

In The
Supreme Court of the United States

—◆—
SHARONELL FULTON, et al.,

Petitioners,

v.

CITY OF PHILADELPHIA, et al.,

Respondents.

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

—◆—
**BRIEF OF AMICI CURIAE CENTER FOR
THE STUDY OF SOCIAL POLICY AND
NATIONAL CENTER FOR LESBIAN RIGHTS
IN SUPPORT OF RESPONDENTS**

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae Center for the Study of Social Policy and National Center for Lesbian Rights do not have any parent entities and do not issue stock.

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INTEREST OF AMICI CURIAE¹

The **Center for the Study of Social Policy (CSSP)** is a national nonprofit organization dedicated to building a racially, socially, and economically just society. CSSP advocates with and for children, youth, and families marginalized by public policies and institutional practices, and is recognized for its work in reforming public systems to better serve families. CSSP's work includes a focus on transforming systems to be responsive to the needs of families of color, people with diverse sexual orientations, gender identities, and gender expressions (SOGIE), immigrant families and others who are often discriminated against through and by systems and institutions. We work with communities across the country promoting strategies that are family-centered, multi-generational, anti-racist, and culturally responsive—aimed at ensuring families have every possible opportunity to be healthy and successful.

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their

¹ All parties consented to the filing of this brief. No party authored this brief in whole or in part, and no one other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in ensuring that all families are free from discrimination and are treated equally in the child welfare system and in adoptions. NCLR has represented adoptive parents as well as parents facing removal of their children through the dependency system.

◆

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Philadelphia contracts with private agencies to provide foster care services. JA 80, 83; *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 669 (E.D. Pa. 2018). When providing services, contractors are required to comply with a non-discrimination requirement based on the City's Fair Practices Ordinance, which prohibits discrimination based on numerous characteristics, including race, religion, sex, and sexual orientation. JA 146, 298; *see Fulton*, 320 F. Supp. 3d at 669-71. In contracting with the City to provide foster parent certification and home visits, Catholic Social Services (CSS) was obligated to provide services under the terms of the contract, including the non-discrimination requirement. JA 298-300; *Fulton*, 320 F. Supp. 3d at 669-71.

When the City learned that CSS was unwilling to certify same-sex couples as foster parents when providing services under the contract, it sought to enforce its non-discrimination requirement. Petitioners

asserted rights under the First Amendment and Pennsylvania's Religious Freedom Protection Act not to comply with the City's non-discrimination requirement. They requested a preliminary injunction requiring the City to enter into a new contract with CSS with an exception to the non-discrimination requirement. *Fulton*, 320 F. Supp. 3d at 668. After an evidentiary hearing, the district court denied a preliminary injunction, and the Third Circuit affirmed. *Id.*; *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019).

Amici write to provide a broader context by highlighting how the government's compelling interests in protecting children and eliminating discrimination converge in the child welfare system. The goal of the child welfare system is to promote safety, permanency, and well-being for children and families. The government's interest in eliminating discrimination, which is always compelling, takes on heightened importance in the child welfare context. Decisions at every stage must be based on the welfare of children and not distorted by bias based on race, national origin, religion, gender, disability, sexual orientation, or gender identity.

Any discrimination in the system harms the children the system is charged with protecting and shatters the families the system is charged with preserving. Bias can and does infect the system at any point, including when an agency or its contractors fail to exercise reasonable efforts to keep families together, fail to place children with families consistent with their best interests, or fail to provide the necessary

services to reunify families. Decisions in the child welfare system based on bias undermine the goal of ensuring that state interventions protect the welfare of children and present significant barriers to child health and well-being. Children are traumatized by removal alone, and if they experience bias in the homes where they are placed, they are re-traumatized. Too often this results in failed placements and family moves and ultimately placement in group homes—all of which lead to additional trauma for the child.

A ruling that the First Amendment requires the City to contract with agencies unwilling to comply with the City's non-discrimination requirement when providing services would undermine the government's compelling interests in eliminating discrimination and protecting children and families. Requiring the City to allow discrimination in its child welfare program would turn the foundational principles of the child welfare system on their head. Such a ruling would limit the government's ability to ensure that all child welfare decisions are based on relevant factors, not religious views about particular groups. It would also create intractable problems in the child welfare system and other contexts.



ARGUMENT

I. THE GOVERNMENT HAS A COMPELLING INTEREST IN ELIMINATING DISCRIMINATION IN ALL ASPECTS OF THE CHILD WELFARE SYSTEM TO PROMOTE SAFETY, PERMANENCY, AND WELL-BEING FOR CHILDREN AND FAMILIES.

A. The Goal of the Child Welfare System Is to Promote Safety, Permanency, and Well-Being for Children and Families.

The goal of the child welfare system, at the federal level and in every state and locality, is to promote safety, permanency, and well-being for children and families.² Philadelphia’s Department of Human Services “provide[s] and promote[s] safety, permanency, and well-being for children and youth at risk of abuse, neglect, and delinquency.”³ *See, e.g., D.P. v. G.J.P.*, 146

² *See, e.g.*, U.S. Dep’t of Health & Hum. Servs., Children’s Bureau, *What We Do*, <https://perma.cc/JFZ6-UBEE>; U.S. Dep’t of Health & Hum. Servs., Children’s Bureau, Child & Family Servs. Reviews, *National Goals*, <https://perma.cc/ZQH4-ZVFB>. States have primary responsibility for child welfare, and the federal government “support[s] States in the delivery of services through funding of programs and legislative initiatives.” U.S. Dep’t of Health & Hum. Servs., Child Welfare Info. Gateway, *How the Child Welfare System Works* 1 (2013), <https://perma.cc/TY8P-AE6V>.

³ *See* City of Phila. Dep’t of Hum. Servs., *What We Do, supra*. The child welfare system in Pennsylvania is county-administered and state-supervised. Pa. Dep’t of Hum. Servs., *DHS Program Offices—Office of Children, Youth and Families*, <https://perma.cc/8XM3-7EB2> (click “Office of Children, Youth, and Families”). Philadelphia’s Department of Human Services is the county child

A.3d 204, 211 (Pa. 2016) (noting the state’s “compelling interest in safeguarding children from various kinds of physical and emotional harm and promoting their wellbeing”).

The principle that, whenever possible, children should be raised by their families of origin is deeply embedded in our constitutional and statutory law. For decades, the Court has recognized the fundamental nature of a parent’s interest in the “desire for and right to ‘the companionship, care, custody, and management of his or her children’. . . .” *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); see also *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (“[T]he liberty interest in family privacy has its source . . . in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’”) (citation omitted). “When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.” *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). “A parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one.” *Lassiter*, 452 U.S. at 27. The state must prove parental neglect by clear and convincing evidence, as “parents retain a vital interest in preventing the irretrievable destruction of their family life.” *Santosky*, 455 U.S. at 753, 756.

welfare agency. See *City of Phila. Dep’t of Hum. Servs., What We Do*, *supra*.

The state’s interest in ensuring the accuracy and fairness of child welfare proceedings is equally compelling. The protections given to parent-child bonds rest on “the traditional presumption that a fit parent will act in the best interest of his or her child.” *Troxel v. Granville*, 530 U.S. 57, 69 (2000). Accordingly, the state’s interest in promoting the welfare of the child “favors preservation, not severance, of family bonds. . . .” *In the Interest of Coast*, 561 A.2d 762, 766 (Pa. Super. Ct. 1989) (citing *Santosky*, 455 U.S. at 766-67).

Because “[m]ost children are best cared for in their own families,” child welfare systems “focus on building family strengths and providing parents with the assistance needed to keep their children safe so that the family may stay together.”⁴ The Family First Prevention Services Act, enacted in 2018, aims to “provide enhanced support to children and families and prevent foster care placements” by allowing federal reimbursement for services such as mental health services, substance use treatment, and in-home parenting skill training.⁵ Bipartisan Budget Act of 2018, P.L. 115-123, § 50702 (2018). By permitting federal funds to be used for prevention services, the law “recognizes that too many children are unnecessarily separated from

⁴ U.S. Dep’t of Health & Hum. Servs., *National Goals, supra*.

⁵ *See also* Part I.C.2, *infra* (discussing the Family First Prevention Services Act).

parents who could provide safe and loving care” if given access to appropriate services.⁶

Pennsylvania similarly requires its Juvenile Act to be interpreted “[t]o preserve the unity of the family whenever possible,” and to place children for adoption only “when the unity of the family cannot be maintained.” 42 Pa. Stat. and Cons. Stat. Ann. § 6301(b)(1). A guiding principle is to “[r]ecognize that a child should be maintained with his or her parents whenever possible,” and that “families are capable of change and, with support, most can safely care for their children.”⁷ A court must make certain findings before ordering removal of a child from their home, including “whether reasonable efforts were made prior to the placement of the child to prevent or eliminate the need for removal of the child from his home. . . .” *Id.* § 6351(b)(2). If a child is placed in foster care, reunification remains the goal, and “[i]n most cases, the preferred permanency plan is to reunify children with their families.”⁸ Consistent with these goals, in

⁶ Annie E. Casey Foundation, *Keeping Kids in Families: Trends in U.S. Foster Care Placement* 1 (2019), <https://perma.cc/DK47-K8W9>.

⁷ Office of Children & Families in the Courts, *Pennsylvania Dependency Benchbook* 1-15 (3d ed. 2019), <https://perma.cc/2V6M-MSYR>.

⁸ See U.S. Dep’t of Health & Hum. Servs., *National Goals*, *supra*. Federal law requires state child welfare agencies receiving federal foster care maintenance payments to adopt a plan requiring that “reasonable efforts shall be made to preserve and reunify families” absent certain exceptions. 42 U.S.C. § 671(a)(15)(B). Agencies must “make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her

Philadelphia, “[t]he goal of foster care is to reunite children with their families.”⁹

B. Eliminating Discrimination in the Child Welfare System Is a Compelling Government Interest.

In the child welfare system, the government’s interest in eliminating discrimination takes on heightened importance. Decisions made at every stage of dependency proceedings, including investigation, removal, reunification, and foster care and adoption placements, must be based on the welfare of children and not distorted by bias based on race, national origin, religion, gender, disability, sexual orientation, or gender identity. Without unbiased decisionmaking, children cannot be guaranteed the care they require to grow into healthy and successful adults—and could in fact be placed in homes that create harmful and long-lasting barriers to their health and well-being.

The Court has recognized the government’s “compelling interest in eradicating discrimination” as an interest “of the highest order” that “assur[es] its citizens equal access to publicly available goods and services.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984). Discrimination “denies society the benefits of wide

home, as long as the child’s safety is assured” and “to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child). . . .” 45 C.F.R. § 1356.21(b).

⁹ City of Phila. Dep’t of Hum. Servs., *What We Do*, *supra*.

participation in political, economic and cultural life.”
Id. at 625.

The government’s compelling interests in eliminating discrimination and protecting children and families converge in the child welfare system. The government’s interest in combatting discrimination is tied to its interest in keeping families together and protecting children from the serious harm of being wrongfully separated from their families, denied adequate reunification services, or placed in foster or adoptive homes based on considerations other than their best interests, where they risk the impact of bias in homes that fail to provide support needed for well-being. The government must be able to address discrimination in the child welfare system to ensure that child welfare decisions meet the state’s goal of achieving safety, permanence, and well-being for the children and families it serves.

Many constitutional and statutory provisions promote this important goal. In addition to the U.S. Constitution’s guarantee of equal protection, various federal, state, and local non-discrimination provisions—enacted long before the dispute in this case—protect the rights of children, parents, and potential foster and adoptive parents to be free from discrimination in all aspects and at all stages of the child welfare system. As a recipient of federal funds, Philadelphia is subject to Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and

national origin.¹⁰ 42 U.S.C. § 2000d *et seq.* The City is also subject to Title II of the Americans with Disabilities Act, which prohibits disability discrimination in the services, programs, and activities of state and local governments, and Section 504 of the Rehabilitation Act, which prohibits disability discrimination by entities receiving federal funding. 42 U.S.C. § 12131 *et seq.*; 29 U.S.C. § 794 *et seq.* Philadelphia’s programs and services are also subject to state and local non-discrimination law, including the Pennsylvania Human Relations Act and the Philadelphia Fair Practices Ordinance. 43 Pa. Stat. and Cons. Stat. Ann. § 951 *et seq.*; Phila. Code § 9-1101 *et seq.* Philadelphia’s contracts with agencies providing child welfare services, including its prior contract with CSS to certify foster parents, prohibit contractors from discriminating based on sex and sexual orientation, as well as other characteristics such as race, national origin, and religion, when providing services under the contract.

Enforcing these important protections ensures that children are not separated from their families based on factors unrelated to their welfare, and that

¹⁰ Funding recipients are also responsible for the actions of contractors providing services to children and families. 28 C.F.R. § 42.104(b)(1)-(2); 45 C.F.R. § 80.3(b)(1)-(2). Agencies receiving certain federal funds must also comply with the Multiethnic Placement Act of 1994. 42 U.S.C. § 1996b. In addition, the Indian Child Welfare Act, enacted “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,” governs state child custody proceedings, including foster care placements, involving Indian children who are members of or eligible for membership in a federally recognized tribe. 25 U.S.C. § 1901 *et seq.*

all decisions regarding their placement are based on relevant factors rather than misconceptions or prejudices regarding particular groups, or, in this case, the religious beliefs of private agencies contracted to perform this governmental function. As the Department of Health and Human Services (HHS) and Department of Justice (DOJ) have stated, child welfare agencies “have important responsibilities to protect the best interests of children and to provide appropriate, non-discriminatory services to the children and families that they serve. Under Title VI, the duty to avoid discrimination on the basis of race, color, or national origin serves these child-protective responsibilities.”¹¹ HHS and DOJ have also stated that “[t]he goals of child welfare and disability non-discrimination are mutually attainable and complementary.”¹²

C. Non-Discrimination Requirements Have Vital Importance in the Child Welfare System.

Certain groups, particularly families and children of color and parents with disabilities, are overrepresented in the child welfare system and experience

¹¹ U.S. Dep’t of Health & Hum. Servs. & U.S. Dep’t of Justice, *Dear Colleague 5* (Oct. 2016), <https://perma.cc/DMS3-FLBP>.

¹² See U.S. Dep’t of Health & Hum. Servs. & U.S. Dep’t of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts Under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* (2015), <https://perma.cc/44RW-42KN>.

disparities that the child welfare profession is actively working to reduce. Separating children from their families based on bias or other factors not directly related to their safety causes devastating harm.¹³ When children are placed in foster care, they “face heightened risk for abuse and neglect within the system itself and generally suffer poorer outcomes and prospects. . . .”¹⁴ Any bias in the system undermines the goal of ensuring that state interventions not only protect the welfare of children, but provide the support needed to achieve well-being.

¹³ Separation of children from their families has a long history and occurs in many contexts. *See generally* Laura Briggs, *Taking Children: A History of American Terror* (2020) (discussing history of U.S. policies involving family separation); Elisa Minoff, Ctr. for the Study of Soc. Policy, *Entangled Roots: The Role of Race in Policies That Separate Families* (2018), <https://perma.cc/JE8R-GYHR> (discussing the role of race in policies involving family separation in immigration, criminal justice, and child welfare systems).

¹⁴ Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 Marq. L. Rev. 215, 218 (2013); *id.* at 240-43 (discussing “secondary harms” of foster care); *see also, e.g.*, Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 Marq. L. Rev. 1161, 1165-70 (2019) (describing research showing that removal and placement of children in foster care can traumatize children and their parents).

1. Children and families of color, parents with disabilities, and other groups are overrepresented in the child welfare system and experience worse outcomes.

Certain groups of families and children are overrepresented and experience worse outcomes in the system. Nationwide, families and children of color, primarily those who are Black and Native American, are overrepresented in the child welfare system compared with their proportion of the general population.¹⁵ Black children are represented in foster care at a rate 1.66 times greater than their proportion in the general population, and Native American children are overrepresented at a rate 2.67 times greater than their

¹⁵ U.S. Dep't of Health & Hum. Servs., Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare*, 2-3 (Nov. 2016), <https://perma.cc/N4TQ-DWEM> [hereinafter *Disproportionality*]; C. Puzanchera & M. Taylor, Nat'l Council of Juvenile & Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care Dashboard* (2020), http://www.ncjj.org/AFCARS/Disproportionality_Dashboard.aspx (click "Disproportionality Index: Children in, entering, and exiting foster care"); see, e.g., Megan Martin & Dana Dean Connelly, Ctr. for the Study of Soc. Policy, *Achieving Racial Equity: Child Welfare Policy Strategies to Improve Outcomes for Children of Color* 4, 6 (2015), <https://perma.cc/TM7J-WT7E>; Ctr. for the Study of Soc. Policy et al., *Disparities and Disproportionality in Child Welfare: Analysis of the Research* (Dec. 2011), <https://perma.cc/8NM4-4AL2>; Robert B. Hill, Casey-CSSP All. for Racial Equity in Child Welfare, *An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels* (2007), <https://perma.cc/6HGP-ZLA6>; see generally Marian S. Harris, *Racial Disproportionality in Child Welfare* (2014); Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002).

proportion in the general population.¹⁶ Latino children are also overrepresented in the foster care system in some jurisdictions, in certain states at a rate of more than 1.8 times their proportion in the general population.¹⁷ In addition, once families of color are in the child welfare system, they “tend to have worse outcomes—such as children more likely to be removed from their homes, less likely to receive family preservation services, and in the case of African American children, experiencing longer stays in foster care.”¹⁸ A study evaluating data from 2007 to 2017 found that child welfare systems were least likely to place Black children in a family and had made the most progress in reducing group placements for white children.¹⁹ Data also show that the overrepresentation of Native American children in state welfare systems “grows higher at each major decision point in child welfare.”²⁰ One study found that where abuse by a family member had been reported, Native American children were four times more likely to be removed from their home and placed in foster care than white children.²¹ As the DOJ and HHS have observed, “[e]vidence of disproportionality

¹⁶ Puzanchera & Taylor, *supra* (click “Disproportionality Index: Children in, entering, and exiting foster care” for 2018).

¹⁷ *Id.* (click “2018 Disproportionality Index for Hispanic children in foster care”).

¹⁸ Martin & Connelly, *supra*, at 4.

¹⁹ Annie E. Casey Foundation, *Keeping Kids in Families*, *supra*, at 1.

²⁰ Nat’l Indian Child Welfare Ass’n, *Disproportionality in Child Welfare Fact Sheet 1* (2019), <https://perma.cc/5MDV-MZDB>.

²¹ *Id.* at 1 n.1.

can be a red flag signaling that additional attention is necessary to see if and how system structures, access to services, and delivery methods may contribute to racial and ethnic disparities.”²²

Researchers have documented bias at various decisionmaking stages. For example, HHS has cited studies in Texas finding that although Black families tended to be assessed with lower risk scores than white families, they were more likely than white families to have their children removed.²³ A study of Michigan’s child welfare system from the Center for the Study of Social Policy (CSSP) found that Black families did not receive necessary supports that could prevent or divert their involvement with the child protective system.²⁴ The study concluded that “[t]he belief that African American children are better off away from their families and communities was seen in explicit statements by key policy makers and service providers. It was also reflected in choices made by DHS.”²⁵ Even purportedly

²² U.S. Dep’t of Health & Hum. Servs. & U.S. Dep’t of Justice, *Dear Colleague, supra*, at 2.

²³ U.S. Dep’t of Health & Hum. Servs., *Disproportionality, supra*, at 6 (citing studies).

²⁴ Ctr. for the Study of Soc. Policy, *Race Equity Review: Findings from a Qualitative Analysis of Racial Disproportionality and Disparity for African American Children and Families in Michigan’s Child Welfare System* ii (Jan. 16, 2009), <https://perma.cc/W3DZ-7ZY9>.

²⁵ *Id.* Another study concluded that “[r]acial inequity in service availability and service delivery is the strongest contributing factor in disproportionate numbers of children of color in placement with child welfare.” Marian S. Harris & Wanda Hackett, *Decision Points in Child Welfare: An Action Research Model to*

objective tools for evaluation have been found to incorporate biases.²⁶ Such discrimination causes enormous harm to children and families.

Disabled parents are also overrepresented in the child welfare system and experience discrimination. The National Council on Disability issued a study finding that “[p]arents with disabilities and their families are frequently, and often unnecessarily, forced into the system and, once involved, lose their children at disproportionately high rates.”²⁷ The study describes the situation of a Missouri couple whose two-day-old child was taken into state custody during a critical developmental phase simply because both parents were blind—not based on any allegations of abuse.²⁸ The parents were eventually reunited with their daughter after 57 days of separation from her. This family’s story

Address Disproportionality, 30 Child. & Youth Servs. Rev. 199, 202 (2008).

²⁶ Stephanie K. Glaberson, *Coding Over the Cracks: Predictive Analytics and Child Protection*, 46 Fordham Urb. L.J. 307, 332-34, 346 (2019) (describing county algorithm generating a “risk score” for children and statement from county official that “[a]ll of the data on which the algorithm is based is biased. Black children are, relatively speaking, over-surveilled in our systems, and white children are under-surveilled”).

²⁷ Nat’l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 72 (2012), <https://perma.cc/65BC-RAJ4>; see ADA Nat’l Network, *Parents with Disabilities in Child Welfare Agencies and Courts*, <https://perma.cc/D94M-DPW5>; Univ. of Minn. Sch. of Soc. Work, Ctr. for Advanced Studies in Child Welfare, *The Intersection of Child Welfare and Disability: Focus on Parents* (Fall 2013), <https://perma.cc/D79W-X5AD>.

²⁸ Nat’l Council on Disability, *supra*, at 95.

of separation “shows the devastation that can occur when there is a presumption of unfitness. . . .”²⁹ Another study found that 19 percent of children in foster care had been removed from their home at least in part because they had a parent with a disability.³⁰ That study also found that foster children removed due to parental disability were much less likely to have a case plan goal of permanency, and much more likely to have a case plan goal of long-term foster care.³¹

Overrepresentation in the child welfare system is amplified for children and families who may be subject to bias based on multiple overlapping characteristics rendering them vulnerable to unequal treatment. For example, the National Council on Disability noted that “while no available data look specifically at the overrepresentation of parents of color with disabilities and their families, presumably the numbers are devastatingly high” in light of the “double discrimination” experienced by people of color with disabilities.³² Child welfare agencies may also equate poverty with “neglect,” which has a significant impact on communities

²⁹ *Id.*

³⁰ Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 *Child. & Youth Servs. Rev.* 22, 26 (2016).

³¹ *Id.* at 25.

³² Nat'l Council on Disability, *supra*, at 78-79 (citation omitted); *id.* at 110 (citing “shockingly high” rate of disability—26.5 percent—among Native American caregivers from whom the child welfare system removed children).

of color.³³ Data from New York City, for example, show that the neighborhoods with the most child welfare investigations have “both high poverty rates and a high concentration of Black and Latino residents.”³⁴ Similarly, while little data exists on lesbian and bisexual mothers of color whose children are removed by the state, a study of 339 low-income Black mothers indicated that lesbian or bisexual participants were more than four times likelier than heterosexual participants to have lost their children to the state in child welfare proceedings.³⁵

2. The child welfare profession is actively working to eliminate disproportionality and disparities in the child welfare system.

The child welfare profession—including experts, child welfare administrators, and elected officials at all levels of government—recognizes the critical need to eliminate disproportionality and disparities in the child welfare system. HHS has noted that “[t]he child

³³ See Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty With Neglect*, 20 Children’s Bureau Express (Dec. 2019/Jan. 2020), <https://perma.cc/A7UF-CG25>.

³⁴ Angela Butel, The New Sch. Ctr. for N.Y.C. Affs., *Data Brief: Child Welfare Investigations and New York City Neighborhoods* 4 (June 2019), <https://perma.cc/385A-BD4R>.

³⁵ Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 Fam. L.Q. 87, 90 n.32, 92 (2018) (citing Kathi L.H. Harp & Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss Among a Sample of African American Mothers: A Novel Approach*, 60 Soc. Sci. Res. 283, 291 (2016)).

welfare community has moved from acknowledging the problem of racial and ethnic disproportionality and disparity in the child welfare system to formulating and implementing possible solutions.”³⁶ As CSSP has found, “public policy can play an important role in reducing . . . disparities and improving outcomes for children and families of color,” and many jurisdictions have adopted specific strategies to do so.³⁷ Another CSSP study describes “the range of child welfare system partners driving this effort,” as well as prominent types of disparity-reduction efforts, such as legislative directives or executive mandates, the creation of operational structures with responsibility to advance a racial equity action agenda, data development and analysis strategies, as well as training, workforce development, and capacity-building.³⁸ According to HHS, “[s]trategies to address disproportionality and

³⁶ U.S. Dep’t of Health & Hum. Servs., *Disproportionality*, *supra*, at 1.

³⁷ Martin & Connelly, *supra*, at 4; *see, e.g.*, Oronde Miller & Amelia Esenstad, CSSP & All. for Racial Equity in Child Welfare, *Strategies to Reduce Racially Disparate Outcomes in Child Welfare* (Mar. 2015), <https://perma.cc/TXP2-Z4S4>; U.S. Dep’t of Health & Hum. Servs., Child Welfare Info. Gateway, *Addressing Racial Disproportionality in Child Welfare* (2011), <https://perma.cc/C32T-DUTU>; All. for Racial Equity in Child Welfare, *supra*; Ctr. for the Study of Soc. Policy, *Places to Watch: Promising Practices to Address Racial Disproportionality in Child Welfare* (2006), <https://perma.cc/EYZ6-Z7GW>.

³⁸ *See* Miller & Esenstad, *supra*, at 6-8.

disparities are often the same strategies to improve child welfare for all children and families.”³⁹

While much of the research focuses on strategies to eliminate racial disproportionalities and disparities, the National Council on Disability describes how innovative, evidence-based programs providing services to parents with disabilities can prevent unnecessary removal and loss of children.⁴⁰ For example, a nonprofit in Berkeley, California has provided tailored services to parents with intellectual disabilities and their children that achieved a significantly lower rate of out-of-home placement compared to the national rate.⁴¹

At the federal level, the Family First Prevention Services Act marks a major reform to address failures in the system, including the over-placement of youth in foster care and in congregate care facilities such as group homes, where Black and Latino youth are overrepresented, rather than in less restrictive, family placements. Family First permits federal funds to be used for the first time for services to prevent children from entering foster care.⁴² P.L. 115-123, § 50702. The law will also reduce unnecessary placements in group settings by significantly limiting federal funding for congregate settings. *Id.* at § 50741. Research shows that “young people who spend most of their time in

³⁹ U.S. Dep’t of Health & Hum. Servs., *Disproportionality*, *supra*, at 7.

⁴⁰ Nat’l Council on Disability, *supra*, at 217-27.

⁴¹ *Id.* at 219.

⁴² *See* Part I.A, *supra*.

child welfare in group placement, or whose last placement was in a group setting, are least likely to ever become part of a permanent family,” and “[t]his lack of support leads to a greater likelihood of arrest, homelessness, unemployment and early parenthood.”⁴³ A study from 2015 shows that Black youth were 18 percent more likely than white youth to be sent to a group placement.⁴⁴ From 2007 to 2017, states generally increased the rate of placement of foster youth in families rather than group settings, but made the least progress with respect to increasing the rates of family placement for youth who are Black, Latino, or Asian Pacific Islander.⁴⁵

3. Discrimination at any stage in the child welfare system harms the children the system is charged with protecting and undermines the system’s goals.

Discrimination in the child welfare system—whether in investigations, the provision of family preservation services, the removal of children from their parents, or certifying potential parents to be foster or adoptive parents—hurts the children the system is designed to protect and shatters the families the

⁴³ Annie E. Casey Foundation, *Keeping Kids in Families*, *supra*, at 2.

⁴⁴ Annie E. Casey Foundation, *Every Kid Needs a Family* 5 & n.30 (2015), at <https://perma.cc/7YPW-PWC8>.

⁴⁵ Annie E. Casey Foundation, *Keeping Kids in Families*, *supra*, at 2.

system is charged with preserving. Any bias undermines the child welfare system's goal of ensuring that state interventions protect the integrity of the family and improve the welfare of children.

For example, an HHS investigation determined that the Alabama Department of Human Resources used a father's inability to speak English to justify its denial of services and attempts to terminate the father's parental rights after the child's mother passed away.⁴⁶ Among other findings, HHS noted that the caseworker stated to investigators and testified in court that the father's "failure to learn English demonstrated a lack of commitment to his daughter."⁴⁷ The agency's petition to terminate the father's parental rights "specifically referenced his failure to learn English as a justification."⁴⁸ In addition, the agency required the father, whose primary language was Akateco, to communicate using Spanish interpreters and undergo a psychological examination conducted in Spanish, even though the father was not proficient in Spanish or English.⁴⁹ The agency also admitted failing to provide services that would have enabled the father to regain custody.⁵⁰

⁴⁶ See U.S. Dep't of Health & Hum. Servs., *Title VI Review of Alabama Department of Human Resources* 4, 9 (Jan. 13, 2017) (on file with counsel).

⁴⁷ *Id.* at 9.

⁴⁸ *Id.*

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 14.

HHS’s investigation also found evidence of systemic discrimination demonstrating the state agency’s failure to take reasonable steps to provide meaningful access to child welfare services for parents with limited English proficiency.⁵¹ In one county, for example, the failure to secure bilingual counseling services for six months caused a delay in parents’ reunification with their children.⁵² As another example, when a parent filed a motion in court seeking services, the agency responded that they did not have services in Spanish and “the client would need to learn English in order to obtain needed reunification services.”⁵³ HHS concluded that “Latino national origin minority parents face significant barriers to reunification with their children, have difficulty participating in services, and are at greater risk for loss of parental rights” due to the agency’s failure to ensure meaningful access for individuals with limited English proficiency to its services.⁵⁴ HHS and the agency entered into a settlement agreement to address these systemic issues.⁵⁵

As another example, in *Cruz v. Mississippi Department of Human Services*, 9 F. Supp. 3d 668 (S.D. Miss.

⁵¹ *Id.*

⁵² *Id.* at 13.

⁵³ *Id.*

⁵⁴ *Id.* at 13-14.

⁵⁵ See U.S. Dep’t of Health & Hum. Servs., Office for Civil Rights, *Settlement Agreement Between U.S. Department of Health & Human Services Office for Civil Rights, Southeast Region and Alabama Department of Human Resources* (Aug. 28, 2017), <https://perma.cc/D49C-HSBU>.

2014), the court denied summary judgment to defendants in a civil rights lawsuit brought by an immigrant mother whose newborn had been removed from her custody. Ms. Cruz, whose primary language was Chatino, had alleged that hospital and child welfare agency staff assumed she had been trading sex for housing, reported her to authorities as an “illegal alien,” failed to interview her using a competent interpreter, and then placed her newborn in the custody of the agency without proof of abuse or neglect. *See id.* at 674-79. In 2014, after a compliance review and investigation of the *Cruz* case, HHS entered into a voluntary resolution agreement with the Mississippi Department of Human Services. The agency was required to implement corrective actions to ensure meaningful access for people with limited English proficiency to its programs, including foster care and adoption services, child protective services, abuse prevention services, child visitation, and the family reunification planning process.⁵⁶

In the disability context, HHS recently entered into a voluntary resolution agreement with the Oregon Department of Human Services concerning the rights of parents with disabilities in Oregon’s child welfare system.⁵⁷ HHS initiated an investigation based on

⁵⁶ *See* U.S. Dep’t of Health & Hum. Servs., Office for Civil Rights, *Resolution Agreement Between the U.S. Department of Health and Human Services Office for Civil Rights & Mississippi Department of Human Services Division of Family & Children’s Services* (Mar. 23, 2014), <https://perma.cc/2QKP-KPWL>.

⁵⁷ *See* U.S. Dep’t of Health & Hum. Servs., Office for Civil Rights, *Voluntary Resolution Agreement Between U.S. Department*

allegations that the state removed two infant children from a mother and father with disabilities and denied the parents effective and meaningful opportunities to reunite with their children “due in significant part to their allegedly having IQ (intelligence quotient) scores that were too low.”⁵⁸ The parents were eventually reunified with their children after four years of separation from their older child and ten months of separation from their younger child.⁵⁹ HHS’s investigation revealed “systemic deficiencies” regarding the state agency’s “implementation of its disability rights policies, practices, and procedures to prevent discrimination against parents with disabilities in Oregon’s child welfare system.”⁶⁰ The state agreed to take affirmative steps to ensure compliance with civil rights laws prohibiting disability discrimination.⁶¹

As another example, HHS and DOJ issued a letter of findings to the Massachusetts Department of Children and Families concluding that the department discriminated against a 21-year-old mother with a

of Health and Human Services Office for Civil Rights & Oregon Department of Human Services (Nov. 20, 2019), <https://perma.cc/AM2U-QX7R>.

⁵⁸ U.S. Dep’t of Health & Hum. Servs., Office for Civil Rights, *HHS OCR Secures Voluntary Resolution and Ensures Child Welfare Programs in the Oregon Department of Human Services Protect Parents with Disabilities from Discrimination* (Dec. 4, 2019), <https://perma.cc/4VAX-XA2Z>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See id.*

developmental disability.⁶² The letter cited “systemic failures” and requested that the agency immediately implement services and supports to allow the mother a “full and equal opportunity” to pursue reunification with her daughter.⁶³ These examples illustrate the harms when, as the parents in Oregon had alleged, children are separated from their families of origin “based on stereotypical beliefs about [parents’] ability to safely care for their children.”⁶⁴ This bias undermines the goals of the child welfare system.

Discrimination based on sex, including sexual orientation, similarly undermines the goals of the child welfare system. In one example, two women in Kansas were raising children together.⁶⁵ Based on comments from one of the couple’s older children, a social worker interviewed the younger child at school and immediately took the child into state care, without notice to the family. The petition said that the child’s mother had a female partner, and therefore that the child was subject to “more confusion and social difficulties than other children.” The judge ruled that the child should be placed in a foster home with “healthy parents.” The

⁶² U.S. Dep’t of Justice & U.S. Dep’t of Health & Hum. Servs., *Letter of Findings re: Massachusetts Department of Children & Families 2-3*, 9 (Jan. 29, 2015), <https://perma.cc/995S-MBDA>.

⁶³ *Id.*

⁶⁴ U.S. Dep’t of Health & Hum. Servs., *HHS OCR Secures Voluntary Resolution*, *supra*.

⁶⁵ See Andrew Solomon, *Far from the Tree* 646-50 (2012).

state social worker repeatedly said, “we’re not giving this child back to lesbians.”⁶⁶

Requiring the government to permit discrimination in any aspect of the child welfare system would severely undermine the government’s compelling interests in protecting children and families and ensuring that child welfare decisions are based on legitimate and relevant factors.

II. REQUIRING THE CITY TO PERMIT DISCRIMINATION IN ITS CHILD WELFARE SERVICES WOULD UNDERMINE COMPELLING GOVERNMENT INTERESTS AND LEAD TO INTRACTABLE PROBLEMS.

Petitioners seek an extraordinary remedy: an injunction requiring the City to enter into a new contract with CSS that would permit it to violate the City’s non-discrimination requirement when certifying foster parents on the City’s behalf. The issue is not whether the City may choose to provide an exemption to its generally applicable non-discrimination requirement in a contract with CSS (or anyone else), but whether the First Amendment compels it to do so. To find that the Constitution prohibits the City from requiring contractors to refrain from discrimination when providing City services would undermine compelling government interests and lead to intractable problems in the child welfare system.

⁶⁶ *See id.* at 648-50.

As the district court concluded after an evidentiary hearing, and as the Third Circuit affirmed, Petitioners had not met their burden of showing a likelihood of success on the merits on their claims under the First Amendment or the Pennsylvania Religious Freedom Act. *Fulton*, 320 F. Supp. 3d at 703; *Fulton*, 922 F.3d at 165. The City's actions to enforce its neutral, generally applicable non-discrimination requirement satisfy rational basis review under *Employment Division v. Smith*, 494 U.S. 872 (1990). *Fulton*, 922 F.3d at 147. In addition, as the City and Intervenor-Respondents explain, this case concerns the City's management of its own programs, rather than regulation of private conduct or provision of a benefit to the general public. See Intervenor-Resp. Br. 14, 19; Resp. Br. 21-22. Accordingly, while the lower courts' conclusion "would be correct even if this case arose in the context of government acting as sovereign . . . it is doubly correct given the broad discretion the government enjoys as manager of contractors performing services on its behalf." *Id.* at 28.

Even if strict scrutiny applied, the City's interest in eradicating all forms of discrimination prohibited by the Fair Practices Ordinance is not only legitimate, but compelling. See *Fulton*, 922 F.3d at 163-64; *Roberts*, 468 U.S. at 623. Requiring contractors to comply with the City's non-discrimination requirement when providing child welfare services to the public on the City's behalf is the least restrictive means of achieving that objective. See *Fulton*, 922 F.3d at 163-64.

To hold otherwise would severely undermine the government's compelling interests in eliminating discrimination and protecting children and families. As described in Part I, *supra*, the government's ability to enforce non-discrimination protections in its own child welfare program is directly linked to its compelling interest in the welfare of children and families. To hold that the government must permit discrimination by its own contractors undermines that interest and subverts the government's efforts to eliminate discrimination in all aspects of the child welfare system.

This case involves a contractor's religious objection to certifying foster families headed by same-sex couples. But private contractors provide a range of child welfare services that vary from jurisdiction to jurisdiction. In Philadelphia, contractors provide case management services and operate congregate care facilities. In some states, contractors provide other services, such as family reunification services and selecting family placements for children. If religious objections to complying with non-discrimination requirements allowed child welfare contractors to opt out of these requirements, there could be broad implications for parents' ability to have their children returned home or placed with family members. A ruling in Petitioners' favor would turn the foundational principles of the child welfare system on their head and limit the government's ability to ensure that all child welfare decisions are based on relevant factors, not preconceptions or religious views about particular groups.

The ruling Petitioners seek would also create intractable practical problems. It would compel governments to permit state-contracted agencies providing child welfare services to disregard any contractual or statutory non-discrimination provisions that conflict with their religious beliefs. A contractor may believe, for example, that its religious beliefs require denying services to people of a particular religion, people in interfaith marriages, or people who have no religious beliefs or affiliation.⁶⁷ This is not a speculative concern: in South Carolina, for example, a Jewish woman who wanted to be a foster parent learned that she could not work with a state-funded child placement agency because the agency only accepted Protestant Christian families.⁶⁸

Forcing the City to allow each contracting agency to implement its own religious criteria for potential foster families would be unworkable and would undermine governments' ability to set conditions on contractors. It would open the door for contractors to discriminate in providing other services for foster

⁶⁷ As the district court noted, CSS had a “policy to refuse to certify any prospective foster parent without a ‘clergy letter’ from a religious minister.” *Fulton*, 320 F. Supp. 3d at 669 n.4. During the proceedings below, CSS sent a letter to the district court representing that it “will agree not to require pastoral letters.” *Id.*

⁶⁸ Lydia Currie, *I Was Barred From Becoming a Foster Parent Because I Am Jewish*, Jewish Telegraphic Agency (Feb. 5, 2019), <https://perma.cc/6NVJ-NB3C>. The agency’s policies are the subject of litigation, including a lawsuit brought by a Catholic prospective foster parent. *See* Compl., *Maddonna v. U.S. Dep’t of Health & Hum. Servs.*, No. 19-cv-03551-TMC (D.S.C. Dec. 20, 2020), ECF No. 1.

children and their families, such as denying or limiting visitation and reunification services based on the religious beliefs (or lack of religious beliefs) of a child's family of origin. A ruling in Petitioners' favor could also open the door to broad, unilateral exemptions to non-discrimination requirements in contracts to provide government services in other contexts.



CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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August 2020