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 *AMICI CURIAE* SCHOLARS OF THE CONSTITUTIONAL RIGHTS AND INTERESTS OF CHILDREN IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici are law professors and scholars of children and the law, family law, equal protection law, and anti-discrimination law. Professor Cary M. Shelby is a former foster youth. *Amici* submit this brief to: (1) demonstrate that allowing a government contractor providing public foster care services a categorical exemption—unrelated to children's needs and same-sex foster parents' fitness—harms children in the State's care; and (2) explain that allowing agencies to discriminate based on a conviction that only men and women can marry would give legal effect to a private religious belief, at the expense of foster children and contrary to Fourteenth Amendment values. Neither the majority nor "some fraction of the body politic" should be permitted to "use the power of the State to enforce [its private] views on the whole of society through operation of [law]."[2] A*mici*'s analysis advances the primacy of

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person other than *amici* and their academic institutions contributed monetarily to the preparation or submission of this brief. This *amicus* brief is filed pursuant to a letter of consent from Petitioners and Intervenors. Respondents filed blanket consents on the docket.

[2] *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (explaining that the condemnation of same-sex sexual relations "has been shaped by religious beliefs, conceptions of rights and acceptable behavior, and respect for the traditional family," however, "[t]he issue is whether the majority may use the power of the State to enforce these views on the whole of society through operation of the criminal law."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("[T]he City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic. 'Private biases may be

children's rights and interests to highlight that carving out a religious exemption to an anti-discrimination mandate forces the State to breach its highest duty to protect children in its care and offends the Fourteenth Amendment.

SUMMARY OF ARGUMENT

There can be no keener revelation of a society's soul than the way in which it treats its children.[3]

The framing of this dispute has centered on the religious rights of a government contractor to exclude married same-sex couples from providing foster homes in violation of the City's contractual anti-discrimination law. Minimized in the analysis are thousands of children in foster care who may be directly and adversely impacted if Catholic Social Services' (CSS) private belief in the provision of foster care services is given legal effect. It is the children whose placement options that may be curtailed and their interests that *amici* center in the constitutional calculus.[4]

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outside the reach of the law, but the law cannot, directly or indirectly, give them effect.' ") (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

[3] President Nelson Mandela, Address at the Launch of the Nelson Mandela Children's Fund, AFR. NAT'L CONG. (May 8, 1995), http://www.mandela.gov.za/mandela_speeches/1995/950508_nmcf.htm.

[4] We believe that the best solution for children is to remain or be reunified with their families of origin when possible.

Amici advance two arguments. First, a categorical exemption, based on religious beliefs rather than foster children's needs, does not serve the best interests of children and violates the State's duty to foster children. Such an exemption needlessly restricts the pool of prospective foster parents, exacerbating child-welfare realities that increase the risk of a greater number of children being confined to long-term, institutional care. The reduction of same-sex foster parents would also have a disproportionate impact on "special needs"[5] and LGBT children in foster care.[6]

Second, allowing a government contractor to exclude same-sex foster parents gives legal effect to private beliefs in the provision of public foster care services in contravention of the aims of the Fourteenth Amendment. The requested exemption is not inert; it is one that gives legal effect to unconstitutionally impermissible forms of discrimination on the basis of sex and sexual orientation. This Court's equality and liberty jurisprudence eschews gender stereotyping about the role of men and women in parenting, maintains a strong presumption against sex discrimination, and

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[5] 55 Pa. Code §§ 3140.201–3140.210 (2020); *Pennsylvania State Adoption Assistance Program*, N. AM. COUNCIL ON ADOPTABLE CHILD. (Sept. 2019), https://www.nacac.org/help/adoption-assistance/adoption-assistance-us/state-programs/pennsylvania-adoption-assistance-program/__(an itemized list of children deemed "special needs").

[6] *Child Welfare*, YOUTH.GOV, https://youth.gov/youth-topics/lgbtq-youth/child-welfare (last visited July 10, 2020).

rejects state action that singles out or excludes LGBT people.[7]

ARGUMENT

CSS is a government contractor providing public foster care services for the City of Philadelphia. Like all contractors performing this critical government service, CSS must adhere to generally applicable nondiscrimination requirements. The City includes a provision in all foster care contracts that requires contractors to comply with the Fair Practices Ordinance (FPO). This ordinance prohibits discrimination in "public accommodations" on the basis of race, religion, sexual orientation, gender identity, and marital status, to name a few.[8] Yet, CSS seeks a religious exemption to the prohibition on sexual orientation discrimination because of its religious belief that marriage can only be between a man and a woman.[9] In other words,

[7] *Romer v. Evans*, 517 U.S. 620, 633 (1996) (The flaw of a blanket exemption to state anti-discrimination law is akin to one of this Court's objections to Amendment 2: "It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.").

[8] Phila. Code § 9-1106 (2016).

[9] Brief for Petitioner at 8–9, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123) ("Home study certifications signify an agency's approval of a family, and CSS understands the home studies as an endorsement of the relationships of those living in the home. Accordingly, CSS cannot certify relationships during a home study that are inconsistent with its Catholic beliefs.").

CSS seeks to categorically refuse to certify qualified same-sex couples as foster parents and to continue receiving government funding while doing so.[10]

Often, rights-based disputes center on adults' interests; however, critical to the Court's analysis is the fact that children are at the heart of this legal controversy.[11] As *amici* highlighted in their amicus brief in *Obergefell v. Hodges*, which the Court cited, children's interests must be weighed in the constitutional analysis.[12] This Court has acknowledged, "the protection that foster children have is simply the requirement of state law that decisions about their placement be determined in the light of their best interests."[13] The City would breach its duty to foster children in its care by allowing a government contractor to exclude families based on private beliefs that contravene both children's best interests and Fourteenth Amendment principles. This breach is particularly acute for "special needs"[14] children who face unique placement

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[10] *Id.* at 9 ("In practice, this means that CSS cannot provide foster care certifications for unmarried couples, regardless of sexual orientation, nor for same-sex married couples.").

[11] Catherine Smith, Obergefell's *Missed Opportunity*, 79 L. & CONTEMP. PROBS. 223, 223 (2016) ("[C]hildren's legal interests are usually sidelined by an unyielding obsession with the interests of adults in our society.").

[12] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (citing Brief of Scholars of the Constitutional Rights of Children as *Amici Curiae* 22-27).

[13] *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 860 (1977) (Stewart, J., concurring).

[14] Tanya M. Washington, *Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption*

challenges and for LGBT children who have been forced from their homes because their families reject their sexual orientation or gender identity, often on religious grounds.[15]

I. ALLOWING A GOVERNMENT CONTRACTOR TO CATEGORICALLY EXCLUDE SAME-SEX FOSTER PARENTS FAILS TO SERVE THE BEST INTERESTS OF CHILDREN

"[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties."[16] These obligations center on the needs and interests of minor children to whom the State owes "a duty of the highest order."[17] The proper

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Bans, 6 HASTINGS RACE & POVERTY L. J. 1, 1 (2008) ("'[S]pecial needs' children . . . includes children with medical and developmental disabilities, older children, and sibling sets wh[o] are more difficult to place. . . .").

[15] Approximately 26 percent of LGBT youth were forced from their homes because of conflicts with their families of origin regarding their sexual orientation or gender identity. *Child Welfare*, YOUTH.GOV, https://youth.gov/youth-topics/lgbtq-youth/child-welfare (last visited July 10, 2020).

[16] *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000); *see also D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992) (*en banc*) ("A relationship between the state and foster children arises out of the state's affirmative act in finding the children and placing them with state-approved families. By so doing, the state assumes an important continuing, if not immediate, responsibility for the child's well-being.").

[17] *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

exercise of the State's commitment to children within its care and custody is defined by the best interests of the child standard.[18] In the foster care context, the best interests of children are served by the placement option that provides the most permanence, stability, and security.[19]

The State has a duty to take actions that facilitate, rather than foreclose, placement in the optimal setting.[20] Providing foster care services is delegable, and the duty owed to foster children remains. This delegated duty must be performed in service of children's best interests.

Whether the City or its contracted agent is assessing the eligibility of prospective foster parents, determinations must be informed by objective factors related to children's needs and parental fitness. Contractors who *choose* to provide foster care services do not have the authority to act in ways that harm

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[18] *In re Sweeney*, 574 A.2d 690, 691 (Pa. Super. Ct. 1990) (noting, "issues of custody and continuation of foster care are determined according to a [foster] child's best interests"); *Lindley v. Sullivan*, 889 F.2d 124, 128–32 (7th Cir. 1989).

[19] Pennsylvania and federal child welfare law identify children's best interests as being served by the most beneficial placement option. *See* The Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 671(a)(15), 673(b)(d), 675(5)(E) (2018); 11 PA. STAT. AND CONST. STAT. ANN. § 2633 (West 2020); *D.P. v. G.J.P.*, 146 A.3d 204, 211 (Pa. 2016) (observing the state's "compelling interest in safeguarding children . . . and promoting their wellbeing").

[20] Once a child is within the care and custody of the State, and it is acting "[a]s *parens patriae*, the State's goal is to provide the child with a permanent home." *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

children, even if their actions are grounded in privately held religious beliefs. Excluding same-sex foster parents based on categorical considerations unrelated to merit or fitness contravenes children's best interests and breaches the government's duty to act in furtherance of those entrusted to its care. In the foster care context, children's best interests are served by access to familial settings.[21]

A. Children's Best Interests are Better Served By Placement with Foster Families Than in Institutional Care Settings

Placement with foster families, including LGBT foster families, is generally more beneficial to children than placement in long-term institutional care in congregate care homes and furthers, rather than frustrates, children's best interests.[22] There is a

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[21] *Encouraging Adoption: Hearing Before the Subcomm. on Human Res. of the Comm. on Ways and Means*, 105th Cong. 112 (1997) (statement of Fred H. Wulczyn, Ph.D., University of Chicago) ("Permanency has a variety of connotations including the notion of stability with respect to the home where a child lives and his or her relationship to their caregivers.").

[22] "[Foster care] youths, lacking permanent families to help them transition into adulthood, are at heightened risk of negative outcomes: emotional adjustment problems, poor educational results and employment prospects, and inadequate housing and homelessness; furthermore, they are more likely to become involved with the criminal justice system." EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR WAITING CHILDREN II: ELIMINATING LEGAL AND PRACTICE BARRIERS TO GAY AND LESBIAN ADOPTION FROM FOSTER CARE 11 (2008).

substantial and growing body of evidence documenting the harms of extended institutional care, including poverty, homelessness, housing insecurity, increased rates of substance abuse, unemployment, incarceration, poor academic performance, low graduation rates, and early parenthood.[23] Conversely, exclusion of LGBT parents from fostering finds no support in the body of credible social science research on outcomes for children in LGBT families.[24]

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[23] Gary J. Gates et al., Williams Inst., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 4, 17–18 (2007).

[24] Mary L. Bonauto, *Civil Marriage as a Locus of Civil Rights Struggles*, 30 HUM. RTS. 3, 7 (2003) (noting that "thirty-five years of studies showing that children of gay and lesbian parents are normal and healthy on every measure of child development"). "[R]esearch has challenged the stereotype of gays and lesbians as individuals who lack the ability, relationship stability and/or moral values to adequately raise children. Reviews of nearly a quarter-century of research on parenting by non-heterosexual adults is extraordinarily consistent in indicating that they are just as competent and well-adjusted as their heterosexual counterparts and that the children in their households show no meaningful differences in psychological adjustment from those who grow up with straight parents. . . ." DAVID M. BRODZINSKY & EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 13 (2011), https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/52535.pdf?r=1&rpp=10&upp=0&w=+NATIVE%28%27recno%3D52535%27%29&m=1; *see also* Nanette Gartrell et al., *Adolescents with Lesbian Mothers Describe Their Own Lives*, 59 J. OF HOMOSEXUALITY 1211, 1212–22 (2012) (The researchers conducted a longitudinal study over three decades of children of lesbian parents and reported positive outcomes for children.).

This Court acknowledged the parental fitness of same-sex couples in *Obergefell v. Hodges*, observing:

> Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.[25]

Placement with foster families is more beneficial to children than long-term institutional settings, and LGBT families are available to provide foster homes.

B. A Government Contractor's Categorical Exclusion Diminishes Access to Familial Placements, Harming All Children in Foster Care and Disproportionately Impacting "Special Needs" and LGBT Children

Allowing discrimination that excludes same-sex foster parents based solely on their sexual orientation harms all foster children and imposes an even harsher consequence on "special needs" and LGBT children in the State's care.

Child welfare realities across the nation reflect a surplus of waiting children and a deficit of prospective parents.[26] The number of children in the child welfare

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[25] *Obergefell*, 135 S. Ct. at 2600 (citing Brief for Gary J. Gates as *Amicus Curiae* 4–5).

[26] Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Welfare Outcomes 2016 Report to Congress* (2016),

system is increasing, while there has been no corresponding increase in the numbers of available foster families.[27] According to a study from 2014 to 2016, same-sex couples raising children were seven times more likely to foster children and to adopt children than their different-sex counterparts.[28] LGBT foster families are increasingly filling an important need in the foster care system. Excluding them from the pool of prospective parents will mean more foster children will experience the harms of long-term, institutionalized care.[29]

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https://www.acf.hhs.gov/sites/default/files/cb/cwo2016_exesum.pdf; Children's Bureau, U.S. Dep't of Health & Human Servs., *Trends in Foster Care and Adoption: FY 2009–FY 2018*, at 1 (2019), https://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption_09thru18.pdf.

[27] John Kelly, *Projection: National Foster Care Numbers Continue to Rise in 2017* IMPRINT, (Nov. 2, 2017), https://chronicleofsocialchange.org/youth-services-insider/projection-national-foster-care-numbers-will-continue-rise; Children's Bureau, U.S. Dep't of Health & Human Servs, *The AFCARS Report: Preliminary FY 2016 Estimates as of Oct 20, 2017–No. 24* (2017), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf; U.S. Administration for Children and Families Children's Bureau, *The AFCARS Report: Preliminary FY 2017 Estimates as of August 10, 2018–No. 25* (2019), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf [hereinafter *The AFCARS Report: Preliminary FY 2017 Estimates*].

[28] Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the U.S. are Raising Children*, WILLIAMS INST. 1 (July 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Same-Sex-Parents-Jul-2018.pdf.

[29] BRODZINSKY, *supra* note 24, at 3 ("[S]ocietal stigmas relating to adoption by lesbians and gay men remain, as do institutional barriers. These impediments do not further the best

1. A Categorical Exclusion Harms *All* Foster Children

A government contractor using its delegated authority to exclude same-sex couples would likely expose more foster children to the documented harms of long-term confinement in state institutions and group homes.[30] Categorical exclusions of same-sex foster parents would shrink the already insufficient pool of available prospective foster parents.[31] The net effect of allowing an exemption from the City's non-discrimination requirement would be frustration of the City's ability to provide the most beneficial placement option for the greatest number of foster children.[32] More foster children would likely experience negative outcomes in contravention of their best interests.[33] The

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interests of children; indeed, they prevent or delay permanency for many, undermining their long-term psychosocial and academic adjustment. With over 100,000 children continuing to linger in foster care . . . every effort must be made to find timely and permanent placements for them. . . .").

[30] *Pennsylvania State Adoption Assistance Program*, *supra* note 5.

[31] *Id*. at 6 ("[B]anning or hindering lesbians and gay adults from fostering or adopting will reduce the number of permanent and nurturing homes for children in need.").

[32] "[S]ome children will not be adopted at all. Such children may have to live in state foster institutions." Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption and the Best Interests of the Child*, 45 KAN. L. REV. 49, 76 (1996).

[33] Barbara Bennett Woodhouse, *Waiting for* Loving*: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 326 (2005) ("In the face of a shortage of adoptive parents, categorical bans actually ensure that some children will never have a

exemption CSS is seeking would frustrate, rather than facilitate, the best placement option for foster children and breach the government's fiduciary duty to this vulnerable population.

2. A Categorical Exclusion Disproportionately Impacts "Special Needs" Foster Youth

"Special needs" children are defined under Pennsylvania law to include:

- children ages 5 to 18;
- racial or ethnic minority youth;[34]
- sibling groups;

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family of their own. . . . Many of these children will wait in vain and will 'age out' of the system into homelessness and joblessness.").

[34] Half of the children under eighteen who live with same-sex couples are children of color. Gary J. Gates, Williams Inst., *LGBT Parenting in the United States* 1 (2013), https://willamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf; *see also* Washington, *supra* note 14, at 2 ("For many Black orphans the choice is not between placement with a heterosexual parent or a gay or lesbian parent; rather, it is between placement and nonplacement."); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 149 (2002). LGBT foster youth of color are suffering at the intersection of race and LGBT identity. Kerith J. Conron & Bianca D.M. Wilson, Williams Inst., *LGBT Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems: A Research Agenda* 4 (June 2019), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-YOC-Social-Services-Jul-2019.pdf.

- children with physical, mental, emotional conditions or disabilities; and
- children with a genetic condition that indicates a high risk of developing a disease or disability.[35]

"Special needs" children, who are more likely to be fostered by same-sex couples, tend to have few family placement options available to them and are particularly vulnerable to experiencing the harms of institutional care and the risk of aging out of the foster care system.[36]

Same-sex couples are not only seven times more likely to foster and adopt, they are also "more likely to adopt older children and children with special needs, who are statistically less likely to be adopted."[37] Allowing religious entities to refuse to certify same-sex couples would therefore decrease the number of available families for children. Categorically excluding same-sex foster parents is likely to substantially and adversely impact the foster care system and the most vulnerable children it serves.

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[35] *Pennsylvania State Adoption Assistance Program*, *supra* note 5.

[36] "Special needs children . . . suffer disproportionately from categorical barriers to adoption. Remember, special needs children include not only disabled and older children, but also children of color. [They] are the 'toughest children to place in adoptive homes' and they 'often wait the longest before being adopted.'" Woodhouse, *supra* note 33, at 327.

[37] *The AFCARS Report: Preliminary FY 2017 Estimates*, *supra* note 27; *see also* BRODZINSKY, *supra* note 24, at 33–34.

3. A Categorical Exclusion Disproportionately Harms and Stigmatizes LGBT Foster Youth

LGBT children will also be detrimentally and disproportionately impacted by the exclusion of LGBT families by contracted foster care agencies. Because LGBT youth, like "special needs" foster children, have unique needs and present unique placement challenges, it is more likely they will age out of the foster care system and suffer harmful outcomes.

LGBT youth are overrepresented in the foster care system, comprising a staggering 19 to 34 percent of foster children.[38] They are also more likely to experience multiple placements and to be placed in congregate care.[39] Seventy percent of LGBT youth report experiencing physical violence while in congregate care.[40] LGBT youth continue to experience negative effects of foster care even after exiting the system.[41] These

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[38] LGBTQ YOUTH IN THE FOSTER CARE SYSTEM, Human Rights Campaign, https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf.

[39] *Id.*

[40] *Id.*

[41] *Homelessness & Housing*, YOUTH.GOV, https://youth.gov/youth-topics/lgbtq-youth/homelessness (last visited Aug 3, 2020). Twenty to forty percent of homeless youth identify as LGBT. *Id.* Two of the top four causes for homelessness among LGBT youth include: (1) family rejection of their sexual orientation or gender identity; and (2) aging out of the foster care system. *Id.* at 5. One study found that 65 percent of homeless LGBT youth had lived in congregate care or foster homes, and 39 percent of those youth were forced to leave because of their sexual orientation or gender identity. *Child Welfare*, *supra* note 15.

negative experiences are only exacerbated for LGBT youth of color.[42] The disproportionate number of LGBT youth in foster care highlights the need to increase the pool of foster parents available to provide an affirming, supportive, familial placement setting.

Further, when discrimination against same-sex couples occurs in the context of the public child welfare system—a government program—it sends a message that stigmatizes and humiliates LGBT foster children.[43]

In *United States v. Windsor*, in striking down the Defense of Marriage Act, this Court raised its concern for how the "differentiation" between different-sex and same-sex families humiliates children being raised by same-sex couples.[44] This concern should undoubtedly extend to LGBT youth. It would certainly be incongruous to recognize the pain of discrimination to children of LGBT parents and not to LGBT children themselves.[45]

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[42] *See* Kerith J. Conron & Bianca D.M. Wilson, *supra* note 34.

[43] *United States v. Windsor*, 570 U.S. 744, 771–75 (2013) (DOMA "humiliates tens of thousands of children now being raised by same-sex couples"); *see also* Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 Harv. C.R.-C.L. 231 (2009) (documenting similar harms to children in multiracial families).

[44] *Windsor*, 570 U.S. at 772.

[45] *See generally* Kyle C. Velte, Obergefell's *Expressive Promise*, 6 HLRE 157 (2015) (illustrating how the Court's LGBT-rights

Allowing sexual orientation and gender identity discrimination in the provision of government foster care services would exacerbate the psychic trauma that many LGBT foster children already carry with them. A significant percentage of these young people are forced from their homes because their families reject their sexual orientation or gender identity, often on religious grounds.[46] To require governments to enshrine into law the hurtful personal beliefs LGBT youth seek to escape or are forced to flee is diametrically opposed to public child welfare aims.

Allowing an exclusion of LGBT foster parents also sends a negative message about who these young people are now, as LGBT youth, and who they will be as adults. LGBT youth should be free to experience teen crushes and first love without government-endorsed messages that tell them that they and their relationships are illegitimate. It also sends a harmful message to LGBT youth who hope to one day become parents and foster parents themselves.

LGBT youth have reported that placement with accepting foster parents is a factor contributing to their empowerment and positive future outcomes.[47] Ensuring a robust pool of foster parents—including

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opinions send an important and transformative message about the place of LGBT Americans in society).

[46] ANNIE E. CASEY FOUNDATION, LGBTQ IN CHILD WELFARE: A SYSTEMATIC REVIEW OF THE LITERATURE 3 (2016), https://www.aecf.org/m/resourcedoc/aecf-LGBTQ2inChildWelfare-2016.pdf [hereinafter CASEY FOUNDATION REVIEW].

[47] *Id*. at 35.

LGBT foster parents—to LGBT youth, will maximize the number of placements that can mitigate the psychological and emotional harm these children suffer.[48]

Permitting a government contractor to violate the City of Philadelphia's non-discrimination requirement would harm all children in foster care and frustrate child welfare goals. Notably, the coronavirus is making it even more difficult to find foster homes for children.[49]The harmful impact of the rule CSS seeks would exacerbate the challenge of finding foster homes in the midst of a global, deadly pandemic, particularly for "special needs" and LGBT youth. To ignore this reality, in deference to an impermissible, discriminatory, personal belief against the families more likely to foster the most vulnerable children, would violate children's rights and interests, and constitute an unconscionable act of cruelty.

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[48] *Id.*

[49] "Prior to COVID-19, no communities in the country could say they had more than enough foster families. . . . When you layer COVID-19 on top of that, the crisis becomes just that much more challenging." Gracie Bonds Staples, *Why Surge in Foster Care Placement Will Follow COVID-19 Pandemic*, ATLANTA JOURNAL-CONSTITUTION (April 7, 2020), https://www.ajc.com/lifestyles/why-surge-foster-care-placement-will-follow-covid-pandemic/NKtnijOQwZpfsL8XypJsrL//. "As a result, the number of foster homes, already all too scarce in Washington before the crisis hit, will remain static for the state's over 10,000 foster care children until the pandemic subsides. . . ." David Dodge, *How Coronavirus Is Affecting Surrogacy, Foster Care and Adoption*, N.Y. TIMES (April 1, 2020), https://www.nytimes.com/2020/04/01/parenting/coronavirus-adoption-surrogacy-foster-care.html.

II. Allowing the Exclusion of Same-Sex Couples Gives Impermissible Legal Effect to Religious Beliefs at the Expense of Children in Contravention of Fourteenth Amendment Values

Here, the requested exemption is not simply a private belief with no import or meaning; it is one that gives legal effect to unconstitutionally impermissible forms of discrimination. This Court has addressed this issue in a number of contexts, including LGBT cases. These decisions raise concerns about government practices that endorse or sanction Fourteenth Amendment offending personal or private beliefs by giving them effect in the law.

In the seminal case *Palmore v. Sidoti*,[50] this Court took the unusual step of reviewing, and striking down, a state family court's custody order. Following the divorce of a white couple, the mother was awarded custody of the couple's young child.[51] Within months of the divorce, the father sought custody of the child based on changed conditions: the mother's relationship with and marriage to a Black man.[52]

Despite finding no concern with either the mother's or the stepfather's parental fitness, the family court heeded a court counselor's recommendation about the "social consequences" for a child being raised

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[50] 466 U.S. 429 (1984).

[51] *Id.* at 430.

[52] *Id*.

in "an interracial marriage."[53] Specifically, the counselor opined: "[T]he wife . . . has chosen for herself and for her child, a life-style unacceptable to the father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice."[54]

While the father's disapproval of the relationship was an insufficient basis for awarding him custody, the judge found that placement with the father was in the child's best interest, so that she did not "suffer from . . . social stigmatization" in a society that did not fully accept interracial relationships.[55]

This Court reversed because of the actual *function* of the lower court's reliance on a segment of society's views of interracial relationships.[56] This Court explained that, although "the Constitution cannot control such prejudices [] neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[57] This Court's ruling in *Palmore* recognized the eradication of racial discrimination by the State as a core purpose of the Fourteenth Amendment and made clear that the law must not give credence to those views in contravention of the Amendment's objectives.

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[53] *Id.*

[54] *Id.* at 431 (internal quotation marks omitted).

[55] *Id.*

[56] *Id.* at 432 ("This raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.").

[57] *Id.* at 433.

Some people may view *Palmore* as a product of social views, not religious ones, yet it was decided a mere twenty years after *Loving v. Virginia*.[58] This Court in *Loving* explicitly acknowledged the religious origins of anti-miscegenation laws and held that they were outweighed by the constitutional gravitas of the Fourteenth Amendment right to marry.[59] The salient point is not the origin of the personal belief, it is that once that belief has been deemed offensive to Fourteenth Amendment values, the government may not give it legal effect.

We saw a similar concern raised in *Obergefell*, in which this Court explained:

> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises. . . . But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the

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[58] 388 U.S. 1 (1967).

[59] *Id.* at 12. *See also id.* at 3 (noting that the trial court judge had highlighted the religious underpinnings of the State of Virginia's anti-miscegenation law by "stating in an opinion that: 'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.' "). *See generally* Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases* 42 CARDOZO L. REV ___ (forthcoming 2020)

> imprimatur of the States itself on an exclusion[.][60]

Here, allowing a government contractor to discriminate in the administration of public foster care services because they believe marriage must only be between a man and a woman would give legal effect to private biases, or even personal beliefs, in violation of the Fourteenth Amendment. This Court has drawn "upon principles of liberty and equality to define and protect the rights of gays and lesbians," and their families.[61] And it should do so here to protect same-sex couples, and the focus of this brief—children in foster care.

First, affording a government contractor a religious exemption would legally endorse private views based on gender stereotypes about parenting. Second, it would give legal effect to impermissible sex discrimination in violation of the equal protection guarantee—a conclusion that should be all but a *fait accompli* after this Court's recent decision in *Bostock v. Clayton County.*[62] Third, it would give legal effect to a private

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[60] *Obergefell*, 135 S. Ct. at 2602.

[61] *Id.* at 2604; *see also Lawrence*, 539 U.S. at 578.

[62] 140 S. Ct. 1731 (2020). *See* Erwin Chemerinsky, *Chemerinsky: Gorsuch Wrote His "Most Important Opinion" in SCOTUS Ruling Protecting LGBTQ Workers*, ABA JOURNAL (July 1, 2020), https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion ("It is possible that the court will say *Bostock* was just about interpreting the language of Title VII, and that it is different under equal protection. But there seems to be little basis for such a distinction once the court held that a prohibition against sex discrimination includes outlawing discrimination based on sexual orientation and gender identity."); *Bostock*, 140 S. Ct. at 1783 (Alito, J.,

bias against same-sex couples, placing the State's "imprimatur . . . on [the] exclusion."[63]

A. Allowing the Exclusion Gives Impermissible Legal Effect to Stereotyping

Granting a religious exemption to discriminate against same-sex foster parents gives effect to personal beliefs based on stereotypes about appropriate gender roles in parenting. It is well-established that laws may not rely on overbroad generalizations about the different talents, capacities, or preferences of men and women.[64] Assumptions about expected parenting roles that men and women must or should perform based on gender alone fall squarely within the gender stereotyping that has been deemed impermissible in equal protection law.[65]

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dissenting) ("Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a 'heightened' standard of review is met. By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjection of all three forms of discrimination to the same exacting standard of review.").

[63] *Obergefell*, 135 S. Ct. at 2602.

[64] *See Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (recognizing "pervasive sex-role stereotype that caring for family members is women's work" as an insufficient justification under Equal Protection Clause); *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (holding invalid justification based on state's preference for allocation of family responsibilities under which wife plays a dependent role).

[65] *See* Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of*

For example, in *Caban v. Mohammed*,[66] the Court struck down a New York law that permitted unwed mothers to block the adoption of their children by denying consent to potential adoptees but did not grant this consent-based objection to unwed fathers. A father challenged this gender-based distinction as an equal protection violation.[67] The mother argued that the distinction between unwed mothers and unwed fathers was based on a fundamental difference between the sexes because "a natural mother, absent special circumstances, bears a closer relationship with her child" than a father.[68] This Court disagreed, finding that "maternal and paternal roles are not invariably different in importance," and that even if unwed mothers were closer to their newborn children, "this generalization concerning parent-child relations would become less acceptable as the age of the child increased."[69] This Court "reject[ed] . . . the claim that the broad, gender-based distinctions of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development."[70]

Exclusion—Legitimacy, Dual-Gender Parenting, and Biology, 28 LAW & INEQ. 307, 326 (2010); *see also* Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 725–48 (2003).

[66] 441 U.S. 380 (1979).

[67] *Id.* at 385.

[68] *Id.* at 388.

[69] *Id.* at 389.

[70] *Id.*

In *J.E.B. v. Alabama*,[71] a prosecutor used nine of ten peremptory strikes to remove male jurors in a paternity and child support trial. The prosecutor defended his actions "based upon the perception, supported by history, that men might be more sympathetic to the arguments of a man alleged to be the father of an out-of-wedlock child, while women might be more sympathetic and receptive to the. . . . [mother]."[72] Concerned about gender stereotypes being given impermissible legal effect, this Court rejected the prosecutor's justification, explaining that "[w]hen state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women."[73]

Here, CSS' belief that marriage or child rearing can only be performed by a man and a woman invokes age-old stereotypes about the proper roles for men and women.[74] Many can sincerely hold this belief on personal moral, philosophical, or religious grounds; this private view about gender fitness cannot, however, be operationalized through law into the administration of public foster care without running afoul of equal protection jurisprudence. *Palmore* teaches that "the Constitution cannot control such prejudices but neither

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[71] 511 U.S. 127 (1994).

[72] *Id.* at 137.

[73] *Id.* at 140.

[74] Anthony Michael Kreis, *Policing the Painted and the Powdered*, 41 CARDOZA LAW REVIEW 399 (2019) (exploring LGBT discrimination's relationship to gender stereotyping and sexism).

can it tolerate them."[75] They must not "directly or indirectly" be given legal effect.[76]

To give them effect not only tramples on Fourteenth Amendment prohibitions, it also contravenes the best interests of the child standard, which requires an individualized assessment of the needs of a child and of the parental competencies of each prospective parent.[77] Gender-based exclusion of same-sex couples based on categorical and discriminatory beliefs about their parental fitness does violence to equal protection values this Court has established in *Palmore*, *Caban*, and *J.E.B.*, and is contrary to foster children's best interests.

B. Allowing the Exclusion Gives Impermissible Legal Effect to Sex Discrimination

Granting a government contractor a religious exemption to discriminate against same-sex foster parents would give the government's imprimatur to impermissible sex classifications, which this Court has long held carry a "strong presumption" of "invalid[ity]"

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[75] *Palmore*, 466 U.S. at 433.

[76] *Id.*; *see generally Lawrence*, 539 U.S. at 578 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

[77] Washington, *supra* note 14, at 18.

under the Equal Protection guarantee.[78] Since the 1970s, LGBT advocates have consistently argued that LGBT discrimination is sex discrimination.[79]

This Court's recent pronouncement in *Bostock* that it is impossible to discriminate against LGBT people without engaging in sex discrimination should apply with equal or greater force to equal protection law.[80]

In *Bostock*, this Court held:

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.[81]

Title VII prohibits employment discrimination that occurs "because of . . . sex."[82] According to this Court, the ordinary meaning of the word "'sex' signified . . . biological distinctions between male and female."[83] Further, it clarified that "because of" means but-for causation, which is not the same as a *sole* cause.[84] "So long as the plaintiff's sex was *one* but-for cause [of the

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[78] *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring).

[79] Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 413 (2000).

[80] *Bostock*, 140 S. Ct. at 1737.

[81] *Id.*

[82] 42 U.S.C. § 2000e-2(a)(1) (2020).

[83] *Bostock*, 140 S. Ct. at 1739.

[84] *Id.*

challenged employment] decision, that is enough to trigger the law."[85]

Justice Gorsuch then applied the entire phrase "because of an individual's . . . sex" to the LGBT plaintiffs and concluded that it was impossible to discriminate against LGBT people without taking their "sex" into consideration. With regard to sexual orientation, he explained: "If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleagues."[86] Similarly, for transgender employees, he reasoned: "If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."[87] In both of these instances, "but-for" the employee's sex, the individual would not have been subjected to termination.[88] In short, as this Court concluded, it is not possible to

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[85] *Id.* (emphasis added); *see also id.* ("Often, events have multiple but-for causes. . . . [A Title VII] defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." (emphasis in original)).

[86] *Id.* at 1741.

[87] *Id.*

[88] "For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'" *Id.* at 1743 (internal citation omitted).

discriminate against an LGBT individual without engaging in sex discrimination.[89]

Here, CSS seeks to offer its services only to different-sex married couples based on the religious belief that marriage is between only a man and a woman. Rejecting an otherwise qualified same-sex foster couple constitutes sex discrimination because if one member of the same-sex couple were a different sex, CSS would offer them certificatoin. In other words, CSS is discriminating against the couple because of sex. Their exclusion from the pool of available parents therefore constitutes sex discrimination.

C. Allowing the Exclusion Gives Impermissible Legal Effect to Sexual Orientation Discrimination

Permitting a categorical religious exemption in this context would give impermissible legal effect to CSS' personal beliefs about same-sex marriage and same-sex families.[90] This Court has expressly confirmed that "many same-sex couples provide loving and nurturing homes to children, whether biological or adopted . . . and many adopted and foster children

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[89] *Id.* at 1741 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

[90] *Latta v. Otter*, 771 F.3d 456, 470 (9th Cir. 2014) ("[T]he fear that an established institution will be undermined due to private opposition to its inclusive shift is not a legitimate basis for retaining the status quo."). Nor is it grounds for changing it.

have same-sex parents."[91] It has also struck down state laws, including those supported by sincerely held moral and religious beliefs, that single out or exclude LGBT people from the Fourteenth Amendment's strictures.[92] And, because CSS is a government contractor, if it is granted a religious exemption from the City's contractual non-discrimination law, that puts "the imprimatur of the State itself" on CSS' exclusion of same-sex couples.[93]

In *Lawrence v. Texas*,[94] this Court struck down Texas' sodomy statute as an unconstitutional violation of the Due Process rights of gays and lesbians, reversing *Bowers v. Hardwick*.[95] The State's justification for criminalizing sodomy was that society had long condemned homosexual conduct as immoral. This Court explained that simply having a deeply held moral or religious conviction does not answer whether an exclusion is constitutionally sound.[96] "*The issue is whether the majority may use the power of the State to enforce these views on the whole of society through operation of*

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[91] *Obergefell*, 135 S. Ct. at 2600.

[92] *Romer*, 517 U.S. at 635 ("A State cannot so deem a class of persons a stranger to its laws.").

[93] *Obergefell*, 135 S. Ct. at 2602.

[94] 539 U.S. 558 (2003).

[95] 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

[96] *Lawrence*, 539 U.S. at 571.

criminal law."[97] This Court's answer: the majority may not.[98]

This Court's ruling in *Obergefell* left no doubt that children and their rights and interests are paramount considerations in familial contexts. This Court expressed concerns about marriage bans economic and psychological injury to children of same-sex couples, and the interference with the "integrity . . . of their own famil[ies]."[99]

In this case, allowing a government contractor to refuse to certify same-sex couples as foster parents based on the belief that marriage is between a man and a woman would force the state to place its imprimatur on the exemption. The consequence of this exclusion harms LGBT people.[100] And, *amici* contend that

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[97] *Id.* (emphasis added); *see also id*. at 577–78 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting))); *Bowers*, 478 U.S. at 212 (Blackmun, J., dissenting) ("A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. 'The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect.'" (quoting *Palmore*, 466 U.S. at 433)).

[98] *Lawrence*, 539 U.S. at 578.

[99] *Obergefell*, 135 S. Ct. at 2600.

[100] *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (discussing the Equal Protection Clause's goal to eliminate laws that create social castes).

such exclusions also harm children in foster care awaiting families.

City of Cleburne v. Cleburne Living Center[101] provides another instructive example of the dangers of allowing private beliefs to take root in law. In *Cleburne*, this Court struck down a zoning ordinance requiring permits for group homes for individuals with cognitive disabilities, in part, due to the City Council's reliance on property owners' stereotypes.[102] This Court was clear:

> The City may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic.[103]

Here, the City of Philadelphia opposes such deference, yet respondents, a government contractor, seek a religious exemption to directly give impermissible legal effect to their personal beliefs about the administration of public foster care services. Some may view private beliefs about sexual orientation as not triggering heightened Fourteenth Amendment protections.[104] *City of Cleburne*, however, demonstrates that state action that gives impermissible legal effect to private beliefs can fail even rational basis review.[105]

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[101] 473 U.S. 432 (1985).

[102] *Id.* at 448.

[103] *Id.* (citing *Palmore*, 466 U.S. at 433).

[104] This conclusion is called in to question by this Court's ruling in *Bostock*.

[105] *City of Cleburne*, 473 U.S. at 450.

CSS invokes its sincerely held religious belief to discriminate against same-sex couples. However, the freedom to express or exercise one's religion is not absolute. Giving impermissible legal effect to a government contractor's personal beliefs in contravention of Fourteenth Amendment protections, whatever their source or rationale, undermines children's rights and interests and contravenes the City's duty to provide them with the most advantageous, familial placement setting.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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