

18-2574

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

SHARONELL FULTON; CECELIA PAUL; TONI LYNN SIMMS-BUSCH;
CATHOLIC SOCIAL SERVICES, *Plaintiffs-Appellants,*
—v.—

CITY OF PHILADELPHIA; DEPARTMENT OF HUMAN SERVICES FOR THE
CITY OF PHILADELPHIA; PHILADELPHIA COMMISSION ON HUMAN RELATIONS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**BRIEF FOR *AMICI CURIAE* STATED CLERK OF THE GENERAL
ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA); CENTRAL
CONFERENCE OF AMERICAN RABBIS; THE CENTRAL ATLANTIC,
PENN CENTRAL, PENN NORTHEAST, PENNSYLVANIA SOUTHEAST,
AND PENN WEST CONFERENCES OF THE UNITED CHURCH OF
CHRIST; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION
FOR REFORM JUDAISM; UNITARIAN UNIVERSALIST ASSOCIATION;
COVENANT NETWORK OF PRESBYTERIANS; FRIENDS FOR
LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER CONCERNS;
MEN OF REFORM JUDAISM; MORE LIGHT PRESBYTERIANS;
MUSLIMS FOR PROGRESSIVE VALUES; RECONCILINGWORKS;
LUTHERANS FOR FULL PARTICIPATION; RELIGIOUS
INSTITUTE, INC.; WOMEN OF REFORM JUDAISM;
AND INDIVIDUAL FAITH LEADERS IN SUPPORT OF
DEFENDANTS-APPELLEES AND AFFIRMANCE**

JEFFREY S. TRACHTMAN
Counsel of Record
NORMAN C. SIMON
TOBIAS B. JACOBY
JASON M. MOFF
ELISE FUNKE
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that none of the organizations that join this brief issues stock or has a parent corporation that issues stock.

/s/ Jeffrey S. Trachtman

JEFFREY S. TRACHTMAN

Counsel of Record

KRAMER LEVIN NAFTALIS & FRANKEL LLP

1177 Avenue of the Americas

New York, New York 10036

jtrachtman@kramerlevin.com

Counsel for Amici Curiae

October 4, 2018

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	7
I. The Common Humanity Of LGBT Persons And Their Families Informs The Theology Of A Wide Cross-Section Of American Religious Traditions.....	9
II. Diverse Faith Groups And Religious Observers Affirm The Place Of LGBT Persons And Families In Civic Life.....	14
III. Enforcing Generally Applicable Antidiscrimination Provisions In Government Contracts To Provide Social Services Is Lawful And Necessary	20
A. Enforcing Generally Applicable Antidiscrimination Contract Provisions Does Not Burden Free Exercise Of Religion	20
B. Permitting Exemptions Based On Religious Convictions Would Undermine Enforcement Of Generally Applicable Antidiscrimination Provisions.....	26
CONCLUSION	28
COMBINED CERTIFICATIONS.....	29
ADDENDUM A: STATEMENTS OF INTEREST OF <i>AMICI CURIAE</i>	Add. 1

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	5, 25
<i>Emp’t Div., Dep’t of Human Res. of Or. v. Smith</i> , 494 U.S. 872 (1990).....	<i>passim</i>
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 565 U.S. 171 (2012).....	5, 21
<i>Larson v. Valente</i> , 456 U.S. 228 (1982).....	8
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	22
<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978).....	23
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	5, 21
<i>Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church</i> , 393 U.S. 440 (1969).....	23
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	24
<i>Torcaso v. Watkins</i> , 367 U.S. 488 (1961).....	23
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	24
<i>United States v. Ballard</i> , 322 U.S. 78 (1944).....	23

Constitutional Provisions

U.S. CONST. amend. I.....*passim*

Statutes

Pennsylvania Religious Freedom Protection Act,
71 P.S. § 2402 *et seq.* (2012)*passim*

Other Authorities

217th General Assembly, Theological Task Force on Peace, Unity and
Purity of the Church, *A Season of Discernment* (2006),
https://www.pcusa.org/site_media/media/uploads/oga/pdf/peace-unity-purity-final-report-revised-english.pdf 12

Affirmation United Methodists for Lesbian, Gay, Bisexual,
Transgender and Queer Concerns, *Affirmation Affirms Election of
First Gay Bishop* (July 30, 2016), <http://www.umaffirm.org/site/current-events/24-latest-news/140-affirmation-affirms-election-of-first-gay-bishop.html>..... 10

Sarah Pulliam Bailey, *ELCA Lutherans Elect First Openly Gay
Bishop* (June 3, 2013), <http://www.religionnews.com/2013/06/03/elca-lutherans-elect-first-openly-gay-bishop/>
(last visited Sept. 21, 2018) 10

Zac Baker, Reconciling Works: Lutherans for Full Participation,
Georgia Clergy Unite To Oppose Religious Refusal Bills (Jan. 14,
2015), <https://www.reconcilingworks.org/georgia-clergy-unite-to-oppose-religious-refusal-bills/> 17

*Business Resolution: Confronting Sexual Orientation and Gender
Identity Discrimination*, General Assembly of the Unitarian
Universalist Association (2010), <http://www.uua.org/statements/statements/169267.shtml> (last visited Sept. 21, 2018) 13

Central Conference of American Rabbis, *Report of the Ad Hoc
Committee on Homosexuality and the Rabbinate of the Central
Conference of American Rabbis Annual Convention* (1990),
http://borngay.procon.org/sourcefiles/CCAR_Homosexuality.pdf.....9, 12

Central Conference of American Rabbis, *Resolution on State Religious Freedom Restoration Acts* (May 6, 2015)17

Daniel Cox, Molly Fisch-Friedman, Rob Griffin, Robert P. Jones & Alex Vandermaas-Peeler, Public Religion Research Institute, *Emerging Consensus on LGBT Issues: Findings From the 2017 American Values Atlas* (May 5, 2018), <https://www.ppri.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/>14

Daniel Cox, Molly Fisch-Friedman, Maxine Najle & Alex Vandermaas-Peeler, Public Religion Research Institute, *Wedding Cakes, Same-Sex Marriage, and the Future of LGBT Rights in America* (Aug. 2, 2018), <https://www.ppri.org/research/wedding-cakes-same-sex-lgbt-marriage/>14

Daniel Cox & Robert P. Jones, Public Religion Research Institute, *Most Americans Oppose Laws Limiting LGBT Rights* (Sept. 14, 2017), <https://www.ppri.org/research/poll-wedding-vendors-refusing-service-same-sex-couples-transgender-military-ban/>19

Elliot Dorff, Daniel Nevins & Avram Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples*, Rabbinical Assembly (Spring 2012), <http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf>10

Evangelical Lutheran Church in America, *Human Sexuality: Gift and Trust* (Aug. 19, 2009), <http://www.elca.org/Faith/Faith-and-Society/Social-Statements/Human-Sexuality> (last visited Sept. 21, 2018)12

Shoshana K. Goldberg & Kerith J. Conron, The Williams Institute, *How Many Same-Sex Couples in the U.S. are Raising Children?* (July 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf>.....17

Interracial Marriage Discouraged, The Deseret News, June 17, 1978, https://news.google.com/newspapers?id=_RxVAAAIBAJ&sjid=YIADAAAIBAJ&pg=5866%2C501249322

JFCS Non-Discrimination Policy, Jewish Family & Children’s Service of Greater Philadelphia, <https://jfcsphilly.org/main-home-page/children-teens-families/> (last visited Sept. 20, 2018)18

Robert P. Jones, Public Religion Research Institute, *Attitudes on Same-sex Marriage by Religious Affiliation and Denominational Family* (Apr. 22, 2015), <http://www.ppri.org/spotlight/attitudes-on-same-sex-marriage-by-religious-affiliation-and-denominational-family/>7

Robert P. Jones, Daniel Cox & Elizabeth Cook, Public Religion Research Institute, *Generations at Odds: The Millennial Generation and the Future of Gay and Lesbian Rights* (Aug. 29, 2011), <http://publicreligion.org/site/wp-content/uploads/2011/09/PRRI-Report-on-Millennials-Religion-Gay-and-Lesbian-Issues-Survey.pdf>13

Journal of the 78th General Convention of The Episcopal Church, Resolutions 2015-A036 & 2015-A054 (New York: General Convention 2015), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=2015-A036, http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=2015-A05411

Leadership Council of Conservative Judaism, *Conservative View on Intermarriage* (Mar. 7, 1995), <http://www.mazorguide.com/living/Denominations/conservative-intermarriage.htm>21

Lesbian Rabbi Is to Become President of Reform Group, N.Y. Times (Mar. 15, 2015)10

Letter of Elizabeth A. Eaton, Presiding Bishop of the Evangelical Lutheran Church in America (June 30, 2015), http://download.elca.org/ELCA%20Resource%20Repository/Letter_on_Supreme_Court_Decision.pdf?_ga=1.178451175.279518488.147296118111

LGBTQ Ministries Multicultural Growth and Witness, *LGBT History & Facts for Unitarian Universalists* (2012), <https://www.uua.org/documents/lgbtq/history.pdf>10

Sierra Mannie, *Simons Says: HB 1523 ‘Is About Bigotry,’* Jackson Free Press (July 6, 2016), <http://www.jacksonfreepress.com/news/2016/jul/06/simons-says-hb-1523-about-bigotry/>16

Anthony Moujaes, *UCC social justice advocates keep watch on ‘religious freedom’*, United Church of Christ (Apr. 12, 2016), http://www.ucc.org/news_ucc_social_justice_advocates_keep_watch_on_religious_freedom_0412201617

Mireya Navarro, *Openly Gay Priest Ordained in Jersey*, N.Y. Times, Dec. 17, 19899

Nondiscrimination Statements, theVillage, <https://village1877.org/nondiscriminationstatements/> (last visited Sept. 20, 2018)18

Michael J. Perry, *Religion in Politics*, 29 U.C. Davis L. Rev. 729 (1996)8

Pew Research Center, *America’s Changing Religious Landscape* (May 12, 2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf>7

Pew Research Center, *U.S. Public Becoming Less Religious* (Nov. 3 2015), http://www.pewforum.org/files/2015/11/201.11.03_RLS_II_full_report.pdf7

Press Release, *Statement by the Rt. Rev. Brian R. Seage, Bishop of the Episcopal Diocese of Mississippi* (Mar. 31, 2016), http://www.dioms.org/dfc/newsdetail_2/317822016

Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples, Reconstructionist Rabbinical College, *et al.* (Feb. 24, 2010), <https://archive.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples> (last visited Sept. 21, 2018)11

Resolution 2006-A167, *Reaffirm Church Membership of Gay and Lesbian Persons*, 75th General Convention of The Episcopal Church (2006), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A167 (last visited Sept. 21, 2018)12

Resolution of Immediate Witness, *Support of the Right to Marry for Same-Sex Couples*, General Assembly of the Unitarian Universalist Association (1996), <https://www.uua.org/statements/statements/14251.shtml>.....10

Resolution On Clarifying the Position of the PC(USA) Regarding Appropriate Boundaries of Religious Liberty, 223rd PC(USA) General Assembly (2018), <https://www.pc-biz.org/#/search/3000261>.....15

Resolution On Same Gender Officiation, 111th Convention of the Central Conference for American Rabbis (Mar. 2000), <https://www.ccarnet.org/ccar-resolutions/same-gender-officiation/>10

Resolutions: Calling on United Church of Christ Congregations to Declare Themselves Open and Affirming, Open and Affirming Coalition United Church of Christ: UCC Actions (1985), <https://openandaffirming.org/about/history/ucc-actions/>11

Resolutions: Gay and Lesbian Jews, Union for Reform Judaism (1989), <http://www.urj.org/what-we-believe/resolutions/gay-and-lesbian-jews> (last visited Sept. 21, 2018)12

Pamela Smoot, *Race Relations, How Do Baptists Treat Their Brothers and Sisters?*, History Speaks, To Hard Questions Baptists Ask (2009), <http://www.baptisthistory.org/smootracerelations.pdf>7

Social Policy Statement on LGBT Concern, United Church of Christ, http://www.ucc.org/lgbt_statements16

Social Principles & Creed, United Methodist Church, <http://www.umc.org/what-we-believe/the-social-community> (last visited Sept. 21, 2018)13

Amy Stone, *Out and Ordained, New York’s Jewish Theological Seminary Graduates its First Openly Lesbian Rabbi*, Lilith (2011), https://www.lilith.org/pdfs/LILSu11_FINAL_Outandordained.pdf9

The Right of LGBT Parents to Adopt and Raise Children: A Resolution of Witness, 28th General Synod of the United Church of Christ (July 1-5, 2011), http://uccfiles.com/pdf/2011_THE_RIGHT_OF_LGBT_PARENTS_TO_ADOPT_AND_RAISE_CHILDREN.pdf.....16

Unitarian Universalist Association, *Unitarian Universalist LGBTQ: History & Facts*, <http://www.uua.org/lgbtq/history/185789.shtml> (last visited Sept. 21, 2018)10

Unitarian Universalist LGBT History Timeline, Unitarian Universalist Association of Congregations, <http://www.uua.org/lgbtq/history/20962.shtml> (last visited Sept. 21, 2018)9

United Church of Christ, *Order for Marriage, An Inclusive Version*, http://www.ucc.org/worship/pdfs/323_346i_order-for-marriage-inclusive.pdf.....10

United States Conference Of Catholic Bishops, *Compendium – Catechism Of The Catholic Church* (2006).....22

Sharon Youngs, Presbyterian Church (USA), *Presbyterian Church (USA) Approves Change In Ordination Standard* (May 10, 2011), <http://www.pcusa.org/news/2011/5/10/presbyterian-church-us-approves-change-ordination/> (last visited Sept. 21, 2018)9

Rabbi Shawn I. Zevit, *JRF Homosexuality Report and Inclusion of GLBTQ Persons*, <http://archive.is/3a6x> (last visited Sept. 21, 2018).....9, 13

INTEREST OF *AMICI CURIAE*¹

Amici curiae (“*Amici*”) comprise a broad range of religious stakeholders (including individual clergy and faith leaders from Pennsylvania, New Jersey, and Delaware) who represent traditions rooted in centuries of American history and who affirm religious liberty and equal rights.² *Amici* come from faiths that have addressed social and religious questions affecting lesbian, gay, bisexual, and transgender (“LGBT”) people and their families in different ways over time. But *Amici* unite in believing that it is both morally correct and constitutionally permissible to require that foster care agencies comply with neutral and generally applicable antidiscrimination obligations when providing taxpayer funded child welfare services to children.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants and *amici* favoring reversal ask this Court to create a novel and unsupported constitutional exemption from neutral, generally applicable antidiscrimination obligations in a government contract to provide public child welfare services so that a foster care agency may refuse to certify same-sex couples as foster parents – regardless of their qualifications. This attempt is based in no

¹ All parties have consented to the filing of this *amici curiae* brief. No counsel for a party authored this brief in whole or in part, and no person or entity besides undersigned *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

² Addendum A states the interests of each of the institutional *Amici* and lists all individual *Amici*.

small measure on a false dichotomy between LGBT equality and religious liberty. Our legal system distinguishes readily between the ironclad protections provided to religion in its own sphere and the different balances that society strikes in laws and obligations regulating interactions in the civil sphere. Appellants and *amici* favoring reversal seek to blur this crucial distinction built into our constitutional system, but the values they purport to espouse do not require this result. The undersigned *Amici* also represent religious voices that affirm religion as a central element of personal identity and believe that marriage has a spiritual significance to the point of being sacred. But their religious faith in the common humanity of all persons leads *Amici* to view this dispute first and foremost as a discrimination case, not one involving religious liberty. Personal religious views are entitled to the utmost respect, but do not provide a license to write those views into contracts to provide government services and thus dictate how those services are provided. The City of Philadelphia has chosen to prohibit discrimination by its contracted foster care agencies so that responsible families who can provide a good home for a child in need are not turned away and Philadelphians are not subjected to discrimination in a public program. Neither the Constitution nor the Pennsylvania Religious Freedom Protection Act (“RFPA”), 71 P.S. § 2402 *et seq.*, prevents Philadelphia from doing this.

The posited dichotomy between LGBT rights and people of faith is false for an additional reason: Within the diverse panorama of American religious thought, a large and growing portion of the religious community welcomes, accepts, and celebrates LGBT individuals and families and rejects the notion that they should be subject to discrimination in the civil sphere based on differing religious views about LGBT people and same-sex relationships. As *Amici* will show, views embracing LGBT equality are widely shared by, among others, Mainline and Evangelical Protestants, Jews of the Reconstructionist, Reform, and Conservative movements, and many individual Mormons, Muslims, Orthodox Jews, and Roman Catholics. Consistent with these views, many leaders among longstanding pillars of the faith community – including Episcopalians, Lutherans, Presbyterians, and Unitarians, as well as the Central Conference of American Rabbis and the United Church of Christ – have objected to claims for broad religious exemptions from antidiscrimination obligations. Any suggestion that “religion” or “people of faith” as a whole reject LGBT equality is false and insulting to millions of Americans of faith. And, given the broad and growing religious support for LGBT equality, any claim that enforcing antidiscrimination provisions in government contracts will discourage faith-based organizations from providing social services or otherwise limit the diversity of the services offered is vastly overstated.

Amici accordingly urge the Court to reject Appellants’ plea for a free exercise-premised exemption from the antidiscrimination obligations in the contract between Catholic Social Services (“CSS”) and the City of Philadelphia. Appellants have every right to their religious beliefs and to lawfully act on those beliefs in their personal and religious lives. But once CSS entered the civil sphere by contracting with Philadelphia to provide taxpayer funded foster care placement services to the public, CSS became subject to the nondiscrimination provisions incorporated into its contract. If CSS refused to certify an interracial couple on the ground that its religion teaches that marriages can properly exist only between persons of the same race, we respectfully submit that few would give this objection credence. The injury to an interracial couple turned away from CSS would be obvious and palpable – and hardly remedied by the offer to refer them to another agency.

Amici reject the argument that enforcement of antidiscrimination obligations, whether in government contracts or otherwise, constitutes a threat to religious freedom. To the contrary, evenhanded civil rights enforcement that declines to give special status to any one set of religious views is consistent with the pluralism that is the essence of religious liberty. Affirmance here will not impinge upon religious doctrine or practice, and religions and religious people will remain free to determine what and who satisfies the requisites for practice of their faith. *See*

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 (2012) (recognizing that certain matters are “strictly ecclesiastical” and therefore “the church’s alone” (citation omitted)). This includes defining marriage within the faith and preserving marriage practices consistent with those tenets. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (affirming right of religions to define marriage according to principles of their faith).

Nor will affirmance undercut religious entities’ or individuals’ core First Amendment freedoms to speak and practice what they believe. Focusing here on CSS’s purported free exercise claims, the U.S. Supreme Court “ha[s] consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quotation and citation omitted), *overturned on other grounds by legislative action* (Nov. 16, 1993). The neutral civil rights enforcement in this case does not target or discriminate against CSS’s religious beliefs, unlike the laws struck down in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) – indeed, the antidiscrimination obligations in question have nothing to do with CSS’s religious beliefs, apply to secular as well as religiously affiliated agencies, and would apply in exactly the same way if CSS refused to certify otherwise

qualified individuals for *non*-religious reasons. And CSS has come nowhere close to establishing that any government action imposes a “substantial burden” on its religious exercise under the First Amendment or RFPA, especially since CSS is not required by law or contract to make *any* findings or endorsement concerning marriage, and, indeed, is not required to contract with Philadelphia at all. Finally, there is no limiting principle for the religious exemption sought by Appellants and *amici* supporting reversal; in the name of religious “freedom,” the claimed exemption would open the door to wholesale evisceration of civil rights enforcement – including in the context of government programs – and, paradoxically, permit religious discrimination against people of faith.

Amici submit that the best way to ensure that *all* people retain the First Amendment right to speak, preach, pray, and practice their religious beliefs (including with respect to sexual orientation and gender identity) is to prevent discrimination in the civil sphere regardless of its basis. Affirmance in this case will not constitute an attack on religion or signal a judicial imprimatur on changing social mores. Rather, affirmance will recognize that the religious pluralism woven into the fabric of American law, culture, and society requires that all, regardless of faith, are entitled to equal treatment under the law.

ARGUMENT

America's religious landscape is vast and diverse.³ Religious adherents differ on contentious issues, including intra-denominationally,⁴ and religious bodies have evolved and disagreed over time on various civil rights and social issues.⁵ In view of that history and the wide range of modern religious thought

³ Recent data confirm that significant majorities of Americans believe in God (89%) and have some formal religious affiliation (76.5%). Pew Research Center, *U.S. Public Becoming Less Religious*, 3, 5, 7 (Nov. 3 2015), http://www.pewforum.org/files/2015/11/201.11.03_RLS_II_full_report.pdf. This includes Americans who are of various Christian denominations, and Buddhists, Hindus, Jews, Muslims, and others. *Id.* at 5. In Pennsylvania and New Jersey, 19% and 13%, respectively, of Pew survey respondents identified as being from the Evangelical Protestant tradition, 23% and 12%, respectively, from Mainline Protestant traditions, and 24% and 34%, respectively, from the Catholic tradition, with lesser percentages identifying with a number of other traditions. Pew Research Center, *America's Changing Religious Landscape*, 143 (May 12, 2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf>. The Pew study did not include data for Delaware.

⁴ Views on marriage rights for same-sex couples are a case in point. “[A]s opinions . . . shifted in the general population, so [did] those of [the] faithful. . . . A decade ago, the most supportive religious groups were white mainline Protestants and Catholics, with 36 percent and 35 percent support, respectively. [By 2015], major religious groups reside[d] on both sides of this issue and within many key groups – such as Catholics – support among rank and file members [came to be] at odds with official church opposition.” Robert P. Jones, Public Religion Research Institute, *Attitudes on Same-sex Marriage by Religious Affiliation and Denominational Family* (Apr. 22, 2015), <http://www.ppri.org/spotlight/attitudes-on-same-sex-marriage-by-religious-affiliation-and-denominational-family/>.

⁵ For example, the American Baptist Church revised its earlier belief in church and social segregation by race. Pamela A. Smoot, *Race Relations, How Do Baptists Treat Their Brothers and Sisters?*, Baptist History and Heritage Society: History Speaks (2009), <http://www.baptisthistory.org/smootracerelations.pdf>. A prominent law and religion scholar also has noted that religions' shifting views on usury, the

concerning the respect for LGBT persons, their families, and their place in civic life, it would be wrong to permit particular religious views on sexual orientation, gender identity, or marriage to give rise to broad exemptions from neutral antidiscrimination obligations incorporated into government contracts for social services. Longstanding jurisprudence makes clear that religious favoritism by government is impermissible. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”). Particular religious perspectives on civil marriage and family must not, on the ostensible ground of “accommodating” religious exercise, be permitted to deny a protected class of otherwise qualified persons the opportunity to be foster parents. Religious liberty means that all voices may contribute to our national conversation about LGBT equality. But particular religious perspectives may not be accorded special privileges or permitted to undermine the protections afforded by neutral, generally applicable statutes, regulations, and government contract provisions.

dissolubility of marriage, and slavery reveal “the displacement of a principle or principles that had been taken as dispositive.” Michael J. Perry, *Religion in Politics*, 29 U.C. Davis L. Rev. 729, 772 n.94 (1996).

I. The Common Humanity Of LGBT Persons And Their Families Informs The Theology Of A Wide Cross-Section Of American Religious Traditions

Religious Americans increasingly affirm that respect for LGBT persons follows theologically from the basic tenets of their religion. Some traditions reflect this evolution in approving LGBT persons for ministry,⁶ selecting prominent

⁶ The Episcopal Church ordained its first openly gay priest in 1977. See Mireya Navarro, *Openly Gay Priest Ordained in Jersey*, N.Y. Times, Dec. 17, 1989. The Unitarian Universalist Church called its first openly gay minister to serve as leader for a congregation in 1979. See Unitarian Universalist LGBT History Timeline, Unitarian Universalist Association of Congregations, <http://www.uua.org/lgbtq/history/20962.shtml> (last visited Sept. 21, 2018). The seminary for Reconstructionist Jews began accepting gay and lesbian applicants in 1984. See Rabbi Shawn I. Zevit, *JRF Homosexuality Report and Inclusion of GLBTQ Persons*, <http://archive.is/3a6x> (last visited Sept. 21, 2018) (citing Reconstructionist Commission on Homosexuality, *Homosexuality and Judaism: The Reconstructionist Position* (1993)). The Central Conference of American Rabbis endorsed the view in 1990 that “all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation [that] they have chosen.” Central Conference of American Rabbis, *Report of the Ad Hoc Committee on Homosexuality and the Rabbinate of the Central Conference of American Rabbis Annual Convention*, 261 (1990), http://borngay.procon.org/sourcefiles/CCAR_Homosexuality.pdf. The Conservative Jewish movement welcomed gay and lesbian rabbinical and cantorial students to Jewish Theological Seminary in 2007. See Amy Stone, *Out and Ordained, New York’s Jewish Theological Seminary Graduates its First Openly Lesbian Rabbi*, Lilith (2011), https://www.lilith.org/pdfs/LILSu11_FINAL_Outandordained.pdf. And in 2011, the Presbyterian Church (USA) amended the church’s Book of Orders to effectively open ordained ministry to persons in same-gender relationships. See Sharon Youngs, Presbyterian Church (USA), *Presbyterian Church (USA) Approves Change In Ordination Standard* (May 10, 2011), <http://www.pcusa.org/news/2011/5/10/presbyterian-church-us-approves-change-ordination/> (last visited Sept. 21, 2018).

leaders,⁷ extending religious blessing and rites to same-sex unions,⁸ or otherwise providing religious affirmation of LGBT relationships and of the children whom LGBT persons love, nurture, and raise.

⁷ For example, the Rev. Dr. Karen Oliveto was elected as the United Methodist Church's first openly lesbian bishop in 2016. Affirmation United Methodists for Lesbian, Gay, Bisexual, Transgender and Queer Concerns, *Affirmation Affirms Election of First Gay Bishop* (July 30, 2016), <http://www.umaffirm.org/site/current-events/24-latest-news/140-affirmation-affirms-election-of-first-gay-bishop.html>. In 2015, Rabbi Denise L. Eger became the first openly LGBT president of Reform Judaism's Central Conference of American Rabbis. *Lesbian Rabbi Is to Become President of Reform Group*, N.Y. Times (Mar. 15, 2015), <https://www.nytimes.com/2015/03/16/us/lesbian-rabbi-is-to-become-president-of-reform-group.html>. And in 2013, the Evangelical Lutheran Church in America elected its first openly gay bishop, the Rev. R. Guy Erwin. Sarah Pulliam Bailey, *ELCA Lutherans Elect First Openly Gay Bishop* (June 3, 2013), <http://www.religionnews.com/2013/06/03/elca-lutherans-elect-first-openly-gay-bishop/> (last visited Sept. 21, 2018).

⁸ The United Church of Christ promulgated a new template for marriage ceremonies that could be used in any marriage ceremony regardless of gender. United Church of Christ, *Order for Marriage, An Inclusive Version*, http://www.ucc.org/worship/pdfs/323_346i_order-for-marriage-inclusive.pdf. The Unitarian Universalist Association formally affirmed its practice of celebrating same-sex unions in 1984. See LGBTQ Ministries Multicultural Growth and Witness, *LGBT History & Facts for Unitarian Universalists* (2012), <https://www.uua.org/documents/lgbtq/history.pdf>; Resolution of Immediate Witness, *Support of the Right to Marry for Same-Sex Couples*, General Assembly of the Unitarian Universalist Association (1996), <https://www.uua.org/statements/statements/14251.shtml>; Unitarian Universalist Association, *Unitarian Universalist LGBTQ: History & Facts*, <http://www.uua.org/lgbtq/history/185789.shtml> (last visited Sept. 21, 2018). The Conservative, Reform, and Reconstructionist Jewish movements allow their rabbis to perform religious wedding ceremonies for same-sex couples. See, e.g., Elliot Dorff, Daniel Nevins & Avram Reisner, *Rituals and Documents of Marriage and Divorce for Same-Sex Couples*, Rabbinical Assembly (Spring 2012), <http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/same-sex-marriage-and-divorce-appendix.pdf>; *Resolution On Same Gender Officiation*, 111th Convention

Such practices show that religious respect for LGBT persons, their relationships, and their families – including by “traditional” or “mainstream” religions – is deep, but not new. It was over thirty years ago that the United Church of Christ, with nearly one million members today, adopted a policy of membership nondiscrimination regarding sexual orientation.⁹ In 1989, the 45th General Assembly for the Union of Reform Judaism, representing 1.3 million Reform Jews, resolved to “urge [its] member congregations to welcome gay and

of the Central Conference for American Rabbis (Mar. 2000), <https://www.ccarnet.org/ccar-resolutions/same-gender-officiation/>; *Reconstructionist Movement Endorses Civil Marriage for Same-Sex Couples*, Reconstructionist Rabbinical College, *et al.* (Feb. 24, 2010), <https://archive.rrc.edu/news-media/news/reconstructionist-movement-endorses-civil-marriage-same-sex-couples> (last visited Sept. 21, 2018). In 2015, the Episcopal Church amended its canon law to recognize marriage between two *persons*, and authorized marriage ceremonies that refer to “the couple” or “spouses” as well as “husband” or “wife.” Journal of the 78th General Convention of The Episcopal Church, Resolutions 2015-A036 & 2015-A054, at 778-83 (New York: General Convention 2015), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=2015-A036, http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=2015-A054. The Presiding Bishop of the Evangelical Lutheran Church of America has afforded individual clergy and congregations the freedom to determine whether to solemnize same-sex marriages and to what degree such marriages are recognized. Letter of Elizabeth A. Eaton, Presiding Bishop of the Evangelical Lutheran Church in America (June 30, 2015), http://download.elca.org/ELCA%20Resource%20Repository/Letter_on_Supreme_Court_Decision.pdf?_ga=1.178451175.279518488.1472961181.

⁹ *Resolutions: Calling on United Church of Christ Congregations to Declare Themselves Open and Affirming*, Open and Affirming Coalition United Church of Christ: UCC Actions (1985), <https://openandaffirming.org/about/history/ucc-actions/>.

lesbian Jews to membership, as singles, couples, and families.”¹⁰ More recently, in 2009, the Evangelical Lutheran Church in America, with approximately 3.5 million members, adopted a statement affirming that the church “has called upon congregations and members to welcome, care for, and support same-gender couples and their families.” The statement acknowledges that “families are formed in many ways,” including “where the parents are the same gender.” “The critical issue with respect to the family is not whether it has a conventional form but how it performs indispensable individual and social tasks. *All families have responsibility for the tasks of providing safety, shielding intimacy, and developing trustworthy relationships.*”¹¹ The Episcopal Church,¹² the Presbyterian Church (USA),¹³

¹⁰ *Resolutions: Gay and Lesbian Jews*, Union for Reform Judaism (1989), <http://www.urj.org/what-we-believe/resolutions/gay-and-lesbian-jews> (last visited Sept. 21, 2018). Cf. Central Conference of American Rabbis, *Report of the Ad Hoc Committee*, *supra* note 6, at 262.

¹¹ Evangelical Lutheran Church in America, *Human Sexuality: Gift and Trust*, 19, 23 (Aug. 19, 2009), <http://www.elca.org/Faith/Faith-and-Society/Social-Statements/Human-Sexuality> (last visited Sept. 21, 2018) (emphasis added).

¹² Resolution 2006-A167, *Reaffirm Church Membership of Gay and Lesbian Persons*, 75th General Convention of The Episcopal Church (2006), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=2006-A167 (last visited Sept. 21, 2018).

¹³ 217th General Assembly, Theological Task Force on Peace, Unity and Purity of the Church, *A Season of Discernment*, 20 (2006), https://www.pcusa.org/site_media/media/uploads/oga/pdf/peace-unity-purity-final-report-revised-english.pdf.

Reconstructionist Judaism,¹⁴ the Unitarian Universalist Church,¹⁵ the United Methodist Church,¹⁶ and myriad other faiths similarly embrace a theological belief in the fundamental human dignity of LGBT Americans and their families.

That there is no one “religious” view of marriage or family predominating in America also can be seen in the views of religious individuals, who have demonstrated an increasingly positive view of LGBT persons. In 2011, four years *before* the Supreme Court’s *Obergefell* decision, a majority of Americans from most major religious groups had positive moral and theological views of gay and lesbian people, including 62% of Catholics and 63% of white Mainline Protestants.¹⁷ Today, post-*Obergefell*, same-sex couples’ civil right to marry, for example, garners “strong support . . . among most religious groups,” including “three-quarters (75%) of white mainline Protestants, and about two-thirds (66%) of Catholics.”¹⁸ Such data suggests that most people of faith see no conflict between religion and LGBT civil rights.

¹⁴ Zevit, *supra* note 7.

¹⁵ *Business Resolution: Confronting Sexual Orientation and Gender Identity Discrimination*, General Assembly of the Unitarian Universalist Association (2010), <http://www.uua.org/statements/statements/169267.shtml> (last visited Sept. 21, 2018).

¹⁶ *Social Principles & Creed*, United Methodist Church, <http://www.umc.org/what-we-believe/the-social-community> (last visited Sept. 21, 2018).

¹⁷ Robert P. Jones, Daniel Cox & Elizabeth Cook, Public Religion Research Institute, *Generations at Odds: The Millennial Generation and the Future of Gay and Lesbian Rights* 18-20 (Aug. 29, 2011), <http://publicreligion.org/site/wp->

II. **Diverse Faith Groups And Religious Observers Affirm The Place Of LGBT Persons And Families In Civic Life**

Religious support for LGBT nondiscrimination extends beyond religious profession to advocacy in civil society. Traditions that run the gamut of American religious expression support legal nondiscrimination protections for LGBT individuals. For example, 95% of Unitarians, 80% of Jews, 78% of Buddhists, 75% of Hindus, 74% of white Catholics, 71% of white mainline Protestants, 70% of Hispanic Catholics, 69% of Mormons, 65% of black Protestants, 59% of Hispanic Protestants, and 54% of white evangelical Protestants support such protections.¹⁹ To be sure, polling data should never determine the scope of individual liberties. But such evidence does illustrate an emerging consensus among people of divergent faith beliefs that enforcing principles of antidiscrimination in the civic arena is compatible with – or at least does not endanger – their religious practices.

content/uploads/2011/09/PRRI-Report-on-Millennials-Religion-Gay-and-Lesbian-Issues-Survey.pdf.

¹⁸ Daniel Cox, Molly Fisch-Friedman, Maxine Najle & Alex Vandermaas-Peeler, Public Religion Research Institute, *Wedding Cakes, Same-Sex Marriage, and the Future of LGBT Rights in America* (Aug. 2, 2018), <https://www.ppri.org/research/wedding-cakes-same-sex-lgbt-marriage/>.

¹⁹ Daniel Cox, Molly Fisch-Friedman, Rob Griffin, Robert P. Jones & Alex Vandermaas-Peeler, Public Religion Research Institute, *Emerging Consensus on LGBT Issues: Findings From the 2017 American Values Atlas* (May 5, 2018), <https://www.ppri.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/>.

Indeed, many mainstream religious groups and leaders deem the embrace of civil nondiscrimination to be *required* by foundational religious tenets. For example, in June 2018, the General Assembly of the Presbyterian Church (USA), a denomination with nearly 1.6 million members, unanimously passed a resolution to, among other things, “Direct the Stated Clerk and the Office of Public Witness” of that body, and “Encourage synods and presbyteries,” to “oppose legislative, judicial, and administrative efforts at the state and federal levels to limit the protection of persons based upon race, ethnicity, sex, gender, sexual orientation, gender identity, religion, or gender expression in the guise of religious freedom.”

The General Assembly further resolved to:

Encourage all Presbyterians to distinguish between our historical understanding of our religious freedom to practice the essential tenets of our faith, and the misuse of the term religious freedom as a justification for discrimination in the provision of secular employment or benefits, healthcare, public or commercial services or goods, or parental rights to persons based on race, ethnicity, sex, gender, physical limitations, sexual orientation, gender identity, religion or gender expression.²⁰

As another example, the General Synod of the United Church of Christ resolved in 2011 to “call[] on all states to evaluate prospective adoptive parents solely on the basis of their individual character and ability to parent, not on their

²⁰ *Resolution On Clarifying the Position of the PC(USA) Regarding Appropriate Boundaries of Religious Liberty*, 223rd PC(USA) General Assembly (2018), <https://www.pc-biz.org/#/search/3000261>.

sexual orientation or gender identity, and to grant second-parent or joint adoptions when it is in the child's best interests." The church stated that its "biblical and theological rationale" included that "[t]he care and nurture of children is a moral responsibility for families, the church and the community."²¹

And the Bishop of the Episcopal Diocese of Mississippi recently opposed state legislation seen as privileging certain religious views with respect to LGBT rights, including same-sex couples' marriage rights, declaring that the "baptismal covenant requires that each of us will respect the dignity of every human being."²²

Rabbi Jeremy Simons perceived the same law as being "not about religion . . . [but] about bigotry," citing the command appearing dozens of times in the Bible that "[y]ou shall not oppress the stranger, for you were strangers in the land of Egypt."²³ Religious leadership and advocacy groups have also, over the course of several years, explicitly opposed interpreting constitutional doctrines or extending

²¹ *The Right of LGBT Parents to Adopt and Raise Children: A Resolution of Witness*, 28th General Synod of the United Church of Christ (July 1-5, 2011), http://uccfiles.com/pdf/2011_THE_RIGHT_OF_LGBT_PARENTS_TO_ADOPT_AND_RAISE_CHILDREN.pdf; see also *Social Policy Statement on LGBT Concern*, United Church of Christ, http://www.ucc.org/lgbt_statements (stating resolution was adopted).

²² Press Release, The Episcopal Church in Mississippi, *Statement by the Rt. Rev. Brian R. Seage, Bishop of the Episcopal Diocese of Mississippi* (Mar. 31, 2016), http://www.dioms.org/dfc/newsdetail_2/3178220.

²³ Sierra Mannie, *Simons Says: HB 1523 'Is About Bigotry,'* Jackson Free Press (July 6, 2016), <http://www.jacksonfreepress.com/news/2016/jul/06/simons-says-hb-1523-about-bigotry/> (internal quotation marks omitted).

legislative provisions protecting religious freedom in a such a manner as to “enable religious liberty claims to prevail in a way that would permit discrimination against protected classes and other minorities, including but not limited to the LGBT community.”²⁴

The broad religious support generally for LGBT nondiscrimination under civil law extends to support for equal legal treatment for LGBT relationships and families, including in the selection of foster parents. *Amici* accept and welcome LGBT persons as foster parents.²⁵ This acceptance is born not only from *Amici*’s religious belief in the common humanity of all persons, but also from *Amici*’s respect for the division between religious and civil spheres in American society. *Amici* believe that agencies that contract to provide taxpayer funded social services to the public voluntarily enter the civil sphere and therefore should abide by civil antidiscrimination rules.

²⁴ Central Conference of American Rabbis, *Resolution on State Religious Freedom Restoration Acts* (May 6, 2015); see also Zac Baker, Reconciling Works: Lutherans for Full Participation, *Georgia Clergy Unite To Oppose Religious Refusal Bills* (Jan. 14, 2015), <https://www.reconcilingworks.org/georgia-clergy-unite-to-oppose-religious-refusal-bills/>; Anthony Moujaes, *UCC social justice advocates keep watch on ‘religious freedom’*, United Church of Christ (Apr. 12, 2016), http://www.ucc.org/news_ucc_social_justice_advocates_keep_watch_on_religious_freedom_04122016.

²⁵ *Amici* note that same-sex couples are over seven times more likely than different-sex couples to be raising foster children. See Shoshana K. Goldberg & Kerith J. Conron, The Williams Institute, *How Many Same-Sex Couples in the U.S. are Raising Children?* (July 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf> (“same-sex couples

Whether or not their individual faith traditions embrace marriage equality for same-sex couples, many faith-based organizations that provide taxpayer funded child welfare services in fact are open to working with same-sex couples and placing foster children with them when that is in the best interests of the child. For example, Bethany Christian Services, which previously turned away a same-sex couple, now has represented that it will comply with Philadelphia’s Fair Practices Ordinance. District Court Opinion at 41-42. Other faith-based foster care agencies in Philadelphia also appear willing to work with same-sex couples.²⁶

Many religious Americans agree that private organizations should not discriminate against LGBT individuals when those organizations enter the civil sphere, such as when they accept government funding. For example, in the context of adoption agencies, a significant majority of “non-Christian religious traditions (73%), Catholics (69%), white mainline Protestants (68%), and black Protestants (67%) oppose allowing federally funded [adoption] agencies to exclude qualified

with children were far more likely than male/female couples with children to have . . . a foster child (2.9% versus 0.4%)”).

²⁶ See, e.g., JFCS Non-Discrimination Policy, Jewish Family & Children’s Service of Greater Philadelphia, <https://jfcspshilly.org/main-home-page/children-teens-families/> (last visited Sept. 20, 2018) (“JFCS clients have a right to be treated with dignity and respect; free of all discrimination, including that which is based on . . . sexual orientation [and] gender identity”); Nondiscrimination Statements, theVillage, <https://village1877.org/nondiscriminationstatements/> (last visited Sept. 20, 2018) (“Admissions to services, the provision of services, and the referral of clients are made by theVillage without regard to . . . sexual orientation.”).

gay and lesbian couples from consideration.” Even a majority of white evangelical Protestants “also say religiously affiliated agencies that receive federal funding should not be allowed to refuse to place children with gay and lesbian couples.”²⁷

The preceding analysis makes clear that a broad and growing swath of American religious institutions and individuals embrace LGBT persons’ civil equality. This position, shared by *Amici* here, is grounded in an abiding sense that the common humanity of all people is not just a guidepost of theological reflection, but also an ethical precept that should inform evenhanded application of civil law and obligations. Certainly there remain contrary views within the rich diversity of American religious thought and practice. No one view speaks for “religion” – even if, contrary to the Establishment Clause, it were appropriate to give weight to religious views in applying the Constitution’s secular promise of equal protection. But it is no longer possible, if it ever was, to claim that neutral and generally applicable antidiscrimination protections for LGBT persons are in and of themselves offensive to religion.

In light of this and the broad *religious* support for LGBT civil nondiscrimination, claims made by *amici* favoring reversal – that enforcing antidiscrimination provisions in government contracts will discourage faith-based

²⁷ Daniel Cox & Robert P. Jones, Public Religion Research Institute, *Most Americans Oppose Laws Limiting LGBT Rights* (Sept. 14, 2017), <https://www.ppri.org/research/poll-wedding-vendors-refusing-service-same-sex-couples-transgender-military-ban/>.

organizations from providing social services or otherwise limit the diversity of the services offered, *see, e.g.*, Alliance Defending Freedom et al. Br. at 19, 23 – are vastly overstated.

III. Enforcing Generally Applicable Antidiscrimination Provisions In Government Contracts To Provide Social Services Is Lawful And Necessary

Affirming the decision below upholding generally applicable antidiscrimination provisions in CSS’s contract with Philadelphia will not undermine Appellants’ fundamental First Amendment freedom to believe that “marriage is a sacred bond between a man and a woman,” Appellants’ Br. at 13, and to express that belief in private or public. Affirmance poses no threat to religious liberty, either on the facts of this dispute or in general. To the contrary, reversal would upend longstanding Free Exercise jurisprudence by granting CSS a unilateral right to exempt itself from generally applicable legal obligations. Such a carve-out would have no limiting principle and could lead to widespread undermining of civil rights enforcement.

A. Enforcing Generally Applicable Antidiscrimination Contract Provisions Does Not Burden Free Exercise Of Religion

The neutral and generally applicable contractual provisions that Appellants challenge pose no risk to core freedoms to hold, express, and practice a religious (or nonreligious) understanding of marriage that is limited to the union of one man

and one woman. However government defines civil marriage or determines who has a constitutional right to participate in it, existing constitutional principles protect the autonomy of religious entities (or others) to teach their own principles concerning sexuality, marriage, and family life and to preserve practices that comport with their respective tenets. *See Hosanna-Tabor*, 565 U.S. at 195 (affirming principle that certain “matter[s are] ‘strictly ecclesiastical,’” meaning they are “the church’s alone”) (citation omitted). As the Supreme Court made clear in *Obergefell*, “religions, and those who adhere to religious doctrines,” may continue to adhere to an understanding of marriage as limited to different-sex couples, and “[t]he First Amendment ensures that religious organizations and persons are given proper protection” with respect to religious practices consistent with that understanding. 135 S. Ct. at 2607.

It bears repeating that our Constitution’s longstanding respect for religious autonomy has permitted various religions to enforce religious sexual norms or define religious marriage in ways that would be unenforceable under civil law – *e.g.*, prohibiting interfaith marriage, as Conservative Judaism does;²⁸ declining to recognize the union of those civilly divorced and remarried, as Roman Catholicism

²⁸ Leadership Council of Conservative Judaism, *Conservative View on Intermarriage* (Mar. 7, 1995), <http://www.mazorguide.com/living/Denominations/conservative-intermarriage.htm>.

does;²⁹ or discouraging interracial marriage, as the Mormon Church did well after the Supreme Court ruled in *Loving v. Virginia*, 388 U.S. 1 (1967), that the Constitution requires states to allow interracial civil marriages.³⁰

The existence and persistence of such differences show why affirmance here will not burden fundamental religious exercise rights, including those pertaining to marriage. Post-*Obergefell*, religions, faith-based organizations, and persons of faith remain free to define *religious* marriage as limited to the union of one man and one woman and to withhold spiritual blessing from any marriages, or bar those entering into them from being congregants at all, just as they have been free to do so on grounds of faith, race, prior marital status, deviation from sexual norms, or any other characteristic deemed religiously significant. There is therefore no basis for arguing that CSS or others could somehow be coerced into *religiously* endorsing unions they find offensive.

Certifying that prospective foster parents are qualified to care for foster children under civil, non-religious criteria in no way forces CSS to participate in religious rites, rituals, practice, or observance. Merely enforcing neutral, generally

²⁹ United States Conference Of Catholic Bishops, *Compendium – Catechism Of The Catholic Church*, ¶ 349 (2006).

³⁰ See *Interracial Marriage Discouraged*, The Deseret News, June 17, 1978, at 4, https://news.google.com/newspapers?id=_RxVAAAAIIBAJ&sjid=YIADAAAIBAJ&pg=5866%2C5012493 (“Now, the brethren feel that it is not the wisest thing to cross racial lines in dating and marrying.” (quoting President Spencer W. Kimball in a 1965 address to students at Brigham Young University)).

applicable antidiscrimination contractual provisions – requiring that agencies treat all prospective foster care parents equally and without regard to, among other things, “race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, disability, [and] marital status” – comes nowhere close to threatening core Free Exercise rights. Enforcement of the antidiscrimination obligations in CSS’s contract with Philadelphia does not “compel affirmation of religious belief, *see Torcaso v. Watkins*, 367 U.S. 488 (1961), punish the expression of religious doctrines [the government] believes to be false, *United States v. Ballard*, 322 U.S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious status, *see McDaniel v. Paty*, 435 U.S. 618 (1978); . . . or lend [government] power to one or the other side in controversies over religious authority or dogma, *see Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445, 452 (1969).” *Smith*, 494 U.S. at 877.

Moreover, there is no “substantial burden” on CSS’s free exercise under either the First Amendment or RFPA. No state law, regulation, or provision in its contract with Philadelphia requires that CSS make *any* finding or endorsement concerning marriage. CSS cannot claim a free exercise violation based on an alleged burden arising solely from its own policy. *See Appellees’ Br.* at 16, 48-50;

see also 71 P.S. §§ 2403, 2404 (RFPA violation requires government “agency action” “[s]ubstantially burden[ing]” free exercise).

Nor was or is CSS compelled to provide child welfare services in exchange for taxpayer dollars at all. If CSS believed it could not comply with the nondiscrimination obligations in its contract with Philadelphia due to its religious beliefs, it did not have to enter into that contract. And while Appellants and certain *amici* favoring reversal appear to assert that voluntary participation in a government contract to provide government services is a “public benefit,” it isn’t. *See, e.g.*, Appellants’ Br. at 28, 46-47; Jewish Coalition for Religious Liberty Br. at 7-8; Texas et al. Br. at 12-13. Cases like *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), therefore provide no support for Appellants’ novel expansion of the Free Exercise Clause. *See Sherbert*, 374 U.S. at 403-04 (substantial burden on free exercise where plaintiff was forced to choose between “following the precepts of her religion and forfeiting [unemployment compensation] benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand”); *Comer*, 137 S. Ct. at 2024 (“The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified.”).

Here, in contrast, CSS is not being asked to choose between free exercise and a public benefit available to all. It is choosing to enter into a contract to provide services and is simply required to honor the religiously neutral requirements imposed equally on all service providers. CSS's religious motivation for participating in foster care services, *see* Appellants' Br. at 42; Brief of Jewish Coalition for Religious Liberty at 7 n.6; Brief of 43 United States Senators and Members of the United States House of Representatives at 11 & n.5; Brief for Alliance Defending Freedom at 3, does not change this analysis. The Free Exercise Clause does not give CSS a constitutional right to put their beliefs ahead of the welfare of children in need of foster families, and to rewrite a government contract into which they voluntarily entered.

Amici acknowledge and embrace the need to protect minority religious views from unfair government suppression, but that is not what is going on here. This is not, like *Lukumi*, a case of "religious gerrymander[ing]," 508 U.S. at 534-35, aimed at legally burdening a particular faith or viewpoint. Rather, the antidiscrimination obligations incorporated into Philadelphia's foster care contracts prohibit discrimination against LGBT prospective foster parents regardless of the contracting party's religious affiliation or beliefs (or lack thereof), and whether or not religious affiliation or belief is the reason for the discrimination. Indeed, the antidiscrimination provisions at issue apply in a neutral way without respect to

religious views. In these circumstances, religious convictions do not trump “the obligation to comply with a valid and neutral [obligation] of general applicability.” *Smith*, 494 U.S. at 879. To the contrary, evenhanded enforcement of civil rights laws in the public sphere, without exemptions that favor one set of religious views over others, is consistent with our system’s core value of religious pluralism.

B. Permitting Exemptions Based On Religious Convictions Would Undermine Enforcement Of Generally Applicable Antidiscrimination Provisions

The exemption advanced by Appellants and *amici* favoring reversal admits of no coherent limiting principle and thus would seriously undermine the purpose of antidiscrimination obligations like those contained in the contract between CSS and Philadelphia.

A broad range of faith-based organizations with differing views provide important social services to the public through contracts with government entities. If courts were to start granting exemptions to neutral, generally applicable antidiscrimination obligations based on the varied beliefs of service providers, it would create an untenable situation in which exceptions would swallow the rule and members of the public would face discrimination when seeking to participate in government programs. Indeed, it would be hard to see why all faith-based organizations could not decide for themselves whether, when, and how civil antidiscrimination obligations in government contracts may be enforced. This

would truly permit “each conscience [to be] a law unto itself,” *Smith*, 494 U.S. at 890, yielding a slippery slope that affirmance would avoid.

In this regard, it is worth noting that there is no reason why, under the approach of Appellants and *amici* favoring reversal, claimed exemptions logically would be limited to discrimination against same-sex couples or to the foster care context. Foster care agencies, or any social service provider, could turn away people of faith (whether or not they identify as LGBT) for not sharing the agency’s religious beliefs.³¹ The claims of “religious liberty” advanced by Appellants and their *amici* thus could, if accepted, permit religious discrimination against persons of faith. Beyond religious discrimination, a social service provider that harbors a deep religious conviction that marriage between people of different races is sacrilegious could seek the same exemption. The Court should avoid such untoward results by rejecting CSS’s asserted Free Exercise right to exempt itself from the antidiscrimination provisions to which it agreed to be bound.

³¹ This is not a hypothetical concern. Until it was revealed at the preliminary injunction hearing, CSS had a policy “to refuse to certify any prospective foster parent without a ‘clergy letter’ from a religious minister,” which, the district court pointed out, would exclude individuals “whose religious exercise does not include a relationship with a minister.” District Court Opinion at 3 n.4.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

/s/ Jeffrey S. Trachtman

JEFFREY S. TRACHTMAN

Counsel of Record

NORMAN C. SIMON

TOBIAS B. JACOBY

JASON M. MOFF

ELISE FUNKE

KRAMER LEVIN NAFTALIS & FRANKEL LLP

1177 Avenue of the Americas

New York, New York 10036

jtrachtman@kramerlevin.com

Counsel for Amici Curiae

October 4, 2018

COMBINED CERTIFICATIONS

1. Type-Volume Limitation, Typeface Requirements, and Type Style Requirements: This brief complies with the type-volume limitations of Fed. R. App. P. 29 (a)(5) because the brief contains 6,423 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and thus does not exceed the 6,500-word limit. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in 14-point Times New Roman.

2. Identical Compliance of Briefs: Pursuant to Third Circuit L.A.R. 31.1(c), the text of the electronically filed brief is identical to the text of the original copies filed by hand with the Court today.

3. Bar Membership: Pursuant to Third Circuit L.A.R. 28.3(d) and 46.1(e), I hereby certify that I am a member of the bar of this Court.

4. Virus Check: I hereby certify, pursuant to Third Circuit L.A.R. 31.1(c), that a virus check was performed on the electronically filed copy of this brief using Bitdefender Endpoint Security Tools, product version 6.2.18.884, engines versions 7.70079. No viruses were detected.

5. Service: I hereby certify that on October 4, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF, and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeffrey S. Trachtman

Jeffrey S. Trachtman

Counsel of Record

KRAMER LEVIN NAFTALIS & FRANKEL LLP

1177 Avenue of the Americas

New York, New York 10036

jtrachtman@kramerlevin.com

Counsel for Amici Curiae

ADDENDUM A: STATEMENTS OF INTEREST OF *AMICI CURIAE*

Amicus curiae Stated Clerk of the General Assembly of the Presbyterian Church (USA) (“PCUSA”), Reverend Dr. J. Herbert Nelson II, joins this brief as the senior ecclesiastical officer of the PCUSA. The PCUSA is a national Christian denomination with nearly 1.6 million members in over 9500 congregations, organized into 170 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706.

Since 1968, the PCUSA has been engaged in extensive discussion and debate about sexuality, and the fact that people of deep faith and honest intelligence can and do differ on how they understand Scripture and the voice of the Holy Spirit on this subject. Since 1978, the denomination has called and advocated for civil rights for all people, regardless of sexual orientation. This brief is consistent with the policies adopted by the General Assembly of the PCUSA wherein the General Assembly has affirmed as appropriate boundaries of religious liberties, that religious freedom is not a license for discrimination against any of God’s people, and cannot justify the denial of secular employment or benefits, healthcare, public or commercial services or goods, or parental rights to persons based on race, ethnicity, sex, gender, sexual orientation, gender identity, religion or gender expression. The 223rd General Assembly encourages all Presbyterians to

distinguish between their historical understanding of their religious freedom to practice the essential tenets of their faith, and the misuse of the term religious freedom as a justification for discrimination in the provision of these same considerations. The General Assembly does not claim to speak for all Presbyterians, nor are its policies binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Amicus curiae The Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, opposes discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and every human being.

Amicus curiae Central Atlantic Conference of the United Church of Christ includes 167 UCC congregations in the Mid-Atlantic region, covering New Jersey, Delaware, Maryland, the District of Columbia and parts of Virginia and West Virginia. It includes 40,000 local church members and approximately 400 ordained ministers.

Amicus curiae Penn Central Conference of the United Church of Christ includes 184 congregations that passionately declare and demonstrate the courageous love of Christ by engaging justice issues in the community and world, to create a better future for all creation to flourish.

Amicus curiae Penn Northeast Conference of the United Church of Christ is united in faith, created to service, committed to care. Through this we seek to be inclusive and welcoming as we equip, empower and support those who are engaged in Christ's ministry.

Amicus curiae Pennsylvania Southeast Conference of the United Church of Christ covers a diverse area: Philadelphia and its suburbs are in our southern region, but the conference also includes several small cities, and stretches into farming communities and the heart of anthracite coal region. Our churches are just as diverse, with memberships ranging from 1,500 to just a dozen. The conference is made up of 165 churches with 42,000 members in Philadelphia and the surrounding six counties.

Amicus curiae Penn West Conference of the United Church of Christ is a Conference of the United Church of Christ with 102 local churches in western Pennsylvania and western Maryland that has the following mission: "Engaging in covenantal relationships; sharing God's love with all."

Amicus curiae Reconstructionist Rabbinical Association (“RRA”), established in 1974, is the professional association of Reconstructionist rabbis. Comprised of over 300 rabbis, the RRA represents the rabbinic voice within the Reconstructionist movement.

Amicus curiae Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, is committed to ensuring equality for all of God’s children, regardless of sexual orientation.

Amicus curiae Unitarian Universalist Association was founded in 1961 and has nurtured a heritage of providing a strong voice for social justice and liberal religion. Unitarian Universalism is a caring, open-minded faith community that traces its roots in North America back to the Pilgrims and the Puritans.

Amicus curiae Covenant Network of Presbyterians, a broad-based, national group of clergy and lay leaders, seeks to support the mission and unity of the PCUSA, articulate and act on the church’s historic, progressive vision, work for a fully inclusive church, and find ways to live out the graciously hospitable gospel by living together with all our fellow members in the PCUSA.

Amicus curiae Friends for Lesbian, Gay, Bisexual, Transgender, and Queer Concerns (“FLGBTQC”) is a faith community within the Religious Society of Friends (Quakers). FLGBTQC deeply honors, affirms, and upholds that of God in all people.

Amicus curiae Men of Reform Judaism come to this issue out of deep commitment to ensuring equality for all of God's children, regardless of sexual orientation.

Amicus curiae More Light Presbyterians represents lesbian, gay, bisexual, and transgender people in the life, ministry, and witness of the Presbyterian Church (USA) and in society.

Amicus curiae Muslims for Progressive Values is guided by the following ten principles, each of which is rooted in Islam: collective identity, equality, separation of religious and state authorities, freedom of speech, universal human rights, gender equality, LGBTQ inclusion, critical analysis and interpretation, compassion, and diversity.

Amicus curiae ReconcilingWorks: Lutherans For Full Participation embodies, inspires, advocates and organizes for the acceptance and full participation of people of all sexual orientations and gender identities within the Lutheran communion, its ecumenical and global partners, and society at large.

Amicus curiae Religious Institute, Inc. is a multi-faith organization whose thousands of supporters include clergy and other religious leaders from more than 50 faith traditions. The Religious Institute partners with the leading mainstream and progressive religious institutions in the United States.

Amicus curiae Women of Reform Judaism represents more than 65,000 women in nearly 500 women's groups in North America and around the world and comes to this issue rooted in a commitment to speaking and acting forcefully against discrimination.

Amici curiae leaders of United States religious communities from Pennsylvania, New Jersey, and Delaware include: Rev. LaVonne Althouse (Retired), Evangelical Lutheran Church in America, Lititz, PA; Rev. Dr. Kharma Amos, Metropolitan Community Church, Metropolitan Community Churches, Lewes, DE; Rev. Robert Burke, Episcopal, Grace Episcopal Church, Lake City, PA; Rev. Dr. Randy Bush, Presbyterian Church (USA), East Liberty Presbyterian Church, Pittsburgh, PA; Rev. Dr. Beverly Dale, Christian-Disciples of Christ, United Christian Church of Levittown, Philadelphia, PA; Rev. Dr. Janet Edwards, Presbyterian Church (USA), Community House Presbyterian Church, Pittsburgh, PA; Rev. Jean Erb (Retired), United Church of Christ, Philadelphia, PA; Rev. Margaret Diane Fisher, Metropolitan Community Church, MCC Rehoboth, Lewes, DE; Rev. Phillip Geliebter, Episcopal Church, St. Mark's Church-Frankford, Philadelphia, PA; Rev. Michael Giansiracusa, Episcopal Church, St. Gabriel's, Philadelphia, PA; Rev. Hilary Greer, Episcopal Church, St. Andrew's Church, Langhorne, PA; Rev. Sara Hale (Retired), Evangelical Lutheran Church in America, Yeadon, PA; Rabbi Erin Hirsh, Jewish-Reconstructionist, Gratz College,

Glenside, PA; Rev. Dr. Melford Holland (Retired), Episcopal Church, St. Andrew's–Yardley, Morrisville, PA; Rev. Rebecca Irwin-Diehl, American Baptist USA, Second Baptist Church of Germantown, Philadelphia, PA; Rev. Dr. Elizabeth Kaeton, Episcopal Church, All Saint's Episcopal Church, Millsboro, DE; Rev. Catherine Kerr, Episcopal Church, Good Shepherd Episcopal Church, New Hope, PA; Rev. Mary Kisner, Episcopal Church, St. Luke's Episcopal Church, Lebanon, PA; Rev. Dr. Vincent Kolb, Presbyterian Church (USA), Sixth Presbyterian, Pittsburgh, PA; Rev. Jeffrey Miller (Retired), United Methodist Church, First United Methodist Church of Pittsburgh, Pittsburgh, PA; Rev. Bill Neely, Unitarian Universalist Association, Unitarian Universalist Congregation of Princeton, Princeton, NJ; Rev. Linda Noonan, United Church of Christ, Chestnut Hill United Church, Philadelphia, PA; David Pickett, Ordained Ruling Elder, Presbyterian Church (USA), First Presbyterian Church, Vineland, NJ; Rev. William Podobinski, (Retired), Roman Catholic, Dignity Pittsburgh, Pittsburgh, PA; Rev. Serena Rice, Evangelical Lutheran Church in America, Abiding Peace Lutheran Church, Belle Meas, NJ; Rev. Michael Ruk, Episcopal Church, St. Philip's Episcopal Church, New Hope, PA; Michele Schenk, Clergy in Residence, Christian–Disciples of Christ, United Christian Church, Washington Crossing, PA; Rev. Matthew Simpson, Episcopal Church, Trinity Buckingham Episcopal, Fulrong, PA; Rev. Megan Sutker (Retired), Episcopal Church, St. Andrew's

Episcopal Church–Yardley, Langhorne, PA; Rev. Stephanie Anne Thompson, United Church of Christ, United Church of Christ, Sellersville, PA; Rev. Naomi Washington-Leapheart, Christian, The Fellowship of Affirming Ministries, Philadelphia, PA; Rev. Amy Welin, Episcopal Church, St. Stephen’s Episcopal Cathedral, Harrisburg, PA; Rev. Dr. Traci West, United Methodist Church, Theological School Professor, Morris Plains, NJ; and Rev. Joan Wylie, Episcopal Church, Episcopal Church of the Trinity; Coatesville, PA.