

No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL.,

Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,

Respondents.

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

**BRIEF OF PROSPECTIVE FOSTER PARENTS
SUBJECTED TO RELIGIOUSLY MOTIVATED
DISCRIMINATION BY CHILD-PLACEMENT
AGENCIES AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICI CURIAE*¹

Amici sought to become foster parents but were rejected by faith-based child-placement agencies in state and federal foster-care programs because they are of the ‘wrong’ religion or do not adhere to an agency’s religious beliefs concerning same-sex couples. *Amici* write to explain the harms that they have suffered, and the coordinate harms to the children who are thus deprived of opportunities to be placed in loving, supportive homes. In light of these substantial harms, *amici* explain why child-placement agencies should not have the right to a government contract to administer government services in a manner that contravenes nondiscrimination requirements that the government mandates and the Constitution requires.

Amici are:

- Aimee Maddonna
- Lydia Currie
- Eden Rogers and Brandy Welch
- Fatma Marouf and Bryn Esplin

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to fund the brief’s preparation or submission. Consents to the brief are on file with the Clerk’s office.

INTRODUCTION AND SUMMARY OF ARGUMENT

Government has a duty of the highest order to care for the hundreds of thousands of children in foster care nationwide, who often come into the system during tumultuous periods of transition and instability. This legal and ethical obligation includes ensuring that the children have the best opportunities to be placed in good homes.

Fortunately, individuals and couples like *amici* step in to provide safe, loving homes for children desperately in need, whether for a month, a year, or a lifetime.

When evaluating prospective foster parents, what should matter is whether they are capable of providing a stable, supportive environment. Unfortunately, some government-contracted, government-funded child-placement agencies instead judge prospective foster parents based on whether they belong to the ‘right’ religion or adhere to the agency’s religious views about what makes a marriage and family.

In South Carolina, Aimee Maddonna was rejected as a potential foster parent by Miracle Hill Ministries—the state’s largest, best-resourced child-placement agency—because the Maddonnas are Catholic. Lydia Currie was ineligible because the Curries are Jewish. Eden Rogers and Brandy Welch, because they are Unitarian Universalists and a same-sex couple. In Texas, meanwhile, Fatma Marouf and Bryn Esplin were excluded by Catholic Charities Fort Worth from federal programs to place unaccompanied refugee children, because their relationship does not “mirror the Holy Family.”

This religiously motivated discrimination denies prospective foster parents like *amici* the opportunity to partake of government services on the same terms as everyone else; and they receive the hurtful message from a government program that their religious beliefs and their families are not of equal dignity and worth. And every otherwise-qualified family that is turned away means one more child delayed or denied the opportunity to be placed in a loving home.

To stave off these substantial harms, government can and must require that its child-placement agencies do not discriminate in the provision of governmental foster-care services.

Catholic Social Services casts itself as a victim of religious discrimination, contending that the City of Philadelphia impermissibly conditions participation in the foster-care system on adherence to views about same-sex couples that CSS does not share. Pet. Br. 30–33. But child-placement agencies contract with and get paid by government to provide quintessential government services: the care and placement of children whom the state or federal government has removed from their parents' custody.

These agencies are not recipients of generally available public benefits or grants. They are not mere “participants” in a government program. They are *agents* hired by government to administer a government program that delivers government services to the actual participants in the program—foster parents, potential foster parents, and children in state or federal care and custody. The agencies' duty is to do the government's work delegated to them, not to pursue their separate aims.

Government can, without violating the First Amendment, impose restrictions on its own programs and operations to ensure that they are administered effectively and efficiently. See *Garcetti v. Ceballos*, 547 U.S. 410, 421–422 (2006).

And sometimes it must. For government cannot accomplish through contractors what the Constitution forbids it to do directly. See *Norwood v. Harrison*, 413 U.S. 455, 465, 467 (1973). Thus, because the City is forbidden to discriminate based on religion or sexual orientation, it must not hire contractors to do so either.

What is more, a religious exemption here would inflict severe harms on children and prospective foster parents to advance petitioners’ religious beliefs. Not only is that shifting of the costs and burdens of petitioners’ religious exercise not required by the Free Exercise Clause, but it is barred by the Establishment Clause. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–710 (1985).

ARGUMENT

A. Religious Discrimination In Foster Care Is Real—But Not In The Way That Petitioners Contend.

When child-placement agencies enforce religious litmus tests for being foster parents, the rejected families and the children who lose opportunities to be placed in their loving homes are the actual victims of religious discrimination.

1. Aimee Maddonna

Aimee Maddonna, her husband, and their three children live near Greenville, South Carolina.

Aimee's father grew up in foster care—a system that, he often told Aimee, had failed him. He was therefore committed as an adult to taking in and caring for children in foster care, so that he could give them the loving, supportive family that he never had. Aimee thus shared a home and a life with dozens of foster brothers and sisters—some for just a few days, others for years.

That experience instilled in Aimee the importance of providing a safe, loving home to children who otherwise would go without. She hopes to impart these values of charity and service to her own children.

Aimee learned that Miracle Hill Ministries, a Greenville-based child-placement agency, was soliciting volunteers to mentor older children in foster care. South Carolina contracts with Miracle Hill to care for children in the state's custody, to evaluate potential foster families, and to facilitate placement of the children with those families.

Aimee desperately wanted to volunteer to mentor children in the foster-care system, because volunteering allows families to develop relationships with children who might be good matches for foster placement in their homes. And because Aimee's children have special needs, it is especially important to ensure that any foster child would be a good fit with the whole family.

So Aimee contacted Miracle Hill to volunteer for the state program. She corresponded with Miracle Hill over a period of weeks, expressing her excitement to mentor a child and describing her family's experience with and interest in helping those most difficult to place—older children and children with

special needs: “I can’t really imagine a type of child that I couldn’t mentor” or a situation that would “cause me discomfort,” whether that meant advising a teen parent, helping a child with a learning disability do schoolwork, or supporting a child in any other circumstance that might arise. Aimee told Miracle Hill that she was looking forward to trips to the children’s museum, going out to lunch, playing soccer, and book-browsing at Barnes & Noble. “I have the view that every child has the ability to enrich the lives of adults around them, too.”

Just before Aimee’s final, in-person interview, Miracle Hill asked what church the Maddonnas attended. Aimee answered that they belonged to Our Lady of the Rosary—a Catholic parish.

And that was that. Miracle Hill told Aimee that the Maddonnas couldn’t be in the program because it would not accept Catholics as volunteer mentors or foster parents. The Miracle Hill representative expressed disappointment because, but for the fact that the Maddonnas are Catholic, Aimee “really seem[ed] like the perfect mentor.”

Aimee learned that it wasn’t just Catholics who were barred. Only Christians who attended Miracle Hill-approved evangelical-Protestant churches were permitted to mentor or foster the children assigned to the agency by the state: Because “mentors play an important role in providing spiritual as well as emotional support, guidance, and counsel,” Miracle Hill explained, they must “agree with our Protestant statement of faith” and “share our distinctly Protestant beliefs and convictions.”

The rejection came as a painful surprise to the Maddonnas. “It was demoralizing to hear that we are

not good enough because we aren't the right kind of Christians." Aimee had to explain to her children that, "because we're Catholic, we can't take these kids out for ice cream and cheer them on at their games. I was devastated." "I've never considered myself a religious minority until that moment."²

Pursuing other options for fostering was not realistic. Miracle Hill is the largest, most prominent child-placement agency in South Carolina, and the one with the best resources, as it receives hundreds of thousands of dollars in government funding each year. It is also the only child-placement agency assigned any meaningful number of children in the part of the state where the Maddonnas live. And the handful of other, smaller contractors in the area are likewise religiously affiliated, so South Carolina and the U.S. Department of Health and Human Services authorized them to discriminate based on religion also.³

² When Miracle Hill learned of litigation against the government over its policy (see *Maddonna v. U.S. Dep't of Health & Human Servs.*, No. 6:19-cv-03551-TMC (D.S.C.)), it lifted its formal ban on Catholics (see Press Release, Miracle Hill Ministries Strengthens Christian Identity by Opening Foster Program to Catholic Foster Parents (July 5, 2019), <https://bit.ly/3ikboDi>), but it still requires that prospective foster parents agree and live in accordance with its evangelical-Protestant doctrinal statement (see *Foster Care Inquiry Form*, Miracle Hill Ministries, <https://bit.ly/31vLKF0>). For Aimee, falsely "stating that I agree with the statement of faith would not only be a lie, it would be a sin." And sincerely agreeing with it "would, essentially, be synonymous with my leaving the Catholic Church."

³ See S.C. Exec. Order No. 2018-12 (Mar. 13, 2018), <https://bit.ly/3gDLvxY>; Letter from HHS Admin. for Children & Families to S.C. Gov. Henry McMaster (Jan. 23, 2019), <https://bit.ly/3gJKvbw>.

For Aimee, the rejection “was particularly offensive because I felt like I was not just being proselytized by a religious group against my beliefs. I was being coerced by the government to participate in the religious program.”

Aimee recognizes, too, that when loving families like hers are turned away, it is the children in foster care who suffer the most. “It was difficult for my family, of course, but at the end of the day my kids still have parents. These foster children need and deserve to have someone looking out for them, and the government is taking that away.” “They don’t have moms at their football games, or Sunday night dinners around the table. These children are still in an institution. That isn’t right, it isn’t fair, and it isn’t necessary.”

2. *Lydia Currie*

Lydia Currie and her family live in Philadelphia. Until recently, they lived in Greenville, where Lydia navigated the foster-care system as a foster-adoptive parent and guardian *ad litem* for children in institutional foster-care facilities.

Lydia’s father had been in institutional foster care. Hearing about his experiences had Lydia “dreaming of someday becoming a foster parent able to take older children out of an institution and offer them a family.”

She was also guided by her faith: “The Jewish value of *tikkun olam* teaches that abundance exists to be used in the repair of the world.” And the Curries “had enough of everything: emotional and financial security, time, and love.”

Lydia knew that older children are all too often left “warehoused in modern-day orphanages.” She decided that “fostering a boy too old to be considered ‘safe’ or ‘cute’ by many was the path God had laid open for me to help create a world where there is no shortage of loving homes for children of every age, race, and background.”

So she went to the Greenville office of the South Carolina Department of Social Services to obtain a foster-adoptive license. But after an orientation, the process “stalled completely”—Lydia heard nothing for more than six months. Eventually, the director of the Greenville DSS office told her that the Department was “completely backlogged” and “could not even predict when our license would be issued.” The director recommended applying through the private agency Miracle Hill, which had many older boys in need of foster homes and would allow the Curries to “move forward right away”; Miracle Hill offered better services and could “do a much better job” licensing families.

Lydia took this advice. But when she downloaded Miracle Hill’s foster-care application, she saw that it requested a reference letter from a “Bible-believing” church, along with a “personal testimony about our relationship with Jesus Christ.” Lydia thus learned “that we were excluded based on nothing but our religious convictions.”

“The message could not have been clearer. And when somebody tells you that a hurting child is better off at their orphanage than living in your Jewish home, it doesn’t make you feel good about yourself.”

It was therefore another *year* before Lydia was licensed as a foster parent, after she learned that

South Carolina had begun contracting with an agency in the Greenville area that would accept Jews. The Curries fostered two older boys, who later reunified with biological relatives. The Curries then adopted their third foster son, with the selfless support of his biological mother—who saw both how institutional care had compounded the boy’s trauma and how a stable, loving foster family had helped him begin to heal. In time, though, the agency ceased offering services in Greenville. When the Curries became foster-adoptive parents again, it was to a girl who had been in an institution in another county.

With perseverance in the face of discrimination, and long delay, the Curries were able to provide a loving home to children in the foster-care system. But Lydia’s experiences as a foster parent and guardian *ad litem* made her keenly aware of the daunting crisis in South Carolina.

There are more than 4,300 children in the state’s foster-care system.⁴ That number has spiked in recent years, in part because of the opioid epidemic. And yet, as the number of children has risen, the number of home placements has stagnated, leaving a shortfall of some 1,600 homes.⁵

Every long-term institutional placement “is a sign that another child has fallen victim to our crisis-level foster-parent shortage.” “How many children simply age out of the system, sent off into the world utterly alone? How egregiously have we failed those children when that happens?”

⁴ S.C. Dep’t of Soc. Servs., *Foster Care/Foster Home Needs Report* (July 1, 2020), <https://bit.ly/3iPD5EB>.

⁵ *The Numbers*, Care2Foster, <https://bit.ly/2EbkyTR>.

“There is nothing wrong with being a religious child-welfare advocate—I am one myself,” Lydia says. But “when a child needs shelter and support and a chance to begin healing, the adults who control the child’s immediate future—as government agents—cannot have a separate agenda that overrides the child’s welfare.” “Leaving a child in an institution for even one extra day because the supply of foster parents has been artificially constrained is simply incompatible with the state’s duty to ensure the protection and healing of children in its custody.”

And that is to say nothing of the coercion that children in foster care may experience. Lydia’s adopted daughter, baptized Catholic as an infant, was forcibly converted to the Baptist faith by a foster family at age seven and later sent to an evangelical orphanage. “She has been coerced so much in her short life by adults who thought that they knew God’s will for her. We would rather have a child who is not Jewish than a child who became Jewish as some sort of bargain—her soul for our love and protection. Our love and protection are freely given, no strings attached. All children in foster care deserve that same gift.”

Lydia’s adopted children will always carry the trauma of being institutionalized and indoctrinated during the most painful and stressful period of their lives. Fortunately, “children are resilient, and it’s amazing what a stable, loving home can do.” But seeing her own children thrive calls to mind “the other older children who were waiting for families, the ones in Miracle Hill institutions whom we could have loved if we had not been rejected because of our faith. I wonder what happened to them—and whether they are still waiting.”

3. *Eden Rogers and Brandy Welch*

Eden Rogers and Brandy Welch live in the Greenville area with their daughters, an eleven-year-old and an eight-year-old. Brandy works at an accounting firm and Eden formerly taught at a Montessori school. They've been together for ten years and married for almost five.

The couple has long wanted to expand their family by welcoming a child in foster care into their home. Building a life with Eden helped Brandy recognize that family is more than just blood relation. Eden, having helped raise her siblings in challenging family circumstances, "always hoped" to "build a large family." Brandy explains that Eden has a way of "making each child feel special." "The foundation of everything we believe in is love. We would like to give that to more kids."

Once they were ready, "we didn't have to put much thought into it." "Miracle Hill has a pretty strong presence here where we live." They knew that Miracle Hill is a Christian organization, "but when you think about fostering in this area, that's who you see." In fact, they used to drive past a Miracle Hill billboard every day on their way to work. "The sign says, 'Foster with Miracle Hill.'" "It doesn't say, 'Foster with Miracle Hill if you're a Christian and you go to a Christian church.'"

So the couple contacted Miracle Hill about obtaining a foster-care license. Brandy mentioned that they are a same-sex couple. They were told to complete Miracle Hill's inquiry form for prospective foster parents. The Miracle Hill representative noted that the agency is a Christian ministry that follows

Christian values and suggested that the couple read about Miracle Hill on its website.

The couple completed the form, identifying themselves as a same-sex couple and as members of a local Unitarian Universalist Church. They wrote that they would “provide a safe and loving environment” for a child, explaining that they want to become foster parents because they “would like for more children to know what it feels like to be unconditionally loved and to be part of a loving family.”

Within a few days, they heard back from Miracle Hill: a flat rejection. It was “a gut punch for both of us.” As Brandy puts it, “Seeing that email come across my screen really made me feel ill.”

Miracle Hill declared that the couple’s faith “does not align with traditional Christian doctrine” so Miracle Hill “would not be a good fit” to help them “secure state licensure to become foster parents,” because the agency accepts only those who share its beliefs and are active in a Christian church that Miracle Hill deems acceptable—an evangelical-Protestant church. Unitarians need not apply.

Nor would belonging to the right kind of church be enough. Miracle Hill also requires that foster parents adhere “in belief and practice” to the agency’s religious views about what a family should look like: “God ordained the family as the foundational institution of human society. * * * God’s design for marriage is the legal joining of one man and one woman in a life-long covenant relationship.”⁶

⁶ *What We Believe: Our Doctrinal Statement*, Miracle Hill Ministries, <https://bit.ly/34m0OVM>.

Miracle Hill suggested other volunteer opportunities, such as sorting clothes at one of the ministry’s thrift stores—just nothing that would place the couple in “positions of spiritual responsibility or influence” over a child. And while Miracle Hill furnished a list of other agencies that purportedly could work with the couple to obtain a foster-care license from the state, being rejected by the largest, most prominent agency in the region meant that Eden and Brandy “have no reason to think that that wouldn’t happen anywhere else.”

And really, there aren’t comparable alternatives. Though Miracle Hill identified nine agencies, six license families solely for therapeutic foster care, not for the regular foster care that Eden and Brandy want to provide.⁷ One of the remaining three is the state Department of Social Services, which, as Lydia Currie explains, has a tremendous backlog and contracts out for most placements. The two nontherapeutic-child-placement contractors are both religiously affiliated—and both are headquartered more than forty miles outside Greenville. One first began offering foster-care licensing only in 2017, so it lacks the experience, track record, and services that Miracle Hill provides. And the state assigns to Miracle Hill the overwhelming majority of children; the other agencies have hardly any to place with prospective foster families. Commensurate opportunities these are not.

Eden and Brandy have trouble making sense of the rejection. “We work hard to raise our own two girls

⁷ Children in therapeutic foster care have complex needs and require a higher level of care. South Carolina thus divides agencies into those offering regular (i.e., nontherapeutic) foster care and those offering therapeutic foster care. See *Agencies Near Me, Care2Foster*, <https://bit.ly/2Yg6YpI>.

in a loving and stable home. Faith is a part of our family life, so it is hurtful and insulting to us that Miracle Hill's religious view of what a family must look like deprives foster children of a nurturing, supportive home."

And knowing that Miracle Hill is the biggest, most prominent agency in the area "made us think there's so many people that would love to be foster parents that don't fit into the small box that they're accepting." "We can't be the only ones that would love the opportunity to provide a home for a child that doesn't have one."

The worst part for Eden and Brandy is knowing that "there are children waiting for homes that don't have to be waiting." And the children in state custody whom Miracle Hill is assigned to place "don't all fit into the small box" of what Miracle Hill deems acceptable either. LGBT children assigned to Miracle Hill are denied even the possibility of being placed with loving, affirming LGBT foster parents. "I think it's really important to be able to show them that family is not just about biology," Eden explains. "We can create our own families, and we can love just as hard as biological families."

"You're not given a manual when you get children," she continues. "But I know with one-hundred-percent certainty that we offer a loving, safe, healthy, supportive home. If that's not what the right family is, then what is?"

4. *Fatma Marouf and Bryn Esplin*

Fatma Marouf and Bryn Esplin are a married same-sex couple who live in Fort Worth, Texas. Fatma is a professor and director of the Immigrant Rights Clinic at Texas A&M School of Law, and Bryn is a

professor of Bioethics at the University of North Texas Health Science Center.

Through Fatma’s work, the couple realized that they want to provide a home for an unaccompanied refugee child. In 2017, the head of Catholic Charities Fort Worth contacted Fatma to see about partnering with her immigration clinic. Fatma was invited to tour the organization’s facility, where she observed the operation of the federal foster-care programs for unaccompanied refugee children: The federal government is legally responsible for the care of the thousands of children who have come to the United States without a parent or legal guardian—refugees, asylees, victims of trafficking, and children without lawful immigration status. Many are fleeing violence. The U.S. Department of Health and Human Services’ Office of Refugee Resettlement funds organizations to provide shelter and assist with placement of the children in its custody.⁸

Fatma’s visit to the facility underscored the desperate need for loving homes for these children. “It made me really sad to see some of the barren little rooms without a lot of color or toys or anything.” “There are hundreds and hundreds of children who come in as refugees who have gone through enormous ordeals and need places to say.”

Fatma came home that day, excited about the prospect of welcoming an unaccompanied refugee

⁸ HHS pays millions of dollars in federal funds each year to the United States Conference of Catholic Bishops, which disburses the funds to subgrantees, including Catholic Charities Fort Worth. These agencies are supposed to match children with qualified families in accordance with HHS’s prescribed standards of care. See 8 U.S.C. §§ 1232(c), 1522(d).

child into Bryn's and her home. After talking it over, the couple realized "what a unique, perfect fit" they would be. Fatma is the daughter of immigrant parents and was raised Muslim, and Bryn was raised Mormon, so they are ready "to embrace a child from a different background and religion." They are also happy to welcome an older child or set of siblings into their home. They're "prepared for a long-term commitment of something that might be difficult but incredibly rewarding." So they began exchanging e-mails with Catholic Charities about the next steps, and an initial phone interview was scheduled.

It was during this phone interview that things took a turn. The agency's representative described the population of children in need of homes and listed some of the agency's requirements. A few minutes into the call, she stated that foster parents must "mirror the Holy Family." When Fatma asked for clarification, explaining that Bryn and she are a same-sex couple, the agency representative declared that they do not "qualify" to foster a refugee child.

"We just sat there in disbelief for a couple of minutes," Bryn recalls. "Being denied the opportunity to even apply to foster a child because we don't 'mirror the Holy Family'—explicitly code for being a same-sex couple—was hurtful and insulting." "I couldn't quite believe that criterion was true, and then the grief sort of set in, with the realization that this process could be so much more difficult for a married couple like ourselves than I had thought."

"It was so disappointing and hurtful to be told that we don't qualify to foster refugee children simply because of who we are and who we love," Fatma recalls. "Being told that we could not foster felt almost like a physical blow—it felt like a slap in the face. Our

love is as big as any other love. And then to be seen as lesser than or inadequate prospective parents doesn't treat our marriage with the equality and dignity that is automatically given to heterosexual marriages."

The couple knew of the Catholic Church's stance on same-sex couples, but they thought that it would not be able to impose its religious views using taxpayer dollars through federal programs overseeing the care and placement of children in the legal custody of the government. "For us, it really came as a surprise, because we felt like we were approaching a government program." Says Fatma, "It never even occurred to me that they would discriminate against us based on our sexual orientation."

"Underneath the feelings of disappointment, there was also anger," Bryn describes. "I was really upset that such an important job had been handed over to an agency that unilaterally defines 'best interest' according to its own values."

Add to that the fact that the agency had just invited Fatma to visit its facility and sought to collaborate with her professionally: "They had invited me and asked me to volunteer and asked for my support, and then when I was offering it, they turned it down." In fact, the very day that the agency rejected the couple as foster parents, its director asked Fatma to deliver a "Know Your Rights" presentation on immigration law at a Catholic Charities event, which she did.

Worse yet, "insisting on such a narrow, religious view of what a family must look like deprives these children of a nurturing, supportive home," Bryn explains. "It's not just we who are being denied something." As with so many states' foster-care

systems, there are more children in federal custody than there are available foster and adoptive homes. Given the number of children in need of a loving home and the shortage of available foster families, “to be turned away just because of our sexual orientation seems very short-sighted.”

From her legal work, Fatma knows that “refugee children have been through enough trauma to last a lifetime. A lot of these kids have gone through hell to get to the U.S. They need love, stability, and support, which Bryn and I have in abundance. But instead, the agency put their religious views of LGBT people above what is best for the kids in their care.”

Allowing agencies to reject prospective foster parents because they don’t adhere to some preferred religious view about how a family should look leaves a pool of foster parents who don’t reflect the pool of refugee children. As Fatma notes, “such a system doesn’t take into account the diversity of refugees who are coming in, what their religions are, what their cultural backgrounds are, and how we might actually be a pretty good fit for some of those kids.” “There are a lot of LGBT children who get refugee status because of their sexual orientation or gender identity.” “To then reject prospective foster parents based on their sexual orientation or gender identity tells those children that the child-placement agency caring for them, and the federal government agency legally responsible for their safety and well-being, believe that they’re not okay the way they are.”

Knowing that LGBT status can be a basis for asylum, the disconnect is glaring for Fatma: “How can you be offering protection to children, including on the basis of their sexual orientation, and then refuse to place them in foster homes? What message does that

send to those children about their worth and their dignity?”

Fatma and Bryn knew of no other organization in their part of Texas that administered the federal programs to provide foster-care and adoption services for these children so desperately in need of stable, secure, loving homes. When Fatma reported to HHS the discrimination to which Bryn and she have been subjected, she asked for information on other organizations that would allow same-sex couples to become foster parents for unaccompanied refugee children. HHS never offered any alternatives.

B. Agencies That Contract To Supply Government Services Are Not Entitled To Pursue Their Own Ends At The Expense Of Prospective Foster Parents And Children.

Amici's experiences illustrate the harms that befall prospective foster parents and children when child-placement agencies pursue their own aims. Fortunately, government may forbid its contractors to discriminate when administering foster-care services on its behalf, without running afoul of the First Amendment.

1. *Child-placement agencies do not “participate” in a government program—they administer it.*

Government has a responsibility of the highest order to protect and care for children when it removes them from their homes and places them in its legal custody. Among the duties that it owes these children is to place them in appropriate foster homes.

Jurisdictions like Philadelphia and South Carolina and federal programs like the ones for unaccompanied refugee children contract with child-placement agencies to provide foster-care services on their behalf. Philadelphia hires child-placement agencies to recruit, approve, and place children with foster families, to fulfill Pennsylvania’s legal obligations to the children. See 55 Pa. Code §§ 3130.67(b)(7), 3700.61.

When child-placement agencies perform these government functions, authorized by regulation, license, contract, grant, or some combination thereof, they act as arms of government, without whose authority they could not operate. They are not recipients of foster-care services. They are not beneficiaries of public benefits. And they are not “participants” in foster care in the sense that petitioners suggest. It is the children in foster care and the prospective foster parents who wish to provide them with loving homes who are the recipients, the beneficiaries, the participants. The agencies are government contractors administering government programs on the government’s behalf. That they act with a genuine desire to help needy children is admirable. But their duty as agents of government is to carry out the government’s business, not their own.⁹

⁹ Petitioners proudly detail the role of religious institutions in aiding orphaned children in centuries past. Pet. Br. 3. And rightly so. But as they acknowledge (*id.* at 4), modern foster-care systems are markedly different by virtue of government involvement. When government, as *parens patriae*, terminates parental rights and takes custody of children, it bears a particular responsibility to respect constitutional limitations—a responsibility that extends to its contractors.

2. *Government may control child-placement agencies' activities to ensure effective delivery of public services.*

Public employees don't relinquish all their rights when they sign an employment contract. But neither do they get to "perform their jobs however they see fit" under cover of the First Amendment. *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). For "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Lane v. Franks*, 573 U.S. 228, 236 (2014) (quoting *Garcetti*, 547 U.S. at 418). Accordingly, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. Here, those limitations ensure that Philadelphia delivers foster-care services effectively, efficiently, and fairly.

As an initial matter, it is of no consequence that petitioner CSS administers foster-care services as a contractor rather than as a direct City employee. "[F]ormal distinctions such as whether a 'service provider' has a 'contract of employment or a contract for services' with the government [are] a 'very poor proxy' for constitutional interests at stake." *NASA v. Nelson*, 562 U.S. 134, 150 (2011) (quoting *Board of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996)). Thus, this Court employs the same test whether "a government employer takes adverse action on account of an employee or service provider's right of free speech." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996).

This Court has established a two-step inquiry into whether a contractor's speech is protected, asking first

whether the contractor speaks as a citizen on a matter of public concern, and if so, whether the government has sufficient justification for restricting the speech. See *O’Hare*, 518 U.S. at 719; *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). That framework, not the compelled-speech doctrine that petitioners urge (Pet. Br. 30–33), applies. And under it, a contractor has no protected interest in categorically refusing to certify same-sex couples when performing on its contract to do the City’s work of identifying families for foster placements.

Even setting aside whether certification determinations are matters of public concern in the pertinent sense and whether the act of certifying foster parents is expression rather than conduct—both of which we doubt—CSS acted here not as a private citizen but as a contractor administering a state program. An agent for a governmental entity simply does not speak as a private citizen when “the speech at issue is itself ordinarily within the scope of [the] employee’s duties.” *Lane*, 573 U.S. at 240.

“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Garcetti*, 547 U.S. at 421–422; accord *Janus v. American Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2471 (2018) (“[E]mployee speech is largely unprotected if it is part of what the employee is paid to do.”).

Identification and certification of foster parents is the very essence of what the City hired CSS to do. A child-placement agency’s determination regarding the fitness of prospective foster parents is no different

from an assistant district attorney’s “advi[c]e [to] his superior about how best to proceed with a pending case” (*Garcetti*, 547 U.S. at 421). The agency’s report on prospective foster parents “owes its existence” (*ibid.*) to the agency’s status as a City contractor. Indeed, child-placement agencies administer foster-care services solely through delegations of legal authority from the state, because as a matter of law only government may terminate parental rights and gain legal custody over foster children. Hence, while CSS in its private capacity is entitled to its beliefs about what makes a suitable family, government gets to specify the criteria for the determinations that child-placement agencies render in the scope of their employment doing the City’s work.

But even if certification determinations involved citizen speech on matters of public concern—which they do not—that speech still would not be protected, because the City has “adequate justification for treating [its child-placement agencies] differently from any other member of the general public.” *Garcetti*, 547 U.S. at 418. “[G]overnment employers often have legitimate ‘interests in the effective and efficient fulfillment of their responsibilities to the public,’ including ‘promoting efficiency and integrity in the discharge of official duties.’” *Lane*, 573 U.S. at 242 (brackets omitted) (quoting *Connick v. Myers*, 461 U.S. 138, 150–151 (1983)). The City “must have authority * * * to restrain employees who * * * frustrate progress toward the ends they have been hired to achieve.” *Borough of Durea v. Guarnieri*, 564 U.S. 379, 389 (2011). “The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one

when it acts as employer.” *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion).

Here, the City’s justification for barring discrimination in its foster-care system on the basis of protected classifications cannot be gainsaid. Government always has a paramount interest in preventing discrimination in the administration of public programs and the provision of government services. Cf., e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Beyond that, Philadelphia has both the overwhelming interest and the legal obligation to find suitable homes for children in state custody. With chronic and increasing shortages of foster families, it has strong reason to secure the largest possible pool of qualified foster parents in order to reduce the number of children relegated to institutional facilities. Allowing contractors to shrink this already-too-shallow pool by imposing religious tests is contrary to the City’s duties and the children’s needs.

Aimee Maddonna would share family dinners, provide cultural experiences, and ultimately welcome a needy child into her loving home. But she is deemed unworthy because she’s Catholic. So a child goes unserved. Lydia Currie is unacceptable because she’s Jewish. Another child without a loving home. Eden Rogers and Brandy Welch—they’re out because they are Unitarians and a same-sex couple. Yet another child deprived of unconditional love and support. Fatma Marouf and Bryn Esplin don’t “mirror the Holy Family,” so another child goes without a loving home. And *amici* and others like them can’t just go someplace else to be foster parents. They’ve been turned away from the only game in town.

So children are left to languish in the system, deprived of the love and support that people like *amici* are ready and willing to provide.

None of that is what government should want. None of it is what Philadelphia *does* want. The City has every reason to direct those it hires not to discriminate, because regardless of a contractor's motivations, discrimination undercuts the effectiveness of the state foster-care program. And everyone suffers.

C. Government Is Forbidden To Hire Agencies That Engage In Religiously Motivated Discrimination Against Prospective Foster Parents.

1. *Government cannot accomplish through contractors what the Constitution forbids it to do directly.*

“What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.” *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990). The same is true under the Equal Protection Clause. See *Norwood v. Harrison*, 413 U.S. 455, 465, 467 (1973) (“[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” (citation omitted)). Thus, quite apart from the restrictions that Philadelphia *may* impose to fulfill its legal duties and program objectives for children in its custody, it *must* ensure that it does not violate constitutional prohibitions.

The Establishment Clause forbids government to act with a predominantly religious purpose (*McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860, 865 (2005)),

to allocate public benefits using religious criteria (*Agostini v. Felton*, 521 U.S. 203, 231 (1997)), to impose a religious test as a condition of obtaining a public benefit or privilege (*Torcaso v. Watkins*, 367 U.S. 488, 495–496 (1961)), to coerce anyone to support or participate in religion or its exercise (*Lee v. Weisman*, 505 U.S. 577, 587 (1992)), or to prefer one religious denomination over another (*Larson v. Valente*, 456 U.S. 228, 244, 246 (1982)). And the Equal Protection Clause bars government from treating marriages of same-sex couples worse than marriages of other couples. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam); *Obergefell v. Hodges*, 576 U.S. 644, 675, 681 (2015).

Thus, just as government would violate those clauses by imposing a religious test on prospective foster parents or by excluding them based on sexual orientation, so too would it violate the clauses by hiring, contracting with, and paying private agencies to administer foster-care services on these terms. Hence, the City is not just permitted, but required, to ensure that its contractors and agents do not discriminate on the basis of religion or sexual orientation. The actual participants in the foster-care program—the children and prospective parents—deserve no less.

2. *Religious exemptions from nondiscrimination requirements would impermissibly harm prospective foster parents and children.*

While government may, and in some circumstances must, accommodate religious institutions by exempting them from general legal requirements, religious accommodations must not detrimentally affect third parties. For if in purporting to accom-

modate some people's religious exercise government imposes costs or burdens on others, it unconstitutionally favors the religion of those being benefited over the religious beliefs, rights, and interests of nonbeneficiaries. *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (“[A]n accommodation must be measured so that it does not override other significant interests.”); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–710 (1985).

Thus, in *Caldor* this Court invalidated a state law requiring employers to accommodate Sabbatarians in all instances, because “the statute t[ook] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath.” 472 U.S. at 709. The Court held that “unyielding weighting in favor of Sabbath observers over all other interests * * * impermissibly advances a particular religious practice.” *Id.* at 710. And every member of the Court in *Burwell v. Hobby Lobby Stores, Inc.*, acknowledged that “detrimental effect[s]” on nonbeneficiaries must be considered when evaluating religious accommodations. 573 U.S. 682, 729 n.37 (2014); see *id.* at 693 (“Nor do we hold * * * that * * * corporations have free rein to take steps that impose ‘disadvantages * * * on others’ or that require ‘the general public [to] pick up the tab.’” (citation omitted)); *id.* at 739 (Kennedy, J., concurring); *id.* at 745 & n.8 (Ginsburg, J., dissenting).

Free-exercise jurisprudence further underscores this fundamental principle. See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting Amish employer's request for exemption from social-security tax because it would “operate[] to impose the employer's religious faith on the employees.”). “[T]he limits [on religious exercise] begin to operate

whenever activities begin to affect or collide with liberties of others or of the public.” *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring).¹⁰

Permitting child-placement agencies to refuse to serve those who do not adhere to preferred religious beliefs and practices—whether about marriage of same-sex couples or otherwise—would grievously harm prospective foster parents and children in foster care. For discrimination inflicts stigmatic harms on those who are turned away, sending them the unambiguous message that they—their religious beliefs, their marriages, and the composition of their families—do not deserve respect from a government program. To Aimee Maddonna, it was “demoralizing” to be told “that we are not good enough because we aren’t the right kind of Christians.” To Lydia Currie, it was painful to be told that a child was better off in an institution than with her Jewish family. Being told that they are of the wrong faith and don’t meet a religious test for what a family should look like made Brandy Welch and Eden Rogers “feel ill.” To Fatma Marouf and Bryn Esplin, being rejected for failing a religious test “was a slap in the face.” Such exclusion from a government program undermines the equal

¹⁰ Though religious institutions are exempt from anti-discrimination laws when they hire ministers (see *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020)) and may be permitted to hire co-religionists to carry out nonprofit endeavors (see *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987)), these exemptions embody the Religion Clauses’ special solicitude for the rights of churches to select their clergy and control their internal operations. Petitioners, by contrast, wish to impose religious criteria *externally*, on those seeking government services.

dignity with which *amici*, and all of us, deserve to be treated.

Yet CSS wishes to deny government services to those who do not live up to its religious standards. And while petitioners suggest that there are alternative child-placement agencies in Philadelphia—which prospective foster parents must apparently cross their fingers and hope do not employ similar religious tests—in many places that is just not so, as *amici* know from experience.

But more fundamentally, it should make no difference whether there are other contractors across town, or even across the street, who might act differently. Telling the same-sex couple or the Catholic or Jewish or Unitarian parent who is suffering the pain and humiliation of discrimination to “just go someplace else” is no remedy for the grave stigmatic harms. Cf. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (antidiscrimination laws “vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments’”); *Brown v. Board of Educ.*, 347 U.S. 483, 493–495 (1954). Must same-sex couples, religious minorities, and other disfavored classes carry around a Green Book to find government programs that will serve them? Cf. Brent Staples, *Traveling While Black: The Green Book’s Black History*, N.Y. Times (Jan. 25, 2019), <https://nyti.ms/3aaPiAB>. Must they give up on foster-parenting altogether to avoid further humiliation and exclusion?

And again, all of that pales in comparison to the harms to children in the foster-care system. Balancing their welfare against the interest of a government contractor in imposing its religious views when

administering a government program to serve them, there is really no contest.

Recognizing a constitutional right to be a government agent who turns away otherwise-qualified foster families for not living up to the agent's religious beliefs would mean fewer homes—fewer loving families—for children in need. Fewer opportunities, as Aimee Maddonna puts it, for children to have “someone looking out for them.” Children of minority faiths are less likely to be put with a family who will raise them consistent with their beliefs. LGBT children will be less likely to find LGBT parents familiar with the particular challenges that they may face growing up. And many, many children will be deprived of the opportunity, as Eden Rogers and Brandy Welch describe, “to know what it feels like to be unconditionally loved.” Those costs are simply too high for our Constitution to allow.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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