No. 19-123

IN THE
# Supreme Court of the United States

SHARONELL FULTON, *ET AL.*,

*Petitioners,*

v.

CITY OF PHILADELPHIA, *ET AL.*,

*Respondents.*

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

## BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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A complete list of the 24 U.S. Senators and the 148 Members of the House of Representatives participating as *Amici* is provided in an appendix to this brief. Among them are:

SEN. CHARLES E. SCHUMER
*Senate Minority Leader*

REP. NANCY PELOSI
*Speaker of the House of Representatives*

SEN. KIRSTEN GILLIBRAND
*Lead Senate* Amicus *on Brief*

REP. ANGIE CRAIG
*Lead House of Representatives* Amicus *on Brief*

REP. STENY H. HOYER
*Majority Leader of the House of Representatives*

REP. JAMES E. CLYBURN
*Majority Whip of the House of Representatives*

## TABLE OF CONTENTS

**Page**

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Page(s)**

**Page(s)**

**Statutes & Rules**

**Page(s)**

**Other Authorities**

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are 24 United States Senators and 148 Members of the United States House of Representatives (together, "Members of Congress").[2] These Members of Congress include members of various committees that focus on the interests of children and families.

As Members of Congress, *amici* have a compelling interest in preventing invidious discrimination against all members of the public, including discrimination by entities receiving federal funds and performing government functions. *Amici* further share an inherent interest in the validity and enforceability of federal laws, particularly as these laws affect the civil rights and civil liberties of all Americans.

Petitioners ask the Court to overrule its decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), and establish a broad right to religious exemptions from the enforcement of neutral, generally applicable antidiscrimination laws. Indeed, they demand that

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certify that City Respondents have given blanket consent to the filing of *amicus* briefs. Petitioners and Intervenor-Respondents have given written consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in the appendix to this brief.

they be permitted to provide a government service with taxpayer funds while at the same time refusing to comply with an antidiscrimination requirement applicable to all government contractors. The Court's decision in this case will thus likely affect the applicability and enforceability of similar federal laws, including as applied to federally funded contractors and grantees providing government services. *Amici* are therefore uniquely positioned to share with this Court the compelling interests in enforcing these laws and to describe the damage a ruling accepting Petitioners' claim risks inflicting on Congress's longstanding antidiscrimination efforts.

*Amici* urge the Court to affirm the Court of Appeals for the Third Circuit's decision, which rejected Petitioners' arguments and appropriately recognized Philadelphia's right to require all organizations providing foster care services with public funds to abide by applicable antidiscrimination laws. A contrary ruling threatens to undermine Congress's ability to protect Americans from discriminatory practices in both government programs and the private sector and risks forcing Congress to provide federal funds or federal contracts to entities that fail to abide by fundamental antidiscrimination principles.

## SUMMARY OF ARGUMENT

Petitioners challenge the City of Philadelphia's requirement that private agencies providing public foster care services with government funds comply with Philadelphia's antidiscrimination laws. Petitioner Catholic Social Services (CSS) asserts a right under the Free Exercise Clause and Free Speech Clause to receive contracts to provide foster care services—which is a government function—even though, when evaluating potential foster families, it refuses to comply with neutral, generally applicable antidiscrimination policies by refusing to certify same-sex couples seeking to serve as foster parents based solely on their sexual orientation.

Petitioners ask the Court to overrule its prior decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which holds that the Free Exercise Clause does not provide an exemption from neutral laws of general applicability, and replace the clear *Smith* test with a far more malleable balancing test.[3] If granted, Petitioners' requests could have sweeping consequences for Congress's ability to eliminate discrimination, in general, and among entities

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[3] Petitioners also ask this Court to conclude that the City of Philadelphia's actions were unconstitutionally based on hostility toward Petitioners' religious beliefs about marriage. (Pet'rs' Br. at 24-25.) Although *amici* Members of Congress take no position on this fact-based aspect of the case, they note that Petitioners argue they should prevail even if their religious hostility argument is not successful. That is, Petitioners argue that they are entitled to a religious exemption from a neutral and generally applicable antidiscrimination requirement even if there is no showing of religious hostility.

performing public functions or receiving government funds, in particular.

As Members of Congress, *amici* have a well-established interest in eradicating discrimination across all walks of life. Congress has enacted a multitude of antidiscrimination laws to ensure that all individuals receive equal treatment in American society and to protect the dignity of historically marginalized groups. These federal laws both embody and promote Congress's compelling interest in eradicating discrimination—an interest long recognized and venerated by this Court.

Congress also has a particular interest in preventing entities receiving taxpayer money or performing public functions from using those funds to discriminate against the populations they serve. As a result, Congress routinely requires private entities to comply with antidiscrimination laws in order to receive contracts or grants under innumerable federal programs. Both this Court and the lower courts have long recognized Congress's interest in attaching and ability to attach such antidiscrimination conditions to the receipt of federal funds and contracts.

An adverse ruling in this case risks undermining both these interests. If Petitioners here are entitled to an exemption from Philadelphia's antidiscrimination policies under the strict scrutiny standard that Petitioners advance, there will be a tidal wave of similar requests for exemptions from enforcement of analogous federal antidiscrimination provisions, including Titles II, VI and VII of the Civil Rights Act of 1964, Titles I and III of the Americans with Disabilities Act, Sections 503 and 504 of the

Rehabilitation Act of 1973, the Violence Against Women Reauthorization Act of 2013, Section 1557 of the Affordable Care Act, Section 654 of the Head Start Act and Section 299A of the Juvenile Justice and Delinquency Prevention Act. Such exemptions risk compromising the federal government's entire antidiscrimination infrastructure.

Additionally, a ruling for Petitioners would frustrate Congress's particular interest in eliminating discrimination within its own programs and services. Congress relies on private entities to perform a host of government functions, which it supports through the use of federal funds, grants and contracts. Allowing entities to provide these government functions with taxpayer dollars while at the same time engaging in discriminatory practices in violation of Congress's express prohibitions threatens to destroy this construct. Indeed, the potential consequences for marginalized groups across the country abound: a federally funded nursing facility might refuse to accept lesbian, gay, bisexual, transgender and queer (LGBTQ) residents in violation of federal law, a hospital receiving federal funding might refuse to treat HIV positive patients in violation of federal law and a federally funded domestic violence shelter might deny refuge to LGBTQ individuals in violation of federal law, to name just a few examples.

## ARGUMENT

### I. Congress Has a Compelling Interest in Eliminating Discrimination Both Generally and by Entities Receiving Federal Funds or Government Contracts

#### A. Congress Has a Compelling Interest in Eliminating Discrimination Generally

Over the past nearly 60 years, Congress has enacted a variety of antidiscrimination laws to ensure that all individuals receive equal treatment in American society and to protect the dignity of historically marginalized groups. For example, in 1964, Congress passed Title II of the Civil Rights Act, which guarantees equal enjoyment of public accommodations "without discrimination . . . on the ground of race, color, religion, or national origin," 42 U.S.C. § 2000a, to eliminate the physically and psychologically damaging "affronts and denials" faced by minorities in places of public accommodation, 110 Cong. Rec. 7400 (1964) (statement of Sen. Magnuson (quoting Roy Wilkins, Executive Secretary of the NAACP) ("[T]he affronts and denials that [Title II], if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity.")).

Similarly, through the passage of Title VII of the Civil Rights Act in 1964 and its subsequent expansion in 1972 and 1991, Congress made unlawful employment discrimination "because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2(a)(1). In so doing,

Congress aimed to "target[] the elimination of all forms of discrimination [in employment] as a 'highest priority.'" *EEOC. v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991). And just this term, this Court acknowledged that the plain words of Title VII encompass employment discrimination based on sexual orientation and gender identity. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

Additionally, through Title III of the Americans with Disabilities Act, enacted in 1990, Congress prohibited discrimination on the basis of disability in places of public accommodation, 42 U.S.C. § 12182(a), to "give to the disabled of our country back their personal and professional dignity," *Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989 Before the Subcomm. on Select Educ. and Emp. Opportunities of the Comm. on Educ. and Labor*, 101st Cong. 1534 (1989) (statement of Rep. Matthew G. Martinez), and to eliminate "the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life," Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 Weekly Comp. Pres. Doc. 1165 (July 26, 1990).

These antidiscrimination measures reflect and reinforce Congress's compelling interest in eliminating invidious discrimination—an interest Petitioners challenge here. (*See* Pet'rs' Br. at 34-35.) Though Petitioners insist that "government actors need to do more than merely assert a broad nondiscrimination interest" to justify enforcing

antidiscrimination policies against individuals and entities with religious objections, this Court has long recognized that such a "broad nondiscrimination interest" is a compelling governmental value. (*Id.*) In *University of California Regents v. Bakke*, 438 U.S. 265 (1978), for instance, the Court noted that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," *id.* at 307, and in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court upheld Title II of the Civil Rights Act of 1964, which bars discrimination on the basis of race, color, religion or national origin in public accommodations, as a legitimate exercise of Congress's "interest in civil rights legislation," *id.* at 245. Subsequently, the Court recognized the "compelling state interests" in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).

Following this Court's holdings, lower courts also have consistently acknowledged Congress's compelling interest in eliminating discrimination in all aspects of life. *See, e.g.*, *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 (6th Cir. 2018) (holding that the government has a "compelling interest in combatting discrimination in the workforce"), *aff'd sub nom. Bostock*, 140 S. Ct. 1731; *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (holding that the government's interest in eradicating discrimination is of the "highest order"); *EEOC v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating

discrimination in all forms."). Indeed, "with open minds attuned to the clear and strong purpose of the [Civil Rights] Act," *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64, 67 (5th Cir. 1975) (quoting *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 349 (5th Cir. 1968)), courts have supported the full enforcement of antidiscrimination laws as the "highest priority," *Pac. Press Publ'g Ass'n*, 676 F.2d at 1280.

In short, federal antidiscrimination laws serve critical goals, and Congress has a compelling interest in ensuring those laws are enforced.

### B. Congress Has a Compelling Interest in Eliminating Discrimination by Entities Receiving Federal Funds or Government Contracts

Beyond its interest in eradicating discrimination generally, Congress has a particular interest in eradicating discrimination perpetuated by entities providing services with federal funds or through government contracts. Indeed, the Court has found that Congress, through its power of the purse, may prohibit entities receiving federal funds from discriminating against beneficiaries of those funds, *see Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981), and Congress has repeatedly required compliance with antidiscrimination rules as a condition of receipt of federal funding. For example, Title VI of the Civil Rights Act of 1964 bars discrimination "on the ground of race, color, or national origin" by "any program or activity receiving Federal financial assistance," 42 U.S.C. § 2000d, Section 504 of the Rehabilitation Act of 1973 bars

federally funded programs and activities from discriminating against individuals with disabilities,[4] 29 U.S.C. § 794, and Section 40002(b)(13) of the Violence Against Women Reauthorization Act of 2013 bars invidious discrimination, including discrimination on the basis of sexual orientation or gender identity, by "any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994," 34 U.S.C. § 12291(b)(13)(A). As this Court has long recognized, such antidiscrimination efforts were designed with the twin goals of "avoid[ing] the use of federal resources to support discriminatory practices" and "provid[ing] individual citizens effective protection against those practices." *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (discussing legislative history of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972).

In the child and family welfare space, in particular, Congress prohibits private entities from engaging in discrimination in a wide host of programs and grants. The Head Start Act, for instance, bars "financial assistance for any program, project, or activity" that discriminates on the basis of "race, creed, color, national origin, sex, political affiliation, or beliefs" or on the basis of any "handicapping condition." 42 U.S.C. § 9849. And "any program or activity which receives funds under" the Welfare-to-

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[4] Notably, while the American with Disabilities Act exempts religious organizations from its prohibition on discrimination by public accommodations, 42 U.S.C. § 12187, Section 504 of the Rehabilitation Act does not include a similar exemption for religious "program[s]" or "activit[ies]" that receive federal funds, 29 U.S.C. § 794.

Work program, which provides benefits and assistance to low-income families, is required to abide by the Age Discrimination Act, the Americans with Disabilities Act and Title VI of the Civil Rights Act. 42 U.S.C. § 608(d). Similar antidiscrimination provisions exist in the Juvenile Justice and Delinquency Prevention Act, 34 U.S.C. § 11182 (incorporating 34 U.S.C. § 10228(c)), the Family Violence Prevention and Services Act, 42 U.S.C. § 10406(c)(2), the Low-Income Home Energy Assistance Act, 42 U.S.C. § 8625(a), the Maternal and Child Health Services Block Grant, 42 U.S.C. § 708(a)(1), (2), and the Preventative Health and Health Services Block Grants, 42 U.S.C. § 300w-7(a)(1), (2), to name a few additional examples.

As this Court has recognized, Congress's ability to implement such conditions stems from its strong interest in knowing how the funds over which it has control are being used and, in particular, if any use of those funds conflicts with or undermines the aims of other federal laws. *See Sabri v. United States*, 541 U.S. 600, 608 (2004) ("The power to keep a watchful eye on expenditures and on the reliability of those who use public money is bound up with congressional authority to spend in the first place."). These interests are all the more pronounced where the funding conditions are intended to eradicate discrimination from Congress's own programs and grants. *See Lau v. Nichols*, 414 U.S. 563, 569 (1974) (holding that Congress may "requir[e] that public funds, to which all taxpayers . . . contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in . . . discrimination"); *see also Fullilove v. Klutznick*, 448 U.S. 448, 483-84 (1980) (upholding

Congress's power to "induce voluntary action to assure compliance with existing federal statutory . . . antidiscrimination provisions"); *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) ("Congress has a strong interest in making certain that federal funds do not subsidize conduct that infringes individual liberties.").

This Court and others have thus recognized Congress's compelling interest in preventing federal contractors and grant recipients from engaging in invidious discrimination while using federal money and have endorsed Congress's ability to make receipt of federal money contingent on compliance with antidiscrimination laws. This Court should decline Petitioners' invitation to brush aside the government's compelling interest in enforcing antidiscrimination requirements.

## II. Congress's Compelling Interest in Eliminating Discrimination Would Be Gravely Undermined if the Court Accepts Petitioners' Claim

### A. If Petitioners' Arguments Prevail, the Enforceability of Existing and Future Federal Antidiscrimination Laws Is at Risk

In this case, Petitioners seek not only an exemption from Philadelphia's antidiscrimination policies, but also a wholesale restructuring of this Court's Free Exercise jurisprudence. (*See* Pet'rs' Br. at 19-30, 37-52.) In particular, Petitioners ask the Court to overrule its prior decision in *Smith*, where the Court held that the Free Exercise Clause does not

provide individuals and organizations an exemption from neutral laws of general applicability, 494 U.S. at 879, and substitute in its place a balancing test (*see* Pet'rs' Br. at 37-52). And they argue that the City's interest in enforcing its antidiscrimination requirement does not satisfy strict scrutiny.

Accepting Petitioners' arguments would gravely threaten Congress's antidiscrimination efforts. If Petitioners are entitled to an exemption from Philadelphia's antidiscrimination policies, then any number of entities may be entitled to similar exceptions from federal antidiscrimination prohibitions when they assert a religious objection to complying. A landlord, for instance, could claim an exemption from the Fair Housing Act for her refusal to rent a unit to a family practicing a religion different than hers as part of her free exercise interest. *Cf. Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (landlords sought exemption from state ordinance prohibiting discrimination in the leasing of real property on the basis of marital status). Likewise, a hospital receiving federal funding might claim an exemption from Section 1557 of the Affordable Care Act and turn away an HIV-positive patient, whom it associates with behaviors that conflict with its beliefs, regardless of whether its assumptions are accurate or not. The relief sought thus affects far more than the provision of foster care services in Philadelphia—it threatens to undermine a substantial portion of the U.S. Code and hamper the enforcement of Congress's duly enacted laws.

Indeed, given the Court's understandable reluctance to question the sincerity of religious beliefs, *see, e.g.*, *Hernandez v. Comm'r of Internal Revenue*,

490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."), exemptions for religious objectors could very well overwhelm Congress's duly enacted protections. The possibility for far-reaching exemptions from generally applicable antidiscrimination laws thus could be grave. Establishing a new constitutionally protected exemption to antidiscrimination requirements would erode the constitutional norms and civil rights Congress aimed to protect. The country's undergirding antidiscrimination infrastructure would suffer.

Moreover, Petitioners' requested relief could weaken not only current federal antidiscrimination laws, but also impede the enforceability of future laws. If broad exemptions to compliance are permitted in the present, it will become increasingly difficult for Congress to design and implement laws in the future that enshrine equality and civil rights for all.[5] Compliance would not be an expectation, but

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[5] Undeniably, some federal antidiscrimination laws already include appropriately tailored religious exemptions, which were developed following careful consideration and debate. Title VII of the Civil Rights Act of 1964, for instance, includes a narrow exemption for religious institutions from its prohibition on religious discrimination. *See, e.g.*, *Rayburn*, 772 F.2d at 1166 ("The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent."). What Petitioners request here is entirely different. Rather than a narrow, well-considered exemption to comprehensive antidiscrimination protections, Petitioners seek a broad constitutional rule that threatens to gut federal antidiscrimination laws.

rather a case-by-case question. In the case of a ruling for Petitioners, lawmakers will have difficulty adding protections to a weakened statutory scheme of antidiscrimination. Congressional authority would be undermined and legislative efforts at civil rights reform impeded. More concretely, allowing religious exemptions to antidiscrimination provisions means that marginalized individuals, some of whom were only recently assured equal treatment under the law, will once again suffer "a disadvantage, a separate status, and so a stigma" in their everyday lives. *See United States v. Windsor*, 570 U.S. 744, 746 (2013).

Granting Petitioners' request would undermine the compelling governmental interest underlying federal antidiscrimination protections and weaken the ability of Congress to enact enforceable antidiscrimination laws going forward.

### B. Granting Petitioners' Requested Exemption Would Undermine Congress's Compelling Interest in Eliminating Discrimination by Entities Receiving Federal Funds or Providing Government Services

Perhaps most saliently, granting Petitioners' requested exemption would hinder Congress's ability to halt discrimination by entities providing services with government funds or contracts. The federal government funds and contracts with private entities across innumerable programs, divisions and agencies to provide a broad swath of social services. Exemptions would allow such entities to defy religiously neutral, generally applicable antidiscrimination requirements and result in the

denial of service to the very individuals these grants and programs are designed to serve. For example, a taxpayer-funded hospital could refuse to perform medical care on a patient because he is disabled (*e.g.*, HIV positive), notwithstanding the ban on such discrimination in Section 1557 of the Affordable Care Act. Or a preschool receiving funds through the federal Head Start program could deny admittance to the child of a couple from Iran on religious grounds.

In particular, Petitioners' rule would enable federally funded entities and contractors to refuse to serve those who follow a different faith, or no faith at all. Such an outcome is not far-fetched. In South Carolina, for instance, the state requested and received a waiver from federal antidiscrimination regulations for the state's largest, government-funded agency that assists in certifying foster families. This waiver enables the child placement agency to discriminate on the basis of religion—and thus to refuse to work with families that do not explicitly adhere to its evangelical Christian faith, including Catholic and Jewish families. Compl. ¶ 59, *Maddonna v. U.S. Dep't of Health & Human Servs.*, No. 6:19-cv-03551-TMC (D.S.C. Dec. 20, 2019); *see also* Lydia Currie, *I Was Barred from Becoming a Foster Parent Because I Am Jewish*, Jewish Telegraph Agency (Feb. 5, 2019), https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish. Accepting Petitioners' argument in this case would enable any government

service provider that so wishes to exclude any individual that does not share its religious beliefs.[6]

It is no answer to argue, as Petitioners and their *amici* do, that individuals discriminated against by one entity can simply turn to other organizations that do not discriminate. Even if there are other service providers available—which isn't necessarily the case—the cure for discrimination is equal treatment, not separate options, much less a reduced set of options. The ability to work with another foster care agency, live in a different nursing facility or dine at a different restaurant is no redress for the "humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring). The stigmatic injury suffered in being denied a public service or public accommodation is severe.

Nor is it an answer to emphasize the long history of religious organizations providing social services such as foster care services. None of that is disputed but neither does it justify requiring federal, state or local authorities to contract with private entities that

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[6] Discrimination on the basis of sexual orientation is particularly lamentable in the foster care setting, as it not only deprives LGBTQ individuals of the meaningful opportunity to help care for children in need, but it also deprives many children of a loving home, as LGBTQ individuals are significantly more likely than different-sex couples to be raising foster children. Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. Are Raising Children?* (July 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Same-Sex-Parents-Jul-2018.pdf.

refuse to comply with religiously neutral, generally applicable antidiscrimination laws.

Petitioners argue that compliance with Philadelphia's antidiscrimination policies would force them to convey a message in their written foster care certifications with which they do not agree. (Pet'rs' Br. 30-33.) But this case is not about forcing religious organizations to "endorse" same-sex marriage or anything else. Indeed, to the extent Petitioners here are speaking at all, they do so in their capacity as governmental contractors performing a public function, rather than as private entities engaging in private speech. The government's power to "fund[] particular state or private programs or activities . . . includes the authority to impose limits on the use of such funds to ensure they are used in the manner [the government] intends." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013). A condition barring the use of taxpayer funds to advance discriminatory practices falls well within this spending power. A party that objects to these antidiscrimination conditions can simply decline the contract and decline the funds. "This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Id.* at 214.

At bottom, nothing in the First Amendment requires Congress to allow private entities to use taxpayer funds to discriminate against a subset of taxpayers. This Court has long recognized Congress's interest in curbing discrimination among entities receiving federal funds or performing public functions, and an adverse ruling in this case threatens to undermine individuals' access to congressionally

designed and funded programs, interfere with Congress's ability to set programmatic requirements for its authorized programs and, ultimately, subvert Congress's core antidiscrimination goals.

## CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm.

August 20, 2020

Respectfully submitted,

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# APPENDIX

## I. COMPLETE LIST OF *AMICI CURIAE*

### A. United States Senators (24)

Tammy Baldwin
Richard Blumenthal
Cory A. Booker
Sherrod Brown
Christopher A. Coons
Tammy Duckworth
Dianne Feinstein
Kirsten Gillibrand
Mazie K. Hirono
Tim Kaine
Edward J. Markey
Robert Menendez
Jeffery A. Merkley
Patty Murray
Jacky Rosen
Bernard Sanders
Brian Schatz
Charles E. Schumer
Jeanne Shaheen
Tina Smith
Chris Van Hollen
Mark R. Warner
Elizabeth Warren
Ron Wyden

### B. Members of the United States House of Representatives (148)

Alma S. Adams, Ph.D.
Pete Aguilar
Colin Z. Allred
Nanette Diaz Barragán
Karen Bass
Ami Bera, M.D.
Donald S. Beyer Jr.
Earl Blumenauer
Lisa Blunt Rochester
Suzanne Bonamici
Anthony G. Brown
Julia Brownley
Salud O. Carbajal
Tony Cárdenas
Ed Case
Sean Casten
Kathy Castor
Joaquin Castro
Judy Chu
David N. Cicilline
Gilbert R. Cisneros, Jr.
Katherine Clark
Yvette D. Clarke
Wm. Lacy Clay
James E. Clyburn
Gerald Connolly
Jim Cooper
TJ Cox

Angie Craig
Sharice L. Davids
Danny K. Davis
Madeiline Dean
Peter A. DeFazio
Diana DeGette
Rosa L. DeLauro
Suzan K. DelBene
Val Demings
Mark DeSaulnier
Theodore E. Deutch
Debbie Dingell
Lloyd Doggett
Eliot L. Engel
Veronica Escobar
Anna G. Eshoo
Adriano Espaillat
Dwight Evans
Bill Foster
Lois Frankel
Marcia L. Fudge
Ruben Gallego
Jesús G. "Chuy" García
Sylvia R. Garcia
Jimmy Gomez
Josh Gottheimer
Raúl M. Grijalva
Deb Haaland
Jahana Hayes
Denny Heck
Brian Higgins
Steven Horsford
Steny H. Hoyer
Jared Huffman
Sheila Jackson Lee
Pramila Jayapal
Hakeem S. Jeffries
Henry C. "Hank" Johnson, Jr.
Marcy Kaptur
Joseph P. Kennedy, III
Ro Khanna
Daniel T. Kildee
Derek Kilmer
Ann Kirkpatrick
Ann McLane Kuster
James R. Langevin
John B. Larson
Brenda L. Lawrence
Al Lawson
Barbara Lee
Andy Levin
Ted W. Lieu
Zoe Lofgren
Alan Lowenthal
Ben Ray Luján
Stephen F. Lynch
Tom Malinowski
Carolyn B. Maloney
Sean Patrick Maloney
A. Donald McEachin
James P. McGovern
Grace Meng
Gwen S. Moore
Joseph D. Morelle
Seth Moulton
Debbie Mucarsel-Powell
Stephanie Murphy
Jerrold Nadler
Grace F. Napolitano

Richard E. Neal
Donald Norcross
Eleanor Holmes Norton
Alexandria Ocasio-Cortez
Frank Pallone, Jr.
Jimmy Panetta
Chris Pappas
Nancy Pelosi
Ed Perlmutter
Scott H. Peters
Chellie Pingree
Mark Pocan
Katie Porter
Ayanna Pressley
Mike Quigley
Jamie Raskin
Kathleen M. Rice
Harley Rouda
Lucille Roybal-Allard
Bobby Rush
Linda T. Sánchez
Mary Gay Scanlon
Jan Schakowsky
Adam B. Schiff
Kim Schrier, M.D.
David Scott
Robert C. "Bobby" Scott
José E. Serrano
Terri A. Sewell
Donna E. Shalala
Adam Smith
Darren Soto
Abigail D. Spanberger
Jackie Speier
Greg Stanton
Haley Stevens
Mark Takano
Dina Titus
Rashida Tlaib
Lori Trahan
David Trone
Juan Vargas
Filemon Vela
Nydia M. Velázquez
Debbie Wasserman Schultz
Maxine Waters
Bonnie Watson Coleman
Peter Welch
Jennifer Wexton
Susan Wild
John Yarmuth