

No. 18-2574

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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SHARONELL FULTON, et al.,

*Appellants,*

v.

CITY OF PHILADELPHIA, et al.,

*Appellees,*

SUPPORT CENTER FOR CHILD ADVOCATES and  
PHILADELPHIA FAMILY PRIDE,

*Intervenor-Appellees.*

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On Appeal from the United States District Court for the Eastern District of  
Pennsylvania in Civil Action No. 2:18-cv-2075 (Tucker, J.)

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**BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN  
RIGHTS, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER,  
DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS  
EDUCATION AND DEFENSE FUND, INC., EQUAL JUSTICE SOCIETY,  
GLBTQ LEGAL ADVOCATES & DEFENDERS, IMPACT FUND, LEGAL  
AID AT WORK, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL  
FEDERATION OF THE BLIND, AND TRANSGENDER LAW CENTER IN  
SUPPORT OF APPELLEES, INTERVENOR-APPELLEES, AND  
AFFIRMANCE OF THE DISTRICT COURT**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4), the undersigned counsel for amici curiae National Council for Lesbian Rights et al. states that amici are non-profit public interest organizations, none of which has parent corporations, and none of which issues public stock.

/s Julie Wilensky  
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## INTEREST OF AMICI CURIAE<sup>1</sup>

This brief is submitted by amici curiae National Center for Lesbian Rights and a coalition of national non-profit public interest organizations: Civil Rights Education and Enforcement Center, Disability Rights Advocates, Disability Rights Education and Defense Fund, Inc., Equal Justice Society, GLBTQ Legal Advocates & Defenders, Impact Fund, Legal Aid at Work, National Association of the Deaf, National Federation of the Blind, and Transgender Law Center.

The **National Center for Lesbian Rights (NCLR)** is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender 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 LGBT people and their 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 and has represented both adoptive parents and parents facing removal of their children through the dependency system.

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<sup>1</sup> All parties consented to the filing of this brief. 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.

Statements of interest of the additional amici are in the Addendum. Each amicus organization is dedicated to the protection and advancement of civil rights and the eradication of discrimination.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

By entering into a contract with the City of Philadelphia to provide foster parent certification and home visits, Appellants agreed to provide services consistent with Philadelphia's Fair Practices Ordinance. Appellants now claim the Constitution authorizes them to violate this neutral and generally applicable antidiscrimination law. *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661, 679 (2018). The district court properly denied the extraordinary remedy Appellants seek: a preliminary injunction *requiring* Philadelphia to provide an exemption to its Fair Practices Ordinance.

Amici write to highlight how the state's compelling interests in protecting children and eliminating discrimination powerfully 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 and bias, which is always compelling, takes on heightened importance in the child welfare context. Decisions made at every stage of dependency proceedings must be based on the welfare of children and not distorted

by discrimination or bias based on race, religion, gender, disability, sexual orientation, or gender identity.

Any bias in the system serves no child-protective purpose and undermines the goal of ensuring that state interventions protect the welfare of children.

Discrimination hurts the children the system purports to protect, for example, when providers needlessly remove children from their families of origin when they could be cared for safely, fail to provide timely reunification services, or fail to provide the most appropriate permanent placement based on the children's best interests.

To overrule the district court and find that the Constitution *prohibits* Philadelphia from enforcing its contract would severely undermine the government's compelling interests in eliminating discrimination and protecting children and families. Requiring the City to permit discrimination in the certification of foster parents 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 preconceptions or categorical rules about particular groups. It would also create intractable practical problems in the child welfare system and other contexts.

## ARGUMENT

### **I. The State Has a Compelling Interest in Eliminating Discrimination and Bias 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, federally and in every state and locality, is to promote safety, permanency, and well-being for children and families.<sup>2</sup> 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.”<sup>3</sup> *See, e.g., D.P. v. G.J.P.*, 146 A.3d 204, 211 (Pa. 2016) (noting state’s “compelling interest in safeguarding children from various kinds of physical and emotional harm and promoting their wellbeing”).

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<sup>2</sup> *See, e.g.,* U.S. Dep’t of Health & Human Servs., Children’s Bureau, *What We Do*, <https://perma.cc/9SS8-RHEN>; U.S. Dep’t of Health & Human Servs., Children’s Bureau, *National Goals*, <https://perma.cc/AV3G-MGVL>. 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 & Human Servs., Child Welfare Info. Gateway, *How the Child Welfare System Works* 1 (2013), <https://perma.cc/W757-RGHB>.

<sup>3</sup> *See* City of Phila. Dep’t of Human Servs., *What We Do*, <https://perma.cc/8BZR-9VDV>. The child welfare system in Pennsylvania is county-administered and state-supervised. Pa. Dep’t of Human Servs., *Office of Children, Youth and Families*, <https://perma.cc/BEQ7-FP2N>. The Philadelphia’s Department of Human Services is the county child welfare agency. *See* City of Phila. Dep’t of Human Servs., *What We Do*, *supra*.

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 Supreme 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 (1992). "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, and "parents retain a vital interest in preventing the irretrievable destruction of their family life," *Santosky*, 455 U.S. at 753, 756 (holding that the state must prove parental neglect by clear and convincing evidence).

The state's interest in ensuring the accuracy and fairness of child welfare proceedings is equally compelling. The fundamental 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.”<sup>4</sup> The federal Family First Prevention Services Act, passed 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. *See* P.L. 115-123, at 50702 (Feb. 9, 2018).

Pennsylvania similarly requires that its Juvenile Act 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 of the child dependency system in Pennsylvania is to “[r]ecognize that a child should be maintained with his or her parents whenever possible,” and that “families are capable of change

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<sup>4</sup> U.S. Dep’t of Health & Human Servs., *National Goals*, *supra*.

and, with support, most can safely care for their children.”<sup>5</sup> In Pennsylvania, as in all states, a court is required to 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 . . . .” 42 Pa. Stat. and Const. Stat. Ann. § 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.”<sup>6</sup> Consistent with these nationally recognized goals, in Philadelphia, “[t]he goal of foster care is to reunite children with their families.”<sup>7</sup>

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

In the context of the child welfare system, the government’s interest in eliminating discrimination and bias takes on heightened importance. Decisions

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<sup>5</sup> Office of Children & Families in the Courts, *Pennsylvania Dependency Benchbook* 13 (2010), <https://perma.cc/M5M3-8CZY>.

<sup>6</sup> See U.S. Dep’t of Health & Human 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 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).

<sup>7</sup> City of Phila. Dep’t of Human Servs., *What We Do*, *supra*.

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 discrimination or bias based on race, religion, gender, disability, sexual orientation, or gender identity.

As a general matter, governments at all levels have a compelling interest in eradicating discrimination.<sup>8</sup> The Supreme Court has recognized the “compelling interest in eradicating discrimination,” and 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 (1984). Antidiscrimination laws ensure “society the benefits of wide participation in political, economic and cultural life.” *Id.* at 625.

The state’s compelling interests in protecting children and eliminating discrimination powerfully converge in the child welfare system. The government’s interest in combating bias is inextricably tied to its compelling 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 the best

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<sup>8</sup> Although the district court correctly concluded that Appellants’ challenge does not implicate heightened scrutiny, the government interest in enforcing neutral, generally applicable civil rights laws and contract provisions in the context of child welfare services is not only legitimate, but compelling. *See infra* Part II.



interests of a particular child. The state needs to be able to address bias and discrimination in the child welfare system to ensure that child welfare decisions protect, rather than harm, 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 antidiscrimination 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 in 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.<sup>9</sup> 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 of 1973, which prohibits disability discrimination by entities receiving federal funding. 42 U.S.C. § 12131 *et*

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<sup>9</sup> Funding recipients are also responsible for the actions of contractors providing services to children and families on their behalf. 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, that involve Indian children who are members of or eligible for membership in a federally recognized tribe. 25 U.S.C. § 1901 *et seq.*

*seq.*; 29 U.S.C. § 794 *et seq.* Philadelphia’s programs and services are also subject to state and local antidiscrimination law, including the Pennsylvania Human Relations Act and the Philadelphia Fair Practices Ordinance. 43 Pa. Stat. and Const. Stat. Ann. § 951 *et seq.*; Phila. Code § 9-1101 *et seq.* Philadelphia’s contracts with agencies providing child welfare services, including the contract with Appellants, incorporate the Fair Practices Ordinance, which prohibits discrimination based on sex and sexual orientation, among other characteristics such as race and religion. *Fulton*, 320 F. Supp. 3d at 677, 682-83.

Enforcing these important protections ensures that children are not separated from their families based on factors unrelated to their welfare, and that all decisions regarding their placement are based on relevant factors rather than misconceptions or prejudices regarding particular groups. In this case, Philadelphia determined that “respecting and following the City’s anti-discrimination law is a compelling interest,” and that enforcing its contractual provision incorporating the Fair Practices Ordinance was “in the best interest of the children and necessary to protect its residents from discrimination.”<sup>10</sup> Similarly, as the federal 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

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<sup>10</sup> *Fulton v. City of Philadelphia*, No. 18-cv-2015, Dkt. No. 20, at 20, 28.

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.”<sup>11</sup> HHS and DOJ have also noted in context of disability discrimination that “[t]he goals of child welfare and disability non-discrimination are mutually attainable and complementary.”<sup>12</sup>

**C. Antidiscrimination Provisions 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 other disparities that the child welfare profession is actively working to reduce. Separating children from their families based on bias causes devastating harm. 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 . . . .”<sup>13</sup> Any bias in the system serves no child-protective purpose and undermines the goal of ensuring that state interventions protect the welfare of children.

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<sup>11</sup> U.S. Dep’t of Health & Human Servs. & U.S. Dep’t of Justice, *Dear Colleague* 5 (Oct. 2016), <https://perma.cc/87R9-EL8Q>.

<sup>12</sup> See U.S. Dep’t of Health & Human 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/W44M-C78E>.

<sup>13</sup> Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 Marq. L. Rev. 215, 218 (2013); *id.* at 240-243 (discussing “secondary harms” of foster care).

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 both 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 representation in the general population.<sup>14</sup> For example, Black children are represented in foster care at a rate 1.8 times greater than their proportion in the general population, and Native American children are overrepresented at a rate 2.7 times greater than their proportion in the general population.<sup>15</sup> Hispanic/Latino children are also

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<sup>14</sup> U.S. Dep't of Health & Human Servs., Child Welfare Info. Gateway, *Racial Disproportionality and Disparity in Child Welfare*, 2-3 (Nov. 2016), <https://perma.cc/J6MA-8KKM> [hereinafter *Disproportionality*]; Shamini Ganasarajah et al., Nat'l Council of Juvenile & Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2015)*, (2017), <https://perma.cc/36GA-HZRW>; 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/YML7-CLTR>; Ctr. for the Study of Soc. Policy et al., *Disparities and Disproportionality in Child Welfare: An Analysis of the Research* (Dec. 2011), <https://perma.cc/G73R-N3LG>; 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/3MFN-WQ2M>; see generally Marian S. Harris, *Racial Disproportionality in Child Welfare* (2014); Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002).

<sup>15</sup> Nat'l Indian Child Welfare Ass'n, *What Is Disproportionality in Child Welfare?* (2017), <https://perma.cc/L9MX-P8TQ>; U.S. Dep't of Health & Human Servs., *Disproportionality*, *supra*, at 3.

overrepresented in the foster care system in some jurisdictions, in some states at two or more times their proportion in the general population.<sup>16</sup> 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.”<sup>17</sup> In 2002, Black children were the least likely to exit foster care and reunify with their families.<sup>18</sup> While the average stay in foster care for white children at the end of FY 2003 was approximately 24 months, the average stay for Black children was more than 40 months.<sup>19</sup> As another example, a 2007 study found that where abuse by a family member had been reported, American Indian/Alaska Native children were four times more likely to be removed from their home and placed in foster care than white children.<sup>20</sup> As DOJ and HHS have observed, “[e]vidence of disproportionality can be a red flag signaling that additional attention is necessary

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<sup>16</sup> Ganasarajah, *supra*, at 5-6 & tbl.1, 15.

<sup>17</sup> Martin & Connelly, *supra*, at 4.

<sup>18</sup> Cooper, *supra*, at 242.

<sup>19</sup> *Id.* (citation omitted).

<sup>20</sup> Nat’l Indian Child Welfare Ass’n, *supra*.

to see if and how system structures, access to services, and delivery methods may contribute to racial and ethnic disparities.”<sup>21</sup>

Researchers have documented bias at various decisionmaking stages. For example, a 2016 report from HHS cites two 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.<sup>22</sup> A 2009 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, and 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.”<sup>23</sup> Such discrimination causes enormous harm to children and families.

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<sup>21</sup> U.S. Dep’t of Health & Human Servs. & U.S. Dep’t of Justice, *Dear Colleague*, *supra*, at 2.

<sup>22</sup> U.S. Dep’t of Health & Human Servs., *Disproportionality*, *supra*, at 6 (citing studies).

<sup>23</sup> 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/37RW-EHQP>. 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*:

Parents with disabilities are also overrepresented in the child welfare system and experience discrimination and bias. A 2012 study from the National Council on Disability concluded 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.”<sup>24</sup> The study describes an example of a Missouri couple whose two-day-old child was taken into state custody simply because both parents were blind – not based on any allegations of abuse.<sup>25</sup> The parents were eventually reunited with their daughter after 57 days, but the family’s story “shows the devastation that can occur when there is a presumption of unfitness . . . .”<sup>26</sup> A 2016 study found that 19 percent of children in foster care in the United States had been removed from their home at least in part because they had a disabled parent.<sup>27</sup> That study also found that foster children removed due to

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*An Action Research Model to Address Disproportionality*, 30 Child. & Youth Servs. Rev. 199, 202 (2008).

<sup>24</sup> Nat’l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 72 (2012), <https://perma.cc/EX98-AWS2>; see ADA Nat’l Network, *Parents with Disabilities in Child Welfare Agencies and Courts*, <https://perma.cc/DTM9-LCPC>; 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/MXB8-4DVR>.

<sup>25</sup> Nat’l Council on Disability, *supra*, at 95.

<sup>26</sup> *Id.*

<sup>27</sup> 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).

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.<sup>28</sup>

Overrepresentation in the child welfare system is amplified for children and families who may be subject to bias based on multiple overlapping characteristics that render 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.<sup>29</sup> Similarly, while little data exists on lesbian and bisexual mothers of color whose children are removed by the state, a recent study of 339 low-income Black mothers indicated that those participants who identified as lesbian or bisexual were four times more likely than those who identified as heterosexual to have lost their children to the state in child welfare proceedings.<sup>30</sup>

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<sup>28</sup> *Id.* at 25.

<sup>29</sup> 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).

<sup>30</sup> Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 Fam. L. Q. (forthcoming 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 (2016)).



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. As HHS has noted, “[t]he child 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.”<sup>31</sup> A study from CSSP notes that “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.<sup>32</sup> 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

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<sup>31</sup> U.S. Dep’t of Health & Human Servs., *Disproportionality*, *supra*, at 1.

<sup>32</sup> 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/YFY5-TAWC>; U.S. Dep’t of Health & Human Servs., Child Welfare Info. Gateway, *Addressing Racial Disproportionality in Child Welfare* (2011), <https://perma.cc/SY6F-4336>; All. for Racial Equity in Child Welfare, *Policy Actions to Reduce Racial Disproportionality and Disparities in Child Welfare: A Scan of Eleven States* (Oct. 2009), <https://perma.cc/Q27B-78PY>; Ctr. for the Study of Soc. Policy, *Places to Watch: Promising Practices to Address Racial Disproportionality in Child Welfare* (2006), <https://perma.cc/2JLB-MG55>.

advance a racial equity action agenda, data development and analysis strategies, as well as training, workforce development, and capacity-building.<sup>33</sup> According to HHS, “[s]trategies to address disproportionality and disparities are often the same strategies to improve child welfare for all children and families.”<sup>34</sup>

In Philadelphia, an evaluation recommended that “direct service staff and mandatory reporters should receive training on implicit bias,” and further recommended “examin[ing] whether training of intake, ongoing casework staff, and mandatory reporters includes sufficient content in recognizing and addressing implicit bias, especially as it pertains to issues of race and culture.”<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

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<sup>33</sup> See Miller & Esenstad, *supra*, at 6-8.

<sup>34</sup> U.S. Dep’t of Health & Human Servs., *Disproportionality*, *supra*, at 7.

<sup>35</sup> Child Welfare Policy & Practice Grp., *Evaluation of the Improving Outcomes for Children Transformation in the Child Welfare System in Philadelphia* 12, 45 (Oct. 2017), <https://perma.cc/SEF4-9Y5P>.

<sup>36</sup> Nat’l Council on Disability, *supra*, at 217-227.

<sup>37</sup> *Id.* at 219.

3. Bias at Any Stage in the Child Welfare System Serves No Child-Protective Purpose and Undermines the Goal of Ensuring That State Interventions Protect the Welfare of Children.

Bias at any stage 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 – serves no legitimate child-protective purpose and undermines the goal of ensuring that state interventions protect the integrity of the family and the welfare of children. In *Cruz v. Mississippi Department of Human Services*, 9 F. Supp. 3d 668 (S.D. Miss. 2014), the court denied the government’s motion to dismiss an immigrant mother’s civil rights lawsuit, finding that the mother presented a prima facie case that her rights were violated when her newborn was removed from her custody. Ms. Cruz, whose primary language was Chatino, had alleged that hospital and child welfare agency staff assumed Ms. Cruz had been trading sex for housing, reported Ms. Cruz to the state 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 674-679. 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 services, activities, and programs, including

foster care and adoption services, child protective services, abuse prevention services, child visitation, and the family reunification planning process.<sup>38</sup> In the disability context, HHS and DOJ issued a letter of findings to the Massachusetts Department of Children and Families concluding that DCF discriminated against Sara Gordon, a 21-year old mother with a developmental disability, citing “systemic failures,” and requesting that the agency immediately implement services and supports to allow the mother a “full and equal opportunity” to pursue reunification with her daughter.<sup>39</sup>

Discrimination based on sex or sexual orientation similarly undermines the child-protective goals of the child welfare system. In one example, two women in Kansas moved in together with their respective children, including a gender nonconforming child.<sup>40</sup> 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

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<sup>38</sup> See U.S. Dep’t of Health & Human Servs., Office for Civil Rights, *Resolution Agreement between HHS Office for Civil Rights & Miss. Dep’t of Human Servs.* (Mar. 23, 2014), <https://perma.cc/J5WA-3PCF>.

<sup>39</sup> U.S. Dep’t of Justice & U.S. Dep’t of Health & Human Servs., *Letter of Findings re: Massachusetts Dep’t of Children & Families* 2-3, 9 (Jan. 29, 2015), <https://perma.cc/Q76A-XNXA>.

<sup>40</sup> See Andrew Solomon, *Far from the Tree* 646-650 (2012).

“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 state social worker repeatedly said, “we’re not giving this child back to lesbians.”<sup>41</sup>

Unlawful discrimination on other bases, such as religion, also undermines the goals of the child welfare system. For example, a Muslim mother in Baltimore, who had grown up as a child in the foster care system, applied for a license to be a foster parent.<sup>42</sup> She passed an initial screening and completed 50 hours of training, but after a home visit, a state-contracted agency denied her application because the woman did not allow pork products in her home.<sup>43</sup>

Compelling 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. The District Court Properly Denied a Preliminary Injunction, and to Hold Otherwise Would Undermine Compelling Government Interests and Lead to Intractable Problems.**

The district court properly denied the extraordinary remedy Appellants seek: a preliminary injunction *requiring* Philadelphia to provide an exemption to its Fair

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<sup>41</sup> *See id.* at 648-50.

<sup>42</sup> Brent Jones, *ACLU: Foster Mother Rejected for Not Serving Pork*, The Baltimore Sun (Apr. 14, 2010), <https://perma.cc/GS9P-MTV5>.

<sup>43</sup> *Id.*

Practices Ordinance, incorporated into its contract with Appellants to perform taxpayer-funded services. As the district court found, by entering into the contract with Philadelphia, Appellants agreed to provide services consistent with the Fair Practices Ordinance, which Appellants now claim a constitutionally-based right to violate. *Fulton*, 320 F. Supp. 3d. at 672, 694-95. The issue is not whether the City may voluntarily choose to provide an exemption to its antidiscrimination provision in a contract with Appellants, but whether it is constitutionally *required* to do so. To find that the Constitution *prohibits* Philadelphia from enforcing its contract would undermine compelling government interests and lead to intractable problems in the child welfare system.

After a three-day evidentiary hearing, the district court properly concluded that Appellants failed to establish a likelihood of success on the merits of their claims under the First Amendment and the Pennsylvania Religious Freedom Act. *See id.* at 703-04. This case presents a straightforward application of a neutral, generally applicable antidiscrimination ordinance and contractual provision, which the district court correctly found “appear to have been neutrally and generally applied in this case,” and thus subject only to rational basis review under *Employment Division v. Smith*, 494 U.S. 872 (1990). *See id.* at 684. Such review is easily satisfied, as the City’s interest in eradicating all the forms of discrimination

prohibited by the Fair Practices Ordinance, both generally and in its contract with Appellants, is not only legitimate, but compelling.<sup>44</sup>

To hold otherwise and grant Appellants the extraordinary remedy they seek 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 antidiscrimination protections in the child welfare system is directly linked to its compelling interest in the welfare of children and families. To hold that the government must permit discrimination in decisions about potential foster parents undermines that compelling interest and subverts the government's attempts to eliminate discrimination in all aspects of the system. Such a ruling 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 categorical rules about particular groups.

A ruling in Appellants' favor would also create intractable practical problems. It would set a precedent compelling the government to permit state-contracted agencies providing child welfare services to disregard any contractual

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<sup>44</sup> As noted above, even if strict scrutiny applied, it would be satisfied, as enforcing the Fair Practices Ordinance with respect to Appellant's contract is the least restrictive means of furthering Philadelphia's compelling interest in eradicating the discrimination prohibited by the Fair Practices Ordinance. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 590-97 (6th Cir. 2018).

or statutory antidiscrimination 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.<sup>45</sup> This is not a speculative concern: in South Carolina, a Jewish woman who had been a foster parent for ten years in another state was told she could not work with a faith-based foster care agency because she did not share the organization's Christian beliefs.<sup>46</sup>

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 their contractors. It would open the door for contractors to discriminate in the provision of other services for foster 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 Appellants' favor could also open the door to broad-ranging, unilateral exemptions to antidiscrimination requirements in government contracts to provide services in other contexts.

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<sup>45</sup> In this case, Appellants 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. Appellants subsequently sent a letter to the district court representing that it "will agree not to require pastoral letters." *Id.*

<sup>46</sup> Angelia Davis, *Scrutiny of Miracle Hill's Faith-based Approach Reaches New Level*, Greenville News (Mar. 1, 2018), <https://perma.cc/EY2Q-BBW5>.



## CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the decision of the district court.

Dated: October 4, 2018

Respectfully submitted,

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## CERTIFICATES

Julie Wilensky, counsel for amici curiae, certifies as follows:

1. Pursuant to L.A.R. 28(3)(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.
2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) & Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,863 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
3. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman style, with 14-point font.
4. Pursuant to L.A.R. 31.1(c), I certify that this brief was served electronically on all counsel of record through the Court's CM/ECF system, and that the text of the electronic version of the brief is identical to the text of the paper copies to be delivered to the Clerk.
5. Pursuant to L.A.R. 31.1(c), I certify that a virus check was performed on the PDF version of this brief using the Windows Defender program (version 1.277.515.0) prior to transmitting it to the Clerk electronically and no virus was found.

Dated: October 4, 2018

/s Julie Wilensky  
Julie Wilensky

## **ADDENDUM OF ADDITIONAL AMICI**

The **Civil Rights Education and Enforcement Center (CREEC)** is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, and to ensure that everyone can fully and independently participate in our nation's civic life without discrimination based on race, gender, disability, religion, national origin, age, sexual orientation, or gender identity. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that individuals of any sexual orientation and gender identity have access to all programs, services, and benefits of public entities, especially programs as fundamental as those that support parenting and families.

**Disability Rights Advocates (DRA)** is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

**Disability Rights Education and Defense Fund, Inc. (DREDF)** is a national disability civil rights law and policy organization dedicated to securing

equal citizenship for Americans with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy and law reform efforts. Nationally recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF has consistently worked to promote the full integration of citizens with disabilities into the American mainstream, and to ensure that the civil rights of persons with disabilities are protected and advanced. Disabled parents have also been denied the right to parent or be foster parents. DREDF has a strong interest in the rights of disenfranchised and marginalized people to have the fundamental right to parent on the same basis as others.

The **Equal Justice Society (EJS)** is transforming the nation's consciousness on race through law, social science, and the arts. A national legal organization focused on restoring constitutional safeguards against discrimination, EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all citizens receive equal treatment under the law. We use a three-pronged approach to accomplish these goals, combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. Our legal strategy aims to broaden conceptions of present-day

discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience.

**GLBTQ Legal Advocates & Defenders (GLAD)** is a non-profit legal organization that engages in litigation, public policy advocacy and education to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. As counsel or amicus counsel, GLAD has represented lesbian, gay, bisexual and transgender (“LGBT”) individuals and their families regarding marriage, equal treatment of their marriages, and the imposition of religious defenses to equal treatment. *See, e.g., Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), *United States v. Windsor*, 133 S. Ct. 2675 (2013).

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. It provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights cases, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

**Legal Aid at Work (LAAW)** is a non-profit public interest law firm whose mission is to protect, preserve, and advance the rights of individuals and families

from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAAW has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g., National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g., U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). LAAW’s interest in preserving the protections by this country’s antidiscrimination laws is longstanding.

The **National Association of the Deaf (NAD)**, founded in 1880, is the oldest civil rights organization in the United States, and is the nation’s premier organization of, by, and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing individuals in the U.S. The NAD endeavors to achieve equality for its constituents through systemic changes in all aspects of society including education, employment, and ensuring equal and full access to

programs and services. Discrimination against our constituents, including in caring for children through foster placements, remains a prevalent problem for deaf and hard of hearing people in Pennsylvania and throughout the United States. How this court interprets cities' obligations to ensure nondiscrimination in foster care placements will affect deaf and hard of hearing individuals throughout the Third Circuit.

The **National Federation of the Blind (NFB)** is the largest and most influential membership organization of blind people in the United States. With tens of thousands of members, and affiliates in all fifty states, the District of Columbia, and Puerto Rico, the ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. Since its founding in 1940, the NFB has devoted significant resources toward advocacy, education, research, and development of programs to ensure that blind individuals, including blind parents, enjoy the same opportunities enjoyed by others. The NFB has taken a significant role in advocating for blind parents, including working with legal advocates to ensure that the interests of blind parents are represented in child welfare proceedings and in private custody disputes and that state laws protect the rights of parents with disabilities against the biases and assumptions that many people make about the ability of parents with disabilities to safely and confidently parent. The NFB has led the effort to pass bills on parental rights for the blind in ten states and

has developed a resource library at <https://nfb.org/blindparents> which it hopes will be helpful to anyone involved in protecting the rights of blind parents.

**Transgender Law Center (TLC)** is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.