No. 19-123

In the
Supreme Court of the United States

SHARONELL FULTON, ***et al.*****,**
Petitioners,
v.
CITY OF PHILADELPHIA, PA., ***et al.*****,**
Respondents.

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

BRIEF *AMICI CURIAE* OF CONCERNED WOMEN FOR AMERICA, CENTER FOR ARIZONA POLICY, THE DELEWARE FAMILY POLICY COUNCIL, THE FAMILY FOUNDATION, HAWAII FAMILY FORUM, THE ILLINOIS FAMILY INSTITUTE, NEBRASKA FAMILY ALLIANCE, CORNERSTONE POLICY RESEARCH, WISCONSIN FAMILY ACTION, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

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STATEMENTS OF INTERESTS[1]

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

Center for Arizona Policy (CAP) is a nonprofit advocacy group whose mission is to promote and defend the foundational values of life, marriage and family, and religious freedom. CAP is dedicated to strengthening Arizona families through policy and education, and CAP works with elected officials and members of the community to make Arizona a welcoming state to raise a family.

The Delaware Family Policy Council (DFPC) is a non-partisan, non-profit organization based in Delaware committed to rebuilding a culture of life, marriage, family, and religious freedom. DFPC works to preserve and defend the God-

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[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

ordained institution of the family. DFPC believes that children should be given every opportunity to experience the unrivaled benefits from being raised by both a mother and a father in a home and that the adoption and foster agencies that make it a priority to provide that opportunity for children should be protected in their right to do so as a matter of conscience.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

Hawaii Family Forum (HFF) was established in 1998 to protect, preserve, and strengthen Hawaii's ohana (family). We are a non-profit, pro-family research and education organization that provides resources that equip citizens to make their voices heard on critical social policy issues involving the sanctity of human life, the preservation of religious liberties, and the well-being of the ohana as the building block of society.

The Illinois Family Institute (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and

conscience rights for all individuals and organizations, including in the area of foster care for needy children.

Nebraska Family Alliance (NFA) is a non-profit policy, research, and education organization that advocates for strong family values, the sanctity of human life, and religious freedom. The diverse, statewide network of NFA is composed of thousands of individuals, families, and faith-leaders who seek to advance a culture in which the religious freedom and conscience rights of all citizens are protected and preserved. NFA's public policy efforts focus on protecting unborn children, supporting pregnant women, defending religious freedom, and ensuring fair and equitable treatment for all foster home agencies.

Cornerstone Policy Research is a non-partisan, non-profit organization committed to promoting strong family values, defending religious freedom, parental rights, and the sanctity of human life in New Hampshire through citizen advocacy and education. We seek to advance a culture where God is honored, religious freedom flourishes, families thrive, and life is cherished. Cornerstone supports first amendment religious liberties for every citizen and defends against discrimination on the basis of faith. Our interest in this case is derived from our commitment to preserving our nation's historic dedication to public expression of religious faith, which includes honoring the faith traditions of social service providers and fighting for fair and equitable treatment for all foster home agencies, both faith-based and secular.

Wisconsin Family Action (WFA) is a Wisconsin not-for-profit organization dedicated to strengthening, preserving, and promoting marriage, family, life and religious freedom. WFA has a unique and significant statewide presence with its educational and advocacy work in public policy and the culture. WFA's interest in this case stems directly from its core issues, in particular its long-sustained efforts to protect and promote religious freedom, including allowing faith-based adoption agencies to work with the foster-care system without sacrificing their beliefs or their faith traditions.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Pennsylvania, seek to ensure that a historically accurate understanding of the Religion Clauses is presented to our country's judiciary. The NLF often represents religious organizations that have important social service ministries—for example, work in disaster relief. These organizations cannot perform these social services ministries if they must act inconsistently with their religious beliefs to do so.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the

development of the law in this area. PJI often represents religious organizations whose important ministries are fueled by their religious beliefs. Those organizations sincerely believe that they must perform their ministries consistently with their religious beliefs.

SUMMARY OF THE ARGUMENT

What do you do when important interests collide? In a case like this, which involves the multiple private interests of religion, speech, and association, you balance those fundamental interests against the public (or governmental) interest at stake. And you do so, not at a level of generality that automatically gives the governmental interest the high trump card, but at a level of specificity that gives appropriate weight to the particular facts.[2]

In this case involving foster care services, proper balancing requires an exercise of discipline to resist treating the word "discrimination" as a shibboleth, the eradication of which is automatically a "compelling" interest that overrides all others. Not all discrimination is *wrongful* discrimination. Indeed, the First Amendment protects the ability of organizations and individuals to discriminate by their differentiating among religious beliefs (Freedom of Religion), by their deciding with whom to associate (Freedom of Assembly), by their choosing

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[2] Of course, no balancing is done when, as a constitutional matter, the government is restrained from interfering in the private decision, such as a religious organization's decision as to who is to be its minister. *See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

how to put their beliefs into practice in their relationships (Freedom of Religion and Assembly), and by their determining what and what not to communicate (Freedom of Speech). When, as here, these legitimate types of discrimination come in conflict with the public interest in protecting a class of persons from harm due to their status, the particular harm to the persons being protected must be concrete and compelling in the particular circumstances if it is to override the fundamental private interests at stake.

This Court in multiple cases has set out the considerations to be balanced when private and public interests are in conflict. From these cases, relevant principles may fruitfully be gleaned. For purposes of this case, two cases are most helpful—one because of its contrasts and one due to its similarities. In *Bob Jones University v. United States*,[3] this Court found the public interest in eradicating racial discrimination in education prevailed in that particular situation. But the relative weight of the interests and their effect on the parties are far different here. The most analogous case to this one is *Wisconsin v. Yoder*.[4] As in *Yoder*, the private interests involved here are fundamental, while the class designed to be protected by the public law is not significantly threatened. Indeed, in this case, the vulnerable foster children in the middle of this tug of war are actually being harmed by the city's application of its civil rights laws.

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[3] 461 U.S. 574 (1983).
[4] 406 U.S. 205 (1972).

ARGUMENT

This case presents what has come to be known as a "hybrid," or multiple, rights situation. While your *Amici* concur that *Smith* should be reconsidered, with an appropriate balancing test also used for situations when the only private right involved is the free exercise of religion, *Smith* distinguished cases of this type in which more than one fundamental, private right is involved.[5] Here, Catholic Social Services is invoking not just its freedom to exercise its religion, but also its freedom to associate and assemble with those it selects and its right to participate in the public sphere without conditions on its speech and religious exercise. When a proper balancing test is performed as illustrated by this Court's prior cases, Catholic Social Services prevails.

I. Context Matters: Some Discrimination Is Permissible and Even Constitutionally Protected.

We all discriminate in many ways. While labeling someone as *discriminatory* is normally pejorative, saying that someone has *discriminating* taste is normally a compliment. To discriminate means only to differentiate, to make a choice.

Some discrimination is wrongful, and some wrongful discrimination is illegal. At its core, such wrongful discrimination denies the equal ultimate

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[5] *Employment Div. v. Smith*, 494 U.S. 872, 881-82 (1990).

worth of a class of persons.[6] But in determining the nature of discrimination, context always matters.[7] For instance, Title VII generally forbids sex discrimination in hiring,[8] but it allows such discrimination if it is a *bona fide* occupational requirement,[9] and regulations under Title IX[10] affirmatively recognize that sex discrimination is appropriate in sports.[11] In our Constitution, some discriminations, like age of office holders, are decreed;[12] some discriminations, like that based on race, are expressly prohibited;[13] and other discriminations, like deciding with whom you will assemble, are expressly protected.[14]

A case like this presents a clash of private and public interests that must be balanced. When doing so, this Court has traditionally and repeatedly addressed these central questions:

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[6] *See generally* Richard W. Garnett, "Religious Freedom and the Nondiscrimination Norm," in *Matters of Faith: Religious Experience and Legal Response* (Austin Saret, ed.) (Cambridge Univ. Press 2012) 217, available at https://ssrn.com/abstract=2087599 (hereinafter "Garnett").

[7] *Id.* at 194-202.

[8] 42 U.S.C. § 2000e-2(a) (2018).

[9] *Id.* § 2000e-2(e).

[10] 20 U.S.C. §§ 1681 *et seq.* (2018).

[11] 34 C.F.R. § 106.41(b), (c) (2020).

[12] *See, e.g.*, U.S. Const. art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5.

[13] *See, e.g.*, *id.* amends. XIV, XV.

[14] *Id.* amend. I. ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble").

- How fundamental are the private interests in this context?

- How important are the governmental interests in this context?

- What are the relative effects on the stakeholders of giving the public or the private rights priority in this situation?

In section IV of this brief, we set out these factors with greater depth based on this Court's precedent.

By the very nature of a balancing test, reasonable people will at times disagree over whether the Court reached the correct result in particular cases. But when the balancing test is applied in this case, there is no doubt as to which side is the weightier:

- Catholic Social Services is exercising its fundamental rights to practice its religion, to associate in the performance of its religious duties with those whom it sincerely believes are best suited to carry out its mission, and to avoid communicating a message of the city with which it disagrees.

- Philadelphia's general interest in enforcing non-discrimination against those in same-sex relationships is counterbalanced by the fact that reasonable people can and do believe that traditional, opposite-sex marriage and family structure is best for children.

- *No same-sex couple has been denied foster parenting services.*[15] Indeed, four agencies in Philadelphia have received the Human Rights Campaign's "Seal of Approval," recognizing their excellence in serving the LGBT community's foster care needs.[16]

- On the other hand, by disallowing Catholic Social Services from qualifying any couples, the city has denied placements to needy children in homes the city concedes are acceptable.[17]

II. When Balancing the Interests, This Court Has Traditionally Looked to Their Relative Weight and How Those Involved Are Affected.

Examples are numerous, but a few will suffice to demonstrate how this Court has analyzed cases presenting competing private and public interests. In *Locke v. Davey*,[18] the State of Washington had refused to provide a scholarship to a theology student studying for the ministry. In conflict were the student's right to be free of religious discrimination and the and the State's interest in not paying for a minister's education, which it interpreted as violating the State's constitutional provision prohibiting public funding of religious schools. To resolve this conflict, the Court recognized the presumptive invalidity of programs that expressly

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[15] Petition for Writ of Certiorari, *Fulton v. Phila.* (July 22, 2019, No. 19-123) (hereinafter, "Cert. Pet.") at 8.
[16] Cert. Pet. at 6-7.
[17] *See* Cert. Pet. at 6-10, 15.
[18] 540 U.S. 712 (2004).

discriminate against religion, but noted that, in the case at hand, the refusal to grant a scholarship was "far milder" than imposition of criminal or civil sanctions.[19] And because the student was not foreclosed from studying for the ministry, the denial of scholarship money was not nearly as detrimental to him as denying "to ministers the right to participate in the political affairs of the community"[20] or requiring him "to choose between [his] religious beliefs and receiving a government benefit."[21] The *Locke* Court recognized strong countervailing interests in the particular context: both the State and Federal Constitutions guard against the establishment of religion by funding churches or their ministers, and the student was preparing for the ministry, a concern with "no counterpart with respect to other callings or professions."[22]

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[19] *Id.* at 720 (distinguishing *Church of Lukumi Babalu Aye, Inc. v. Hialech*, 508 U.S. 520 (1993).

[20] *Id.* (distinguishing *McDaniel v. Paty*, 435 U.S. 618 (1978)).

[21] *Id.* at 720-21 (distinguishing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); and *Sherbert v. Verner*, 374 U.S. 398 (1963)).

[22] *Id.* at 721-25. Justice Scalia and Thomas balanced the interests differently and dissented. *Id.* at 726-34 (Scalia, J., & Thomas, J., dissenting). Justice Thomas wrote separately to note that studying theology "does not necessarily implicate religious devotion or faith." *Id.* at 734 (Thomas, J., dissenting). For an article criticizing the majority's balancing of the interests, see Douglas Laycock, "Theology Scholarships, the Pledge of Allegiance, and Religious Liberty," 118 *Harv. L. Rev.* 155 (2004). The majority's resolution also appears to be in tension with

Boy Scouts of America v. Dale[23] is also instructive. The Boy Scouts at the time prohibited homosexuals from being leaders and, when Dale began speaking publicly about his homosexual orientation, he was removed from his assistant scoutmaster position. New Jersey found this to be unlawful discrimination and ordered the Boy Scouts to readmit him. The Court found that, in the circumstances, the State's interest in its nondiscrimination statute was outweighed by the organization's private interests, even though the State had identified its interest in eliminating "the destructive consequences of discrimination from our society" to be "compelling."[24] The Boy Scouts' interests were the constitutionally protected ones to assemble with those of its choosing and to communicate its belief as to the morality of a homosexual lifestyle.

The *Dale* majority noted that the "forced inclusion of an unwanted person in a group infringes on the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[25] The majority then reviewed the particular circumstances and found that, because Dale had become a public personage advocating views about homosexual conduct that were directly contrary to the Boy Scouts' sincerely held position,

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this Court's later decision in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

[23] 530 U.S. 640 (2000).

[24] *Id.* at 647 (quoting *Dale v. Boy Scouts of Am.*, 160 N.J. 562, 619-20, 734 A.2d 1196, 1227-28 (1999)).

[25] *Id.* at 648.

the harm to the organization of being forced to reinstate him was substantial.[26] In contradistinction, the majority observed that New Jersey was applying its prohibition against discrimination in public accommodations in a non-traditional setting, and, while in a common carrier and commercial situation associational rights are typically diluted, they were not to the same degree for the Boy Scouts.[27] In this more selective context, this Court found the Boy Scouts' "associational interest in freedom of expression" weightier than New Jersey's interest in non-discrimination.[28]

The weighing came out otherwise in *Roberts v. United States Jaycees*[29] due to the different circumstances. The Minnesota civil rights laws forbade discrimination against women, and the challenge was to the Jaycees' allowing women to attend meetings as associates but allowing only men to be full members and to vote. This Court found that enforcement of Minnesota's "compelling" interest in elimination of sex discrimination "in the distribution of publicly available goods, services, and other advantages" at most effected only an "incidental abridgment of the Jaycees' protected

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[26] *Id.* at 653-56.
[27] *Id.* at 656-59 (citing *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995)).
[28] *Id.* at 658-59. *See generally* John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale Univ. Press 2012) (hereinafter, "Inazu"). Justice Stevens, Souter, Ginsburg, and Breyer weighed the competing interests differently and dissented. *Id.* at 663-702 (Stevens, J., & Souter, J., dissenting).
[29] 468 U.S. 609 (1984).

speech" that was "no greater than necessary."[30] Especially given that the Jaycees allowed women to attend and participate at meetings, the majority found the asserted effects on the Jaycees' speech to be hypothetical and "attenuated at best," with "no basis in the record": "the [Minnesota Human Rights] Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[31]

These cases are not presented to argue whether the Court properly balanced the relevant interests. They are presented to demonstrate, in general, the considerations to be weighed when a case presents conflicting interests: the pedigree and purpose of the competing interests must be measured in the particular context and by the challenged action's relative effects on the parties involved. The decisions discussed in the next section apply this balancing analysis in ways particularly helpful to assess the facts and interests involved here.

III. This Case Is Readily Distinguished from ***Bob Jones University*** and Is Controlled by ***Yoder***.

Particularly instructive for deciding this case is to compare its facts with those of *Bob Jones University v. United States*[32] and *Wisconsin v.*

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[30] *Id.* at 626-28.
[31] *Id.* at 627.
[32] 461 U.S. 574 (1983).

Yoder.[33] The Catholic Social Services situation here is sharply distinguishable from that in *Bob Jones University* but closely parallel to that in *Yoder*.

A. The Differences Between This Case and *Bob Jones University* Are Significant.

In *Bob Jones University*, the university challenged the decision of the Internal Revenue Service to revoke its tax-exempt status because it forbade interracial dating and marriage among its students.[34] In denying the university's free exercise claim,[35] the Court articulated the competing interests and weighed them as follows:

- Tax exemptions for charities are for public purposes and, traditionally, tax benefits have only been provided to private institutions that act consistently with public policy.[36]

- "[R]acial discrimination in education violates deeply and widely accepted views of elementary justice," as reflected in the Constitution, federal statutes, and

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[33] 406 U.S. 205 (1972).

[34] 461 U.S. at 580-82.

[35] Justice Powell concurred in part and in the judgment. *Id.* at 606. Justice Rehnquist dissented. *Id.* at 612. For an article criticizing the Court's balancing of the interests, *see* Robert M. Cover, "The Supreme Court 1982 Term, Foreword: Nomos and Narrative," 97 *Harv. L. Rev.* 4 (1983).

[36] 461 U.S. at 585-92.

Supreme Court opinions.[37]

- Racial discrimination, in addition to violating "a most fundamental national public policy," affects the service provided, exerting a "pervasive influence on the entire educational process," including on the students.[38]

- While the withdrawal of tax benefits brought into play the religious schools' right to exercise their religion, it did not "prevent those schools from observing their religious tenets."[39]

The Court concluded that the "governmental interest substantially outweigh[ed]" the burden of denial of a tax exemption on the continuing exercise by the schools of their religious beliefs.[40]

1. The Interest in Promoting Same-Sex Family Practices Is Not of the Same Significance as the Interest in Prohibiting Racial Discrimination in Education.

a. Ancient vs. Recent Pedigree.

Philadelphia's interest in eradicating discrimination against same-sex family practices is

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[37] *Id.* at 592.

[38] *Id.* at 593-94 (quoting *Norwood v. Harrison*, 413 U.S. 455, 468-69 (1973)).

[39] *Id.* at 603-04.

[40] *Id.* at 604.

undoubtedly sincerely and ardently held, but it is not of the same pedigree or caliber as the nation's fundamental public policy against discrimination in education based on race. The addition of "sexual orientation" to Philadelphia's ordinances is of more recent vintage,[41] and the State of Pennsylvania to date has resisted efforts to make it a statewide prohibition.[42] Prohibitions against race discrimination, on the other hand, are embedded in the Constitution.[43]

Of course, in *Obergefell v. Hodges*[44] this Court struck down prohibitions on same-sex couples from being afforded the fundamental right of marriage. But, at the same time, all members of the Court acknowledged that, for centuries, same-sex marriage was considered immoral and against public policy and that reasonable persons can and do still find it immoral and improper.[45]

b. Conduct vs. Characteristic.

The racial discrimination at issue in *Bob Jones*

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[41] *See* Fair Practices Ordinance, Phila. Code § 9-1102(1)(e), which added "sexual orientation" as a protected category in 1982. *See* https://www.freedomforallamericans.org/category/states/pa/.

[42] For example, the Pennsylvania Human Relations Act does not include sexual orientation among its protected categories. *See* 43 Pa. Cons. Stat. § 953 (2020).

[43] *See* U.S. Const. amend. XIV.

[44] 135 S. Ct. 2584 (2015).

[45] *Id.* at 2602 (maj. op.), 2625-26 (Roberts, J., dissenting), 2630 (Scalia, J., dissenting), 2638 (Thomas, J., dissenting), 2642 (Alito, J., dissenting).

University and the sexual orientation discrimination at issue here also are different in kind. Race is an inherent, immutable, and externally apparent characteristic. Catholic Social Services does not discriminate on the basis of a person having homosexual *inclinations*, which may be influenced by both heredity and environment. Instead, Catholic Social Services discriminates only on the basis of homosexual *conduct*, and only that conduct put into practice in the context of its own ministry to children. This Court in *Obergefell* recognized that religious individuals and groups could rationally disagree with the appropriateness of *conduct*, in that case same-sex marriage.[46]

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[46] *Id.* at 2602. And even if religious belief were not involved, ample social science supports the position of Catholic Social Services. Studies reflect the greater incidence of divorce among homosexual couples and less social dysfunction experienced by children raised by opposite-sex parents. *See, e.g.,* Glenn T. Stanton, "What We Can Learn from Same Sex Couples," *First Things*, 5/31/13, https://www.firstthings.com/web-exclusives/2013/05/what-we-can-learn-from-same-sex-couples (reporting on studies of Scandinavian same-sex couples that show twice the rate of dissolutions among male-male couples than heterosexual couples and the lesbian dissolution rate being an additional 77 percent higher than male-male couples); Mark Regnerus, "New Research on Same-Sex Households Reveals Kids Do Best With Mom and Dad," https://www.thepublicdiscourse.com/2015/02/14417/. The author summarized the results of a study ("Emotional Problems among Children with Same-Sex Parents: Difference by Definition," available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500537, and published in the February 2015 issue of the *British Journal of Education, Society, and Behavioural Science* as follows: "[O]n eight out of twelve

This distinction between conduct and beliefs (or inclinations) is well established in this Court's case law. For example in *Cantwell v. Connecticut*,[47] this Court observed that the First "Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[48] Unlike with homosexuality, there is no such thing as a racial inclination, and there is no voluntary conduct specific to only one race.

While it can be argued that, in *Bob Jones University*, the university was also focusing its racial prohibitions on conduct—in that case, interracial dating and marriage—there are key distinctions here.[49] First, the conduct involved in *Bob Jones University* did not directly relate to the educational mission of the school. For Catholic Social Services, it does. Second, marriage involves a fundamental right. Foster parenting does not.

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psychometric measures, the risk of clinical emotional problems, developmental problems, or use of mental health treatment services is nearly double among those with same-sex parents when contrasted with children of opposite-sex parents."

[47] 310 U.S. 296 (1940).

[48] *Id.* at 303-04.

[49] In the companion case in *Bob Jones University*, the elementary and secondary school did not base its discriminatory admissions policy on conduct, but only on the race of the applicant. 461 U.S. at 583.

2. Catholic Social Services Limiting Its Placements to Opposite-Sex Couples Does Not Prejudice the Children It Serves or Deny Same-sex Couples Fostering Opportunities.

a. Harm to Primary Beneficiaries of Foster Care Services

In *Bob Jones University*, it was important that the racial discrimination practiced by the schools adversely affected the educational experience itself for the students.[50] The opposite is true here. Because needy children are potentially being denied home care by Philadelphia's enforcement of its ordinance, it is to the children's obvious detriment to do so. Moreover, Philadelphia does not contend that placements with same-sex parents are in any way *superior* for children than placements with opposite-sex couples.

b. No Harm to Intended Beneficiaries.

Neither are the presumed beneficiaries of the ordinance, the same-sex couples themselves, prejudiced by allowing Catholic Social Services to continue performance. No same-sex couple has ever asked Catholic Social Services for a home study,[51] and the record contains no evidence that any same-sex couple has been denied the opportunity for foster parenting a child because of Catholic Social Services

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[50] *Id.*

[51] Cert. Pet. Appx. at 259a.

practicing its religious beliefs.[52] Indeed, four foster care agencies have been lauded for their service to the LGBT community.[53]

3. Unlike in *Bob Jones University*, Enforcement of the Ordinance in This Circumstance Shuts Down What Catholic Social Services Does.

This Court in *Bob Jones University* recognized that the schools were acting pursuant to their religious beliefs, but it found that denying the tax benefit due to their racial discrimination did not unduly burden their religious exercise, in large part because it did not prevent the schools from continuing their religious practice of discrimination as they continued their educational services.[54] That is not the case here. Philadelphia's enforcement of this ordinance has put Catholic Social Services out of the business of foster care placement. That is the ultimate penalty for practicing its faith. The interests of Catholic Social Services are at their apogee in these circumstances.

B. This Case Is Controlled by *Yoder*.

In *Yoder*, the clashing interests were those of Wisconsin's compulsory education law requiring attendance in formal schooling until sixteen years of age and those of the Amish parents who, for religious

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[52] Cert. Pet. Appx. at 232a.

[53] Cert. Pet. at 6-7.

[54] 461 U.S. at 603-04. *See also Locke*, 540 U.S. at 720-21 (finding the student could continue studying for ministry); *Roberts*, 468 U.S. at 627 (finding organization could continue to pursue its purpose).

reasons, refused to allow their children to attend high school.[55] This Court's balancing of the interests in *Yoder* sets out a proper roadmap for this and other cases.

1. Like the Parents in *Yoder*, Catholic Social Services Here Acts Based on Longstanding, Fundamental Rights.

In *Yoder*, the parents based their defense on (1) the right to exercise their religion as they interpreted it and (2) the right of parents to direct the education of their children.[56] The Court noted that both of these rights were of long standing in our society. Moreover, it recognized that the parents' interests were aligned with the Constitution's prohibition on the establishment of religion by the government.[57] These rights historically have been "zealously protected," and the Court ranked them as "fundamental" and able to withstand Wisconsin's assertion of interests that were themselves, concededly, of "paramount responsibility."[58] The Court remarked that "this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture

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[55] 406 U.S. at 207. This Court in *Smith* held that *Yoder* fell outside of the holding in that case because, in *Yoder*, the parents' free exercise rights were buttressed by their fundamental right to direct the education of their children. 494 U.S. at 881; *see Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

[56] 406 U.S. at 213-15.

[57] *Id.* at 214; *see* U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion").

[58] 406 U.S. at 213-14.

of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."[59]

Catholic Social Services also rests on fundamental rights of long standing. Like the parents in *Yoder*, Catholic Social Services is seeking to practice its religion in the way it has determined to be both appropriate and consistent with its doctrine, while resisting pressure from the State to act inconsistently with its beliefs.

In addition, the right of assembly and its related right of expressive association have a long pedigree and are directly involved here.[60] Catholic Social Services desires when placing children to associate only with those who act consistently with their religious beliefs. Philadelphia is attempting to compel Catholic Social Services to associate with those who do not.

Similarly, Catholic Social Services is protected in this context by the right not to be compelled to communicate a message that is antithetical to its beliefs. Philadelphia insists that, to continue its ministry, Catholic Social Services must affirm that parenting by same-sex couples is just as legitimate—and just as beneficial to children—as parenting by opposite-sex couples. But that is contrary to Roman

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[59] *Id.* at 232.

[60] *See* U.S. Const. amend I ("Congress shall make no law . . . abridging the . . . right of the people peaceably to assemble"); *see generally* Inazu, *supra* note 28.

Catholic doctrine,[61] and compelling Catholic Social Services to mouth the opposite in either word or deed infringes on its rights not to be compelled to speak a message sponsored by the government with which it disagrees. This, too, is a fundamental right rooted in the right to free speech enshrined in our country's foundational document.[62]

Finally, the interests undergirding the Establishment Clause, as in *Yoder*, also support Catholic Social Services, not Philadelphia. Some of the religious-oriented abuses fresh in the minds of the Framers were the British Government's refusal to license nonconformist pastors or to allow Methodists and others (like John Wesley and George Whitefield) to use Church of England buildings to preach.[63] The Framers of the Constitution wished to make sure such discrimination due to creed did not occur at the federal level by including the Establishment Clause in the First Amendment.[64]

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[61] It is also inconsistent with empirical studies. See note 46 *supra*.

[62] *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376-78 (2018); *Agency for Int'l Dev. v. AOSI*, 570 U.S. 205, 212 (2013); *Knox v. SEIU*, 567 U.S. 298, 309 (2012).

[63] *See* Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion," 44 *Wm. & Mary L. Rev.* 2105 (2003) (hereinafter, "McConnell"). The freedom of assembly was also enshrined in the First Amendment to protect against incidents such as William Penn being arrested for preaching to a small group in a London street. *See* Inazu, *supra* note 28, at 24-25.

[64] *See also* U.S. Const. art. VI, cl. 3 ("no religious test shall ever be required as a qualification to any office or public

Philadelphia's discrimination against Catholic Social Services runs contrary to those principles.

2. Like the Public Interests in *Yoder*, Philadelphia's Interests Here Are Not of Long Duration or Foundational.

A governmental interest can be important, even touching "paramount" and "high" responsibilities, as this Court described Wisconsin's interests in *Yoder*,[65] and yet be of lesser weight than the private interests involved in the situation. Simply describing the governmental interest with expansive prose or calling it "compelling" does not make it "absolute to the exclusion or subordination of all other interests."[66] To the contrary, this Court has afforded religious organizations significant protection under the First Amendment, calling the First Amendment "the transcendent value,"[67] and "high 'in the scale of our national values.'"[68]

When analyzing the relevant public interest in *Yoder*, this Court rejected as overly generalized the assertion put forward by Wisconsin that the interest to be weighed was that children be educated to

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trust under the United States"); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017) (holding that it violates the Religion Clauses to refuse a government benefit due to the religious nature of the organization); *see generally* McConnell, *supra* note 63.

[65] 406 U.S. at 213.

[66] *Id.* at 215.

[67] *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

[68] *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979).

prepare them for adulthood and citizenship. The interest had to be tailored to the particular circumstances. In *Yoder*, specifically at stake was the State requiring children to attend formal high school until sixteen years of age, *i.e.*, for an additional two years of schooling than the Amish parents allowed.[69] The Court noted that (a) the children for those two years were not being denied additional education, but were receiving from their parents in-home, vocational training and instruction consistent with their religious beliefs; (b) the "requirement for compulsory education beyond the eighth grade is a relatively recent development in our history"; and (c) historically, education has been in the province of religious organizations, rather than the State.[70]

These lessons from *Yoder* are directly applicable here. The protection of a homosexual lifestyle is of recent vintage, and it is far from being universally protected or from being universally accepted as prudent public policy. Sexual orientation is not even a protected category under the civil rights laws of the Commonwealth of Pennsylvania. It is in no sense foundational, nor does it have deep roots in our history. To the contrary, legal protection for homosexual conduct and marriage reverses longstanding public policy.[71]

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[69] *See* 406 U.S. at 221-22.
[70] *Id*. at 223-27.
[71] *See, e.g.*, 1 Wm. Blackstone, *Commentaries* *442-45; *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 ("It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex

Yoder also dispenses with Philadelphia's attempt (largely adopted by the Third Circuit below[72]) to paint the relevant interests in the broad, sweeping strokes of being "for equality" and "against discrimination." Yes, the city has added "sexual orientation" to its civil rights ordinance, but that does not make it as fundamental an interest as race simply because it appears in the same listing.

Like education in *Yoder*, the care of needy children has historically been handled by religious organizations, and it is only relatively recently that the State has controlled the process.[73] Moreover, while the right to marriage was the fundamental right at issue in *Obergefell*,[74] there is no corresponding, foundational right of individuals to be foster parents. The relevant governmental interests here, when properly defined, are of significantly less weight than those involved in *Yoder*.

3. Like in *Yoder*, the Relevant Parties That the Governmental Interest Protects Here Are Not Significantly Advantaged by Its Enforcement.

Next, the Court in *Yoder* in balancing the private and public interests in conflict took a careful look at whether the beneficiaries of the government policy were suffering injury. It recounted testimony

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partners."); *id.* at 2611 (Roberts, J., dissenting) ("[A] State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational.").

[72] *See* 922 F.3d 140, 159 (3d Cir. 2019).

[73] *See* Cert. Pet. at 5-6, 38-39.

[74] 135 S. Ct. at 2593.

that the Amish children were not disadvantaged by ending their formal education after middle school, either in terms of being self-sufficient in life skills or preparing for constructive citizenship.[75] No child of Amish parents complained of the Amish community's practice.[76] In those circumstances, the interests asserted by Wisconsin were not weighty enough to counterbalance the fundamental rights of the Amish religious community as developed and exercised over several centuries.[77]

The preponderance of the private over the governmental interests here is even starker than in *Yoder*. Catholic Social Services was serving the Philadelphia community with foster care services well before the city supplemented those services and began to regulate them.[78] Children in need are not being benefitted by enforcement of this ordinance that results in removing Catholic Social Services from doing foster placements; they are being harmed, instead.[79] Nor are same-sex couples being deprived of the opportunity to provide foster care. None have ever solicited Catholic Social Services for a home care study, and they may get such services from other organizations.[80]

The only "interest" being pursued here by the city is to punish Catholic Social Services for

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[75] 406 U.S. at 223-28, 233-34.
[76] *Id.* at 229-30.
[77] *Id.* at 234-36.
[78] Cert. Pet. at 6.
[79] Cert. Pet. at 17-18.
[80] *Id.* at 8.

observing its religious beliefs that are disapproved by the city. This is not a valid purpose. As Professor Michael McConnell has observed, "many reasonable . . . worldviews . . . are compatible with good citizenship, and it is neither necessary nor desirable [for the government] to attempt to forge agreement."[81]

The genius of the Religion, Free Speech, and Assembly Clauses is the promotion of tolerance among our citizenry and an appreciation of religious traditions and their beneficial effects throughout our citizenry.[82] The State has no legitimate interest in punishing individuals or organizations just because they do not adopt the latest public dogma, especially when it prevents those individuals and organizations from acting consistently with their religious beliefs. And that is doubly so when, like here, the performance of the religious duties being stopped is of great social benefit.

IV. This Court Should Specify a Proper Balancing Test for Adjudicating Conflicting Private and Public Interests.

This Court, following the lead of many prior decisions, should adopt a balancing test to determine whether private or public interests prevail when they conflict. That balancing requires three basic steps:

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[81] Michael W. McConnell, "The New Establishmentarianism," 75 *Chi.-Kent L. Rev.* 453, 454 (1999).

[82] *See generally* Garnett, *supra* note 6, at 224-27; Inazu, *supra* note 28.

(1) An analysis of the weight of the private interests at issue. This entails, at least, how long the right has been acknowledged under our common-law tradition; whether the right has been embedded explicitly in our Constitution; and the confluence of related, mutually reinforcing rights.

(2) Next and similarly, an analysis of the weight of the public interests at issue. When the private rights involved are fundamental, the State must have a compelling interest to override it. And whether it does so requires an appropriate definition in the context of the particular case; generalities such as "equal rights" or "eliminating discrimination" and attempted analogies to our most fundamental interests such as race should be resisted. Moreover, it must be recognized that the Constitution has already struck the balance in many instances, e.g., by valuing free speech over the sensibilities of those hurt by or objecting to that speech.[83] To have weight in the balancing, harm must be tangible. That some suffer hurt feelings because others disapprove of their conduct deserves no weight.

(3) Finally, an analysis, in the particular circumstances of the case, of the effects of enforcing the governmental interests. This includes, at a minimum, determining the

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[83] *See, e.g.*, *McCullen v. Coakly*, 573 U.S. 464, 481 (2014); *Cantwell*, 310 U.S. at 310-11.

> extent enforcement inhibits the exercise of the relevant private rights, the extent the public interests being advanced are actually furthered, and whether the remedy imposed is suitably tailored to the harm addressed or is needlessly restricting the private rights involved.[84]

When this analysis is applied here, the result is clear. Catholic Social Services' interests overwhelm those advanced by Philadelphia.

CONCLUSION

The Third Circuit below raised the hobgoblin that, were Catholic Social Services to prevail, the whole edifice of the civil rights laws of this country would crumble.[85] This sounds a false alarm. The only real interest of Philadelphia here is the ephemeral one of not making same-sex couples feel bad because some religious organizations believe their cohabitation is immoral. Philadelphia's remedy for that is to force the religious dissenter from the field, to the detriment of both the organization and the needy children it serves. Our system of government recognizes that preserving private rights of religion, speech, and assembly are more important than making sure no one's feelings are hurt.[86]

This Court should reaffirm that principle here and reverse the Third Circuit. "A way of life that is odd or even erratic but interferes with no rights or

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[84] *See, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

[85] 922 F.3d at 159.

[86] *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011).

interests of others is not to be condemned because it is different."[87]

Respectfully submitted
this 3rd day of June 2020,

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[87] *Yoder*, 406 U.S. at 224.