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2020

### Brief for Miguel H. Diaz et a. as Amici Curiae Supporting Respondents, *Fulton v. City of Philadelphia*

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No. 19-123

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

—◆—  
SHARONELL FULTON, et al.,

*Petitioners,*

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, et al.,

*Respondents.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Third Circuit**

—◆—  
**BRIEF *AMICI CURIAE* OF MIGUEL H. DÍAZ,  
AMBASSADOR TO THE HOLY SEE, RET.; CHILD  
USA; DIGNITYUSA; NEW WAYS MINISTRY; WATER;  
AND WOC IN SUPPORT OF RESPONDENTS**

—◆—  
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**INTERESTS OF THE *AMICI CURIAE***<sup>1</sup>

*Amici* are organizations and individuals representing women and men of faith, children and employees of numerous organizations. They support Philadelphia's law allowing same-sex couples to become foster parents without discrimination.

**Miguel H. Díaz, Ph.D.** is the John Courtney Murray University Chair in Public Service at Loyola University Chicago. He was selected by President Barack Obama as the 9th U.S. Ambassador to the Holy See. He is a member of the Catholic Theological Society of America and member and former President of the Academy of Catholic Hispanic Theologians of the United States (ACHTUS). In 2013, Prof. Díaz was the recipient of the prestigious Virgilio Elizondo Award from ACHTUS, given in recognition for distinguished achievement in Theology. He has been awarded honorary doctorates from a number of universities, including Fordham University and Portland University. He is a prolific writer and public speaker. His publications include books, articles, and speeches.

**CHILD USA** is the leading national non-profit think tank working to end child abuse and neglect in the United States. CHILD USA engages in high-level legal, social science, and medical research and analysis

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<sup>1</sup> With the written consent of the Petitioners and the Respondents, *amici* respectfully submit this brief as *amici curiae*. Counsel for *amici curiae* authored this brief in whole and no other person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents granted consent to file.

to derive the best public policies to end child abuse and neglect. Distinct from an organization engaged in the direct delivery of services, CHILD USA develops evidence-based solutions and information needed by policymakers, youth-serving organizations, courts, media, and the public to increase child protection and the common good. CHILD USA works to protect children from abuse in various contexts including its national child sex abuse statute of limitations reform initiative. CHILD USA's interests in this case are directly correlated with its mission to protect children and prevent neglect.

**DignityUSA** is the world's largest membership organization of Catholics committed to justice, equality, and full inclusion of lesbian, gay, bisexual, transgender, queer and intersex persons in our church and society. Among the five areas of commitment outlined in DignityUSA's Statement of Position and Purpose, is Point 4: "**EQUALITY ISSUES:** We dedicate ourselves to develop the potential of all persons to become more fully human. To do this, we work toward the eradication of all constraints on our personhood based on ascribed social roles of women and men, transgender and queer persons, and to promote inclusivity in all areas of liturgical and community life." The ability of those called to raise and nurture children to do so without constraint is part of that priority.

**New Ways Ministry** represents Catholic lay people, priests, and nuns who work to ensure that the human dignity, freedom of conscience, and civil rights of LGBT people are protected in all circumstances,

including in making decisions about healthcare. New Ways Ministry is a national Catholic ministry of justice and reconciliation for people and the wider Catholic Church. Through education and advocacy, New Ways Ministry promotes the full equality of LGBT people in church and society. New Ways Ministry's network includes Catholic parishes and college campuses throughout the United States.

The **Women's Alliance for Theology, Ethics and Ritual (WATER)** is a non-profit educational organization made up of justice-seeking people, from a variety of faith perspectives and backgrounds, who promote the use of feminist religious values to make social change. WATER believes that same-sex couples have a right to be foster parents without discrimination.

The **Women's Ordination Conference (WOC)**, founded in 1975, is the oldest and largest national organization that works to ordain women as priests, deacons and bishops into an inclusive and accountable Catholic church. WOC affirms women's gifts, openly and actively supports women's voices, and recognizes and values all ministries that meet the spiritual needs and human rights of all people. WOC promotes respect and self-determination of all people based on personal discernment.



## SUMMARY OF ARGUMENT

The First Amendment protects religious freedom. It does not protect the right to odious discrimination in the name of religion.

Odious discrimination “includes discrimination on the basis of race, color, religion, national origin, sex, sexual orientation, and transgender status.” Laura S. Underkuffler, *Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century’s Landmark Case on the Free Exercise of Religion and How It Changed History: Odious Discrimination and the Religious Exemption Question*, 32 CARDOZO L. REV. 2069 (2011). Professor Underkuffler asks:

In those cases in which particular identity-based discrimination (on the basis of race, color, religion, national origin, sex, sexual orientation, or gender identity) is prohibited by law, should religious exemptions be permitted to override those laws? Should we, in other words, sanction religiously based, odious discrimination?

*Id.* at 2072. Her answer is no, as this Court’s answer has been in the past and should be again in this case. *Id.*

Members of religions, past and present, have often discriminated against other persons, particularly persons of different color and gender. Philadelphia is contesting this history of discrimination. The city correctly holds everyone doing business with the city to obey the antidiscrimination laws protecting LGBTQ rights.



If Catholic Social Services [CSS] does not agree to follow the law, they cannot contract with the City of Philadelphia to provide foster care services for it. They do not have a constitutional or statutory right to discriminate against same-sex couples in a government-sponsored program. LGBTQ marriages are protected by the Constitution of the United States. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). To grant a religious freedom exception in the foster care situation would undermine all the antidiscrimination laws of the United States and allow religious organizations a constitutional right to odious discrimination.

We ask this Court to state that the First Amendment does not give constitutional or statutory protection to discriminate. Under *Emp't Div., Dept. of Human Res. of Or. v. Smith*, CSS, like everyone else, must obey antidiscrimination's neutral laws of general applicability. 494 U.S. 872 (1990). Under *Sherbert v. Verner*, the government has a "compelling interest" in eradicating discrimination; it would "commit one of 'the gravest abuses' of its responsibilities" if it did not make clear to the country that sexual orientation discrimination, like race discrimination, is illegal. 374 U.S. 398, 406 (1963) (citation omitted); see also *Bostock v. Clayton County, Georgia*, 590 U.S. \_\_\_, \_\_\_ (2020) (slip op., at 33) (holding that, under Title VII of the Civil Rights Act, it is illegal for an employer to "fire[] an individual merely for being gay or transgender. . .").

CSS must respect the laws of Philadelphia when it is doing business with Philadelphia, just as all other agencies do.



## ARGUMENT

### **I. Religious Freedom is not a License to Discriminate.**

Religious freedom is not a license to discriminate. “[T]he Constitution can, and in some instances must, protect [gay couples] in the exercise of their civil rights.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). “Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Id.* Nonetheless, religions have often protected and even promoted forms of discrimination – notably, racism. Church members historically defended slavery and segregation, arguing that they were God’s Bible-based plan for human beings. They taught that Blacks were inferior to whites and could not work in an equal manner. As Professor Williams explains, fifteenth century papal bulls

not only authorized the perpetual enslavement of Africans and Native Americans, but also morally sanctioned the seizure of “non-Christian” lands and the development of the trans-Atlantic slave trade.

Contrary to popular belief, African slavery did not begin in the land area that became the

United States in 1619. Instead, the Catholic Church introduced slavery in present-day South Carolina and then Florida in the 1500s. Moreover, the church served as the largest corporate slaveholder in the Americas, including Louisiana, Saint Domingue (later Haiti) and Brazil.

Shannen Dee Williams, *If Racial Justice and Peace Will Ever Be Attained, It Must Begin in the Church*, CATH. NEWS SERV. (June 10, 2020, 8:11 AM), <http://thediolog.org/opinion/if-racial-justice-and-peace-will-ever-be-attained-it-must-begin-in-the-church-shannen-dee-williams/>; see also ANDRÉS RESÉNDEZ, *THE OTHER SLAVERY* 127 (Mariner Books ed. 2016).

Roger P. Taney, the first Catholic to serve on this Court, wrote this Court's infamous decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, which led to the Civil War. Chief Justice Taney opined that:

[Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.

*Id.* at 407. Some religions continued to uphold slavery and segregation even after the law called those two evils into question. *See Williams, supra* (“After slavery, most white Catholic religious orders of men and women and seminaries continued systematically excluding African-descended people . . . from admission on the basis of race well into the 20th century.”).

Religions also affected the legality of interracial marriage. In *Loving v. Virginia*, this Court noted that Virginia Judge Bazile defended the ban on interracial marriage with a religious argument:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S. 1, 3 (1967); *see also* Leora F. Eisenstadt, *Enemy and Ally: Religion in Loving v. Virginia and Beyond*, 86 *FORDHAM L. REV.* 2659, 2659 (2018). As Professor Eisenstadt explains, Bazile’s conclusion was “a view commonly held across large parts of the United States . . . that separation of the races was ordained by God, supported by religious teachings, and an unassailable societal norm.” *Id.* “The unsettling truth is that, for nearly all of American history, the Jesus conjured by most white congregations was not merely indifferent to the status quo of racial inequality; he demanded its defense and preservation as part of the natural, divinely ordained order of things.” ROBERT P.

JONES, WHITE TOO LONG: THE LEGACY OF WHITE SUPREMACY IN AMERICAN CHRISTIANITY 149 (2020).

Although religions sometimes praise and practice racial discrimination, this Court has recognized that it is against the law. This Court's *unanimous* decision in *Loving v. Virginia* ended the legality of bans on interracial marriage. 388 U.S. at 3. The Court understood that racial marriage bans were not appropriate *law*, even though many religions taught the ban was God's will. *Id.*

Similarly, despite religious support for segregation, this Court in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), ruled that race-based segregation was unconstitutional. Some religious people disagreed, took their children out of integrated public schools and built private single-race schools. Some states closed their public schools so that they could support private discriminatory schools. See Chris Ford et al., *The Racist Origins of Private Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017), <https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/>. Moreover, "[t]he archival, oral history and written record is also littered with heart-wrenching examples of white Catholics subjecting Black and Brown Catholics to humiliating segregation and exclusion in white-led parishes, schools, hospitals, convents, seminaries and neighborhoods." *Williams, supra.*

Despite *Brown* and *Loving*, Goldsboro Christian Schools continued to ban the admission of non-Caucasian

students. See William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 676 (2011) (“From its inception, [Goldsboro] forbade the admission of black students, maintaining that God ‘separated mankind into various nations and races,’ and that such separation ‘should be preserved in the fear of the Lord.’”). Bob Jones University [BJU] continued to ban interracial dating or marriage because of their belief in God’s teaching. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580–81 (1983). Some religious parts of the U.S. government supported the schools’ teachings and their actions. Many religious advocates wrote *amicus* briefs on Goldsboro’s and BJU’s behalf. This Court recognized, however, that a racially discriminatory school does not have a religious right to tax exemption. *Id.* at 595.

Some religions take time to appreciate and protect theirs and others’ constitutional rights. Many years after *Loving* and *Bob Jones*, in March 2000, Bob Jones III announced that BJU would permit interracial dating. See *Bob Jones University Drops Interracial Dating Ban*, CHRISTIANITY TODAY (Mar. 1, 2000), <https://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html>. BJU announced its apology for its old racial policies, which it finally viewed as incorrect. *Id.* The history of racism shows there is no reason to give advocates a legal right to ignore or violate the antidiscrimination laws in the name of religious freedom.

Over time, the law’s support of racial equality undermined the strength of the religious arguments. It

became no longer acceptable to say, directly, that God supported racial inequality. However, “racism never goes away; it adapts.” JEMAR TISBY, *THE COLOR OF COMPROMISE: THE TRUTH ABOUT THE AMERICAN CHURCH’S COMPLICITY IN RACISM* 155 (2019). Churches adapted to defend racism theologically. Students of today’s history know that racism permeates the actions of this country, even though it is supposed to be illegal. “[T]here’s nothing ‘past’ about American racism – it is our present. And it will be our future unless we take radical action to break the cycle of exploitation, violence and lies.” Simran Jeet Singh, *To Fight Racism, We Need to Confront Religion’s Racist Past*, RELIGION NEWS SERV. (July 9, 2020), <https://religionnews.com/2020/07/09/how-americas-religious-colonizers-brought-racism-with-them/>. Part of the reason for the persistence of racism is that some religions still support it, blatantly or tacitly. One lesson of racism is that it continues with religious support even though the laws and Constitution of the United States forbid it.

Although many Christians, even Bob Jones, agree with racial equality today, some Christian groups still oppose it. The Christian Identity Movement, for example, praises white supremacy and works across the country to promote it. See *Christian Identity*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/christian-identity>. It opposes non-white groups and is anti-Semitic as well as racist. *Id.* As Tisby explains, “Since the 1970s, Christian complicity in racism has become more difficult to discern. It is hidden, but that does not mean it no longer exists.

As we look more closely at the realm of politics, we see that Christian complicity with racism remains, even as it has taken on subtler forms.” TISBY, *supra*, at 155.

The Catholic Church has acknowledged its long history of racism and its refusal to combat it adequately. In a recent pastoral letter on racism, the U.S. bishops starkly state, “[T]he truth is that the sons and daughters of the Catholic Church have been complicit in the evil of racism.” Letter from the United States Conference of Catholic Bishops, *Open Wide Our Hearts: The Enduring Call to Love – A Pastoral Letter Against Racism* 21 (2018) (footnote omitted), <http://www.usccb.org/issues-and-action/human-life-and-dignity/racism/upload/open-wide-our-hearts.pdf>. They “express[ed] deep sorrow and regret for [acts of racism committed by leaders and members of the Catholic Church]” and “ask[ed] for forgiveness from all who have been harmed by these sins committed in the past or in the present.” *Id.* at 22. Bishop George Murry, who was chairman of the U.S. Bishops’ Ad Hoc Committee Against Racism, explained that more work must be done: “American Catholics have shown a lack of moral consciousness on the issue of race, . . . If we are to be true to the principles on which our country was founded and the principles on which our faith is based, we must do much more.” See Bishop George Murry, *Catholic Church Must Be “Consistent Voice” to Eradicate Racism*, JESUITS’ NEWS DETAILS (Feb. 6, 2018), <https://jesuitscentralandsouthern.org/news-detail?TN=NEWS-20180206120336UCSPROV>; see also Shannen Dee Williams, *The Church Must Make Reparation for*



*Its Role in Slavery, Segregation*, NAT'L CATH. REP. (June 15, 2020), <https://www.ncronline.org/news/opinion/church-must-make-reparation-its-role-slavery-segregation> (“The denial of the dignity and sanctity of Black life is a part of the DNA of this country. It is also a foundational sin of the American Catholic Church.”).

This history confirms the importance of this Court’s repeated defense of the laws and Constitution of the United States. Religious freedom is not an absolute right. The courts must not give religions the freedom to violate antidiscrimination laws simply because their organizations want to. If the courts had done so in the past, racism would be even stronger and more prevalent than it is today.

The exact same argument applies to this case about same-sex marriage. Many religious people are not yet ready to accept the legality of same-sex marriage and parenthood. Many others, including Catholics, are. About 66% of Catholics support same-sex marriage. See Daniel Cox et al., “*Wedding Cakes, Same-Sex Marriage, and the Future of LGBT Rights in America*,” PUB. RELIGION RES. INST. (Aug. 2, 2018), <https://www.ppri.org/research/wedding-cakes-same-sex-lgbt-marriage> (“[A]bout two-thirds (66%) of Catholics believe the Obergefell decision was correct.”). Catholic same-sex couples have been denied foster care and adoptive children by Catholic organizations because they are not heterosexual. Marianne Duddy-Burke, *Faith Shouldn’t Discriminate: Adoption Restrictions Hurt Children All the More*, TENNESSEAN (Mar. 26, 2019), <https://www.tennessean.com/story/opinion/2019/>

03/27/anti-lgbt-adoption-bills-tennessee-hurt-children/3153144002/ (“By imposing arbitrary restrictions that support a particular set of religious beliefs – beliefs that portray LGBT people and other groups as unfit to parent – the possibility that these children will ever find the stability that a long-term foster or adoptive family can provide is cruelly diminished.”). Disagreement within the church regarding LGBTQ rights is no reason to allow a religious organization to disobey the law. Everyone should obey the antidiscrimination laws.

Catholic Social Services claims a religious right to discriminate against same-sex married couples by refusing to treat them equally to other couples. In response, Philadelphia is doing what the government is supposed to do, namely, enforcing and protecting the constitutional rights of its citizens. Same-sex couples have a constitutionally protected right to marriage and family. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In contrast, there is no constitutional right to religious discrimination. Here, once again, same-sex couples are “ask[ing] for equal dignity in the eyes of the law.” *Id.* at 2608. With this case, we ask the Court to make clear that, just as with racial equality, LGBTQ equality must be protected by the government’s laws, without exception.

Religious freedom does not give individuals a right to disobey the laws that govern everyone. *See, e.g., Emp’t Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). This is the important and sustainable lesson of *Smith*, which has been and should remain our law. Everyone, even religious people, must obey neutral

laws of general applicability. *Id.* at 879. Discrimination is not a permissible exemption for religious actors. The law should not be changed to legalize discrimination, as Petitioners request in this case.

If this Court prefers to apply *Sherbert v. Verner*, 374 U.S. 398 (1963) to this case, the result is the same. The government has a “compelling interest” in eradicating discrimination. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (finding Michigan’s compelling interest in eradicating discrimination justified an imposition on males’ associational freedoms); *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”) (citations omitted); *E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) (“[T]he government has a compelling interest in eradicating discrimination in all forms.”). It would “commit one of ‘the gravest abuses’ of its responsibilities” if it did not make clear to the country that sexual orientation discrimination is illegal. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. \_\_\_, \_\_\_ (2020) (Alito, J., concurring) (slip op., at 10–11) (stating that “[o]nly the gravest abuses, endangering paramount interest could give occasion for [a] permissible limitation on the free exercise of religion.”) (alteration in original) (cleaned up) (quoting *Sherbert*, 374 U.S. at 406); *Bostock v. Clayton Cty., Ga.*, 590 U.S. \_\_\_, \_\_\_ (2020) (slip op., at 32) (asserting that

the “federal government [is prohibited] from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest”).

It may take time, but Catholics and other Americans need to learn to practice sexual orientation equality in civic life, just as they are currently still learning to practice racial equality, 66 years post-*Brown*, 53 years post-*Loving*, and 37 years post-*Bob Jones*.

## **II. Philadelphia is Enforcing a Law that Governs Everyone.**

Philadelphia’s laws ensure that same-sex couples will not be discriminated against by organizations with whom the city does business. CSS does not have a statutory or constitutional right to disobey the law.

CSS is asking Philadelphia “to renew their contractual relationship while permitting it to turn away same-sex couples who wish to be foster parents.” *Fulton v. Philadelphia*, 922 F.3d 140, 146 (3d Cir. 2019). That is a direct violation of Philadelphia law, which requires *everyone* subject to its public accommodations law to treat same-sex couples equally to others and applies to *every* organization that does business with the city. See Fair Practices Ordinance, Phila. Code § 9-1106 (2016) (prohibiting discrimination based on “race, ethnicity, color, sex, *sexual orientation*, gender identity, religion, national origin, ancestry, disability, marital status, familial status, or domestic or sexual violence

victim status”) (emphasis added); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1727 (“[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”) (citations omitted). Furthermore, the First Amendment does not give CSS a religious right to discriminate against same-sex couples because of their religious beliefs. *See Smith*, 494 U.S. at 879 (“[T]he 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).’”) (quoting another source); *see also Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 694 n.24 (2010) (observing that, under *Smith*, the Free Exercise Clause did not require public law school to grant religious exemption to its “all-comers” policy forbidding discrimination by student organizations).

Philadelphia is clear that the law, not religion, must govern the city, and govern everyone in a way that protects codified, same-sex couples’ civil rights. The right to marry and to be part of a family were constitutionally protected by this Court in *Obergefell*, and everyone should obey civil laws connected to that equality. *Obergefell*, 135 S. Ct. at 2608.

In *Obergefell*, this Court noted that one of the reasons for protecting the right to marry “is that it

safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” *Id.* at 2590. This Court quoted older cases to reiterate “the right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” *Id.* at 2600 (citations omitted). The Court repeatedly stated that marriage of their parents protects children’s best interests. *Id.* Moreover, this Court said:

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. *This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.*

*Id.* (emphasis added). Allowing religious institutions to discriminate against same-sex parents by refusing to let them adopt or foster will therefore deprive children of loving and nurturing families. See Ellen C. Perrin & Benjamin S. Siegel, *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian: Technical Report*, 131 AM. ACAD. OF PEDIATRICS 1374, 1380 (2013), <https://pediatrics.aappublications.org/content/pediatrics/131/4/e1374.full.pdf> (“There is no evidence that restricting . . . children’s access to loving and nurturing adoptive or foster care homes on the basis of gender or sexual orientation of the parents is in their best interests.”)

(footnotes omitted); *APA on Children Raised by Gay and Lesbian Parents: How Do These Children Fare?*, AM. PSYCHOLOGICAL ASS'N (June 11, 2012), <https://www.apa.org/news/press/response/gay-parents> (“[L]esbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.”). *Obergefell* invalidated the same-sex marriage bans because the “marriage laws at issue here thus harm and humiliate the children of same-sex couples.” *Obergefell*, 135 S. Ct. at 2590. This Court reiterated that teaching in *Pavan*, when it ruled that female spouses of women who gave birth should not be treated differently from male spouses, because both couples were entitled to the same equal benefits of marriage. *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017).

Churches discriminate against gay and lesbian status as they did and continue to do against people of color. According to the Catholic Church:

Homosexual acts are, according to the catechism, “intrinsically disordered” and “contrary to natural law.” . . . Consequently, the homosexual orientation (and by extension, any orientation other than heterosexuality) is regarded as “objectively disordered.” . . .

Consequently, according to the traditional interpretation of natural law, homosexual acts are not ordered toward those specific ends and so they are deemed “disordered.” Thus, “under no circumstances can they be approved,” as the catechism states.

James Martin, *What is the Official Church Teaching on Homosexuality? Responding to a Commonly Asked Question*, AMERICA: THE JESUIT REV. (Apr. 30, 2018), <https://www.americamagazine.org/faith/2018/04/06/what-official-church-teaching-homosexuality-responding-commonly-asked-question>.

Soon after this Court released its opinion in *Bostock v. Clayton Cty., Ga.*, protecting LGBTQs under Title VII, Archbishop Gomez, the President of the U.S. Bishops' Conference, responded negatively. In his words:

I am deeply concerned that the U.S. Supreme Court has effectively redefined the legal meaning of "sex" in our nation's civil rights law. This is an injustice that will have implications in many areas of life.

By erasing the beautiful differences and complementary relationship between man and woman, we ignore the glory of God's creation and harm the human family, the first building block of society.

*President of U.S. Bishops' Conference Issues Statement on Supreme Court Decision on Legal Definition of "Sex" in Civil Rights Law*, U.S. CONF. OF CATH. BISHOPS (June 15, 2020), <http://usccb.org/news/2020/20-93.cfm>. Same-sex marriage is currently not allowed, just as interracial marriages were banned in the past because of religious teachings.

As this Court explained in *Obergefell*, religion should not block people from exercising their



constitutional rights. Nonetheless, in the past and in the present, LGBTQs have suffered tremendous oppression from people who disagree morally with their lives. Moreover, many Catholics have suffered from their church's mistreatment of gays and lesbians. One Catholic priest described the difficulty of being gay in the church environment, i.e., of growing up "having found ourselves pre-case as the unwitting enemy of everything that we were taught was good and true by parents, teachers, church, and wider society." James Alison, *Facing Down the Wolf: A Gay Priest's Vocation*, COMMONWEAL (June 10, 2020), <https://www.commonwealmagazine.org/facing-down-wolf>. Father Alison chillingly describes "the mortal violence and hatred that fleck from the teeth of the vehemently righteous in any culture – a violence unleashed whenever there is a suggestion that maybe after all LGBT people are loved just as we are." *Id.* "Of course," he writes, "one of the places where this hatred and this violence have a favored embassy on earth is the Catholic clerical closet." *Id.*

A Catholic queer woman author, Jamie Manson, has dealt with similar oppression:

Bishops, priests and even some women religious communicate to me and my communities that we simply are not worth the risk and effort. I know what it is to have my church treat me as subhuman. I know what it is to be told that because of my gender and sexual orientation, I do not deserve equality or justice or access to sacraments in my own church.

Robert Shine, *As Pride Commences, LGBTQ Catholic Advocates Demand the Church Say “Black Lives Matter,”* NEW WAYS MINISTRY (June 3, 2020), <https://www.newwaysministry.org/2020/06/03/as-pride-commences-lgbtq-catholic-advocates-demand-the-church-say-black-lives-matter/>.

Numerous LGBTQ employees of Catholic institutions have been fired for getting married or supporting same-sex marriage. See Robert Shine, *Archdiocese Rebuffs Terminated Gay Church Worker’s Attempts at Dialogue, Reconciliation,* NEW WAYS MINISTRY (May 28, 2020), <https://www.newwaysministry.org/2020/05/28/archdiocese-rebuffs-terminated-gay-church-workers-attempts-at-dialogue-reconciliation/>.<sup>2</sup>

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<sup>2</sup> See, e.g., *Fry v. Ascension Health Ministry Servs.*, No. 18-CV-1573, 2019 WL 1320320 (E.D. Wis. Mar. 22, 2019) (Plaintiff, a nurse, alleged, *inter alia*, that he was terminated by a Catholic hospital for his sexual orientation.); *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 2019 WL 7019362 (S.D. Ind. Dec. 20, 2019) (Defendants fired plaintiff, a homosexual female, after learning of her same-sex union.); *Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 49D01-1907-PL-027728 (Ind. Super. Ct. May 1, 2020), <http://media.ibj.com/Lawyer/websites/opinions/index.php?pdf=2020/may/PAYNE-ELLIOTT.pdf> (Teacher at a Catholic high school filed lawsuit in Indiana state court and complaint with the EEOC alleging he was terminated for entering same-sex marriage.); Kathleen Gray, *Music, Marriage, a Happy Life in the Church. Now, Harder Times*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/24/us/politics/church-lgbtq-workplace-rights.html?smid=tw-share> (Music Director Terry Gonda was fired for marrying a woman.); *Demkovich v. St. Andrew the Apostle Par.*, 343 F. Supp. 3d 772 (N.D. Ill. Sept. 30, 2018) (When Plaintiff’s complaint for employment discrimination was dismissed under the ministerial exception, he filed another complaint alleging hostile work

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environment.); *Collette v. Archdiocese of Chi.*, 200 F. Supp. 3d 730 (N.D. Ill. 2016) (Defendant’s motion to dismiss plaintiff’s complaint under the affirmative defense of ministerial exception was denied but a limited discovery was scheduled to determine applicability of the ministerial exception.); *Barrett v. Fontbonne Acad.*, 33 Mass.L.Rptr. 287, 2015 WL 9682042 (Mass. Super. Dec. 16, 2015) (Plaintiff was entitled to summary judgment when a Catholic institution violated a Massachusetts anti-discrimination law when it refused to hire a qualified food service worker because he was in a same-sex marriage.); *Evenson v. Butte Cent. Catholic Sch.*, No. 2:14-cv-00055 (D. Mont. Mar 10, 2015) (A lesbian teacher settled with Diocese for termination after becoming pregnant outside marriage through artificial insemination.); *Dias v. Archdiocese of Cincinnati*, 2013 WL 2903164 (S.D. Ohio June 4, 2013) (Catholic school fired plaintiff for becoming pregnant by artificial insemination.); *Krolikowski v. St. Francis Preparatory*, No. 25212/2012 (N.Y. Sup. Ct. Feb. 5, 2013) (Transgender teacher settled with Catholic school after being fired for “insubordination” after revealing gender transition.); Sam Roberts, *Marla Krolikowski, Transgender Teacher Fired for Insubordination, Dies at 62*, N.Y. TIMES (Sept. 27, 2015), <https://www.nytimes.com/2015/09/28/nyregion/marla-krolikowski-transgender-teacher-fired-for-insubordination-dies-at-62.html> (School officials “continued to regard [Krolikowski] as a man” and “demanded her resignation” for “not altering her appearance to their satisfaction. . . .”); JoAnne Viviano, *Fired Lesbian Teacher Carla Hale Won’t Get Job Back in Deal with Diocese*, COLUMBUS DISPATCH (Aug. 15, 2013), <https://www.dispatch.com/article/20130815/NEWS/308159568> (Teacher Carla Hale and Catholic diocese reached settlement through mediation after she was fired for naming her lesbian partner in a newspaper obituary.); *Sondheimer v. Georgetown Univ.*, 1987 WL 14618 (D.D.C. Oct. 20, 1987) (Defendant’s motion for summary judgment was upheld because plaintiff, a homosexual Jewish man, failed to establish prima facie case of employment discrimination.); *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 126 Misc. 2d 629, 481 N.Y.S.2d 632 (Sup. Ct. 1984) (Court upheld resolution requiring private agencies, including religious-based organizations, seeking social service contracts to require non-discrimination based on sexual orientation when making employment decisions.).

Despite these narratives of discrimination, many Catholics have supported marriage equality both pre- and post-*Obergefell*. See Francis DeBernardo, *New Ways Ministry and U.S. Catholics Rejoice at Supreme Court Marriage Equality Decision*, NEW WAYS MINISTRY (June 26, 2015), <https://www.newwaysministry.org/2015/06/26/new-ways-ministry-and-u-s-catholics-rejoice-at-supreme-court-marriage-equality-decision/>. A majority of American Catholics currently support same-sex marriage:

While the U.S. Catholic bishops have consistently opposed marriage equality measures on all fronts, Catholic people in the pews have had a different perspective from their leaders. The lived faith of Catholic people has taught them that love, commitment, and sacrifice are the essential building blocks of marriage and family. Their daily experiences interacting with lesbian and gay couples and their families has taught them that these relationships are identical to heterosexual marriages in terms of the essential qualities needed to build a future together, establish a family, and contribute to social stability and growth.

*Id.*

Furthermore, Catholic gays and lesbians continue to work for an inclusive church. As one fired employee explained, “I really honestly believe that eventually the Catholic church will come to see that gay people are not fundamentally broken and that we’re just like

everybody else, and they'll (OK) gay marriage. Now whether that takes 20 years or 100 years, I don't know." See Shine, *Archdiocese Rebuffs Terminated Gay Church Worker's Attempts at Dialogue*, *supra*. Attitudes towards LGBTQs will change, just as attitudes toward racial justice have changed slowly over many years.

Would you like to "Meet Father Bryan Massingale: Black, Gay, Catholic Priest Fighting for an Inclusive Church," who is a professor at Fordham University? Olga Marina Segura, *Meet Father Bryan Massingale: Black, Gay, Catholic Priest Fighting for an Inclusive Church*, THE REVEALER (June 3, 2020), <https://therevealer.org/meet-father-bryan-massingale-a-black-gay-catholic-priest-fighting-for-an-inclusive-church/>. Father Massingale has been fighting for a Black and gay-inclusive church for many years. At times, he has recognized that in the white church, "[his] cultural background didn't count and wasn't valued. It was as if [he] didn't exist as a Black man." *Id.* At one point, he realized that "[he] didn't see how God could be imaged as Black or as gay, and certainly not both simultaneously." *Id.* He then faced the striking realization: "The problem is not from God's side of the equation. The problem is with the Church." *Id.* Working during the AIDS crisis, Father Massingale remembers the fear, uncertainty, and hostility shown toward the gay community. "I don't think we understood the deep silence, the shameful silence and isolation in which many members of the LGBT community lived in then. That the silence impacted our Church and our Church was complicit in it." *Id.*

For forty years, Father Massingale has criticized his church's teaching on LGBTQ people. *Id.* Publicly, he has supported same-sex marriage and acknowledged his gay identity. *Id.* It is still unusual for priests to do that because of church opposition. Father Massingale once spoke at a conference about gay priesthood, surrounded by protestors, and received death threats for his efforts. *Id.* Father Massingale reflected on his experience this way:

The local bishop spoke out against these priests who were praying [with me], questioning the idea of a gay retreat, but said not a word about the violence and the vitriol to which a group of people who are committed to God's service are being subjected to. It angers me that people who want to gather to pray are seen as the problem, whereas those who would incite and insult get a pass.

*Id.*

Father Massingale has repeatedly criticized both the church's racism and its homophobia. "My whole ministry, in some way, has been to help the Church catch up to God, to help the Church understand that God has already gifted people of color with dignity and value and worth, and God has already gifted LGBT people with dignity, value and worth." *Id.* Father Massingale's experience explains why Father James Martin asks, "What can we say to gay people who believe that God hates them?" "How can we help young people who feel tempted to suicide because of their

sexual orientation?” “What can we say to gay or lesbian Catholics who feel that their own church has rejected them?” *See* Martin, *supra*.

Church Militant, a Detroit Catholic organization, recently referred to Wilton Gregory, the African American archbishop of Washington, as an “accused homosexual,” a “Marxist,” and an “African Queen,” after the archbishop criticized President Trump’s photo op at an Episcopalian church. Jack Jenkins, *Church Militant, a Conservative Catholic Group Supportive of Trump, Denounced for Video Calling Black Archbishop ‘African Queen,’* RELIGION NEWS SERV. (June 12, 2020), <https://religionnews.com/2020/06/11/church-militant-conservative-catholic-group-publishes-video-calling-black-archbishop-wilton-gregory-african-queen/>. University of Pennsylvania Professor Anthea Butler called their video racist:

As a black Catholic, I’m appalled. . . . At a time of racial division in this country, Church Militant produced this racist diatribe in the hopes of creating more fissures within the church. . . . They are willing to step over the bodies of black people in order to promote their filth.

For them to do this, in this particular time of pain in our country, is a slap in the face to every black Catholic in America.

*Id.*

Archbishop Gregory has called for the protection of racial, gender, and sexual orientation equality. Detroit Catholic officials later criticized the racism of the remarks about Gregory but said nothing about the homophobia. “[I]s it too much for these bishops to even defend one of their own, by explicitly naming the homophobia that is part of the attacks against Gregory?” See Robert Shine, *As Archbishop Faces Racist and Homophobic Attack, U.S. Bishops Remain Silent*, NEW WAYS MINISTRY (June 13, 2020), <https://www.newwaysministry.org/2020/06/13/as-archbishop-faces-racist-and-homophobic-attack-u-s-bishops-remain-silent/>.

Many Catholics oppose what their church is advocating in this case. The “rest of the faithful need to be outspoken. Catholics must make clear to our co-religionists that such hate will be actively resisted.” *Id.* We ask this Court to resist Petitioners’ claim to have the law approve LGBTQ discrimination. The Court must oppose discrimination against same-sex couples now, just as it has opposed racial discrimination in the past.

First Amendment law supports this conclusion. *Smith* requires everyone to obey laws that prohibit odious discrimination. This Court should reaffirm *Smith* and not grant protection for discrimination. If this Court prefers to apply the *Sherbert* test, the government has a compelling interest in protecting everyone from discrimination, whether the discrimination is classified as racial or LGBTQ.



### III. The First Amendment Does Not Authorize LGBTQ Discrimination.

The “persistent claim that *Smith* radically altered free exercise doctrine is simply wrong.” Marci A. Hamilton, *Employment Division v. Smith at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1673 (2011). *Smith* reflects this Court’s important tradition of asking religious people to obey neutral laws that govern everyone.

Relying on *Smith* in this case, the Third Circuit correctly ruled that the “City’s nondiscrimination policy is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exception from that policy.” *Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019), *cert. granted sub nom. Fulton v. City of Philadelphia, Pennsylvania*, 140 S. Ct. 1104 (2020). The circuit court added that CSS had “failed to make a persuasive showing that the City targeted it for its religious beliefs, or is motivated by ill will against its religion, rather than sincere opposition to discrimination on the basis of sexual orientation.” *Id.*

Philadelphia has “sincere opposition to discrimination on the basis of sexual orientation.” *Id.* It is equally opposed to everyone’s discrimination against same-sex married couples, whose freedom is protected by the Constitution of the United States. As the Third Circuit correctly recognized, “[t]he government’s interest lies . . . in minimizing – to zero – the number of

establishments that [discriminate against a protected class].” *Id.* at 164. In determining this, the Third Circuit specifically asked:

[W]as the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? Based on the record before us, *that question has a clear answer: no*. The City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation.

*Id.* at 156 (emphasis added). This Court should affirm the Third Circuit’s correct ruling that this antidiscrimination law applies to everyone.

The Third Circuit’s ruling is consistent with *Smith* and this Court’s historical interpretation of the Free Exercise Clause. The Court can and should restate that important holding in this case. *Smith* reiterated this Court’s longstanding view that “religious believers are subject to the law.” See Hamilton, *supra*, at 1674–75. “This approach was employed . . . to uphold the anti-polygamy laws, the social security laws, military conscription laws, Sunday closing laws, social security identification requirements, federal oversight of federal lands, prison regulations, and state taxation of products sold by a religious organization.” *Id.* (footnotes omitted). As this Court explained in 1878, “To permit [polygamy among members of the Mormon Church] would be to make the professed doctrines of religious belief superior to the law of the land, and in

effect to permit every citizen to become a law unto himself.” *Id.* at 1675 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). Accordingly, permitting religious organizations to discriminate against protected classes would make the organizations’ beliefs superior to the law of the land, a result that is simply unacceptable.

This case is not properly viewed as an exemption case. Instead, it is consistent with this Court’s repeated holding that religion must not undo laws that protect everyone’s health and safety. *See, e.g., Smith*, 494 U.S. at 879; *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring). As this Court stated in *Smith*:

We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.

494 U.S. at 878–79.

This Court has been clear that religious employers do not enjoy an exemption from the Social Security laws of the United States. *See Lee*, 455 U.S. at 258–61 (identifying the dangers of giving religious exemptions to the tax laws). “The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.” *Id.* at 260; *see also Hernandez v. Comm’r*, 490 U.S. 680 (1989) (rejecting

free exercise challenge to income taxes). Indeed, in *Smith*, this Court reiterated the free exercise point it has made since *Reynolds*: “Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.” *Smith*, 494 U.S. at 882 (quoting *Gillette v. United States*, 402 U.S. 437, 461 (1971)); see also *Reynolds*, 98 U.S. at 164 (“Congress was deprived of all legislative power over mere opinion [by the Free Exercise Clause], but was left free to reach actions which were in violation of social duties or subversive of good order.”).

This Court accepts that a “private right to ignore generally applicable laws is a constitutional anomaly.” *Smith*, 494 U.S. at 886. It noted other situations where the Court had ruled it important for everyone to obey neutral laws. As this Court stated about rejecting the religious exemption rule in *Smith*:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind – ranging from compulsory military service, see, e.g., *Gillette v. United States*, 401 U.S. 437 (1971), to the payment of taxes, see, e.g., *United States v. Lee*, *supra*; to health and safety regulation such as manslaughter and child neglect laws, see, e.g., *Funkhouser v. State*, 763 P.2d 695 (Okla. Crim. App. 1988), compulsory vaccination laws, see, e.g., *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816 (1964), drug laws, see, e.g., *Olsen v. Drug Enforcement Administration*, 279 U.S. App.

D.C. 1, 878 F.2d 1458 (1989), and traffic laws, see *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985), child labor laws, see *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), . . . and laws providing for equality of opportunity for the races, see, *Bob Jones University v. United States*, 461 U.S. 574, 603–04, 103 S.Ct. 2017, 2034–35, 76 L.Ed.2d 157 (1983).

*Id.* at 888–89. As this Court concluded about all of those cases, “*The First Amendment’s protection of religious liberty does not require this.*” *Id.* at 889 (emphasis added).

Instead, this Court accepted the idea that applies to this case: “Simply stated, when conduct jeopardizes human health and safety, government cannot deregulate for religion without sacrificing its health and safety interests in the regulation.” Hamilton, *supra*, at 1687 (footnotes omitted).

A state statute does not change this analysis. The Pennsylvania Religious Freedom Protection Act, RFPA, 71 PA. STAT. ANN. § 2401 *et seq.* (2002), prohibits the government from substantially burdening a person’s free exercise of religion, including any burden which results from a rule of general applicability, unless it is in furtherance of a compelling interest of the

agency and the least restrictive means of furthering the compelling interest.

The government can easily meet this test here. This Court has repeatedly affirmed the importance of laws that prohibit odious discrimination. *See Bostock*, 590 U.S. at \_\_\_ (slip op., at 33) (“An employer who fires an individual merely for being gay or transgender defies the law.”). Philadelphia has a compelling interest to do so, and it has used the least restrictive means of protecting LGBTQ rights. If this Court prefers to apply *Sherbert* to this case, the result is the same. The government has a “compelling interest” in eradicating discrimination. 374 U.S. at 406. That interest is undermined if anyone can hide behind religious freedom to break the discrimination laws.

A religious freedom statute cannot be used to allow religious organizations to engage in odious discrimination. *See Underkuffler, supra*, at 2088. To accept Petitioners’ argument in this case would mean religious organizations could create statutes to protect their right to discriminate on “the basis of race, color, religion, national origin, sex, sexual orientation, and transgender status.” *Id.* at 2070. “[T]here is no convincing reason for tolerance of religiously motivated discrimination in this context.” *Id.* at 2088. Therefore, this Court should reaffirm *Smith*, reject LGBTQ discrimination, and protect the rights of same-sex couples to be foster parents.



## CONCLUSION

Religious organizations do not enjoy a right to odious discrimination.

“Just as a claimed religious belief does not justify murder, theft, or tortious conduct, so it does not justify odious discrimination against individuals because of their identity or other immutable characteristics, when prohibited by law.” *Id.* at 2090. This Court should not allow such odious discrimination in this case. Religions consistently opposed racial equality but having it as the law of the land required them to obey the law instead of following discriminatory theology. Philadelphia is asking everyone to respect the rights of same-sex couples to become foster parents. We ask this Court not to give CSS a constitutional right to odious discrimination.

For the foregoing reasons, *amici* urge the Court to affirm the decision of the Third Circuit.

Respectfully submitted,

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