

No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, ET AL., PETITIONERS

v.

CITY OF PHILADELPHIA, PENNSYLVANIA,
ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**BRIEF FOR THE STATES OF TEXAS, ALABAMA,
ARKANSAS, LOUISIANA, MISSOURI, NEBRASKA,
OHIO, OKLAHOMA, WEST VIRGINIA AND THE
COMMONWEALTH OF KENTUCKY, BY AND
THROUGH GOVERNOR MATTHEW G. BEVIN, AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arkansas, Louisiana, Missouri, Nebraska, Ohio, Oklahoma, West Virginia and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin. The States provide child welfare services through their state-wide agencies and local municipalities. To better provide those services, States often contract with private entities, including child-placement agencies. Some of the private agencies States partner with have religious missions. At least ten States have enacted laws to protect the ability of religious agencies to function according to their beliefs while still providing ample services to children in state care and potential parents willing to care for them.

This case implicates the contractual relationships between States and religiously oriented foster care organizations. Amici urge the Court to grant certiorari to clarify the permissible contours of these relationships.¹

¹ Pursuant to Supreme Court Rule 37.2, Amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amici contributed monetarily to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief.

SUMMARY OF ARGUMENT

Religious entities have been involved in the provision of foster-care services longer than many States have existed. Due in part to that experience, many States wish to avail themselves of the services of faith-based child-placing entities. At least ten States have enacted laws expressly protecting the religious liberty of faith-based child-placing agencies to operate according to those beliefs. These laws prohibit state and local government entities from refusing to work with those agencies because of their beliefs.

But in partnering with religious agencies, States often find themselves attacked on two fronts. On the one hand, when a State contracts with a group whose faith limits its ability to place children in certain home environments, the State is sued by groups advocating for LGBTQ interests and separation of church and state. On the other, when a State precludes faith-based organizations from contracting with the governmental entities unless they violate their religious beliefs, then the State subjects itself to suits by advocates for religious freedom. This Court's intervention is necessary to bring clarity to the law and allow States to utilize the valuable resource of faith-based child-placing agencies.

ARGUMENT

I. The Court Should Clarify Whether States Must Require Religiously Affiliated Foster Care Groups to Set Aside Their Religious Beliefs in Order to Participate in the Foster Care System.

The Petition gives the Court the opportunity to resolve a pressing question: whether States must require religiously affiliated foster care groups to set aside their religious beliefs in order to participate in the State's foster care system.

When States protect the religious liberty of foster-care groups, they face lawsuits from LGBTQ organizations. Conversely, when they exclude such groups—or require them to disregard their sincerely held religious beliefs—they face lawsuits from advocates for religious liberty. This dilemma cries out for resolution.

A. Ten States expressly extend religious liberty protections to child-placing agencies, opening themselves to suits by groups advocating LGBTQ interests and the separation of church and state.

1. States routinely contract with religiously affiliated agencies to assist with foster-care placements, and those agencies have historically provided invaluable services to the States and their most vulnerable residents. *See* Part II, *infra*. In recent years, several States have enacted laws to protect the religious liberty of child-placing agencies who work under state government contracts to help find safe, loving homes for children.

For example, in 2017, Texas enacted House Bill 3859, which protects the religious liberty of religious child-

placing agencies and prohibits the State from granting or denying funding to such organizations because of their religious beliefs. *See* Tex. Hum. Res. Code §§ 45.001–.010. House Bill 3859 prohibits government entities in Texas from discriminating or taking adverse action against a child-placing agency if that provider has declined or will decline to provide, facilitate, or refer a person for child welfare services that conflict with the provider’s sincerely held religious beliefs. *Id.* § 45.004(1); *see also id.* § 45.005(a) (“child welfare services provider may not be required to provide any service that conflicts with the provider’s sincerely held religious beliefs”).

To both protect the religious liberty of child-placing agencies and also maximize potential homes for children in need, Texas law ensures that there is a secondary child-placing agency in the same area able to provide the same service if a religious agency cannot. *Id.* § 45.005(b). In addition, a religious agency unable to serve someone because of its religious beliefs must provide the person seeking services with a list of other providers or refer the person to another provider, to Texas DFPS, or to another agency who can refer the person to an appropriate provider. *Id.* § 45.005(c). This increases the diversity of possible child-placing agencies helping the State find homes for children while protecting the ability of all interested individuals or couples to find an agency who will work with them.

Other States provide similar protections to religious child welfare providers. Five States, including Texas, expressly prohibit state agencies or local governments from discriminating against child-placing agencies that operate according to religious or moral beliefs. *See* Ala.

Code § 26-10D-4(1); Miss. Code § 11-62-5(2); S.C. Exec. Order 2018-12; S.D. Codified Laws § 26-6-39; Tex. Hum. Res. Code § 45.004. Six states declare, as a matter of public policy, broad protections for child-placing agencies to act according to their religious beliefs. *See* Ala. Code § 26-10D-4(2); Mich. Comp. Laws § 722.124e(1); Miss. Code §§ 11-62-3, 11-62-15; S.C. Exec. Order 2018-12; S.D. Codified Laws § 26-6-46; Tex. Hum. Res. Code § 45.009.

At least ten States prohibit their administrative agencies or local governments from requiring child-placing groups to engage in practices that violate their religious or moral beliefs or denying license applications or renewals for child-placing groups because of their religious beliefs. *See* Ala. Code §§ 26-10D-4(1–2), 26-10D-3(1), 26-10D-5(a); Kan. Stat. § 60-5322(b–c); Mich. Comp. Laws §§ 722.124e(2–3) & (7)(a), 710.23g, 400.5a; Miss. Code §§ 11-62-5(2), 11-62-7(2); N.D. Cent. Code §§ 50-12-03, 50-12-07.1; S.B. 1140 § 1(A–B), 56th Leg., Reg. Sess. (Okla. 2018); S.C. Exec. Order 2018-12; S.D. Codified Laws §§ 26-6-38, 26-6-39, 26-6-40; Tex. Hum. Res. Code §§ 45.002(1), 45.004; Va. Code § 63.2-1709.3(A–B).

Relatedly, nine States prohibit government entities from denying or canceling a grant to a child-placing agency due to the agency’s actions undertaken for religious or moral purposes. *See* Kan. Stat. § 60-5322(d); Mich. Comp. Laws §§ 722.124e(3), (7)(a), 710.23g, 400.5a; Miss. Code § 11-62-7(1)(c–d); N.D. Cent. Code § 50-12-07.1; S.B. 1140 § 1(C), 56th Leg., Reg. Sess. (Okla. 2018); S.C. Exec. Order 2018-12; S.D. Codified Laws § 26-6-39; Tex. Hum. Res. Code §§ 45.002(1)(A), 45.004; Va. Code § 63.2-1709.3(C).

These laws advance several important interests. In particular, they play an important role in ensuring diversity of foster-care placements. Some foster groups derive their motivation from a religious calling. Others simply feel a desire to help children. Whatever their reasons, States believe that the foster care system operates better when they partner with a broad constellation of organizations.

That diversity also better enables States to serve people of faith. For example, some parents may prefer to see their children placed with a group that shares their religious beliefs. The availability of a multitude of diverse adoption agencies helps the State serve its diverse array of residents.

Furthermore, faith-based foster groups like Catholic Social Services draw from a wealth of experience. Some religious groups have been caring for poor and abandoned children longer than many States have existed. State foster care systems work better when they court—rather than shun—that lengthy experience and expertise.

Finally, partnering with religiously affiliated foster groups allows the States to demonstrate their commitment to free exercise. The Texas Constitution’s Freedom of Worship Clause, for example, provides that “[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion.” Tex. Const. art. 1 sec. 6. To require faith-based groups to disregard their beliefs would be inconsistent with the States’ commitment to religious liberty.

2. Despite the compelling reasons to partner with—and respect the beliefs of—faith-based foster services,

States who engage in these partnerships face legal challenges from activist groups pressing LGBTQ interests and separation of church and state. For instance, various advocacy groups are currently suing South Carolina officials on behalf of a lesbian couple whom evangelical foster care agency Miracle Hill Ministries declined to endorse for religious reasons. *See* Complaint, *Rogers v. U.S. Dep't of Health & Human Servs.*, No. 6:19-cv-01567 (D. S.C.) (filed May 30, 2019). The suit targets various state officials merely for working with a religious entity who chose to follow the tenets of its faith and only advocate for individuals or couples who shared those beliefs. *Id.*

Likewise, when Michigan passed legislation protecting religious child-placing agencies from having to endorse child placements that violate their religious beliefs, the ACLU sued on behalf of two same-sex couples, alleging that the State's willingness to contract with faith-based agencies without requiring them to violate their beliefs violated the Establishment and Equal Protection Clauses of the Constitution. *See* Complaint, *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich.) (filed Sept. 20, 2017).

B. Other States offer no protection to faith-based child-placing agencies, opening themselves to suits by religious groups.

Some States, like Pennsylvania in this case, provide no formal protections to religious child-placing agencies, and permit cities like Philadelphia to blacklist any faith-based organization whose beliefs limit the individuals they can in good faith recommend to the State as foster parents. Other states, like Michigan, have laws on the

books which purport to permit faith based agencies to contract with governmental units without violating their beliefs, but have been cowed by lawsuits into cutting off contracts with faith-based child-placing agencies. In both cases, such States have faced legal challenges from defenders of religious liberty. *E.g.*, Motion for Preliminary Injunction, *Catholic Charities West Michigan v. Michigan Dep't of Health & Human Servs.*, No. 2:19-CV-11661 (E.D. Mich. June 26, 2019).

Michigan's relationship with religious child-placing agencies is emblematic of the tenuous position in which the States find themselves on this issue. As referenced above, in 2015, Michigan passed legislation protecting a faith-based child-placing agency from being forced to violate its beliefs in order to contract with state agencies. 2015 Mich. Legis. Serv. P.A. 53 (H.B. 4188); Mich. Comp. Laws § 722.124e. The ACLU subsequently sued the Michigan Department of Health and Human Services on behalf of two same-sex couples, alleging that the State's willingness to contract with faith-based agencies who cannot facilitate certain child placements for religious reasons violated the Establishment and Equal Protection clauses of the Constitution. *See Complaint, Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich.).

Michigan chose to settle the claim, entering into an agreement that, *inter alia*, required the Department to include a "non-discrimination provision" in all Department contracts for child placement services, forbidding any child placing agency from "turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family." Stipulation of

Voluntary Dismissal with Prejudice at 9, *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich. March 22, 2019), ECF No. 82; *see also Buck v. Gordon*, No. 19-cv-00286, at *5 (W.D. Mich. July 31, 2019) (order denying ACLU clients' motion to intervene in *Buck* based on the settlement in *Dumont*).

But after implementing the *Dumont* settlement agreement, the State was sued again—this time by St. Vincent Catholic Charities and prospective foster parents affiliated with them—on the grounds that the Department's new position violated the Free Speech, Free Exercise, and Equal Protection clauses of the Constitution. *See* Complaint, *Buck v. Gordon*, No. 19-CV-00286 (W.D. Mich.) (filed April 15, 2019).

Michigan and Pennsylvania are not the only states currently being sued for requiring child-placing agencies to violate their religious beliefs as a precondition to engaging in adoptive services. For instance, the State Office of Children and Family Services for New York threatened to shut down all adoption services of the non-profit religious child-placing agency New Hope Family Services unless it revised its religious policy of only placing children with a married mother and father. *New Hope Family Services, Inc. v. Poole*, 5:18-CV-1419, 2019 WL 2138355 (N.D.N.Y. May 16, 2019). The District Court's dismissal of the First and Fourteenth Amendment claims in that case is currently on appeal in the United States Court of Appeals for the Second Circuit. *Id.*, appeal docketed, No. 19-1715 (2d Cir. June 11, 2019).

This Court's review and guidance is necessary to alleviate the difficult situation in which the States find themselves, where they are forced to absorb the burdens

of litigation no matter how they relate to faith-based child-placing agencies.

II. Religious Child-Placing Agencies Play a Vital Role in Expanding the Options Available to Children Who Need Homes.

When considering child-custody issues, nearly every State in the Union pledges to act in the best interest of the child. To implement this standard, several States have recognized that promoting a diversity of child-placing agencies, religious and nonreligious, maximizes the placement opportunities for children. And faith-based organizations make good partners because they often have a religious duty to help children. Texas is a good example.

Like most States, Texas recognizes the “best interest of the child” as the “primary consideration” for courts when determining parentage, possession, and access to the child. Tex. Fam. Code § 153.002; *see also id.* § 161.001(b)(2). Texas’s “fundamental interest in parental-rights termination cases is to protect the best interest of the child.” *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003). In Texas, the best interest of the child standard “is aligned with another of the child’s interests—an interest in a final decision on termination so that adoption to a stable home or return to the parents is not unduly prolonged.” *Id.*

The Texas Department of Family and Protective Services (“DFPS”), through its Child Protective Services division (“CPS”), cares for children and families and seeks permanency for children in substitute care. At the end of fiscal year 2017, CPS placed over 48,000 children in substitute care (including foster care), and out of more than

7,000 children in CPS custody awaiting adoption, Texas DFPS placed over 5,000 in adoptive homes.

Texas DFPS works with private child-placing agencies to find loving homes for children in the foster care system. These agencies train prospective foster parents, find homes for foster children, and provide continuing services to foster parents after placement. Several of the child-placing agencies that work with Texas DFPS are faith-based organizations. Many are not. For Texas, as with many states, the paramount concern is placing children in safe, loving homes. Working with both religious and nonreligious child-placing agencies ensures that Texas finds as many possible placement opportunities for children as possible.

To that end, Texas operates several initiatives intended to engage the faith community in the child welfare system. One initiative, called Congregations Helping in Love and Dedication (“CHILD”), encourages faith partners across Texas to join with Texas DFPS to help provide support, training, and resources to current and potential adoptive and foster parents. Part of CHILD is the Network of Nurture Initiative, which seeks loving homes for children in foster care, educates parents about these opportunities, and provides continuing support for children in foster care. The purpose of the initiative is to ask faith communities to do more to support the children and families in Texas’s child welfare system. The initiative is open to religious and nonreligious entities.

Another program of Texas DFPS is the One Church, One Child adoption recruitment program designed to partner with minority communities. The program works primarily through churches with predominantly

minority congregations to identify adoptive families and single parents for children in need of homes. It informs church congregations about children awaiting adoption, identifies families willing to adopt, educates the community about the need for adoptive homes and adoption procedures, provides support services to these families, and, ultimately, decreases the amount of time children are in foster care, waiting to be placed permanently with families.

Aside from these specific programs designed to engage the faith community with foster care and adoptions, some child-placing agencies that already work with Texas are faith-based organizations. The availability of these faith-based organizations diversifies the family placement options available to children, which increases the chances for good placement outcomes. Some of these faith-based agencies operate under certain religious beliefs or requirements. But even if an individual parent or couple disagrees with the agency's religious beliefs or requirements, that individual or couple may use any number of other child-placing agencies in Texas to foster or adopt a child. In other words, it is up to the person who wants to be a foster parent to find the right organization he or she wants to work with. Texas's network of child-placing agencies serves all children and potential families. The same is true in other States.

Many States conclude that working with a diverse coalition of child-placing agencies provides better services to children in foster care and the potential parents eager to care for them. Religious child-placing agencies add to this diversity, and this Court should clarify that States may enlist their assistance without coercing them to

violate their religious tenets. For these reasons, the Court should grant the petition for a writ of certiorari, reverse the Third Circuit's judgment, and remand the case for issuance of a preliminary injunction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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