

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 *AMICI CURIAE*, CATHOLIC
CHARITIES OF THE DIOCESE OF
SPRINGFIELD IN ILLINOIS, AND CATHOLIC
CHARITIES OF THE DIOCESE OF JOLIET,
INC., IN SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICI CURIAE*, CATHOLIC
CHARITIES OF SPRINGFIELD, ILLINOIS, AND
CATHOLIC CHARITIES OF JOLIET, ILLINOIS¹**

Amicus curiae, Catholic Charities of the Diocese of Springfield in Illinois (“Catholic Charities of Springfield”), is an Illinois non-profit 501(c)(3) corporation and an integrated auxiliary of the Roman Catholic Diocese of Springfield, Illinois. It has been operating for close to 100 years and provides an extensive range of social services (see <https://cc.dio.org/programs/>). Its mission is to “extend to all the healing and empowering presence of Jesus.” See <https://cc.dio.org/>. From 1965 to 2011 it acted as a foster care agency and, in that capacity, cared for thousands of distressed Illinois children. In 2011, while performing superior service on behalf of about 325 foster children, the State of Illinois (“the State” or “Illinois”) abruptly terminated its foster care services following enactment of Illinois Religious Freedom and Civil Union Act, 750 ILCS 75/1 et seq. The reason: Catholic Charities of Springfield, on religious grounds, declined to agree to assess and qualify same-sex couples as foster parents, although it agreed to refer such applicants to the many DCFS field offices which could provide those services or offer information about private agencies that could do the same.

Amicus curiae, Catholic Charities of the Diocese of Joliet Inc., in Illinois, is similarly organized, with a

1. The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

similar mission, and has served the Diocese of Joliet area for over 100 years, since the early 1900's. See <https://catholiccharitiesjoliet.org/>. It was also a foster care agency from 1965 to 2011 and cared for thousands of Illinois children until Illinois also terminated its care of about 400 foster children in 2011, again for the same reason the State terminated Catholic Charities of Springfield.

Amici curiae's interest in this case is to describe experiences they underwent in 2011 at the hands of the State of Illinois that are similar to those being experienced by the petitioners in the case under review. Their interest is also to explain why the Court should not allow what happened to *amici curiae* to happen again. In a nutshell, the State of Illinois acted for same-sex couples to exclude *amici curiae* from their 40+ years of foster care services, but in doing so it perpetrated actual harm on Illinois children, and abridged *amici curiae's* religious freedom, all without conferring a corresponding benefit on anyone. The values at stake in this case -- interests of same-sex couples, faith-based providers, and distressed children -- are not part of a zero-sum game. All can readily be realized, and must be, in order to protect the interest of highest value, our vulnerable children. Setting the wrong precedent in this case will only serve to encourage continued sacrifice of our vulnerable children on an altar of ideological conformity.

This brief reflects the views of the *amici curiae* and their executive directors, Steve Roach (Springfield) and Glenn Van Cura (Joliet), who directed their respective organizations in 2011 and speak with personal knowledge of the facts recited.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like the petitioners in the case under review, the *amici curiae*, Catholic Charities of the Diocese of Springfield and Catholic Charities of the Diocese of Joliet (collectively “Catholic Charities”) provided decades -- over 40 years each -- of superior foster care services to vulnerable children in Illinois under periodic contracts with the State. See Argument, I.A.1,2. below. In early 2011, Illinois passed the Religious Freedom and Civil Union Act, 750 ILCS 75/1 *et seq.* Almost immediately the State of Illinois threatened to terminate its contractual relationships with faith-based foster care agencies such as Catholic Charities unless the latter agreed to assess and qualify same-sex couples as foster parents. A few faith-based agencies such as Catholic Charities balked at the State’s demand. Catholic Charities had a sincerely held belief in the Roman Catholic Church’s centuries-long teaching that a true “marriage” consists of the union of a man and a woman, not of two men or two women. Catholic Charities proposed that it would refer same-sex applicants to one of over 60 DCFS field offices which could qualify such individuals or refer them to the many private agencies that would. The State rejected this proposal and when Catholic Charities declined to back down, the State terminated its 40-year relationship with them. These events, when compared with the case under review, show a pattern. In each case the government unnecessarily attempted to secure the rights of same-sex couples at the expense of children and religious freedom. See Argument, I.A.3. below.

In Illinois, the State’s exclusion of Catholic Charities from foster care harmed Illinois children. Not only did

the action exclude top-performing faith-based agencies, it had the effect of jettisoning the extensive foster parent recruiting networks these agencies had developed over decades. See Argument, I.B.2. below. With foster parents in critically short supply in Illinois, eliminating the capacity of Catholic Charities and other faith-based agencies to recruit and qualify foster parents harmed Illinois children, and violated the paramount legal standard in Illinois and elsewhere that decisions affecting children must be driven by their “best interests”.

The State also violated the “best interests” standard when it threatened to transfer *en masse* to other providers the more than 2,500 cases managed by the five Catholic Charities organizations in Illinois, as well as other cases managed by a few other faith-based agencies threatened with exclusion. The State’s threat, if carried out, would have created discontinuities of care highly damaging to the foster children. See Argument, I.B.3. below. The State’s brinkmanship forced these agencies, in order to avoid harming the children under their care, to cave in to the State’s threat, agree to terminate their services, and work with the State to permit an orderly transfer of all of their cases to other agencies along with their entire case management staffs.

Yet the State’s exclusion of Catholic Charities and other faith-based agencies from foster care in Illinois, and the harm to Illinois children it caused, conferred no corresponding benefit to same-sex couples. Same-sex couples could already access a highly capacitated system of over 100 DCFS field offices and alternative foster care agencies in Illinois to seek assessment and qualification as foster parents. In 2011 litigation brought against the State

of Illinois by *amici curiae* to protest their exclusion from foster care, the State presented no evidence that same-sex couples were not readily able to find assessment and qualification services from over 60 DCFS offices and over 50 alternative foster care agencies. The State's exclusion of faith-based foster care providers was thus a solution in search of a problem and harmed Illinois children without any countervailing benefit. See Argument, II. below.

The experience of Catholic Charities in Illinois in 2011 is instructive in the case under review because it teaches that the interests at stake -- the interest of same-sex couples to be foster parents, the interest of foster care agencies to enjoy religious freedom, and the paramount interests of vulnerable children -- are not mutually exclusive. All can be realized without sacrificing any. Indeed, the interests must coexist if harm to vulnerable children is to be prevented and religious freedom preserved. See Argument, III. below. *Amici curiae* urge the Court to keep these considerations in mind in the case under review. The foster care system need not and should not be weaponized to achieve an ideological goal that sacrifices religious freedom and vulnerable children in need of foster care.

ARGUMENT**I. IN CANCELLING CATHOLIC CHARITIES' OVER 40 YEARS OF SUPERIOR FOSTER CARE SERVICE IN 2011, THE STATE OF ILLINOIS HARMED ILLINOIS CHILDREN CONTRARY TO ITS DUTY TO ACT IN THEIR BEST INTERESTS.****A. Like Catholic Social Services in Philadelphia, Catholic Charities in Illinois for Many Decades Effectively Cared for Illinois Foster Children Until Their Services Were Abruptly Cancelled By the State of Illinois in 2011, Following Passage of Illinois' Religious Freedom and Civil Union Act.****1. Catholic Charities Effectively Cared For Illinois Foster Children For Over 40 Years, From 1965 to 2011.**

Like Catholic Social Services in Philadelphia, the Catholic Charities of the Diocese of Springfield has operated for many decades (it was founded in 1925) and currently serves twenty-eight counties in Central Illinois through over twenty assistance programs addressing a variety of societal needs. See <https://cc.dio.org/programs/>.² Catholic Charities of the Diocese of Springfield worked for decades to find foster and permanent homes for children before it commenced working with the Illinois Department of Children and Family Services (“DCFS”) as a foster care agency in or about 1965. It continued in that capacity until

2. Illinois has six dioceses: Rockford, Joliet, Peoria, Springfield, Belleville, and the Archdiocese of Chicago.

2011. Its responsibilities included recruiting, training, and qualifying foster parents, initiating child welfare plans, and supervising their implementation on behalf of foster children referred to them by DCFS and matched to one of their qualified foster parents. These activities were performed under successive one-year or multi-year contracts with DCFS. Over the years from 1965 to 2011 Catholic Charities of Springfield recruited thousands of foster care families for the thousands of foster care children it cared for. It did so through a staff of professionals and non-professionals who devised and implemented child welfare plans for the children it served. In 2011, when its relationship with DCFS ended, it was serving approximately 325 foster children.

Catholic Charities of the Diocese of Joliet, Inc., like its counterpart in Springfield, is an integrated auxiliary of its diocese, the Roman Catholic Diocese of Joliet. The Diocese serves seven counties in northern Illinois. Catholic Charities of Joliet's mission is to translate "God's reconciling love into professional human services, advocate for a just and compassionate society and bring together members of the community, church, business, health care and government to develop effective responses to human needs." It started its mission over 100 years ago, in 1914, when it operated Joliet's Guardian Angel Orphanage. It too delivers a myriad of basic needs and professional services. See <https://catholiccharitiesjoliet.org/>). It too was a foster care agency in partnership with DCFS from 1965 to 2011, when its services were also summarily terminated by the State of Illinois. During those years it recruited and qualified thousands of foster care parents to match with distressed children needing foster care in its service area. In 2011 it cared for about 400 foster care children, and in that year it placed 38 foster care children into adoptive homes.

The five Catholic Charities organizations in Illinois altogether cared for over 2500 foster care children in 2011. Significantly, Catholic Charities always subsidized their foster care activities by ten to twenty percent because DCFS payments were not sufficient to defray the full cost of these activities. The extra funds contributed by Catholic Charities came from their own network of donors, some of whom earmarked their contributions for foster care.

2. Catholic Charities in Illinois Was Rated Among the State's Most Effective Foster Care Agencies.

In 2011, there were around 50 private foster care agencies operating in Illinois, and over 60 DCFS field offices, all of which managed child placements in foster homes and could recruit and qualify applicants to become foster care parents. DCFS measured the performance of each agency annually against benchmarks designed to measure movement toward desired outcomes defined in each child's welfare plan. These factors included permanency, stability, frequency of contact with the foster child and family, frequency of intra-family meetings, supervision of caseworkers, child education, and casework on reunification cases.³

3. The factors pinpoint behaviors needed to address effectively the child's needs defined in the child welfare plan, and in that way to achieve high quality of care for the child, as follows:

1. Permanency - Since foster care is not a desired permanent solution, the child welfare plan aims to move the foster child back to his or her natural home, if possible, to the home of a relative, or to a permanent placement (via conversion to adoption) in a foster home.

DCFS also rated agencies and field offices on the number of foster children who attained permanency during the rating period (see fn. 3, ¶1). DCFS encouraged the

All actions of the child welfare team work toward the permanency goal.

2. Stability - Stability is essential in the care of a foster child, who often suffers from reactive attachment disorder as a result of being removed from the natural home, a condition which is aggravated by successive foster home placements. The child welfare plan aims to find a good match with a foster family, and then to support the child and foster family to avoid successive foster care placements.

3. Frequency of Face to face client contact - Agency personnel monitor the placement through regular face to face contacts to ensure the child's safety and progress in achieving child welfare plan.

4. Frequency of Child and Family Meetings - The agency supports the child in the foster family and also the child's relationship with his or her natural family, as a return to the natural family is the common permanency goal.

5. Caseworker Training and Supervision - The agency trains and supervises the child welfare team so that progress is made in achieving the child welfare plan.

6. Child Education - Since placement in foster care may disrupt the child's school attendance, educational goals are set and achieved.

7. Casework on Reunification Cases - If return home is the permanency goal, the agency facilitates progress in achieving the goal so court approval for reunification can be achieved in a timely way.

licensure of foster parents who are relatives of the foster child since statistics show better outcomes for children in licensed relative foster homes. Agency success in achieving licensure of relative foster homes was also rated.

Year after year DCFS rated Catholic Charities among the top performers among its private foster care agencies and its field offices. In Fiscal Year 2010, a typical year, the average ratings achieved by the five Catholic Charities organizations in Illinois who had foster care agency contracts with DCFS (only the Archdiocese of Chicago did not) were significantly higher than the averages for the State's other private agencies or for DCFS's own field offices. With respect to the seven factors listed in fn. 3 above, Catholic Charities averaged a score of 96.4 of 100 possible points, whereas the State's overall average was 88.1 points, and DCFS field offices scored only 84.6 points. Catholic Charities agencies also averaged much higher in achieving permanency outcomes (60 points versus 48.6 points for the State as a whole and 54.5 points for DCFS offices) as well as securing licensure of relative foster homes (60.07% versus 56% overall, and 44.91% for DCFS field offices).

On June 13, 2011, DCFS notified Catholic Charities of the Diocese of Springfield that it received 106 points, out of 114 possible points, in its review of Catholic Charities' annual Foster Parent Law implementation plan, which is developed to assist foster parents to effectuate the Illinois Foster Parent Law. This score earned Catholic Charities of the Diocese of Springfield the highest available performance rating. Seventeen days later the State refused to renew its contract. Catholic Charities of the Diocese of Joliet performed equally as effectively and experienced the same fate.

3. The State of Illinois Ignored Catholic Charities' Superior Foster Care Performance In Terminating Their Services in 2011 Following Passage of the Illinois Religious Freedom and Civil Union Act.

The Illinois Religious Freedom and Civil Union Act was enacted in early January 2011 and took effect on June 1, 2011. During legislative deliberation of the law in 2010, concerns about its impact on faith-based service providers were downplayed. The law's title and legislative history gave only lip service to its "Religious Freedom" component. Almost immediately after the law took effect, and well before its June 1, 2011 effective date, the Attorney General of Illinois, Lisa Madigan, sent a March 8, 2011 letter to Catholic Charities and other faith-based foster care providers, asserting that she had "received notice" that these providers were discriminating in violation of law. On May 5, 2011 DCFS announced that it would be changing its regulations to "be inclusive of Civil Union relationships relative to adoption and foster children. The decision to proceed with providing foster care will be yours to make, not DCFS."

Four of the five Catholic Charities organizations in Illinois that had foster care contracts with DCFS, Catholic Charities of Springfield, Joliet, Peoria and Belleville, filed a lawsuit against the State of Illinois challenging its threat to terminate its long-standing foster care relationship with Catholic Charities. The fifth, Catholic Charities of Rockford, ceased performing any foster care services in 2011 and did not participate in the litigation.

The four Catholic Charities organizations who sued argued, among other points, that the State could not cite a compelling reason why it could not accept Catholic Charities' proposal to refer applicants whom they could not, consistent with Catholic doctrine, assess and qualify as foster parents to other agencies who could. However, in August, 2011, the lawsuit was rejected by the Sangamon County Circuit Court on summary judgment. Without addressing the religious freedom issue, the court decided that plaintiffs had no property interest in continued contracts with the State and thus had no remedy when the State discontinued contracting with them. See Summary Judgment Order 2, *Catholic Charities of the Diocese of Springfield, et al. v. Madigan, et al.*, No. 2011-MR-254 (Ill. Cir. Ct. Aug. 18, 2011). An appeal was filed, but DCFS had sent a follow-up letter to agencies who challenged the new law, including Catholic Charities, identifying the different foster care agencies to which it planned immediately to transfer their existing cases *en masse*. In addition, DCFS said it would no longer license foster care applicants recommended by Catholic Charities, effectively snuffing out their ability to perform as foster care agencies.

After deliberating, the four litigating Catholic Charities organizations decided to abandon their appeal and to cease foster care services. Two Catholic Charities organizations (Belleville and Peoria) were heavily dependent on foster care payments from the State of Illinois and could not continue in business without them. Their dioceses severed ties with them and, as independent private agencies, the agencies agreed to comply with the State's demand that they assess and qualify same-sex couples as foster parents as a condition for continuing as foster care agencies. The State effectively muscled the Catholic dioceses of Belleville and Peoria into severing

their religious ministries from their religious beliefs. *Cf. American Legion v. American Humanist Ass'n*, 139 S.Ct. 2067, 2074 (2019) (“removal or radical alteration” of “a prominent community landmark” because of newfound discomfort with religious symbolism “would be seen by many not as a neutral act but a manifestation of religious hostility. . . .”)(internal quotation marks and citation omitted).

The dioceses of Springfield and Joliet would not walk down that path and their Catholic Charities ceased performing foster care services. In order to minimize discontinuities of care for the children they served, Catholic Charities agreed to transfer all of their foster parents and case management teams, as it happened, to the newly independent Catholic Charities in Peoria and Belleville (and to a Lutheran foster care agency that did not have a conscientious objection to the State’s requirement to assess and qualify same-sex applicants as foster parents). In this way Catholic Charities’ foster care children were spared the negative impact of discontinuities of care that would otherwise have occurred had Catholic Charities not facilitated the transfer demanded by the State.

B. Illinois’ Cancellation of Catholic Charities’ Foster Care Services After 40 Years of Superior Performance Harmed Illinois Children in Foster Care.

1. Illinois Law Requires that Decisions Affecting Illinois Foster Children Be Made in their “Best Interest”.

Children in need of foster care are not removed from their family homes without a serious reason to do so. Of

262,956 children entering foster care in FY 2018, the top five causes for removal were: Neglect (62%, 163,543); Drug Abuse (Parent) (36%, 94,386); Caretaker Inability to Cope (14%, 35,802); Physical Abuse (13%, 33,672); and Housing (10%, 27,323).⁴ As the Illinois Foster Care Law observes in its Legislative Findings: “Family foster care is an essential service for children and their families who have been separated due to the tragedy of child abuse, neglect, or dependency.” 20 ILCS 520/1-5.

Decisions affecting custody and foster care determinations in Illinois must be undertaken in the “best interest” of the child.⁵ Factors considered in determining a child’s best interest emphasize the child’s need for stability in the foster family, the child’s sense of familiarity and social ties, and actions to encourage and sustain positive, affectionate relationships with caregivers and associates.⁶

4. See U.S. Department of Health and Human Services, Administration for Children and Families, *The AFCARS Report 26*, (August 22, 2019). <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf> [<https://perma.cc/R357-FCGF>].

5. See Illinois’ Juvenile Court Act of 1987, *e.g.* 705 ILCS 405/2-4(1)(c) (best interest standard used to remove minor from home for abuse or neglect); 704 ILCS 405/2-10(2) (best interest standard used to determine temporary custody); 705 ILCS 405/2-27.2(a) (placement decisions require consideration of best interest of child); 705 ILCS 405/2-29(2) (termination of parental rights may be ordered if in the best interest of the child). The term “best interest” is used almost one hundred times in this statute. Hearings on custody are referred to as “best interest” hearings, and rely on “best interest” reports of the child welfare team reporting to the court. See *People v. J.B. (In re M.I.)*, 2016 IL 120232 (Ill. S.Ct. 2016) at ¶13.

6. See Illinois’ Juvenile Court Act of 1987, 705 ILCS 405/1-3(4.05), lists various factors to be considered in determining the

The Foster Care Law, 20 ILCS 520/1-1 et seq., requires that the foster child’s “welfare team” must promote the foster child’s best interests by: “. . . providing protection and nurture to children in a safe, healthy environment . . . meeting the developmental and emotional needs of the children . . . and [] working toward permanency for children by connecting them to safe, nurturing relationships intended to last a lifetime, preferably with their own family.” 20 ILCS 520/1-5. The foster parent must work with “caseworkers, and other professionals serving the child and family” to “promote the best interests of the children and families served.” *Id.* The team’s aim is to devise and implement a welfare plan for the child. In all these endeavors, the best interests of the child control.

best interests of the child, including: “(a) the physical safety and welfare of the child . . . the child’s background and ties . . . the child’s sense of attachments, including: (i) where the child actually feels love, attachment, and a sense of being valued (as opposed to where adults believe the child should feel such love, attachment, and a sense of being valued); (ii) the child’s sense of security; (iii) the child’s sense of familiarity; (iv) continuity of affection for the child; (v) the least disruptive placement alternative for the child; (e) the child’s wishes and long-term goals; (f) the child’s community ties, including church, school, and friends; (g) the child’s need for permanence which includes the child’s need for stability and continuity of relationships with parent figures and with siblings and other relatives; (h) the uniqueness of every family and child; (i) the risks attendant to entering and being in substitute care; and (j) the preferences of the persons available to care for the child.” The court may also consider the nature and length of the child’s relationship with the present caregiver and the effect on the child’s emotional and psychological well-being of a change in placement. *People v. Nancy L. (In re Tasha L.-I.)*, 383 Ill. App. 3d 45, 52-53 (1st Dist. 2008) (citing *In re Jaron Z.*, 348 Ill. App. 3d 239, 262(1st Dist. 2004)).

2. Illinois Harmed Illinois Children By Cancelling Its Foster Care Relationship With Catholic Charities, Which Eliminated Their Extensive Foster Parent Recruitment Network At a Time of Critical Need.

Illinois, like many states, suffers from a chronic shortage of foster homes.⁷ In the years immediately following Catholic Charities' exclusion as a foster care provider (2012 to 2017), Illinois foster care beds decreased by 1,547.⁸ Yet, during the same time frame foster care demand rose for various reasons, including the opioid crisis. In 2016, approximately 92,000 children were

7. See O'Keefe, *Southern Illinois Facing Foster Parent Shortage*, February 15, 2012, KFVS 12, <https://www.kfvs12.com/story/16945565/southern-illinois-experiencing-foster-parent-shortage/> [<https://perma.cc/2GXS-KBNZ>]; see also *Foster Care Housing Crisis*, Chronicle of Social Change, October 31, 2017, at 11 <https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf> [<https://perma.cc/6685-ER75>]: "Our research on the recent, state-by-state changes suggests there is a national foster care housing crisis in America. At least half of the states in the country have lost foster care capacity in the past five years. Another 15 were not able to provide enough information for us to even make a determination of their capacity."; see also Editorial Board, *The Crisis in Foster Care*, January 10, 2020. https://www.washingtonpost.com/opinions/the-crisis-in-foster-care/2020/01/11/81caa67e-33f6-11ea-a053-dc6d944ba776_story.html [<https://perma.cc/9FMV-N4LY>].

8. See *supra* *Foster Care Housing Crisis*, Chronicle of Social Change, at Appendix A, 14, and Appendix C, 29 (October 31, 2017) (Youth in non-relative foster homes declined from 11,386 in 2012 to 9,839 in 2017 a loss of 1547 beds.). <https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf> [<https://perma.cc/5ZK9-VVR2>].

removed from their home because at least one parent had issues with drug abuse.⁹ While DCFS has tried to reduce demand by increasing in-home care of distressed children, this approach is not possible or desirable in all cases. Consequently, qualified foster families are perennially in short supply, meaning recruitment of foster families is always a critical, ongoing need. The need to recruit more foster parents is a constant refrain of child welfare advocates and experts, as well as DCFS, which regularly exhorts the public to consider fostering, and requires foster care agencies to devise and implement foster parent recruitment plans. Yet, while demand for foster care families has risen, the supply of foster parents has not. It is always difficult to find and keep suitable foster parents. Compensation for foster care is low; the frustration level in caring for stressed children is high.¹⁰ And many foster children have special needs, who present an even greater challenge for placement.

The importance of a loving, stable foster home for a vulnerable child cannot be overstated. Failure to find such foster homes has severe adverse outcomes for children in need of foster care. One alternative to family placement is group or institutional placement, which is vastly inferior

9. See U.S. Department of Health and Human Services, Administration for Children and Families, *Number of Children in Foster Care Continues to Increase*, November 30, 2017, <https://www.acf.hhs.gov/media/press/2017/number-of-children-in-foster-care-continues-to-increase> [<https://perma.cc/29DX-3BGE>].

10. See Kay Lazar, *For Foster Parents, Chaotic State System Makes Job Even Harder*, *The Boston Globe*, April 13, 2019, <https://www.bostonglobe.com/metro/2019/04/13/foster-families-dcf-failing/1SlwDvK7MLDCyFaLVi9ZeP/story.html> [<https://perma.cc/XC55-LM7D>].

to family placement.¹¹ Another is longer waits for family placement, and overuse of existing foster homes, which leads to foster parent burnout and higher foster home turnover. A consequence of fewer foster homes is that a greater number of foster children “age out” of the system, meaning they never find a permanent home. Children who age out of foster care on average fare much worse than children who end up in loving foster family homes. One in five will become homeless at age 18, only half are employed, and less than 3% graduate from college. The likelihood of unplanned pregnancy and PTSD are also elevated.¹²

Over many decades, Catholic Charities built up an extensive and productive network for locating, recruiting, training, and qualifying foster care parents in the Illinois counties where they worked. Of course, that is what is required in order to find foster parent matches for parental matches with the thousands of foster children they served. Catholic Charities worked assiduously to find foster parents by, among other effort, assigning paid personnel to develop and implement recruiting plans. The plans, which involved communicating with parishioners in the hundreds of parishes their dioceses served, were an

11. See Emily Wax-Thibodeaux, *We are Just Destroying these Kids*, The Washington Post, December 30, 2019, https://www.washingtonpost.com/national/we-are-just-destroying-these-kids-the-foster-children-growing-up-inside-detention-centers/2019/12/30/97f65f3a-eea2-11e9-9c6d-436a0df4f31d_story.html [<https://perma.cc/LT8E-YSJ2>].

12. See Wayne Winston Sharp, *The Human, Social, And Economic Cost of Aging Out of Foster Care*, Adoption Advocate, May 2015, <https://www.adoptioncouncil.org/files/large/c29246a29debe09> [<https://perma.cc/3CTK-VUCD>].

important source of foster parents because faith-based audiences are more likely to consider foster parenting than non-churchgoing individuals and couples. For example, Christians are almost three times more likely to consider foster parenting than the general population (31% vs. 11%).¹³

As a result of their efforts, Catholic Charities were superior in locating, recruiting and qualifying foster parents. Each year Catholic Charities were rated highly in this portion of their performance reviews. Catholic Charities of the Diocese of Springfield received special recognition for its success in recruiting foster parents for special needs children.

Termination of Catholic Charities in 2011 quashed these efforts to recruit foster families. Since the State refused any longer to supply foster children to Catholic Charities or to license foster parents recommended by Catholic Charities, Catholic Charities' recruitment efforts were terminated. The State's action seriously harmed Illinois children by constricting recruitment of available foster parents in a system that critically needed them.

13. See Jedd Medefind, *New Barna Research Highlights Christian Adoption & Foster Care Among 3 Most Notable Vocational Trends*, February 12, 2014, <https://cafo.org/2014/02/12/new-barna-research-highlights-christian-adoption-foster-care-among-3-most-notable-vocational-trends/> [<https://perma.cc/J26E-P629>].

3. Illinois Risked Harmful Disruption of Care to Illinois Children In Threatening to Abruptly Transfer All of Catholic Charities' Cases to Other Agencies.

Illinois also potentially harmed Illinois children by threatening to transfer at one fell swoop the hundreds of foster cases managed by Catholic Charities. Removal of a child from his or her natural family home commonly causes a psychological disorder named “reactive attachment disorder”¹⁴ in the child, which is characterized by symptoms of stress and anxiety and distrust of new caregivers.¹⁵ Placement of foster children in successive foster homes exacerbates this disorder.¹⁶ Changes in the foster care team working with the child and the child’s foster family also exacerbate this condition because the care team now represents familial stability for the

14. See *American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders*, (5th ed.), Arlington, VA: American Psychiatric Publishing (2013), Section 313.389 (F94.1): (“A consistent pattern of inhibited emotionally withdrawn behavior toward adult caregivers, manifested by both of the following: the child rarely or minimally seeks comfort; the child rarely responds to comfort when distressed.”).

15. See Gean, M Gillmore, J., Dowler, *Infants and Toddlers in Supervised Custody: A Pilot Study for Visitation*, 24(B) *Journal of the American Academy of Child and Adolescent Psychiatry*, 608, 610, (1985) [https://www.jaacap.org/article/S0002-7138\(09\)60063-7/pdf](https://www.jaacap.org/article/S0002-7138(09)60063-7/pdf) [<https://perma.cc/5UJK-5LRD>].

16. See Semanchin Jones, A., Wells, S., *Wisconsin-Bremer Project: Preventing Placement Disruptions in Foster Care*, Center for Advanced Studies in Child Welfare, (January 15, 2008), pg 4 <https://casw.umn.edu/portfolio-items/path> [<https://perma.cc/F2UW-ADPP>].

child.¹⁷ Successive placements reduce the child's chances of achieving permanency. For these reasons, foster care agencies work toward stability in foster care relationships and in minimizing change to the foster family dynamic as well as to the agency case management team.

Treatment of a child's reactive attachment disorder commonly involves continuing psychological therapy with the child and his or her foster family.¹⁸ The course of treatment potentially could be ongoing throughout the placement.¹⁹ Reactive attachment disorder therefore must be considered and treated by the agency for the best long term outcome for the foster child. Reducing the incidence and severity of this condition is clearly in the best interest of the child.

17. See Nichole Noonan, *New Documentary On Reactive Attachment Disorders*, Institute for Attachment & Child Development (January 1, 2018), www.instituteforattachment.org [<https://perma.cc/9RK6-VUX9>]; see also, Karyn Purvis Institute Child Development, TBRI: An Overview: Putting the Pieces Together, YouTube (February 1, 2016) <https://www.youtube.com/watch?v=T43zJDgTNPA> [<https://perma.cc/LF6Z-TRCZ>](see 15:20-19:10).

18. See Drisko, James W., Zilberstein, Karen, *What Works in Treating Reactive Attachment Disorder: Parent's Perspectives*, 89(3) *Families in Society: The Journal of Contemporary Human Services*, 476, 477-78 (July 2008), https://www.researchgate.net/publication/270399159_What_Works_in_Treating_Reactive_Attachment_Disorder_Parents'_Perspectives.

19. See Chaffin, et al., *Report of the APSAC Task Force on Attachment Disorder and Attachment Problems*, 2.1 *Child Maltreatment* 76 (February 2006), <https://depts.washington.edu/hcsats/PDF/AttachmentTaskForceAPSAC.pdf> [<https://perma.cc/E43H-EZNK>].

When Illinois sought to exclude Catholic Charities from providing foster care because Catholic Charities wished to remain faithful to Roman Catholic Church doctrine, the State was willing to jettison this important principle of therapy in order to accomplish its ideological goals. In order to pressure Catholic Charities to cave to its demands, Illinois threatened to cancel and precipitously remove foster children from Catholic Charities' care and transfer them to other agencies. It even sent a letter to the agencies informing them where their cases were going to be transferred in the event Catholic Charities failed to acquiesce to the State's demand that they forego their religious convictions and agree to assess and qualify same-sex foster parent applicants. The State was apparently willing to perpetrate serious harm to foster children in the form of discontinuity of care rather than to accommodate Catholic Charities' religious beliefs.

Catholic Charities, on the other hand, took a broader view and realized that if the State acted precipitously as it threatened to do, their foster children would be harmed. For that reason, Catholic Charities dropped their litigation appeal and agreed to work with the State to move all of their foster care cases to other agencies as demanded by the State. Catholic Charities released all of their foster parents and all of their caseworkers to successor agencies in order to ensure continuity of care for their children. In doing so, they facilitated a safe transition for the children whose interests the State, on the other hand, was willing to sacrifice in order to exclude from the Illinois foster care system any faith-based agency that did not tow the State's "party line."

II. ILLINOIS' CANCELLATION OF CATHOLIC CHARITIES' FOSTER CARE SERVICES HARMED THE BEST INTERESTS OF ILLINOIS FOSTER CHILDREN, AND CONFERRED NO BENEFIT ON SAME-SEX COUPLES, WHO HAD READY ACCESS TO QUALIFICATION AS FOSTER PARENTS.

The State of Illinois' termination of the Catholic Charities' foster care services, and the harm it caused to Illinois children in the foster care system, was needless and unnecessary and failed to promote any countervailing benefit to anyone. The State had in 2011 (and has now) over one hundred private agencies and DCFS field offices which are able and willing to assess and recommend for licensure same-sex foster parent applicants. During the 2011 litigation surrounding Illinois' requirement that all foster care providers assess and qualify same-sex couples, no evidence was advanced suggesting that same-sex applicants were unable, or even had difficulty, in securing assessments. For this reason, the State's action to blacklist Catholic Charities from participating in Illinois' foster care system served only to damage Illinois children, and to violate Catholic Charities' religious freedom, without conferring a countervailing benefit to same-sex foster parent applicants, or to anyone else. All that the State accomplished was to harm *amici curiae* and Illinois foster children by eliminating highly-rated foster care providers who were particularly adept at recruiting foster parents and caring for foster children.

III. CATHOLIC CHARITIES' EXPERIENCE IN ILLINOIS TEACHES THAT ACCOMMODATION OF FAITH-BASED FOSTER CARE AGENCIES IS NOT ONLY COMPATIBLE WITH THE INTEREST OF SAME-SEX COUPLES TO QUALIFY AS FOSTER PARENTS, IT IS NECESSARY FOR SECURING THE BEST INTEREST OF DISTRESSED CHILDREN IN NEED OF FOSTER CARE.

The experience of Catholic Charities in 2011 in Illinois is instructive because it shows that exclusion of faith-based foster care agencies in Illinois harmed children (by eliminating superior foster parent agencies and their recruitment networks as well as by risking discontinuities of care for foster children) without providing any corresponding benefit to anyone, including to same-sex couples, who were always able to qualify as foster parents through over a hundred other existing foster care agencies in Illinois. The lesson should be clear: the Court should respect and accommodate the free religious exercise of faith-based agencies because to do so does not conflict with the interest of same-sex couples to become foster parents and, on the other hand, is necessary to prevent harm to children in need of high quality foster care. The Court can support each of these values without sacrificing any, and should therefore do so. To do anything else would be to encourage more initiatives to force faith-based providers of critically needed services for vulnerable children to abandon their religious practices in order to gain the state's permission to continue to provide such care. This is folly the Court should not countenance.

CONCLUSION

For these reasons, *amici curiae* urge the Court to reverse the Third Circuit's decision.

Respectfully submitted,

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