBT individuals. Under these circumstances, Philadelphia's asserted interests cannot overcome Catholic Social Services' legitimate exercise of religion.

Lastly, Philadelphia's professed Establishment Clause interest cannot satisfy strict scrutiny. The historical record—which shows that faith-based organizations have been caring for foster children since our nation's founding, and that States have been contracting with those organizations and subsidizing their work since at least the late 1800s—refutes any Establishment Clause argument. If that were not enough, Philadelphia's system of true private choice further alleviates any Establishment Clause concerns. The funds that pass through Catholic Social Services to foster parents only do so because of those parents' independent choice to work with a religious group. The Establishment Clause does not forbid that.

ARGUMENT

I. Faith-based organizations, both historically and today, provide essential charitable services for foster children.

Faith-based organizations have been—and continue to be—indispensable to serving foster children in America. The historical record shows that they have been doing this critical work since long before the government became actively involved. And their current operations demonstrate that they continue to play a substantial role in meeting the needs of vulnerable children.

A. Faith-based organizations throughout our nation's history have always been free to serve foster children.

Our nation's "history depicts a privately operated child welfare system that preceded the entry of public agency participation." Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 Ohio St. L.J. 1295, 1298 (1999); accord Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems, U.S. Dep't of Health and Hum. Servs., at 2 (March 2008), bit.ly/2T0GMg6 ("[C]hild welfare services actually originated in the private sector"). The historical record tells how "foster care had originally been provided by private agencies" and "public agencies later join[ed] as partners." Mangold, *supra*, at 1298. Faith-based organizations have always been at the forefront of this work.

1. "[F]oster care in the United States extends back to various colonial practices" such as "indenture and apprenticeship." Catherine E. Rymph, Raising Government Children: A History of Foster Care and the American Welfare State 18 (2017). During that time and extending into the early years of the republic, most needy or neglected children "were cared for in almshouses . . . until the age of eight or nine," while older children were indentured or apprenticed. Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, *in* Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs 10, 12 (Gerald P. Mallon & Peg McCartt Hess eds., 2005). Those older children would be taken in by families, cared for, and taught work skills in exchange for

their labor. David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. Va. L. Rev. 459, 460–61 (1999).

"A few private institutions for orphans were also established during the early colonial period. The first such orphanage in the United States was the Ursuline Convent," a Catholic institution "founded in New Orleans in 1727." McGowan, *supra*, at 12. Later, America saw a "dramatic increase in the number of orphanages," particularly during the second half of the 1800s. *Id.* at 13. "[B]y 1880 there were over six hundred orphanages in the United States serving more than fifty thousand children." Rymph, *supra*, at 19. "Most were privately run by religious and charitable groups," Linda Gordon, Child Welfare: A Brief History, bit.ly/3blp4KA, and "[a]lmost half of children in orphanages at the end of the nineteenth century were living in Catholic institutions," Rymph, *supra*, at 19.

In the middle of the 1800s, theologian Charles Loring Brace began advocating for an alternative to institutional settings for children. Rymph, *supra*, at 20–21. Believing that children need "the wholesome effects of family life," he "created the Children's Aid Society" in New York City in 1853 and "soon instituted his famous 'placing out' program, better known today as the 'orphan trains.'" *Id.* at 21. That program, which quickly expanded from New York to "most of the other major eastern cities," sent homeless or destitute children to live with religious families, mainly in rural locations. McGowan, *supra*, at 14; see also Naomi Cahn,

Perfect Substitutes or the Real Thing?, 52 Duke L.J. 1077, 1091 (2003) ("Mid-nineteenth-century child-saving organizations" like the Children's Aid Society placed children "with foster families"). Mirroring what we now call foster care, "parents temporarily 'delegated' [their parental] rights" to these families and would "reclaim[ ] . . . their children" once their circumstances improved. Cahn, *supra*, at 1094.

A related faith-based trend—known as the Children's Home Society movement—also began spreading in the late 1800s. McGowan, *supra*, at 14. That movement saw private organizations serve as "statewide child-placing agencies under Protestant auspices," with those groups "provid[ing] free foster homes for dependent children." *Ibid.* "[B]y 1916, there were 36 Children's Home Societies, located primarily in midwestern and southern states." *Ibid.*

2. After leaving foster care in the private sector for so long, many state and local governments began to reassess their role in the latter part of the 1800s. Starting slowly, most States "drifted into the policy of aiding private institutions because they were unwilling to accept responsibility for the care of the dependent, and because it seemed to be cheaper to grant some aid to private institutions than for the state to provide public care." McGowan, *supra*, at 18 (quoting Grace Abbott, The Child and the State 15 (1938)). New York State is a prime example: by the late 1800s, local communities there "paid a per capita subsidy to voluntary, primarily sectarian, agencies for the care of dependent children." *Ibid.*

Pennsylvania followed this general pattern of delayed governmental involvement in foster care. The responsibility for placing children in foster homes originally fell on private organizations. *Leshko* v. *Servis*, 423 F.3d 337, 343 (3d Cir. 2005) (citing LeRoy Ashby, Endangered Children: Dependency, Neglect, and Abuse in American History 55–61 (1997)). And faith-based organizations, such as the Home Missionary Society of Philadelphia, played a prominent role. *Id.* at 343–44 (citing Priscilla Ferguson Clement, *Families and Foster Care: Philadelphia in the Late Nineteenth Century*, *in* Growing up in America: Children in Historical Perspective 135, 139 (N. Ray Hiner & Joseph M. Hawes eds., 1985)); see also Pet. App. 253a–54a (testifying about the care that the Roman Catholic Church in Philadelphia provided in the 1790s in response to the "yellow fever" outbreak). Pennsylvania law did not give the government authority to "supervis[e] the placement of children in foster care" until the early 1900s. *Leshko*, 423 F.3d at 344. But even then, the government left the placement work to private entities, many of which, like the Home Missionary Society, were religious in nature.

3. The story of Catholic Social Services in Philadelphia reflects this history. In 1917, when the group began a bureau dedicated to foster care, there was no active "government involvement with th[at] program." Pet. App. 254a. The "religious sisters" who ran Catholic Social Services' foster ministry would learn through the community "that a child was at risk," and "they would do a home evaluation." *Ibid.* If "the child

needed to be removed," the sisters would place him or her in a foster home and track "the child's progress." *Ibid.*

It was not until decades later—in the middle of the 1900s—that the government started to contract with Catholic Social Services to provide foster-care services. Pet. App. 255a. But that did not bring much governmental involvement at first. *Ibid.* Catholic Social Services initially retained "tremendous" authority: it would decide whether to remove a child and where to "place the child"; then it would "simply advise the city" on the status. *Ibid.* By the 1970s, Philadelphia had finally assumed a more active role in removing and placing children, but it continued to contract with Catholic Social Services and other private agencies to evaluate foster families. *Id.* at 256a. Fast forward to today, and the city now asserts total power over foster-care work within the city limits. A religious organization in Philadelphia cannot "provide foster-care services without a government contract." *Ibid.*

B. Faith-based organizations continue to provide indispensable charitable work caring for foster children.

The foster-care system is in a state of crisis. Nearly half a million children currently need care. AFCARS Report, U.S. Dep't of Health and Hum. Servs., at 1 (2018), bit.ly/2LyUKS4. But there are not enough resources to meet those needs. This has left many state agencies and officials feeling "overwhelmed," particularly as they "face increasing shortages of foster

homes." Laura Radel et al., Substance Use, the Opioid Epidemic, and the Child Welfare System: Key Findings from a Mixed Methods Study, U.S. Dep't of Health and Hum. Servs., at 7 (Mar. 7, 2018), bit.ly/2WUKjxC.

States need all available resources to navigate this predicament. Vital to their efforts are their ongoing partnerships with a broad array of private organizations, including the faith-based groups that have excelled in this work for centuries.

The need to ensure a diverse selection of child-placing organizations is critical. Different groups develop different expertise and target different audiences for their recruiting efforts. The more groups there are, and the more varied they are, the more effective their collective recruiting will be. Also, because fostering children is difficult work, people often require a deep level of comfort and support before they commit to the task. Allowing prospective foster parents to choose from a broad collection of child-placing agencies increases the likelihood that they will find just the right organization to serve as their support system. And when States generate a large pool of diverse foster parents, that benefits kids by putting more children into homes and by facilitating a better fit between the needs of individual children and the strengths of specific foster families.

As explained below, religious foster-care organizations excel at recruiting and retaining a diverse roster of first-rate foster parents. Because of this, many States rely significantly on their work.

1. Religious organizations excel at recruiting and retaining a diverse pool of high-quality foster parents willing to serve the neediest children.

a. Religious child-placing organizations are effective recruiters of foster families. They often focus on recruiting people who share their beliefs. This is a successful strategy since people of faith motivated by child welfare "have a higher probability" than others of taking "a foster child in[to] their homes." Michael Howell-Moroney, *The Empirical Ties between Religious Motivation and Altruism in Foster Parents*, 5 Religions 720, 731 (2014) (hereinafter "Howell-Moroney, *Empirical Ties*"). Their inclination to foster children makes sense because a primary "motive for fostering is to fulfill religious beliefs by helping a child," Mary Ellen Cox et al., *Recruitment and Foster Family Services*, 29 J. Sociology & Social Welfare 151, 171 (2002), thus following core religious teachings about caring for orphans, *e.g.*, James 1:27 (English Standard) ("pure" religion cares for "orphans . . . in their afflictions"); Quran 2:215 ("Whatever you spend of good is [to be] for . . . orphans").

Bill Williams, CEO of Compass, a faith-based child-placing agency in Nebraska, has described the value of recruitment rooted in shared religious duty:

"Our [organization's] motivation to serve children in need came from our faith and we were convinced that others within the church would feel likewise. . . . We went to our local churches to share the message that Nebraska needs foster parents, and our message resonated and people answered the call." Neb. Unicameral Judiciary Comm. Transcript at 94–95 (Feb. 17, 2016), bit.ly/3cAdUD2 (hereinafter "Neb. Leg. Testimony"). This common religious mission is one reason why "[r]ecruitment through faith-based organizations" is so "effective." Sandra-Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 The Future of Children 74, 83 (2004).

Faith-based organizations thrive not only in enlisting coreligionists but also in building a racially diverse pool of foster parents. Studies show that recruitment through religious groups like churches is "particularly influential . . . with African-Americans." Cox, *supra*, at 155. That is why faith-based organizations like One Church One Child have been successful "work[ing] with state child welfare agencies and African-American churches" to find and engage "African-American foster and adoptive parents." *Id.* at 171.

States benefit immensely when religious organizations recruit foster families. Consider Arkansas's experience working with the CALL, a faith-based organization that "recruits families out of local churches, trains them[,] and then provides support." Michael Howell-Moroney, *Faith-Based Partnerships and Foster Parent Satisfaction*, 36 J. Health and Hum.

Servs. Admin. 228, 233 (2013) (hereinafter "Howell-Moroney, *Faith-Based Partnerships*"). One study found that the group's "targeted recruitment strategy" is "one of the reasons for [its] success." *Id.* at 234. Much like Compass in Nebraska, the CALL goes to Christian churches, "communicate[s] the great need for foster and adoptive parents," and "outline[s] the Biblical basis for fostering and adoption" by "citing many verses of Scripture." *Ibid.*

Beki Dunagan, Deputy Director of Arkansas Division of Children and Family Services, said that comparing foster-care services in the State before and after the CALL is "like day and night." Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, The Chron. of Soc. Change (Nov. 28, 2017), bit.ly/2T6mP7F. According to Arkansas, the CALL has become "the source of 40 percent of all foster homes" in the State, and it moves foster applicants through the approval process nearly two times faster than the government does. *Ibid.* Because of this, the State "consider[s] [t]he CALL an indispensable partner" in its foster-care work. *Ibid.*; see also Howell-Moroney, *Faith-Based Partnerships*, at 233–34 (Arkansas's Senate "passed a resolution formally recognizing the CALL's accomplishments").

Unfortunately, the exclusion of faith-based child-placing organizations will likely reduce available foster homes. Studies involving the CALL support this concern. Notably, 36 percent of foster parents recruited through the CALL said that they *would not* have become foster parents without the group's work,

and 40 percent were not sure. Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, 19 J. of Pub. Mgmt. & Soc. Pol'y 168, 176–77 (2013).

One reason for this is that some people of faith cannot commit to the demanding task of fostering children—work they consider central to their religion—if they are unable to partner with an organization that shares their beliefs. According to Bill Williams, the CEO of Compass in Nebraska, many of his foster parents have told him that they "wouldn't have become a foster parent if [they] couldn't have partnered with a faith-based agency." Neb. Leg. Testimony, *supra*, at 95. As he explained: "The decision to be a foster parent is a very personal one. Choosing an agency that can identify with a foster family and relate to them on the deepest level of faith is important" for many people. *Ibid.*; see also Shamber Flore, *My Adoption Saved Me*, The Detroit News (Mar. 7, 2018), bit.ly/3cEOPaj (woman explaining that her foster parents partnered with a Catholic organization and "would not have [worked] with another agency"). At least for some prospective foster parents, the inability to partner with a child-placing agency that shares their faith is a deal-breaker.

b. Successful recruitment, while critical, is not all that matters. Also important is ensuring that foster parents stay the course. It is no good getting people to sign up, only to see them quickly walk away. Faith-based child-placing organizations do a great job at

minimizing foster-parent dropouts and keeping them engaged for the long haul.

High foster-parent turnover is a huge problem plaguing States. "[B]etween 30 to 60 percent of foster parents quit within their first year." Howell-Moroney, *Faith-Based Partnerships*, at 230; see also Ron Haskins et al., *Keeping Up with the Caseload: How to Recruit and Retain Foster Parents*, Brookings Institution (Apr. 24, 2019), brook.gs/3fRoeZz ("[B]etween 30 to 50 percent of foster families step down each year."). "[M]any quit because of burnout and frustration. One of the most oft cited reasons in the literature for foster parent burnout is a perceived or real lack of support." Howell-Moroney, *Faith-Based Partnerships*, at 230.

Faith-based organizations effectively counter this leading cause of burnout by providing foster families with strong support and community founded on a common faith. Those groups work seamlessly with the religious communities in which their foster parents already live, tapping into "a social network that can provide additional information and support." Cox, *supra*, at 155. Another source of support is the private funding donated to many faith-based child-placing agencies, which they use to provide additional resources to their foster families. Pet. App. 256a (testifying that Catholic Social Services spends millions of dollars each year in private donations on its child-welfare services). Given all this added support, foster parents that come through religious organizations typically stick with it "for more years" than the average foster parent does. Cox, *supra*, at 166; see also

Howell-Moroney, *Faith-Based Partnerships*, at 228 (finding that foster parents who work with faith-based child-welfare organizations "report[ ] much higher levels of satisfaction" during the early stages of the licensing process than foster parents from "the national sample").

Statistics from Illinois further suggest that excluding religious foster-care providers hurts recruitment and retention. Illinois had 11,386 non-relative foster homes in 2012, see Non-Relative Homes, Who Cares: A National Count of Foster Homes and Families, bit.ly/3bMboZc (hereinafter "Non-Relative Homes Statistics"), which is approximately when the State forced many faith-based agencies to shut down their foster-care services, Manya A. Brachyear, *Three Dioceses Drop Foster Care Lawsuit*, Chi. Trib. (Nov. 15, 2011), bit.ly/3g0cWlz. But by 2019, the number of non-relative foster homes fell nearly in half, plummeting to only 6,034, see Non-Relative Homes Statistics, *supra*, even though the total amount of Illinois children in foster or congregate care remained fairly stable during that time, see Youth in Care, Who Cares: A National Count of Foster Homes and Families, bit.ly/3dW0fGH (falling by only 9 percent).

c. While ensuring a sufficient quantity of foster parents is important, quality is also essential. And when it comes to finding great foster parents, faith-based agencies have a strong track record.

"[R]eligiously motivated foster parents are, on average, more likely to possess altruistic motives for fostering." Howell-Maroney, *Empirical Ties*, at 727; accord Cox, *supra*, at 155 ("[F]oster parents who were recruited through church were more likely to be altruistically motivated and more interested in the general welfare of children than those who were recruited using other methods.") And "altruistically-motivated foster parents are among the most desirable"—"more likely" to receive "higher ratings by their social worker." Howell-Maroney, *Empirical Ties*, at 722. Because faith-based organizations focus on finding these kinds of foster parents, they consistently receive high rankings "in meeting positive outcomes for children." Legislative Testimony of Steven Roach, Executive Director of Catholic Charities Diocese of Springfield, Illinois, supporting Kansas's Senate Bill 401 at 1 (Mar. 20, 2018), bit.ly/2LVtptH (hereinafter "Roach Testimony").

Not only do foster parents from faith-based agencies tend to receive high rankings, they also generally take in more children. Howell-Maroney, *Empirical Ties*, at 732. ("[R]eligious altruists . . . have a greater number of foster children"). That is critical, of course, because a willingness to take in additional foster kids multiplies the placements available for children in need.

Religious organizations are also more likely to accept difficult placements, such as children who have been abused. Cox, *supra*, at 171 ("[F]oster families who belong to a place of worship [are] more willing to

foster children who have been deprived or abused than families who did not belong to a place of worship"). And many faith-based groups have focused on—and been recognized for their success in—placing special-needs children. Declaration of Jennifer Allmon, *Texas* v. *Azar*, No. 3:19-CV-00365, ¶¶ 8, 30 (S.D. Tex. Jan. 30, 2020) (ECF No. 15-1) ("Catholic foster care agencies are particularly effective at . . . helping place . . . children with disabilities."); Roach Testimony, *supra*, at 1 ("A plaque from the [State of Illinois] hung in [Catholic Charities'] office with the inscription, 'In recognition of outstanding service in finding adoptive homes for special needs children.'").

2. Many States rely on religious organizations when administering their foster-care programs.

Many States depend on the work of religious foster-care organizations. While statistics are often difficult to find, the best evidence indicates that faith-based groups are responsible for a "significant" number of foster placements and that they are a "substantial part" of the foster-care field. Stephen Monsma, Pluralism and Freedom: Faith-based Organizations in a Democratic Society 29 (2012).

The most reliable data available about a decade ago showed that two faith-based organizations—Catholic Charities and Lutheran Social Services—were responsible for placing nearly 10 percent of children in foster care. *Id.* at 30; see also Mary L. Gautier & Jonathon L. Wiggins, 2014 Annual Survey Final

Report, Catholic Charities USA, at 46 (June 2015), bit.ly/2XigDdY (Catholic Charities provided foster-care services for 12,737 children in 2014). There is little doubt that "faith-based agencies are a large, crucial—many would say indispensible—part of the foster care system." Monsma, *supra*, at 30. Chuck Johnson, the CEO of the National Council for Adoption, put it this way: if faith-based groups "would disappear overnight[,] the whole system would collapse on itself." Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Contemp. Legal Issues 279, 310 (2013) (citation omitted).

In Nebraska, for example, the State "contracts with 36 licensed placing agencies, 10 of which are faith based." Neb. Leg. Testimony, *supra*, at 48. That means approximately 28 percent of Nebraska's child-placing agencies are religious organizations. Those agencies include not only "one of the largest foster care providers in the state," *id.* at 77, but also groups recognized for their "success" and "diversity," *id.* at 94. In short, "faith-based organizations play a large part" in Nebraska's efforts "to find and retain safe, loving, and supportive homes for [foster] children." *Id.* at 48.

South Carolina also depends on faith-based child-placing agencies. One of those groups is Miracle Hill Ministries, which is South Carolina's "largest provider of foster families for Level I foster children, recruiting 15% of the State's foster families." Letter from Henry McMaster, Governor of South Carolina,

to Steven Wagner, Acting Assistant Secretary of U.S. Admin. for Children and Families, at 2 (Feb. 27, 2018), bit.ly/3680L1w. While South Carolina's partnership with Miracle Hill is vital for its foster children, the State's ability to continue that relationship is now threatened because of a pending federal lawsuit. *Rogers* v. *U.S. Dep't of Health and Hum. Servs.*, No. 6:19-cv-01567-TMC, Order (D.S.C. May 8, 2020) (ECF No. 81) (refusing to dismiss an Establishment Clause challenge to South Carolina's partnership with Miracle Hill).

As discussed above, Arkansas is another State that considers faith-based groups "indispensable" to its foster-care work. Hardy, *supra*. Again, just one of those organizations—the CALL—is "the source of 40 percent of all foster homes in Arkansas." *Ibid.* Alabama has also integrated many religious child-placing agencies into its foster-care program. "About 30 percent of the Alabama agencies that provide foster and adoptive services . . . are faith-based organizations." Anna Claire Vollers, *Religious freedom or taxpayer-funded discrimination? Child welfare bill prompts debate*, Alabama.com (Feb. 8, 2017), bit.ly/3bXGYmK.

Texas similarly partners with religious groups. It has a program called Congregations Helping in Love and Dedication (CHILD) that "encourages faith partners across Texas to join with [the State] to help provide current and potential . . . foster parents support, training, and resources." Letter from Ken Paxton, Attorney General of Texas, to Lynn Johnson, Assistant

Secretary of U.S. Admin. for Children and Families, at 1 (Dec. 17, 2018), bit.ly/2LCnucC. And Texas's One Church One Child program connects state officials and religious groups to find prospective parents within minority communities. *Ibid.* As the Director of Federal Funds and Client Services at the Texas Department of Family and Protective Services recently declared, "Texas children and [state agencies] benefit greatly from the services provided" by faith-based child-placing organizations. Declaration of Tamela Griffin, *Texas* v. *Azar*, No. 3:19-CV-00365, ¶ 12 (S.D. Tex. Jan. 30, 2020) (ECF No. 15-1).

Some States like Texas and Alabama consider these faith-based providers so essential to caring for foster children that they recently enacted statutes to ensure those organizations will not be forced to close because of their beliefs. *E.g.*, Ala. Code § 26-10D-5; Kan. Stat. Ann. § 60-5322; Miss. Code. Ann. § 11-62-5(2); N.D. Cent. Code § 50-12-07.1; Okla. Stat. tit. 10A, § 1-8-112; S.D. Codified Laws § 26-6-41; Tex. Hum. Res. Code Ann. § 45.004. This wave of legislation is a testament to the vital work that these religious organizations do.

II. Philadelphia's ban on Catholic Social Services' foster-care ministry must survive strict scrutiny.

The Third Circuit held that strict scrutiny does not apply to Catholic Social Services' free-exercise claim. According to that court, the city relies on "neutral, generally applicable law," and thus *Employment Division* v. *Smith*, 494 U.S. 872 (1990), bars that claim.

Pet. App. 12a. But *Smith*'s rule on neutral and generally applicable governmental action does not control every free-exercise case. *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 n.2 (2017) (refuting the notion "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause"). It surely has no place here, where Philadelphia has prevented (1) a religious organization (2) because of its beliefs (3) from carrying out its religious mission to provide foster-care services (4) as faith-based groups have done throughout our nation's history. Under these circumstances, strict scrutiny applies.

1. The First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012). It "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of . . . faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

This is not to suggest that the Free Exercise Clause provides no protection for individual religious adherents or non-religious entities operated by people of faith for religious purposes. It does. See *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (protecting free-exercise rights of an individual and his for-profit business). But this Court has recognized extra safeguards for religious organizations. For instance, the religious-autonomy doctrine forbids courts from interfering

with decisions of "religious organizations" concerning "internal discipline and government." *Serbian E. Orthodox Diocese for U. S. of Am. & Canada* v. *Milivojevich*, 426 U.S. 696, 724–25 (1976). And the ministerial exception shields religious entities against discrimination claims brought by certain employees. *Hosanna-Tabor*, 565 U.S. at 188–89. That Philadelphia interferes with the operations of a religious organization raises significant free-exercise concerns.

2. Additional constitutional concerns arise because of the reason that Philadelphia has shut down Catholic Social Services' foster-care ministry—namely, its religious beliefs about marriage. Allowing the city to exclude the organization because of its beliefs conflicts with the Free Exercise Clause's promise that governments may not impose "disabilities on the basis of religious views." *Smith*, 494 U.S. at 877.

There is no doubt that Catholic Social Services' religious beliefs about marriage are the sole reason for its exclusion. After more than a century of working with Catholic Social Services, Philadelphia now imposes a new requirement that forces the group to provide home evaluations and make placements that violate its religious beliefs about marriage. If Catholic Social Services held no religious beliefs—or different beliefs—about marriage, it would have been able to continue its foster-care work. Because the organization's religious views are the sole basis for its exile, stringent constitutional review is in order.

3. Philadelphia's actions also cut to the heart of Catholic Social Services' religious exercise. It forces the organization to end one of its ministries and

thwarts one of its core religious purposes. This infringes the "undoubtedly important . . . interest of religious groups" in "carry[ing] out their mission." *Hosanna-Tabor*, 565 U.S. at 196.

Catholic Social Services' foster-care work is part of its "religious ministry." Pet. App. 254a. The group partners with prospective foster parents, reviews their lives and relationships in great detail, endorses them and their living situations as suitable for foster care, and supports them in caring for children. *Id.* at 257a. Catholic Social Services does this work, which it supports with "prayer . . . several times daily," *id.* at 253a, and with millions of dollars annually in private donations, *id.* at 256a, because its faith requires it to care for "orphans . . . in their affliction," James 1:27 (English Standard).

Philadelphia now insists that Catholic Social Services must end this work unless it agrees to violate its religious beliefs about marriage. But a religious group "may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). The First Amendment forbids the "coercion" that this choice places "on the free exercise of religion" just as surely as it bars "outright prohibitions" on religious exercise. *Trinity Lutheran*, 137 S. Ct. at 2022.

Smith's rule about neutrality and general applicability, which applies to "government regulation of *only* outward physical acts," cannot save this intrusion into "the faith and mission" of a religious organization. *Hosanna-Tabor*, 565 U.S. at 190 (emphasis

added). Philadelphia requires Catholic Social Services either to violate its "faith" (its beliefs about marriage) or to end one of its core "missions" (serving orphans through foster-care services). *Smith* does not give the government that kind of power.

Because Catholic Social Services cannot perform its foster-care services in violation of its faith, Philadelphia's actions have the effect of banning the group's ministry. Pet. App. 256a ("[Y]ou would be breaking the law if you tried to provide foster-care services without a contract"). While this is similar to the governmental exclusion of religious organizations deemed "odious" in *Trinity Lutheran*, 137 S. Ct. at 2025, it is in some ways far worse. There, the religious organization was forced to forfeit government subsidy for a new playground surface. But here, Catholic Social Services is compelled to abandon its religious calling to serve foster kids. Since Philadelphia is "wielding the stick of prohibition" against a religious ministry—rather than "dangling the carrot of subsidy"—stringent constitutional review applies. *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 683 (2010).

4. Philadelphia's actions also run counter to the weight of history. After all, it is excluding Catholic Social Services from charitable work that religious organizations have performed since time immemorial.

This Court often interprets the Religion Clauses in light of history. For example, *Hosanna-Tabor* relied on the history surrounding governmental interference with religious groups' leadership choices. 565 U.S. at 182–85. And *Marsh* v. *Chambers*, 463 U.S. 783, 786–91 (1983), hinged on our nation's "history

and tradition" of legislative prayer. Those sorts of historical accounts shed light on what the First Amendment protects and what it forbids.

As explained in Section I.A. above, faith-based organizations have been free to care for foster children throughout our nation's history. In the early years, religious organizations performed this work with practically no government involvement. Even after States started subsidizing and contracting with private organizations, faith-based agencies remained free to operate according to their beliefs. Philadelphia's decision to exclude Catholic Social Services conflicts with these national historical practices.

In addition to departing from our national traditions, Philadelphia's actions are contrary to its longstanding relationship with Catholic Social Services. See *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (one factor relevant to free-exercise analysis is "the historical background of the decision under challenge"). For the first few decades after Catholic Social Services started its foster-care work in the 1910s, the organization made placements with little to no government involvement. Pet. App. 254a–55a. And once Philadelphia began contracting with Catholic Social Services in the middle of the 1900s, the group continued for well over 50 years to serve foster families without any requirement that it violate its faith. *Ibid.* Viewed in light of this background, the city's decision to shut down a 100-year-old religious ministry must undergo rigorous review.

"Perhaps the most telling indication of the severe constitutional problem" with Philadelphia's actions "is the lack of historical precedent" for it. *Free Enter.*

Fund v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (quoting then-Judge Kavanaugh). It was not until a little over a decade ago that a few local governments began excluding faith-based organizations from foster-care work because of those groups' religious beliefs about marriage. Such novel governmental action raises the specter of unconstitutionality and demands strict scrutiny.

Locke v. *Davey*, 540 U.S. 712 (2004), demonstrates the flip-side of this. The Court there rejected a free-exercise challenge to Washington State's exclusion of public scholarship funds for students pursuing degrees in devotional theology. *Id.* at 715. The Court said that our nation has long opposed public funding for church leaders, *id.* at 722–23, and thus the State's exclusion was not "constitutionally suspect," *id.* at 725. But the opposite is true here. Philadelphia acted against the backdrop of faith-based groups doing this work for centuries. Excluding Catholic Social Services departed from that history, and therefore Philadelphia's actions, unlike the law in *Locke*, are highly irregular and constitutionally dubious. See *Trinity Lutheran*, 137 S. Ct. at 2023 (while the law in *Locke* was consistent with historic "opposition" to funding for "church leaders," "nothing of the sort can be said about a program . . . to resurface playgrounds").

These historical considerations further confirm that *Smith* poses no bar to Catholic Social Services' free-exercise claim. *Smith*'s neutrality and general-applicability rule is displaced when government acts contrary to our nation's history and traditions. *Hosanna-Tabor*, 565 U.S. at 190 ("The contention that

Smith forecloses recognition of" well-established historical practices "has no merit"). Because Philadelphia upended longstanding historical practices, strict scrutiny applies.

* * * * *

Governmental action is suspect—and must undergo rigorous review—when it excludes a religious organization, because of its beliefs, from carrying out a charitable religious mission that faith-based organizations have been free to pursue throughout our nation's history. Since that is what Philadelphia has done, the city must satisfy strict scrutiny.

III. Philadelphia's ban on Catholic Social Services' foster-care ministry fails strict scrutiny.

Because strict scrutiny applies, Philadelphia must show that excluding Catholic Social Services "advance[s] interests of the highest order" and that the city's actions are "narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). Under its Pennsylvania Religious Freedom Restoration Act analysis, the Third Circuit assumed that strict scrutiny applied and said that the city satisfied it. Pet. App. 47a. But regardless of whether this is correct under Pennsylvania state law, Philadelphia has not satisfied the demands of strict scrutiny for purposes of federal constitutional analysis.

A. Philadelphia's nondiscrimination interests do not satisfy strict scrutiny.

Philadelphia asserts an interest in eliminating "discrimination in places of public accommodation."

COA Br. at 43–44. But that characterization of the relevant interest is too broad. Strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether that standard "is satisfied through application of the challenged law" to "the particular" party. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 221–22 (1972) (assessing the government's specific interest in forcing Amish children to attend school from ages 14 to 16 rather than its general interest in mandating school attendance). Even the Third Circuit admitted that constitutional strict-scrutiny analysis "examine[s] not the general interest behind the City's anti-discrimination laws but the specific interest" in applying those laws here. Pet. App. 47a n.13.

Accordingly, under this particularized analysis, Philadelphia must demonstrate that it has a compelling interest in forcing a religious organization to either violate its beliefs about marriage or close its foster-care ministry. The city has not done so on this record.

1. Philadelphia has not shown that allowing Catholic Social Services to operate according to its beliefs causes any tangible harm to the city's foster-care services. Most notably, Catholic Social Services does not prevent same-sex couples from becoming foster parents. Dozens of other child-placing agencies are willing and available to perform home evaluations for those couples.

The only tangible harm to the city's foster-care program comes from *excluding* Catholic Social Services. Doing so, as discussed in Section I.B. above, takes away critical foster-care resources, threatens to reduce the number of available foster homes, and jeopardizes the interests of foster kids.

2. Because Philadelphia has not eliminated (but in fact only created) tangible harm, the city must rest its asserted interest on the intangible "dignitary" concern it raises. COA Br. at 44–45. Yet that interest is not compelling under the facts of this case.

"'[C]ontext matters' in applying the compelling interest test." *Gonzales*, 546 U.S. at 431 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003)). This Court has recognized that "dignity" interests must give way when a religious provider's decision not to recognize a same-sex marriage is "well understood in our constitutional order as an exercise of religion." *Masterpiece Cakeshop*, 138 S. Ct. at 1727. This explains why "a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony," *ibid.*, and why Philadelphia cannot force Catholic Social Services to choose between fidelity to its beliefs about marriage and its foster-care ministry.

Five contextual factors confirm the absence of a compelling interest here. First, Catholic Social Services is a nonprofit religious organization that provides foster-care services as a ministry. Second, the organization operates that ministry according to a "decent and honorable" religious belief about marriage that is held "in good faith by reasonable and sincere people." *Obergefell* v. *Hodges*, 135 S. Ct. 2584,

2594, 2602 (2015). Third, Catholic Social Services declines to recognize same-sex marriages when choosing foster-parent partners for its foster-care ministry—conduct central to its religious exercise. Fourth, the organization provides other charitable services to LGBT people. J.A. 171 ("[T]oday we are serving folks from the LGBTQ community."). Fifth, the organization's views on marriage are well known, as the Third Circuit acknowledged, Pet. App. 49a, so people would not be surprised by its policies, as evidenced by the absence of *any* same-sex couple *ever* applying to foster through Catholic Social Services.

These factors collectively demonstrate that Catholic Social Services' decision to operate its religious ministry consistently with its beliefs is "well understood in our constitutional order as an exercise of religion," and that decision is constitutionally protected despite the government's asserted "dignitary" concern. *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

3. Nor has Philadelphia shown that its actions are narrowly tailored. The city's efforts to achieve its asserted interests are vastly underinclusive, which "is alone enough to defeat" strict scrutiny. *Brown* v. *Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011).

Most troubling is that Philadelphia's asserted dignitary concerns are one-sided. For the city to brand Catholic Social Services' religious beliefs as discriminatory and compel the organization to close its foster-care ministry impugns the faith that it and its fellow believers hold. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring) (explaining that "free exercise is essential in preserving the[] . . . dignity" of religious adherents). That

Philadelphia ignores—and in fact inflicts—this similar dignitary harm proves that its actions are underinclusive.

The Third Circuit implied that the government need never allow exceptions or accommodations to nondiscrimination requirements because doing so unacceptably undermines its interests. Pet. App. 47a–49a ("mandating compliance"—with "zero" exemptions—"is the least restrictive means"). But nondiscrimination laws frequently include exceptions and coverage gaps. Title VII of the Civil Rights Act of 1964, for example, allows religious organizations to discriminate in some hiring decisions. 42 U.S.C. § 2000e-1(a). And Title II applies only to some businesses, such as hotels, restaurants, and places of public entertainment. 42 U.S.C. § 2000a(b). But these and similar gaps in coverage have not prevented nondiscrimination laws from furthering their purposes. Nor would allowing Catholic Social Services to continue operating its foster-care ministry according to its religious beliefs. See *Gonzales*, 546 U.S. at 435–36 (rejecting the government's argument that "no exceptions" can be made).

4. The Third Circuit was also wrong to suggest that the facts of this case are akin to "racial discrimination." Pet. App. 47a (quoting *Hobby Lobby*, 573 U.S. at 733). This Court recently recognized that "racial bias" is sui generis—it "implicates unique historical, constitutional, and institutional concerns." *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 868 (2017). And more to the point, this Court has sharply distinguished between racist conduct concerning marriage,

which it labeled "odious" with roots in "White Supremacy," *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967), and the religious belief that marriage is a union between a man and a woman, which the Court affirmed as "decent and honorable," *Obergefell*, 135 S. Ct. at 2602. In short, any attempt to draw parallels between this case and racism misses the mark entirely. The Court should not indulge it.

B. Philadelphia's Establishment Clause interests do not satisfy strict scrutiny.

Philadelphia's Brief in Opposition (at 26–27) references alleged "Establishment Clause concerns" from ruling for Catholic Social Services. Those purported concerns are misplaced and should be rejected. The Court should make clear that the Establishment Clause poses no barrier to the vital partnerships that exist between States and faith-based child-welfare organizations.

1. "[T]he Establishment Clause must be interpreted by reference to historical practices and understandings." *Town of Greece, N.Y.* v. *Galloway*, 572 U.S. 565, 576 (2014) (cleaned up). As explained in Section I.A., faith-based organizations have always been free to care for foster children. Throughout colonial times and for a century after the founding, the government largely stayed out of foster care. When the States began to get more involved in the late 1800s, they did so mostly by funding private organizations—including religious groups—that were already caring for vulnerable children. It was not until many decades later that the States assumed a more active role. But even then, they continued to partner with faith-based

organizations to provide foster-care services. This history refutes any notion that the Establishment Clause bars Catholic Social Services from continuing its foster-care services. See *Marsh*, 463 U.S. at 786 (Establishment Clause does not forbid a practice that "has coexisted with the principles of disestablishment and religious freedom" from "colonial times through the founding of the Republic and ever since").

Whether the Court looks at this broad national history or the specific history of Catholic Social Services' foster-care ministry in Philadelphia, the result is the same. Catholic Social Services has been serving foster children for over a century, and for at least the last 50 years, it has been contracting with the State to do that work. That "passage of time gives rise to a strong presumption of constitutionality" under the Establishment Clause. *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019); see also *Van Orden* v. *Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring) (considering it "determinative" that "40 years passed" during which a monument's placement on public land "went unchallenged"). Philadelphia cannot overcome this historical background in pressing its Establishment Clause concerns.

2. Ignoring these historical considerations, the city suggests that Establishment Clause concerns arise in part because Catholic Social Services receives public "money." City BIO 26. But the Establishment Clause does not forbid governments from operating neutral government programs that fund both religious and secular organizations. Indeed, when a program gives funding "to the religious (including the pervasively sectarian), the areligious, and the irreligious," as

Philadelphia's foster-care contracts do, "it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Mitchell* v. *Helms*, 530 U.S. 793, 827 (2000) (plurality op.).

Moreover, most of the money that the city gives to Catholic Social Services flows to foster parents for the children's benefit. Whether that money passes through a religious or secular foster-care agency ultimately depends on the "independent choices of private individuals"—namely, the foster parent's choice to partner with a specific child-placing agency. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649 (2002). A program with this kind of "true private choice" does not violate the Establishment Clause, and it does not matter that some of those privately directed government dollars go to a religious organization. *Ibid.*

Were the Establishment Clause construed to prohibit government funding for faith-based child-placing organizations, the fallout would be disastrous. As discussed in Section I.B., many States rely on those faith-based agencies because of their outstanding work recruiting and retaining first-rate foster parents. Forbidding States from continuing their work with those organizations would not only burden already strapped state and local agencies but also risk harm to children by reducing the number of available foster homes.

3. Philadelphia argues that *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982), prohibits the city from "vest[ing] a core City function in a religious entity" that operates according to its faith. City BIO 26–27.

But *Larkin* is entirely unlike this case. There, Massachusetts allowed churches to veto nearby businesses' applications for liquor licenses. While the "zoning function" at issue there was "traditionally a governmental task," *Larkin*, 459 U.S. at 121, foster care has historically been the work of private charitable groups (not the government). More importantly, Massachusetts gave churches the "unilateral and absolute power" to decide whether an applicant will receive a liquor license, *id.* at 127, whereas Catholic Social Services has no authority to prevent anyone from becoming foster parents because dozens of other child-placing agencies are available. *Larkin* thus fails to support Philadelphia's position.

Pressing a different theory, the intervenors argued below that allowing Catholic Social Services to continue its foster-care services is an impermissible religious accommodation because it "impose[s] substantial burdens on third parties." COA Br. 43–44 (discussing *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708–09 (1985)). Not so. Catholic Social Services does not burden anyone's rights. Regardless of what that organization does, prospective foster parents may pursue a license through any secular agency. Nor do foster children face any harm from Catholic Social Services' continuing its foster work. On the contrary, it is the city's decision to *exclude* faith-based child-placing organizations like Catholic Social Services—which excel at recruiting and sustaining foster parents—that poses a detriment to kids. Moreover, the intervenors' third-party-burden argument fails as a matter of law. Because Catholic Social Services' free-exercise claim already satisfies strict scrutiny, that analysis adequately accounts for,

and ensures an absence of any great burden on, the interests of others. *Hobby Lobby*, 573 U.S. at 729 n.37; *Cutter* v. *Wilkinson*, 544 U.S. 709, 720–23 (2005). Respondents' Establishment Clause arguments simply do not justify Philadelphia's exclusion of Catholic Social Services.

CONCLUSION

The judgment of the Third Circuit should be reversed.

Respectfully submitted,

DOUGLAS J. PETERSON
Attorney General of Nebraska
DAVID T. BYDALEK
Chief Deputy Attorney General
JAMES A. CAMPBELL
Solicitor General
Counsel of Record
OFFICE OF THE NEBRASKA ATTORNEY GENERAL
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
jim.campbell@nebraska.gov

Counsel for Amici Curiae

[Additional counsel listed on the following page]

JUNE 2020

ADDITIONAL COUNSEL

MARK BRNOVICH
Attorney General
State of Arizona

DAVE YOST
Attorney General
State of Ohio