

No. 19-123

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In the  
**Supreme Court of the United States**

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SHARONELL FULTON, ET AL.,  
*Petitioners,*

v.

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

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the Third Circuit**

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**BRIEF OF AMICI CURIAE 27 LAY ROMAN  
CATHOLICS IN SUPPORT OF RESPONDENTS**

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## INTERESTS OF THE *AMICI CURIAE*

The *amici*, 27 lay men and women, are each faithful, committed, practicing members of the Roman Catholic Church (“Church”) who support the actions of the City of Philadelphia (“City”). The City acted properly when it discontinued its contract with Catholic Social Services (“CSS”) because CSS refuses applicants who are part of the LGBTQ community. The *amici* dispute the claims that “religious beliefs” of the Church prevent CSS from complying with City’s rules, *inter alia*, because there is no singular Catholic belief on the issue of LGBTQ people fostering and adopting children. The position of Petitioners does not adequately reflect current teachings of the Church that derive from open widespread religious debate about how LGBTQ individuals are to be treated.<sup>1</sup>

The *amici* challenge Petitioners on three specific grounds. First, it is unjust and unlawful under our civil laws to permit Petitioners to discriminate against LGBTQ individuals including those who wish to participate in a governmental foster care or adoption program. Second, Petitioners are not entitled to a “religious exemption” based upon claimed teachings of the Church involving rejection of LGBTQ individuals which contradict the message of the Pope and are now in controversy and under challenge. Third, the

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<sup>1</sup> Consistent with this Court’s Rule 37.6, *Amicus Curiae* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court’s Rule 37.2, all parties were timely notified of the intention of amici to file this brief. All parties consented to the filing of this brief.

differences within the Church as to the welcoming or rejection of LGBTQ individuals have polarized to such an extent that if this Court were to rule for Petitioners and the rejection of LGBTQ persons, that decision would constitute an Establishment of religion. The Third Circuit held correctly for respondent and this Court should affirm.<sup>2</sup>

### SUMMARY OF THE ARGUMENT

There are, in effect, unrepresented “real parties in interest” who have not been heard from in this case—His Holiness Pope Francis and the millions of Catholics in the Church who have accepted and live by his Christian message to welcome, not reject, LGBTQ people. These faithful voices are found nowhere in this case. Pope Francis is the hierarchical leader of the Roman Catholic Church and his message of inclusion has been conspicuously disregarded by the Petitioners.

This Court should affirm the opinion of the Third Circuit; this Court must not rule for Petitioners on what is a deficient record as to the actual message of the Pope and the Church. Rejection of LGBTQ people, including same-sex couples, by CSS should not be sanctioned by this Court on purported “religious grounds” when those specific grounds are now being widely challenged within the Church. This is especially so in the absence of a fully briefed “neutral decision maker,” recognized as essential by *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,

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<sup>2</sup> This brief was prepared and is submitted *pro bono publico*. No legal fees were charged, nor will any be charged, for its preparation and submission.

138 S. Ct. 1719 (2018) to “give full and fair consideration” to the religious assertions of Petitioners. And, also, any neutral decision maker should hear from those for whom the *amici* now speak; or, preferably as a matter of First Amendment application, decline to entertain this matter and thereby avoid the consideration of religious disputes on the authority of *Employment Division v. Smith*, 494 U.S. 872 (1990).

The “rejecting approach” asserted by Petitioners as their sincerely held Roman Catholic religious belief is only one side of real doctrinal debate among millions in the global Church. Evolutionary, even revolutionary change is now occurring within the Church. The “belief” that “LGBTQ people should be rejected”, which Petitioners are using to support their claim for a religious liberty exemption from generally applicable, neutral, anti-discrimination laws, is under intensive ecclesiastical and theological challenge within the entire Church.

This Court should not decide which variant of this religious debate to support; by ruling for Petitioners, what in effect would be an *imprimatur* would be weaponized in these ongoing Church controversies to the benefit of those who would reject and to the detriment of those who would welcome. A Supreme Court decision should never be rendered in an on-going Church controversy of this nature. Under the Establishment Clause of the First Amendment, no court should decide such theologically doctrinal matters which it would be doing by accepting Petitioner’s religious liberty claims.

## ARGUMENT

**I. By Ruling for Petitioners on a Disputed Church Matter, this Court Would Be Establishing Religion in Disregard of the First Amendment Establishment Clause.**

**A. There is active religious controversy in the Church and millions of Catholics do not support the rejecting, exclusive approaches of CSS.**

The *amici*, 27 lay Roman Catholic men and women, maintain that the City<sup>3</sup> acted properly in discontinuing its contract with Catholic Social Services because CSS refuses to serve LGBTQ applicants. The *amici* emphasize that LGBTQ people have the legal right to parent children by foster care and adoption. The *amici* dispute the Petitioners' claims that CSS cannot even consider placement of children with LGBTQ couples. Such a position is not based on any authoritative or settled doctrine of the Church.

The strenuous debate within the Church about the manner in which gay people are to be treated is a religious exercise about which the courts below and this Court have not been adequately informed by the Petitioners (even when one recognizes that Petitioners

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<sup>3</sup> The *amici* reside in the states of New York, New Jersey, Pennsylvania, Virginia, and Florida. The *amici* include both presently employed and retired attorneys, public school and non-public schoolteachers and administrators, health care personnel including nurse practitioners, nurses, and hospital administrators, psychologists, therapists and mental health personnel, university professors, and business executives in the pharmaceutical and other industries.

are seeking preliminary relief). A court must be informed, and this Court has not been, if a decision it may render would place an improper stamp of governmental approval on a Church teaching that is in active religious controversy. Clearly, no Court should become involved, especially without sufficient background information, about an internal dispute. As a corollary, courts should not be faced with “first to file” situations, such as this case now before it, where the religious approaches of the first party to file suit are summarily accepted (in effect presumptively to use the words of Justice Scalia) as correct in complex religious matters.

**B. The message of Pope Francis as the ultimate hierarchical leader of the Roman Catholic Church is one of inclusion, not exclusion, of LGBTQ people.**

Pope Francis has repeatedly and publicly emphasized the importance of pastoral care and a welcoming approach for LGBTQ people. His Holiness has expressed his concern about the suffering and rejection that many gay individuals have endured. In an interview with the Jesuit journal, *La Civiltà Cattolica*, Pope Francis described how “...in Buenos Aires, I used to receive letters from homosexual persons who are ‘socially wounded’ because they tell me that they feel like the church has always condemned them...A person once asked me in a provocative manner, if I approved of homosexuality?” Pope Francis responded “...when God looks at a gay person, does he endorse the existence of this person with love, or reject

and condemn this person? We must always consider the person...In life God accompanies persons and we must accompany them, starting from their situation. It is necessary to accompany them with mercy. Fr. Antonio Spadaro, *An interview with Pope Francis*, Libreria Editrice Vaticana, August 19, 2013 [<https://perma.cc/XZ-PJRF>]; see also Fr. Antonio Spadaro [Anthony J. Spadaro, S.J.] *A Big Heart Open to God: An interview with Pope Francis* | America Magazine, September 30, 2013.<sup>4, 5</sup>

During a press conference on the plane returning from World Youth Day Pope Francis again answered a question about a gay individual: “If someone is gay and is searching for the Lord and has good will, who am I to judge him? [emphasis added]. The Catechism of the Catholic Church explains this in a beautiful way, saying ...wait a moment, how does it say it...it says: no one should marginalize these people for this, they must be integrated into society”. [last full paragraph of interview] “Press Conference of Pope Francis During the Return Flight”, Libreria Editrice Vaticana, (July 28, 2013) [<https://perma.cc/N6QP-YLG4>].

The Petitioners would have this Court either disregard, or remain uninformed about, the Pope’s poignant teachings. *Amici* stress that Pope Francis

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<sup>4</sup> <https://www.americamagazine.org/faith/2013/09/30/big-heart-open-god-interview-pope-francis> [perma.ccZ4P-RQY4].

<sup>5</sup> “Accompany” is a commanding word; it carries the meaning of traversing with an “equal”. See Webster’s New International Dictionary of the English Language, Second Edition, Unabridged, 1934; American Heritage Dictionary of the English Language, Fifth Edition, 2016.

and numerous Church leaders, including ethicists and theologians, encourage the “necessary welcoming” of LGBTQ people. Is “welcoming” what Petitioner CSS is doing? Civil discrimination, including the open rejection of LGBTQ individuals and couples by CSS, is not just unchristian, it contravenes Church teaching.

**C. A ruling for CSS, while a recognized internal Church debate about treatment of LGBTQ people continues, would violate the Establishment Clause.**

This Court should never support one side over another other when actual this theological debate is occurring. The Court would be doing so if it ruled for Petitioners; their religious liberty claim should be rejected to prevent an Establishment breach. To entertain the arguments of Petitioners, this Court must enter into disputed, undefined theological territory. Petitioners seek this Court’s approval of traditional views which are not the only recognized approach to these matters among the many believers within the Church. No court under our First Amendment should decide between competing theological positions within the same religion. This *amicus* brief presents details about these religious controversies which are now ongoing within the Church; they are directly relevant, but in the belief of great numbers of Church members clearly contradictory to the relief which Petitioners are seeking.



**D. The *amici*, as laity, have both the duty and the right under Church teachings to now make these religious differences known to this Court.**

Roman Catholic laity are expected to speak out on matters of concern especially where the need for justice is compelling. Paul Halsall, *Modern History Sourcebook: John Henry Newman (1801-1890): On Consulting the Faithful in Matters of Doctrine July 1859*, Internet History Sourcebook Project, Fordham University (1998) [<https://perma.cc/JH44-8Q7C>]. The Second Vatican Council promulgated that, “By reason of the knowledge, competence, or pre-eminence which they have, the laity are empowered—indeed sometimes obliged – to manifest their opinion on those things which pertain to the good of the Church.” *Lumen Gentium (Dogmatic Constitution of the Church)* paragraph 37 [<https://perma.cc/4P6Y-3EGM>].

The laity have always played a role in the development of moral teachings of the Church: some essential tenets in the Church teaching have developed over time as a result of lay people identifying imperatives that arise from emerging situations or scientific developments. These voices of lay people have been heard with corresponding results throughout history. As examples: first, lay people successfully urged Pope Pius VIII to allow Roman Catholics to receive interest on monies loaned, thus signaling the commencement of banking and credit transactions which have supported economic growth and expansion on a momentous scale within society. Second, much greater attention to addressing social problems, signified by Pope

Leo XIII's 1896 Encyclical Letter, *Rerum Novarum* (*On Capital and Labor*), resulted from pressure of lay activists. [<https://perma.cc/EFE3-YQXF> ].

Pope Francis has noted, "...the work of a bishop is wonderful: it is to help one's brother's brothers and sisters to move forward The bishop *ahead* of the faithful to mark out the path; the bishop *in the midst* of the faithful, to foster communion; and the bishop *behind* the faithful because the faithful can often sniff out the path." [emphasis added] Press Conference of Pope Francis, July 28, 2013, *supra*.<sup>6</sup>

On these points, John T. Noonan, Jr.,<sup>7</sup> who was both a respected Catholic theologian and a judge on the Ninth Circuit Court of Appeals for over three decades noted, "The inventor of the idea that Christian doctrine develops is John Henry Newman...[He]pointed to transformation of doctrine as tangible and organic, as many-sided and complex and real, as the passage from childhood to adulthood." John T. Noonan, Jr., *A Church That Can and Cannot Change*, p. 3. (2005) Noonan continues, "One implication that can be drawn...is that moral theologians are often catching up with what is already established..." He emphasizes that theologians, or at least many of them, "do not lead

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<sup>6</sup> [<https://perma.cc/N6QP-YLG4>].

<sup>7</sup> John Thomas Noonan, Jr. was on the bench of the Ninth Circuit Court of Appeals from 1985 until his death in 2017. He was also a recognized Roman Catholic theologian who advised Pope Paul VI and served as a consultant to the Vatican. While on the bench, he decided that a for profit closely held corporation could assert a religious liberty claim. *EEOC v. Townley Eng'r and Mfg. Co.*, 859 F. 2d 610 ((9th Cir. 1988)

the way.” John T. Noonan, Jr., *A Church That Can and Cannot Change*, p. 211. (2005) The *amici*, however, in this brief describe the teaching of certain theologians in the Church who are leading the way to use Judge Noonan’s phrase and the *amici* and many other laity are closely following them. *Id.* p. 211

**E. The duty of the laity to speak out includes the responsibility to defend and protect the rights of LGBTQ people both in civil society and in the Church.**

Fr. Bryan Massingale is Professor of Theological and Social Ethics and the Senior Fellow in Fordham University’s Center for Ethics and Education. He has served as President of the Catholic Theological Society of America. One primary area of his scholarship, addressed in his book *Racial Justice and the Catholic Church* (2010), is the history of racism within the Church. His second primary area of scholarship is the history and teaching of the Church on LGBTQ matters. Olga Segura, *Meet Father Bryan Massingale: A Black, Gay, Catholic Priest Fighting for an Inclusive Church*, *The Revealer*—A Magazine of Religion and Media (June 3, 2020)[<https://perma.cc/C43T-9UXF>].

On the issues of LGBTQ people raising children, Fr. Massingale declares, “Respect LGBTQ families as communities of love who struggle to love as any other family does. Many among us are raising children who provide both delight and challenge. These families are also “holy families”—imperfectly yet truly holy—like every other family in a parish...” Bryan Massingale, *LGBTQ ministry is for the good of all*, U.S. Catholic (August 6, 2020) [<https://perma.cc/KV3G-6MPW>]. He

continues, “The church is discerning whether or how to ritually recognize same-sex unions; the German-speaking churches are at the forefront of this discussion. But nothing should exclude our children from being baptized in the faith. Nor is there any excuse to compound our grief with gratuitous insult when burying our deceased loved ones.” *Id.*

Fr. Massingale has determined that “genuine doctrinal development” concerning the religious treatment of LGBTQ individuals is presently occurring within the Church. Robert Shine, *Fr. Bryan Massingale to LGBTQ Catholics: “Refuse to Be Silenced. Continue to Speak Our Truth.”*, New Ways Ministry (May 24, 2017) [<https://perma.cc/CH9J-9FMB>]. He endorses the right of LGBTQ individuals, under present Church teaching, to participate fully both within civil society and within the Church. He identifies the need for the Church, under Catholic Social Teaching, to extend its existing support for human rights to include the LGBTQ community. Massingale emphasizes that for the Church, “To insist on private acceptance and compassion for LGBT persons...without a commitment to defending LGBT human rights and creating a society of equal justice for all, is not only contradictory; it is inherently incomprehensible and ultimately unsustainable.” *Id.* On these matters, Fr. Massingale calls upon all Catholics to “...Refuse to be silenced. Continue to speak our truth even when we know it’s not going to be welcome.” *Id.*

The submission of this brief, *amicus curiae*, is consistent with that history and that duty; it is the

exercise, by the individual *amici*, of their “informed conscience” and their participation in the Church as part of the “*sensus fidei fidelis*”. See Michael Sean Winters, *The Sensus Fidei*, National Catholic Reporter, (June 30, 2014) [<https://perma.cc/BHC5-682H>]. Recognizing “informed conscience,” “*sensus fidei fidelis*” and Catholic Social Teaching, the *amici* now accept Fr. Bryan Massingale’s challenge for the Church to extend its support for human rights “to more fully include the LGBTQ community.” *Id.*

On the basis of the foregoing, *amici* seek to inform this Court that it should not rule for CSS because its claimed “religiously supported” rejection of LGBTQ people does not represent the hierarchical teachings of Pope Francis who must be recognized as the highest authority within the Roman Catholic Church. Catechism of the Catholic Church (1997) paragraphs 882, 937 [<https://perma.cc/W8R5-KV3S>].

There is no claim here that the Church’s traditional teaching about sacramental marriage as “between a man and a woman” has changed. The *amici* do claim that there is considerably more to Church teaching about LGBTQ people than only that phrase. The tenet about sacramental marriage—“between a man and a woman”—does not diminish the additional profound duty under Church teaching to respect and welcome LGBTQ people. To reject gay people is a primary instance of prohibited “unjust discrimination”; such rejection violates Church teachings including both Catholic Social Teaching and the unquestioned mandate under the Catechism to welcome LGBTQ with “respect, compassion, and sensitivity.” No one,

including the *amici*, claims that the Church must marry a same-sex couple sacramentally; however, the right of an LGBTQ couple to adopt a child should never be denied under a religiously unsupportable approach that unjustly discriminates against LGBTQ individuals. Catechism of the Catholic Church (1997) paragraph 2358 [<https://perma.cc/W8R5-KV3S>].

## **II. There is Extensive Theological Support Within the Church for the Welcoming Treatment, Not the Rejecting Treatment, of LGBTQ People**

### **A. To reject LGBTQ people including refusal to recognize their civil marriages is unjustifiable discrimination under Church Teachings**

Lisa Fullam, Th.D., a Professor of Moral Theology at the University of Santa Clara Jesuit School of Theology, emphasizes that in refusing to recognize the civil marriage of “... same-sex couples, we discriminate against them precisely because they are homosexuals, a form of unjustifiable discrimination that is contrary to Catholic Social Teaching.” Lisa Fullam, *Civil Same-Sex Marriage: A Catholic Affirmation*, New Ways Ministry (2019) [<https://perma.cc/JV7D-XSBP>].

Dr. Fullam also emphasizes, “No aspect of magisterial sexual teaching [of the Roman Catholic Church] has been infallibly defined [Emphasis added]... Historically, the development of doctrine is often driven by the diligent work of scholars...” *Id.* One central concern of this ongoing development is the extent to which traditional Church teaching about

LGBTQ individuals should now be transformed to align with recent advances in scientific understanding concerning human sexuality. She concludes that Church leaders seem to regard “... Magisterial teaching on sexuality as irreformable, while in fact there has been considerable development in authoritative sexual teaching over the centuries. To assert that sexual teaching as we have it now, has reached perfection is unjustified in light of the history of development.” *Id.*

She also states that “civil law is fittingly expressed in a doctrine of rights and duties [that] forbids discrimination before the law on religious grounds. Fullam, *Id.* She notes that this teaching is supported by Pope Paul VI’s *Dignitatis humanae* (Declaration on Religious Freedom; published on December 7, 1965) [<https://perma.cc/5KZV-37YM>] which decreed, “...Government is to see to it that equality of citizens before the law, which is itself an element of the common good, is never violated whether openly or covertly, for religious reasons. Nor is there to be discrimination among citizens.” *Id.*

**B. Catholic Social Teaching is irrefutable that discrimination on the basis of sexuality or gender is always unjust and immoral.**

The work of Todd A. Salzman and Michael G. Lawler is concentrated in the fields of human sexuality and theology including their published books, “Introduction to Catholic Theological Ethics: Foundations and Applications” (2019) and “The Sexual Person-Toward A Renewed Catholic Anthropology”

(2008). Professor Salzman is the Amelia and Emil Graff Professor of Catholic Theology at Creighton University; Professor Lawler is the Emeritus Amelia and Emil Graff Professor of Catholic Theology at Creighton University. On June 25, 2020, they published an article in National Catholic Reporter, *Can U.S. bishops' support of discrimination against LGBT be sustained*. [<https://perma.cc/K39E-X5TH>].

In this article, they state, “Catholic Social Teaching is clear: discrimination on the basis of sexuality or gender is always unjust and immoral.”; they continue, “The Catechism of the Catholic Church clearly states that, ‘the equality of men [and women] rests essentially on their dignity as persons and the rights that flow from it;”. *Id.* Continuing, they emphasize, “every form of social or cultural discrimination in fundamental personal rights on the grounds of sex, race, color, social conditions, language, or religion must be curbed and eradicated as incompatible with God’s design.” *Id.* Basing their conclusions on their own research, and also on the work of Jacques Balthazart (The Biology of Homosexuality, 2012); Simon LeVay (Gay, Straight and the Reasons, 2010); and Fr. James Allison (*The Fulcrum of Discovery or How the ‘Gay Thing’ Is Good News for the Catholic Church*’, unpublished essay, online [<https://perma.cc/KNP3-6KJN>]).

Professors Salzman and Lawler conclude, “Homosexuality in humans is to a very large extent, if not exclusively, determined by biological factors acting prenatally or soon after birth, and that the social or educational environment plays at best a subsidiary in this determination...” *supra*. [<https://perma.cc/K39E->



X5TH]. They continue, “Catholic teaching that homosexual acts are ‘intrinsically disordered’ and ‘can never be morally justified’ are assertions without theological or ethical proof.” Salzman and Lawler, *Id.*

Salzman and Lawler also challenged the recent statements of the United States Conference of Catholic Bishops which criticized this Supreme Court’s decision in *Bostock v. Clayton County*, 590 U.S.\_\_\_\_.(2020). Specifically, they dispute the Bishops’ contention that this Court’s decision in *Bostock*, *Id.* would “promote immoral sexual behavior that fundamentally threatens the family and common good”; Salzman and Lawler conclude that these assertions are “without theological or ethical proof”. *Id.* Salzman and Lawler continue that, “The United States bishops’ opposition to legislation prohibiting discrimination based upon gender, sexual orientation and gender identity is both scientifically and theologically flawed...”; further, such discrimination “...violates human dignity and the truth of God’s unconditional love for all people. It is driving young people away from the church, doing serious economic, psychological, emotional and spiritual damage to LGBT persons, and legitimating hate speech and violence against them.” *Id.*

On the issues of by LGBTQ individuals and same-sex couples, which the Bishops continue to argue is not as successful as that of heterosexual parents, Professors Salzman and Lawler reject such claims and refer to a study of the American Psychological Association which determined from more than 30 years of research: “... that lesbian and gay parents are as likely as heterosexual parents to provide supportive

and healthy environments for their children...and the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.” Salzman and Lawler, “Can U.S. Bishops...”, *Id.* On the basis of this important study, the American Psychological Association and the American Association of Pediatrics both oppose discrimination against same-sex couples. *Id.*

**C. The Pope’s message that LGBTQ people are to be welcomed with dignity and respect is being disseminated by, among many others, Fr. James Martin, S.J.**

Fr. James Martin, S.J., an internationally recognized American Jesuit priest, advocates within the Church for LGBTQ individuals. In his role as a Consultor to the Dicastery for Communication at the Vatican, he helps to communicate the welcoming message of Pope Francis. He is the editor-at-large of *America Magazine: The Jesuit Review of Faith and Culture* and author of the very relevant book, *Building A Bridge: How the Catholic Church and the LGBT Community Can Enter into a Relationship of Respect, Compassion and Sensitivity* (2017; Revised and expanded, 2018) which received formal ecclesiastical approval from his Jesuit superiors—the *Imprimi Potest*.

In *Building A Bridge*, *supra*, Fr. Martin describes how LGBTQ individuals should be welcomed and accepted in the Church and must never be judged exclusively by their sexuality. Fr. Martin emphasizes how the Catechism calls upon Catholics to treat homosexuals with “respect, compassion, and

sensitivity” Catechism of the Catholic Church, No. 2358 [<https://perma.cc/P89DKZCD>].

A number of prominent Church leaders have endorsed Martin’s book including: Cardinal Kevin Farrell, Prefect of the Vatican’s Dicastery for Laity, Family and Life; Cardinal Joseph Tobin, Archbishop of Newark; Bishop W. McElroy of San Diego; Fr. James Alison; and Sr. Jeannine Gramick, SL. (Building A Bridge, 2017, (front-piece).

The Pope—all Popes—teach by example. On October 1, 2019, Fr. James Martin was received by Pope Francis in a private audience to discuss Fr. Martin’s ministry to LGBTQ people. Thomas Reese, *Pope meets with Jesuit priest James Martin to discuss LGBTQ ministry*. National Catholic Reporter, October 1, 2019 [<https://perma.cc/2WJS-6N3N>]. The meeting, according to Fr. Martin, proceeded in a very positive manner. *Id.* Pope Francis met with Fr. Martin in the papal library of the Apostolic Palace (a location usually reserved for meetings with heads of state and diplomats); the Vatican Press Office later released photos of the meeting—both clear signs of Papal approval. *Id.* Fr. Martin in his book communicates “the need to welcome” as supported and recognized by the Pope and Church authority; the “unwelcoming approach” pursued by CSS should be regarded is nonconforming when benchmarked against the Church’s own teaching. *Id.*

**D. The debate about treatment of LGBTQ people as illustrated by differences expressed by Archbishop Charles Chaput, O.F.M. Cap. and Fr. James Martin, S.J.**

Within the Church there are many members of the clergy and the laity who may be described as “traditionalists.” These individuals oppose any consideration of change in approaches to LGBTQ individuals. Charles J. Chaput, O.F.M. Cap., who was in office as Archbishop of the Archdiocese of Philadelphia when the events involving CSS occurred, may be described as a traditionalist. Some traditionalists are viewed as undermining Pope Francis in his efforts to secure change within the Church including recognition and welcoming of LGBTQ people. (Gerard O’Connell, *Cardinal Angelo Scola calls out Pope Francis critics: ‘The Pope is the Pope’*, America Magazine (July 21, 2020).<sup>8</sup>

These on-going controversies within the Church about disputed Catholic teachings, including Pope Francis’ exhortations to welcome LGBTQ individuals, are identified by Petitioners in their brief as a matter of “interpretation.” Petitioner’s brief, p.11. Petitioners’ use of the term “interpretation” minimizes the existence of one of the most active and important religious controversies inside the Church —whether the contemporary welcoming teachings of the Pope or the traditional rejecting teachings of a local archbishop (one of several thousand) are to control in this matter.

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<sup>8</sup> <https://www.americamagazine.org/faith/2020/07/21/cardinal-scola-calls-out-pope-francis-critics-pope-pope>

Criticism former Archbishop Chaput directed towards a speech Fr. Martin gave in Philadelphia emphasizes all of this. On September 19, 2019, Archbishop Chaput published an article critical of Martin’s speech on the Archdiocese website. “Archbishop Charles J. Chaput, *Father James Martin and Catholic belief*; CatholicPhilly.<sup>9</sup> He noted, “Due to the confusion caused by his statements and activities regarding same-sex related (LGBT) issues ... I find it necessary to emphasize that Fr. Martin does not speak with authority on behalf of the Church, and to caution the faithful about some of his claims ...” *Id.*

Fr. Martin does speak with authority—the authority of the Pope and the Vatican; he delivers a much different message from that of Archbishop Chaput. This exemplifies the existence of the debates and differences in interpretation or approach which the *amici* describe. Fr. Martin, at the invitation of the Vatican, originally gave the very same speech which the Archbishop had criticized at the Vatican-sponsored “World Meeting of Families” on August 23, 2018 in Dublin. The title of that speech, “Showing Welcome and Respect in Our Parishes for LGBT People and Their Families,” was actually suggested by the Vatican (hierarchically greater in authority than an archbishop). The entire speech was approved in advance by the Vatican. An article containing the text this speech by Fr. Martin, with a video of the speech embedded in the article as a link, is found at James Martin, *Father James Martin: How Parishes Can*

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<sup>9</sup> [https://perma.cc/Z38Q-CFH8]

*Welcome L.G.B.T.Q. Catholics*, America Magazine, August 23, 2018.<sup>10</sup>

Fr. Martin gave his “progressive” speech in Dublin on August 23, 2018. *Id.* Archbishop Chaput’s rebuttal to Fr. Martin was published more than a year later on September 19, 2019. The Dublin speech and the Philadelphia speech are identical—approved in advance by the Vatican. Roman Catholics recognize the Vatican as the ultimate hierarchical Church authority especially when a message intended for worldwide dissemination is reviewed beforehand by it. Some of the most relevant questions for local parishes which Fr. Martin addressed to his audience in this speech include, “Does the person answering the phone know what to say to a lesbian couple who wants to have their child baptized? At funerals, are the gay adult children of the deceased treated with the same respect as other children? What about the teacher in a parish school who has two fathers coming to a parent-teacher conference? “ In all of these instances, Fr. Martin communicates that the response must be a most welcoming one. James Martin *How Parishes Can Welcome L.G.B.T. Catholics*, America Magazine, August 23, 2018.<sup>11</sup>

So, in a presentation approved by the Vatican, the L.G.B.T.Q couple is to be welcomed for the Baptism of

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<sup>10</sup> <https://www.americamagazine.org/faith/2018/08/23/father-james-martin-how-parishes-can-welcome-lgbt-catholics>; Also, on *YouTube* at <https://youtu.be/U3TvffTC1wQ>

<sup>11</sup> <https://www.americamagazine.org/faith/2018/08/23/father-james-martin-how-parishes-can-welcome-lgbt-catholics>; also, *YouTube* at <https://youtu.be/U3TvffTC1wQ>

their child. In the traditional approach of the Petitioner CSS, L.G.B.T.Q. couples cannot even secure evaluations in a non-sacramental, civil process. These differences are most telling when the weight of hierarchy is acknowledged; unless one intends to ignore the pre-eminent status of the Pope and the Vatican, the weight of the hierarchical authority rests with the welcoming inclusive approach.

**E. A majority of Catholics in the United States support equality for LGBTQ persons.**

At the Church of the Presentation in Upper Saddle River, N. J., a Church attended by several of the *amici*, 712 practicing Roman Catholic parishioners participated in a survey which was conducted by its “*Task Force on Healing and Reform*” (previously designated as the “Sexual Abuse Crisis Task Force”) [<https://perma.cc/52QP-Y6VF>] [results used with permission of the Church of the Presentation] A copy of question No. 8 (out of a total of 15 questions) with 712 responses is attached hereto as Appendix B. The results are noteworthy on the issue of approaches of the laity within the Church to LGBTQ persons. *Id.* Question No. 8 was: “The Church must reformulate its teachings regarding homosexuality”; 80% of those who responded agreed (55.35% “strongly agreed” and 24.65% “agreed”). Only 8.17% of those who responded disagreed; an additional 11.83% were neutral—“neither agreeing nor disagreeing.” *Id.*

The *amici* present this survey as a strong indication that there is very significant support within the Church for reformulation of its teachings regarding

homosexuality; the laity, not just the *amici* herein, must be heard especially by those American Church leaders who would resist Pope Francis on this matter. Recognizing that religion is a creative process, not a static one, this Court should accordingly exercise great caution in any consideration of possible acceptance of the traditional, unwelcoming approaches which Respondents would have it rely upon.

According to a May 14, 2019 report of the Pew Research Center on Religion, with regard to attitudes on marriage by religious affiliation, 61% of Roman Catholics now support same-sex marriage while 66% of mainline Protestants also do. [<https://perma.cc/Y7YG-XDD3>]. Gallup also conducts annual polls; first, as of June 1, 2020 it reported that a record 67% of Americans polled now support same-sex marriages. Justin McCarthy, *U.S. Support for Same-Sex Marriages at Record High*. June 1, 2020 [<https://perma.cc/RKA8-JLWK>]. Gallup also conducts polls gauging the extent of support for adoption of children by same-sex couples; on June 6, 2019, it reported that 75.% of those polled answered in the affirmative on the question whether gay and lesbian individuals should be allowed to adopt children. Justin McCarthy *Gallup First Reported on Gay Issues in '77. What has changed*. June 6, 2019, [<https://perma.cc/QZ33-HZ5H>].



**F. There are two recognized approaches in the Church about LGBTQ people and by ruling for Petitioners this Court would be choosing between the two.**

The positions espoused by those Petitioners and those who support Petitioners' case are often described as "traditional," "exclusive," or "non-affirming."<sup>12</sup> The positions described by Fr. Martin and others, unrepresented in this matter, are often described as "progressive," "inclusive," or "affirming." The *amici* are not asking this Court to determine which position is correct or incorrect, right or wrong, theologically, ethically, or otherwise acceptable—the non-affirming versus the affirming. That determination would involve conduct by this Court which would contravene the Establishment Clause—especially if this Court tried to

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<sup>12</sup> Reference is appropriate to an episode in *Adventures of Huckleberry Finn*, Chapter XXXVI, in which Huckleberry Finn and Tom Sawyer are attempting to rescue their friend, the enslaved Jim, who is locked in a cabin. To do this, they decide to dig under the sill. But, apparently according to tradition and as aspiring pirates, all digging must be accomplished by hand with "case-knives". Realizing that they must rush, Tom says to Huck, "Gimme a case-knife". Huck complies but Tom throws that knife to the ground, saying with much emphasis, "Gimme a *case-knife*". Huck gets the message; reaching for some old tools lying nearby, he "got a pick-ax and gave it to him and he took it and went to work...". In this instant matter, the traditional clerical leadership supporting the claim of Petitioner CSS is asking this Court for a "case-knife"—a religious liberty exemption; in actuality, the "case-knife" they now seek is this Court's approval of discrimination targeted against LGBTQ people which is contrary to both our civil law and Church doctrine. Mark Twain, *Mississippi Writings, Adventures of Huckleberry*, pp. 865,866, Library of America (1982).

attempt to identify what is hierarchically correct given the message of the Pope and the actions of the Vatican *vis a vis* the message of some local archbishops or bishops. The *amici* request that this Court recognize the active, ongoing, current debate which constitutes a real religious dispute within the Roman Catholic Church about the extent to which gay people are to be welcomed. These measures have not been adequately described in the record. In all events, for First Amendment Establishment reasons, this Court must affirm the decision of the Third Circuit and remain far from this religious arena.

### III. Argument on the Law

#### A. In *Wisconsin v. Yoder*, Chief Justice Burger Warned of Establishment Concerns in Religious Liberty Claims as Now Present in the Instant Case.

The *amici* challenge Petitioners on three specific grounds. First, it is unjust and unlawful under our civil laws to permit Petitioners to discriminate against LGBTQ individuals, including those who wish to participate in a governmental foster care or adoption program. Second, Petitioners are not entitled to a “religious exemption” based upon claimed teachings of the Church involving rejection of LGBTQ individuals which contradict the message of the Pope and are now embroiled in controversy and under challenge. Third, the differences within the Church as to the welcoming or rejection of LGBTQ individuals have polarized to such an extent that if this Court were to rule for Petitioners and rejection of LGBTQ persons, that decision would constitute an Establishment of religion.

In *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972), Chief Justice Burger stated, “The Court must not ignore the danger that an exception (221) from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause...” He encouraged the need for a sensible and realistic application of the Religion Clauses. In *Yoder*, he cited *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970), “we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a ‘tight rope’ and one we have successfully traversed.” *Walz v. Tax Commission*, at 672.

This Court now actually stands on a similar tightrope to that described by Justice Burger in his *Yoder, supra*. Tightropes should be terrifying to those who are not accomplished in such exercise; this Court is accomplished but only in secular and civil matters—not so with theological as the instant case presents. If it should decide for Petitioners, it would be supporting those within the Church who would reject LGBTQ individuals--for the non-affirming religious traditionalists. It will have failed to successfully traverse a religious issues tightrope, fundamentally an Establishment Clause challenge. Justice Burger correctly warned about this. This Court should not fall into the abyss of an Establishment violation by deciding in favor of one religious’ faction, quite contrary to and in effect ignoring another viable faction, within a particular religion.

Even with *Yoder, Id.*, there were real expressions of concern: “Yoder struck many observers as troubling

because it did not seriously entertain the possibility that the interests of parents and children may diverge.” Justin Driver, *The School House Gate—Public Education; The Supreme Court, and the Battle for the American Mind* pp.405-410 (2018). Professor Driver, who is the Harry N. Wyatt Professor of Law at the University of Chicago Law School, refers to a dissent in *Yoder* wherein Justice William O. Douglas, *supra* at 244 commented, “...I think the children are entitled to be heard; the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or oceanographer. To do so he will have to break from Amish tradition...” *Wisconsin v. Yoder*, *Id.* at 244, 245. In religion cases, there is almost always a substantial likelihood of the existence of unrepresented, impacted interests such as the Amish children in *Yoder* and the interests of those Catholics, including *amici*, who believe under Church doctrine that LGBTQ people should be welcomed, not rejected, in the matter now before this Court.

However, decisions about religion and its doctrines are difficult, if not impossible, when required of either an administrative panel or a court charged as a neutral decision maker with providing “full and fair consideration” of any religious liberty claim. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). That task becomes especially difficult, perhaps to an extraordinary degree, if there are sincere religious differences, as in the instant matter, between members of a particular religion who believe that its tenets are being either mis-described or mis-applied by those seeking the exemption. Such a situation could be tragic, if not

catastrophic, if a civil court was to rule, on a matter in considerable religious controversy, if that decision would arrive as a surprise to many believers in the same church who do not accede to the particular interpretation which the Court supports. All of this is avoidable if the judicial concerns and restraints, which *Wisconsin v. Yoder*, *supra*, identifies, and which *Employment Division, Department of Human Res. v. Smith*, 494 U.S. 872 (1990) reinforces, remain in place.

Petitioners also claim that *Masterpiece Cake Ltd. v Colorado Civil Rights Comm.*, 138 S. Ct. 1719, 1727 (2018) emphasized the importance of allowing churches to maintain their own marriage solemnization practices.” No one would quarrel with that statement when applied to sacramental, liturgical or theological services of a sacramental nature. But, is that really what *Masterpiece* held? Or, did it hold that there were deficiencies in a required administrative hearing held to identify what the baker’s religious beliefs actually were and were those beliefs sincerely held or were they pretextual. *Masterpiece*, *Id.*

Such an analysis must be undertaken whenever “religious exemptions” are claimed to confirm whether the relied upon religious belief is “sincerely held” and “not pretextual”. Also, it should be required to avoid the possible grant of what in effect could be a governmental *imprimatur* on a faction within a particular religion. However, all of this is essential unless religious exemptions, which many of the adherents of the particular religion would oppose, are to be recognized on a “first in time filed” prevails basis as if mechanically calculating the filing of deeds or

mortgages in order of time in a county land records office. Whose “sincerely held religious beliefs” are to be recognized when active religious controversy affecting the religious exemption requested exists within the particular religion?

When ink was the medium of the day, a summary or “first in time filed” approach would be called a “rubber stamp”—or to use Justice Scalia’s fitting terminology—a process of “presumptive” validation. *Smith, Id.* at 888 Once again, in *Masterpiece, supra*, the baker, who was seeking government endorsement of his “religious exemption”, apparently as an unwelcoming Christian: but, in that case, who spoke for those Christians, a great many, who are welcoming and object on religious grounds, public policy and constitutional and statutory law to discrimination and rejection directed to LGBTQ people. Even more so, are we to have a race to our courthouses by either side when there are clear religious differences or controversies within a specific religion so that the first to file, be recognized and prevails in those courts, earn bragging rights or imprimaturs as to the correctness of their “beliefs”?

However, *amici* emphasize that this Court determined in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871), “In this country the full and free right to entertain any religious belief, to practice any religious principal, and to teach any religious doctrine...which **does not infringe personal rights** [emphasis added] is conceded to all”. The claim of Petitioners, which *amici* argues disregards and violates Church teachings, would infringe personal rights of LGBTQ people. *Watson v. Jones, Id.* also stands for much more,

“[W]henever...questions of discipline, or of faith, or ecclesiastical...have been decided by the highest of these church judicatories..., the legal tribunals must accept such decisions as final and binding on them, [emphasis added] in their application of the case before them.” *Watson v. Jones*, 80 U.S. at 727.

In *Smith, supra*, 887, Justice Scalia emphasized that, “The government may not ...lend its power to one side or the other in controversies over religious authority or dogma, see *Presbyterian Church v. Mary Elizabeth Mem’l Hull Presbyterian Church* 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church of North America*, 344 U.S. 94 (1952); *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696 at 709, 724-725; Here, the ultimate hierarchal authority—Pope Francis—has spoken to such a degree that this Court should not rule for petitioners’ religious liberty claim which contradicts the Pope.

Justice Brennan cautioned, “It is not only the non-believer who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent on government.” *School District of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963).

**B. *Employment Division v. Smith*, as relied upon by the Third Circuit, is an essential standard for review of claims based on religion**

This Court should determine that the decision not to recognize Petitioner's claim for a religious liberty exemption by Third Circuit below, which primarily relied upon *Employment Division, Department of Human Res. v. Smith*, 494 U.S. 872 (1990) should be affirmed. Further, *Smith* should remain in place and unaltered. The judicial regimen which *Smith* established provides the best possible way to gauge "religious liberty" claims. It acknowledges the complexities and dynamics, as in the instant matter, which ordinarily accompany religion. In *Smith, Id.*, complex religious challenges were anticipated by Justice Scalia: "if 'compelling interest' really means what it says ... many laws will not meet the test. Any society courting such a test would be courting anarchy; but that danger increases in direct proportion to the society's diversity of religious beliefs and its determination made up of people of almost every conceivable religious preference." *Smith, Id.* at 888.

Justice Scalia continued, "...precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the higher order." *Smith, Id.* at 888 How can Petitioners be entitled to the grant by this Court of an exemption which it seeks, on purported religious grounds, on the deficient record now before this Court, otherwise than



by deeming the involved laws, ordinances, and local government contractual provisions intended to prevent discrimination against LGBTQ people to be “presumptively invalid”. Again, by deeming Petitioners’ religious beliefs, as opposed to the religious beliefs espoused by *amici* within the very same religion, to be “presumptively valid”? None of this can be proper under our First Amendment.

But if this Court were to do so, who does speak for the Pope and the substantial body of Catholics who believe that rejection is “unjust discrimination, immoral and unsupportable under both Church and Christian teachings? If Petitioners prevail in their effort to eliminate or weaken Smith in this case, the groundswell of religious liberty petitions which Justice Scalia warned about, will soon arrive. *Smith, Id.* at 889.

This instant matter and a number of others pending in lower federal courts show that the groundswell has already arrived. As but one example, suit was commenced on December 20, 2019 in the federal district court of South Carolina, Greenville Division, after a Protestant adoption agency refused to allow the plaintiff to foster parent or adopt because she is a member of the “wrong” Christian Church—plaintiff is a Roman Catholic. *Aimee Madonna v. U.S. Department of Health and Human Services*, 6:19-cv-03551-TMC., U.S. District Court, Greenville District, South Carolina filed 12/20/2019. Our Courts and our administrative agencies are simply not equipped to handle religious liberty claims when such theological and ecclesiastical differences present themselves. Further, Justice Scalia

warns about any approach where, “... each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of religious beliefs.” *Smith, supra* at 890. A decision for Petitioner in the instant matter would do just that.

This Supreme Court should refrain from engaging in any ruling that would support one side or the other in the religious disputes and differences within in the Roman Catholic Church concerning LGBTQ matters. It should avoid the interpretation or weighing of any religious tenets of the Church and affirm the Third Circuit. It should dismiss the petition now under consideration, limit religious exemptions to identifiable ministerial functions—such as ecclesiastical, liturgical or sacramental exercises, and apply the holding in *Employment Division v. Smith* without modification as the best possible judicial approach to preserve constitutional integrity in the demanding arena of religious liberty exemptions.

\*\*\*\*\*

This Supreme Court should not open the flap of the tent and proceed out into the winter storm of religious ethics, moral theology and philosophy in the disputed subject area involving the extent to which LGBTQ people are to be welcomed, or not welcomed, by the Roman Catholic Church. No religious liberty exemption should be granted to Petitioners. No Establishment by this Court in favor one belief or in disregard another contradictory belief within the same Church should occur. To rule for the traditionalists now represented by Petitioners would be a constitutionally prohibited decision on religious matters. As Pope Francis stated in

response to the inquiry about an alleged LGBTQ person, “....Who Am I To Judge?”

**CONCLUSION**

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

Respectfully submitted,

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August 14, 2020

## **APPENDIX**

## APPENDIX

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App. 1

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**APPENDIX A**

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***AMICI CURIAE***

Rosemary Amabile	Barbara Mills
Jeanette Baron	Dorothy Mills
Elizabeth Begley	Hugh J. Mills
Ellen M. Brickwedde	Mary Jo Monahan
Joseph J. Coyne	Sarah Monahan
Stephanie S. Coyne	Cheryl Morrissey
Gerard C. Duer	James K. Riley
Denise Finnegan Schorn	Joan Riley
Catherine Furlani	Marsha Simchera
Deborah Kair	Patricia A. Swanton
Jack Kakolewski	Jennifer Talley
Patricia A. Krasnausky	Gloria Blanchfield Thomas
Shauna Mc Roberts	Mary T. Yelenick
Daniel P. Mecca	

## App. 2

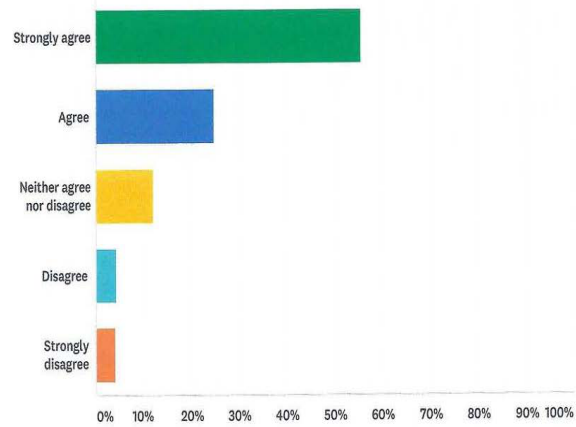
### APPENDIX B

Church of the Presentation Sexual Abuse Task Force

SurveyMonkey

Q8 The Church must reformulate its teaching regarding homosexuality.

Answered: 710 Skipped: 2



ANSWER CHOICES	RESPONSES	
Strongly agree	55.35%	393
Agree	24.65%	175
Neither agree nor disagree	11.83%	84
Disagree	4.23%	30
Strongly disagree	3.94%	28
TOTAL		710