

No. 19-123

---

IN THE  
**Supreme Court of the United States**

---

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

---

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

---

**BRIEF OF THE LEADERSHIP CONFERENCE ON  
CIVIL AND HUMAN RIGHTS, LAWYERS'  
COMMITTEE FOR CIVIL RIGHTS UNDER LAW,  
AND 28 OTHER ORGANIZATIONS AS *AMICI  
CURIAE* IN SUPPORT OF RESPONDENTS**

---

VANITA GUPTA	TODD ANTEN
MICHAEL ZUBRENSKY	<i>Counsel of Record</i>
GAYLYNN BURROUGHS	KATHLEEN M. SULLIVAN
THE LEADERSHIP CONFERENCE	ELLYDE R. THOMPSON
ON CIVIL AND HUMAN RIGHTS	JOMAIRE A. CRAWFORD
1620 L Street NW, Suite 1100	QUINN EMANUEL URQUHART
Washington, DC 20036	& SULLIVAN, LLP
	51 Madison Avenue,
KRISTEN CLARKE	22nd Floor
JON GREENBAUM	New York, NY 10010
DARIELY RODRIGUEZ	(212) 849-7000
NOAH B. BARON	toddanten@
LAWYERS' COMMITTEE FOR CIVIL	quinnemanuel.com
RIGHTS UNDER LAW	
1500 K Street NW, Suite 900	
Washington, DC 20005	

*Counsel for Amici Curiae*

August 20, 2020

---

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	4
I. ANTI-DISCRIMINATION MEASURES ARE PROPERLY TAILORED TO ADVANCE A COMPELLING STATE INTEREST .....	4
A. The Government Has A Compelling State Interest In Eradicating Discrimination .....	5
B. LGBT People—Especially LGBT People Of Color—Are Among Those In Greatest Need Of Anti-Discrimination Protections .....	9
C. The Least Restrictive Way To Eradicate Discrimination Is To Prohibit It To The Greatest Extent Permissible .....	13
D. Similar First Amendment Objections Were Once Used To Challenge Application Of Civil Rights Laws To Protect People Of Color .....	18
II. MAINTAINING THE UNIFORMITY OF ANTI-DISCRIMINATION REQUIREMENTS IN THE CONTEXT OF GOVERNMENT CONTRACTS IS OF PARTICULAR IMPORTANCE .....	21
III. OPENING THE DOOR TO DISCRIMINATION AGAINST LGBT FOSTER CARE APPLICANTS WILL DISPROPORTIONATELY HARM PEOPLE OF COLOR, AND ESPECIALLY CHILDREN OF COLOR .....	26
CONCLUSION .....	33
APPENDIX: LIST OF <i>AMICI CURIAE</i> .....	1a

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987).....	9
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1983).....	9, 17, 19
<i>Bostock v. Clayton County</i> , 140 S. Ct. 1731 (2020).....	10
<i>Brown v. Board of Educ.</i> , 347 U.S. 483 (1954).....	7
<i>United States v. Burke</i> , 504 U.S. 229 (1992).....	14
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	5
<i>Chestnut Hill Coll. v. Pennsylvania Human Relations Comm’n</i> , 158 A.3d 251 (Pa. Commw. Ct. 2017) .....	20, 21
<i>Christian Legal Soc’y v. Martinez</i> , 561 U.S. 661 (2010).....	22, 25
<i>Daniel v. Paul</i> , 395 U.S. 298 (1969).....	15
<i>EEOC v. Mississippi Coll.</i> , 626 F.2d 477 (5th Cir. 1980) .....	9
<i>Fatihah v. Neal</i> , No. 16-cv-00058, Dkt. 97 (E.D. Okla. Dec. 19, 2018).....	21
<i>Gong Lum v. Rice</i> , 285 U.S. 78 (1927).....	6
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 379 U.S. 241 (1964).....	9, 15
<i>Hishon v. King &amp; Spalding</i> , 467 U.S. 69 (1984).....	18

<i>Hurley v. Irish-Am. Gay, Lesbian &amp; Bisexual Grp. of Boston,</i> 515 U.S. 557 (1995).....	10
<i>Korematsu v. United States,</i> 323 U.S. 214 (1944).....	7
<i>Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n,</i> 138 S. Ct. 1719 (2018).....	15
<i>McLaurin v. Oklahoma State Regents for Higher Ed.,</i> 339 U.S. 637 (1950).....	7
<i>Morgan v. Virginia,</i> 328 U.S. 373 (1946).....	7
<i>Newman v. Piggie Park Enters.,</i> 390 U.S. 400 (1968).....	18, 20
377 F.2d 433 (4th Cir. 1967) .....	20
256 F. Supp. 941 (D.S.C. 1966) .....	20
<i>Obergefell v. Hodges,</i> 576 U.S. 644 (2015).....	15
<i>Palmore v. Sidoti,</i> 466 U.S. 429 (1984).....	31
<i>Regents of Univ. of Cal. v. Bakke,</i> 438 U.S. 265 (1978).....	22
<i>Richmond v. J.A. Croson Co.,</i> 488 U.S. 469 (1989).....	22
<i>Roberts v. U.S. Jaycees,</i> 468 U.S. 609 (1984).....	8, 9, 10, 14, 23
<i>Scott v. Emerson,</i> 15 Mo. 576 (Mo. 1852) .....	18
<i>Smith v. Allwright,</i> 321 U.S. 649 (1944).....	7
<i>SmithKline Beecham Corp. v. Abbott Labs.,</i> 740 F.3d 471 (9th Cir. 2014) .....	11
<i>Swanner v. Anchorage Equal Rights Comm’n,</i> 874 P.2d 274 (Alaska 1994) .....	14

<i>Sweatt v. Painter</i> , 339 U.S. 629 (1950).....	7
--	---

### Statutes and Regulations

42 U.S.C. § 2000a(a).....	8
Discrimination on the Basis of Sex, Final Rule, 81 Fed. Reg. 39,108 (June 15, 2016) .....	23
Exec. Order No. 8,802, 6 Fed. Reg. 3109 (June 5, 1941) .....	24
Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) .....	7
Exec. Order No. 9,346, 8 Fed. Reg. 7183 (May 27, 1943) .....	24
Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) .....	24
Secretary’s Order No. 26-05, 31 Fed. Reg. 6921 (May 11, 1966) .....	25
Exec. Order No. 11,375, 32 Fed. Reg. 14303 (Oct. 13, 1967).....	24
Exec. Order No. 13,672, 79 Fed. Reg. 42971 (July 21, 2014) .....	24

### Other Authorities

Annie E. Casey Foundation, <i>Child population by race in the United States</i> , KIDS COUNT DATA CTR. (AUG. 2019) .....	28
M.V. Lee Badgett et al., <i>Evidence from the Front- lines on Sexual Orientation and Gender Identi- ty Discrimination</i> , CTR. FOR EMP. EQUITY (July 2018).....	11
BLACK FUTURES LAB, WHEN THE RAINBOW IS NOT ENOUGH: LGB+ VOICES IN THE 2019 BLACK CENSUS (June 2019).....	30
Robert H. Bork, <i>Against the Bill</i> , CHI. TRIB. (Mar. 1, 1964).....	19

Sucheng Chan, <i>ASIAN AMERICANS: AN INTERPRETIVE HISTORY</i> (1991).....	6
Kerith J. Conron & Shoshana K. Goldberg, <i>WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES</i> (July 2020) .....	29
CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, <i>PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR LGBT PEOPLE OF COLOR</i> (June 2015) .....	12, 13, 16
CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., <i>A NATIONAL LOOK AT THE USE OF CONGREGATE CARE IN CHILD WELFARE</i> (May 13, 2015).....	28
CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., <i>REPORT NO. 26, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM</i> (Aug. 22, 2019) .....	27, 28
CONVENTION OF MINISTERS, <i>AN ADDRESS TO CHRISTIANS THROUGHOUT THE WORLD</i> (1863) .....	18
William N. Eskridge Jr., <i>Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms</i> , 45 <i>GA. L. REV.</i> 657 (2011) .....	18
Rachel Farr & Charlotte Patterson, <i>Transracial Adoption by Lesbian, Gay, and Heterosexual Couples: Who Completes Transracial Adoptions and With What Results?</i> , 12 <i>ADOPTION Q.</i> 187 (2009).....	27
<i>Federal Government Contracting for Fiscal Year 2018</i> , U.S. GOV’T ACCOUNTABILITY OFF.: <i>WATCHBLOG</i> (May 28, 2019).....	22
<i>50 years later, interracial couples still face hostility from strangers</i> , <i>CBS NEWS</i> (June 12, 2017).....	30
John Hope Franklin, <i>History of Racial Segregation in the United States</i> , 304 <i>ANNALS AM. ACAD. POL. &amp; SOC. SCI.</i> 1 (1956) .....	6

Gary J. Gates, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY (Mar. 2015) .....	30
Alejandra Gavilanes, <i>Interracial couples face discrimination, cultural differences</i> , DAILY TEXAN (Jan. 29, 2020).....	30
Abbie E. Goldberg, <i>Lesbian and Heterosexual Preadoptive Couples' Openness to Transracial Adoption</i> , 79 AM. J. ORTHOPSYCHIATRY 103 (2009).....	27
Shoshana K. Goldberg & Kerith J. Conron, WILLIAMS INST., HOW MANY SAME-SEX COUPLES IN THE US ARE RAISING CHILDREN? (July 2018)...	29, 30
H.R. Rep. No. 88-914(1963).....	19
Patricia Turner Hogan & Sau-Fong Siu, <i>Minority Children and the Child Welfare System: An Historical Perspective</i> , 33 SOC. WORK 493 (1988).....	27
HUM. RTS. CAMPAIGN FOUND., THE IMPACT OF COVID-19 ON LGBT COMMUNITIES OF COLOR (2020).....	12
HUM. RTS. CAMPAIGN FOUND., A NATIONAL EPIDEMIC: FATAL ANTI-TRANSGENDER VIOLENCE IN THE UNITED STATES IN 2019 (2019).....	12
Lourdes A. Hunter et al., CITY UNIV. OF N.Y., INTERSECTING INJUSTICE: A NATIONAL CALL TO ACTION (Mar. 2018).....	13
<i>LGBT Policy Spotlight: Public Accommodations Nondiscrimination Laws</i> , MOVEMENT ADVANCEMENT PROJECT (Jan. 2018) .....	8
<i>Local Non-Discrimination Ordinances</i> , MOVEMENT ADVANCEMENT PROJECT (last visited Aug. 9, 2020).....	8
P.R. Lockhart, <i>A venue turned down an interracial wedding, citing "Christian belief." It's far from the first to do so</i> , VOX (Sept. 3, 2019).....	31

Christy Mallory & Brad Sears, <i>Refusing to Serve LGBT People: An Empirical Assessment of Complaints Filed Under State Public Accommodations Non-Discrimination Laws</i> , 8 J. RES. IN GENDER STUD. 106 (2018).....	11
Tim Marcin, <i>Nearly 20 Percent of Americans Think Interracial Marriage is ‘Morally Wrong,’ Poll Finds</i> , NEWSWEEK (Mar. 14, 2018) .....	31
MOVEMENT ADVANCEMENT PROJECT, <i>Employment Nondiscrimination Protections for State Employees</i> (last updated July 1, 2020) .....	25
MOVEMENT ADVANCEMENT PROJECT, <i>LGBT FOSTER AND ADOPTIVE FAMILIES: FINDING CHILDREN FOREVER HOMES</i> (June 2012).....	30
NAT’L PUB. RADIO, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. PUB. HEALTH, <i>DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS</i> (Nov. 2017) .....	11, 12
<i>New Analysis Shows Startling Levels of Discrimination Against Black Transgender People</i> , NAT’L LGBTQ TASK FORCE (Sept. 16, 2011) .....	12
Frank Newport, <i>In U.S., Estimate of LGBT Population Rises to 4.5%</i> , GALLUP (May 22, 2018) .....	29
N.Y. STATE OFFICE OF GEN. SERVS., <i>Complete Listing of All Statewide Contracts</i> (last updated Aug. 3, 2020) .....	26
OFCCP, <i>About Us</i> , U.S. DEP’T OF LABOR.....	25
OFCCP, <i>History of Executive Order 11,246</i> , U.S. DEP’T OF LABOR .....	25
David Benjamin Oppenheimer, <i>Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964</i> , 29 U.S.F. L. REV. 645 (1995).....	7
Deena Prichep, <i>For LGBTQ People Of Color, Discrimination Compounds</i> , NAT’L PUB. RADIO (Nov. 25, 2017) .....	11



Elizabeth Raleigh, <i>Are Same-Sex and Single Adoptive Parents More Likely to Adopt Transracially? A National Analysis of Race, Family Structure, and the Adoption Marketplace</i> , 55 SOCIO. PERSPS. 449 (2012).....	27
Neil G. Ruiz et al., <i>Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID-19 Outbreak</i> , PEW RESEARCH CTR. (July 1, 2020) .....	16
Sejal Singh & Laura E. Durso, <i>Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways</i> , CTR. FOR AM. PROGRESS (May 2, 2017).....	11
U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE (July 2007) .....	28
Validity of Executive Order Prohibiting Government Contractors from Discriminating in Employment Practices on Grounds of Race, Color, Religion, or National Origin, 42 Op. Att'y Gen. 97 (1961).....	23
Emily Waters et al., NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, A CRISIS OF HATE: A REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HATE VIOLENCE HOMICIDES IN 2017 (2018) .....	12
John Witte, Jr. & Joel A. Nichols, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (4th ed. 2016) .....	19
WILLIAMS INST., LGBT DEMOGRAPHIC DATA INTERACTIVE (Jan. 2019) .....	29
Charles Wollenberg, ALL DELIBERATE SPEED (1976).....	7
C. Vann Woodward, THE STRANGE CAREER OF JIM CROW (1955) .....	6

**INTEREST OF *AMICI CURIAE***<sup>1</sup>

*Amici* are 30 organizations committed to civil rights—including the rights of people of color and the rights of lesbian, gay, bisexual and transgender (LGBT) people—that seek to ensure the effective enforcement of our nation’s anti-discrimination laws, consistent with the rights of entities under the First Amendment.

The Leadership Conference on Civil and Human Rights (The Leadership Conference) is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including LGBT individuals. It is the nation’s largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, helping secure passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

Lawyers’ Committee for Civil Rights Under Law (Lawyers’ Committee) is a nonpartisan, non-profit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting Black people and other racial and ethnic minorities. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to voting rights, housing, employment, education, and public accommodation. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that racial and ethnic minorities, including minorities who identify as lesbian, gay, bisexual or transgender, have strong, enforceable protections from discrimination, including in connection with the building of families.

A list of the 28 additional *amici* is provided in the Appendix.

### SUMMARY OF ARGUMENT

Any suggestion that the application of anti-discrimination provisions in public government contracts with private entities cannot satisfy First Amendment scrutiny is dangerously incorrect.

Were this Court to require Philadelphia to enter into foster services contracts with private entities—but *without* enforcing the city's standard anti-discrimination provisions—it would not only open the door to discrimination against prospective foster parents who are same-sex couples to the detriment of vulnerable children, but could also undermine anti-discrimination provisions broadly included in gov-

ernment contracting, including on the basis of race, national origin, and other characteristics.

Time and again, this Court has affirmed that anti-discrimination measures targeted at eradicating discrimination satisfy constitutional muster, even when balanced against First Amendment interests such as free speech and free exercise. As the district court recognized, contractual conditions prohibiting discrimination in government services contracts have “a long and well-established history.” Pet. App 89a. These provisions are critical to ensuring equal access to publicly-funded services and related opportunities, particularly for underrepresented groups—including LGBT people, people of color, and especially those who are both—who have historically faced significant barriers in virtually every aspect of their lives. If the Court accepted the claim of Catholic Social Services (CSS) that it is exempt from adhering to the anti-discrimination provisions of a city’s public contract on First Amendment grounds, such a holding could open the door to *any* private entity that offers services to the public to sidestep even the most basic of anti-discrimination laws—including those that forbid discrimination based on race.

Here, such an outcome would hit hardest LGBT people of color—a population that is already particularly vulnerable to widespread discrimination, yet is more likely to foster the neediest of children. LGBT people are *seven times* more likely to be foster parents than non-LGBT couples, and same-sex couples of color are even more likely to be foster parents than white same-sex couples. Petitioners’ position would also disproportionately harm children of color, as same-sex couples are more likely than different-sex

couples to adopt Black children—a group that is already overrepresented in the foster care system.

Accordingly, the 30 organizations joining this brief urge this Court to affirm, and to reiterate that the application of anti-discrimination provisions in public government contracts with private entities does not violate the First Amendment.

### **ARGUMENT**

As respondents persuasively argue, the circumstances presented by this case do not even implicate whether strict scrutiny applies to Philadelphia’s anti-discrimination requirement because the provision is a neutral, generally applicable requirement of all city contracts. *See* Inter-Resp. Br. 28-41; City Resp. Br. 28-43. Simply put, CSS is required to follow the same rules the city demands of any foster care agency seeking to enter a city contract.

But should the Court reach the question, and apply strict scrutiny, it should affirm because applying the city’s anti-discrimination policy uniformly to foster care agencies seeking city contracts directly advances a compelling interest in eradicating discrimination. It also ensures that citizens and taxpayers are not forced to finance private discrimination against themselves through the vehicle of government contracts. And it ensures the efficient protection of the interests of children in the city’s care.

## I. ANTI-DISCRIMINATION MEASURES ARE PROPERLY TAILORED TO ADVANCE A COMPELLING STATE INTEREST

It is beyond dispute that eliminating discrimination is a compelling government interest, and that measures prohibiting such discrimination are properly tailored to achieving that interest. *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (“The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”). But a ruling that Philadelphia’s policy does not meet the requirements of strict scrutiny—whether by rejecting the long-accepted maxim that eliminating discrimination is a compelling interest, or by concluding that prohibiting discrimination is not narrowly tailored to eliminate discrimination—would be devastating. The result would be broad and amorphous exemptions that would fatally undermine a wide array of anti-discrimination laws to the detriment of communities of color. The Court should reject petitioners’ invitation to allow a public contractor to disregard any anti-discrimination measures with which it disagrees on First Amendment grounds.

### A. The Government Has A Compelling State Interest In Eradicating Discrimination

Civil rights laws have a deep and storied history. In the aftermath of the Civil War, Black people were systematically relegated to second-class citizenship through a system of laws, ordinances, and customs that separated Black people from white people in

every conceivable area of life.<sup>2</sup> This code of segregation “lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking,” and even “orphanages.”<sup>3</sup>

The onslaught of legislation and policies to ensure that Black people remained segregated in nearly every aspect of society was inexhaustible: “Numerous devices were employed to perpetuate segregation in housing, education, and places of public accommodation,” including “[s]eparate Bibles for oath taking in courts of law, separate doors for whites and Negroes, separate elevators and stairways, separate drinking fountains, and separate toilets ... even where the law did not require them.”<sup>4</sup> Racially discriminatory laws and policies were entrenched in the fabric of the country, and Black people were not the only people of color targeted. Asian Americans, for example, historically were subjected to a host of discriminatory laws and policies,<sup>5</sup> including—most egregiously—

---

<sup>2</sup> See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7 (1955).

<sup>3</sup> *Id.* at 8.

<sup>4</sup> John Hope Franklin, *History of Racial Segregation in the United States*, 304 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 8 (1956).

<sup>5</sup> See, e.g., *Gong Lum v. Rice*, 285 U.S. 78, 86-87 (1927) (school segregation: “Most” prior cases “arose ... over the establishment of separate schools as between white pupils and black pupils; but we cannot think that the question is any different, or that any different result can be reached ... where the issue is as between white pupils and the pupils of the yellow races.”); SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE* (footnote continued)

internment of “all persons of Japanese ancestry.”<sup>6</sup> Mexican Americans in the southwest likewise faced both *de jure* and *de facto* segregation.<sup>7</sup>

In the face of this painful brutality, the Black-led movement against Jim Crow gained momentum, with protests and boycotts throughout the early and mid-twentieth century.<sup>8</sup> Those efforts eventually brought national and international attention to the inhumanity of racialized oppression, as well as successful legal challenges to systemic discrimination in access to voting (*Smith v. Allwright*, 321 U.S. 649 (1944)), interstate buses (*Morgan v. Virginia*, 328 U.S. 373 (1946)), graduate school facilities (*McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950)), law school admissions (*Sweatt v. Painter*, 339 U.S. 629 (1950)), and, of course, public school education (*Brown v. Board of Education*, 347 U.S. 483 (1954)), which slowly but steadily chipped away at segregation’s reach.

Separately, many states stepped in to combat discriminatory business practices by enacting anti-discrimination statutes. Such laws “provided the

---

HISTORY 45-61 (1991) (detailing anti-Asian business regulations and segregationist policies).

<sup>6</sup> Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); see also *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>7</sup> See CHARLES WOLLENBERG, ALL DELIBERATE SPEED 113 (1976) (detailing such segregations “of most public facilities including swimming pools, theaters and restaurants”).

<sup>8</sup> See generally David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645 (1995).



primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984).<sup>9</sup>

These efforts have not been limited to combatting racial discrimination, nor to the statewide level. For example, the first city ordinance prohibiting discrimination based on sexual orientation was passed in Minneapolis in 1974; by the end of 2017, 313 cities and counties had implemented local ordinances prohibiting public accommodations discrimination based on sexual orientation, and 280 cities and counties prohibited such discrimination based on gender identity.<sup>10</sup>

Today, Philadelphia’s “compelling interest in eradicating discrimination,” including through the enforcement of anti-discrimination terms in its contracts with private entities, remains compelling even when balanced against First Amendment interests. *Roberts*, 468 U.S. at 623. This Court has long recog-

---

<sup>9</sup> Soon thereafter, Congress passed the Civil Rights Act of 1964, which, *inter alia*, prohibits discrimination or segregation in places of public accommodation. See 42 U.S.C. § 2000a(a) (Title II).

<sup>10</sup> *LGBT Policy Spotlight: Public Accommodations Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT 6 (Jan. 2018), <https://tinyurl.com/MAP-PubAcc>. In addition, as of March 1, 2020, 20 states and the District of Columbia prohibited discrimination against LGBT people in public accommodations at the statewide level, and two more states’ non-discrimination law covered sexual orientation but not gender identity. See *Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT (last visited Aug. 9, 2020), <https://tinyurl.com/MAP-LocalOrd>.

nized that a state’s or city’s “commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services” is a “goal ... [that is] unrelated to the suppression of expression, [and] plainly serves compelling state interests of the *highest order*.” *Id.* at 624 (emphasis added).

Nor is this approach novel. For example, as this Court has acknowledged, “the Government has a *fundamental, overriding interest* in eradicating racial discrimination in education,” even when balanced against First Amendment interests. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (emphasis added). The same is true in other contexts. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964) (“[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.”); *Board of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (“Even if the [public accommodations statute] does work some slight infringement on [the] right of expressive association, that infringement is justified because it serves the State’s compelling interest in eliminating discrimination[.]”). In short, there is a “compelling interest in eradicating discrimination *in all forms*.” *EEOC v. Mississippi Coll.*, 626 F.2d 477, 489 (5th Cir. 1980) (emphasis added).

**B. LGBT People—Especially LGBT People Of Color—Are Among Those In Greatest Need Of Anti-Discrimination Protections**

Prohibitions on discrimination are crucial to ensuring the ability of all persons to fully participate in

our democracy. The principle is no less true for those measures protecting LGBT persons. In upholding anti-discrimination measures, this Court has not limited its reasoning to laws solely protecting against racial discrimination or discrimination in education; rather, statutes prohibiting discrimination on the basis of, *inter alia*, “race, color, religious creed, national origin, sex, [and] sexual orientation” are “well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination and do not, as a general matter, violate the First or Fourteenth Amendments.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995). The government interest in eradicating discrimination is compelling in the face of a First Amendment challenge by objectors even where government discrimination against a group does not otherwise trigger strict scrutiny under the Equal Protection Clause. *See Roberts*, 489 U.S. at 624 (eliminating sex discrimination is a “compelling state interest[] of the highest order”).

Particularly after this Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020), holding that “it is impossible to discriminate against a person” for being LGBT “without discriminating against that individual based on sex,” there can be no doubt that Philadelphia’s interest in eradicating discrimination against LGBT people is similarly a compelling one.

Here, Philadelphia has decided to protect LGBT people from discrimination, as it “has reason to believe” that they are “the target of discrimination.” *Hurley*, 515 U.S. at 572. Like Philadelphia, many courts “have acknowledged that gay and lesbian

individuals have experienced significant discrimination.” *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484-85 (9th Cir. 2014) (recounting decades of discrimination against gays and lesbians, including that “professional licensing boards often revoked licenses on account of homosexuality”).<sup>11</sup>

LGBT people of color have been particularly affected by discrimination and are therefore especially in need of strong civil rights protections, against race, sexual orientation, and gender identity discrimination.<sup>12</sup> For example, a 2017 study found that 20% of LGBT respondents reported experiencing slurs or insensitive comments about their LGBT status during the job application process, but 32% of such respondents were people of color while just 13% were white.<sup>13</sup> Transgender workers of color report higher rates of job loss and employment discrimination than

---

<sup>11</sup> See also, e.g., Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017), <https://tinyurl.com/Singh-CAP>; Christy Mallory & Brad Sears, *Refusing to Serve LGBT People: An Empirical Assessment of Complaints Filed Under State Public Accommodations Non-Discrimination Laws*, 8 J. RES. IN GENDER STUD. 106, 116-17 (2018); M.V. Lee Badgett et al., *Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination*, CTR. FOR EMP. EQUITY (July 2018), <https://tinyurl.com/Badgett2018>.

<sup>12</sup> See, e.g., NAT’L PUB. RADIO, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. PUB. HEALTH, *DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS* 11 (Nov. 2017) (“DISCRIMINATION IN AMERICA”), <https://tinyurl.com/DiscInAm>; Deena Prichep, *For LGBTQ People Of Color, Discrimination Compounds*, NAT’L PUB. RADIO (Nov. 25, 2017), <https://tinyurl.com/NPR-Prichep>.

<sup>13</sup> DISCRIMINATION IN AMERICA, *supra* note 12, at 12.

white transgender workers.<sup>14</sup> Even just since the COVID-19 outbreak, a greater proportion of LGBT people of color have had their work hours reduced (38%) as compared to either white LGBT people (29%) or non-LGBT people of color (29%).<sup>15</sup> LGBT people of color are also more likely to be victims of violent crimes than white LGBT people,<sup>16</sup> yet are more likely (30%) to avoid calling the police out of concern for anti-LGBT discrimination compared to white LGBT people (5%).<sup>17</sup> LGBT people of color are also more

---

<sup>14</sup> CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR LGBT PEOPLE OF COLOR 10 (June 2015) (“UNFAIR PRICE”), <https://tinyurl.com/UnfairPr>. For example, just within the last decade, the unemployment rate for black transgender people has been twice the rate of the overall transgender population, and over four times the unemployment rate of the general population. *New Analysis Shows Startling Levels of Discrimination Against Black Transgender People*, NAT’L LGBTQ TASK FORCE (Sept. 16, 2011), <https://tinyurl.com/TF-Disc>.

<sup>15</sup> HUM. RTS. CAMPAIGN FOUND., THE IMPACT OF COVID-19 ON LGBT COMMUNITIES OF COLOR 2 (2020), <https://tinyurl.com/HRC-Covid19>.

<sup>16</sup> *See, e.g.*, HUM. RTS. CAMPAIGN FOUND., A NATIONAL EPIDEMIC: FATAL ANTI-TRANSGENDER VIOLENCE IN THE UNITED STATES IN 2019 13 (2019), <https://tinyurl.com/HRC-NatIEpid> (since 2013, at least 139 (89%) victims of anti-transgender violence were people of color); EMILY WATERS ET AL., NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, A CRISIS OF HATE: A REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HATE VIOLENCE HOMICIDES IN 2017 9 (2018), <https://tinyurl.com/CrisisOfHate> (71% of victims of anti-LGBT homicides were people of color).

<sup>17</sup> DISCRIMINATION IN AMERICA, *supra* note 12, at 12. In addition, 24% of LGBT people of color say they have personally experienced discrimination because they are LGBT when interacting with the police, compared to 11% of white LGBT people. *Id.* at 11.

likely than their white counterparts to report experiencing discrimination by healthcare providers and substandard medical care, including being twice as likely to have received physically rough or abusive treatment.<sup>18</sup> Finally, LGBT people of color are disproportionately more likely to be housing-insecure, “more likely to be living at or near the poverty level,”<sup>19</sup> and more likely to have less and worse access to educational opportunities.<sup>20</sup>

Given the disproportionate rates of discrimination faced by LGBT people in every aspect of their lives, it is especially important—and the government has an especially compelling interest in ensuring—that state anti-discrimination protections not be permitted to yield to further discrimination against LGBT people, including LGBT people of color, based on the First Amendment.

### **C. The Least Restrictive Way To Eradicate Discrimination Is To Prohibit It To The Greatest Extent Permissible**

In light of such significant discrimination, the Court need not make any new law to uphold Philadelphia’s entitlement to include its standard anti-discrimination provision in city contracts because, on its face, Philadelphia’s anti-discrimination policy is narrowly tailored to advance its goal of eradicating discrimination. On the other hand, finding that the

---

<sup>18</sup> UNFAIR PRICE, *supra* note 14, at 17.

<sup>19</sup> LOURDES A. HUNTER ET AL., CITY UNIV. OF N.Y., INTERSECTING INJUSTICE: A NATIONAL CALL TO ACTION 11 (Mar. 2018), <https://tinyurl.com/SJSP-Pov>.

<sup>20</sup> UNFAIR PRICE, *supra* note 14, at 24-28.

policy is *not* narrowly tailored would be a radical departure from precedent and endanger important protections for marginalized groups, including people of color.

Simply put, there is no way to eradicate discrimination except by prohibiting it. As the Third Circuit below correctly recognized, “[t]he government’s interest lies not in maximizing the number of establishments that do not discriminate against a protected class, but in minimizing—to zero—the number of establishments that do.” Pet. App. 48a-49a. Every act of discrimination “causes grave harm to its victims,” *United States v. Burke*, 504 U.S. 229, 238 (1992), and there is no “numerical cutoff below which th[at] harm is insignificant,” *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 283 (Alaska 1994); *see also Roberts*, 468 U.S. at 625 (discrimination “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life”). Because Philadelphia’s interest is not simply a general reduction in discrimination but rather the elimination of *all* discrimination, the least restrictive way to achieve that aim is through uniformly enforced anti-discrimination measures.

Petitioners’ suggestion that Philadelphia’s anti-discrimination provision is not narrowly tailored because CSS would simply “refer [same-sex applicants] to another nearby agency” (Br. 9) runs contrary to established precedent. “The government views acts of discrimination as independent social evils even if [individuals denied goods, services, access, or opportunities] ultimately” secure them elsewhere. *Swanner*, 874 P.2d at 28. A foster care agency’s discrimination against same-sex couples “result[s] in a

community-wide stigma inconsistent with the history and dynamics of civil rights laws” and “impose[s] a serious stigma on gay persons.” *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1727, 1729 (2018). That stigma is not undone with the words “go somewhere else”; the scar forever remains.

Anti-discrimination laws “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Heart of Atlanta Motel*, 379 U.S. at 250 (quotations omitted). If a city were to allow CSS to refuse all same-sex couples, it would result in a sort of “exclusion that ... demeans” and “stigmatizes those whose own liberty is ... denied.” *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). Such harms are not nullified when the excluded can arguably go elsewhere (even assuming that’s true) because “the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public” is itself an affront to the “vindication of human dignity.” *Heart of Atlanta Motel*, 379 U.S. at 292 (Goldberg, J., concurring) (quotations omitted).<sup>21</sup> A finding to the contrary would consign a host of longstanding anti-discrimination measures to desuetude—a Black job applicant denied employment based on her race could “simply” apply for a job elsewhere; an interra-

---

<sup>21</sup> As this Court has recognized, “[n]o action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a ... citizen who seeks only equal treatment”—than denial of equal treatment by an establishment “ostensibly open to the general public.” *Daniel v. Paul*, 395 U.S. 298, 306, 308 (1969).



cial couple denied hotel lodging based on the proprietor's objection could "simply" go to a different hotel. Such discriminatory acts have not been shielded by the First Amendment.

In short, rendering civil rights laws vulnerable to such attacks through the First Amendment could re-escalate discrimination against LGBT people as well as all marginalized groups. Discrimination undoubtedly persists and the need for uniform civil rights enforcement remains critical. During the course of the COVID-19 pandemic, for example, about 40% of Black and Asian Americans have reported facing discrimination, including: others acting uncomfortable around them because of their race (39% of Asian Americans; 38% of Black Americans); being subject to racial slurs or jokes (31% of Asian Americans; 21% of Black Americans); and experiencing fear of physical violence or threats of violence (26% of Asian Americans; 20% of Black Americans).<sup>22</sup>

Allowing discrimination against LGBT persons particularly exposes to discrimination LGBT people of color—a demographic that experiences "high rates of discrimination both because they are LGBT and because of their race and ethnicity."<sup>23</sup> *See supra* 9–13. Thus, federal, state and local anti-discrimination measures—including the one challenged here—are vital to the protection of this especially vulnerable group.

---

<sup>22</sup> Neil G. Ruiz et al., *Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID-19 Outbreak*, PEW RESEARCH CTR. (July 1, 2020), <https://tinyurl.com/Ruiz-PEW>.

<sup>23</sup> UNFAIR PRICE, *supra* note 14, at 9.

A ruling in petitioners' favor would undermine the long-established precedent that eliminating discrimination is a compelling government interest to which anti-discrimination laws are narrowly tailored when designed to prevent government subsidization of discrimination. In *Bob Jones University*, for example, this Court rejected a university's free exercise challenge to the revocation of its tax-exempt status due to its prohibition on interracial relationships among its students. 461 U.S. at 603-05. Applying strict scrutiny, the Court concluded that the interest in eradicating discrimination was "compelling," and that allowing an exemption "cannot be accommodated with that compelling governmental interest." *Id.* at 604. Rather, that "interest [in eliminating discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Id.* at 604. If the Court accepts petitioners' arguments here—that anti-discrimination laws in the context of foster care or other public contracts are not narrowly tailored to advance a compelling government interest—then a First Amendment objection could be sufficient not only to trigger strict scrutiny but to strike down the law's application to the objector. Such a result would upend this Court's decades-long precedent holding that government may serve a compelling interest in eradicating discrimination through anti-discrimination requirements in government-funded programs. This could devastate civil rights protections for people of color and upend decades of well-settled law.

**D. Similar First Amendment Objections Were Once Used To Challenge Application Of Civil Rights Laws To Protect People Of Color**

Throughout this country’s history, segregationist philosophies cloaked as First Amendment freedoms have been used to try to subvert the progress and promise of civil rights—and, in particular, the civil rights of people of color.<sup>24</sup> *See, e.g., Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968) (per curiam); *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (rejecting First Amendment defenses against Title VII enforcement in context of sex discrimination).

During consideration of the Civil Rights Act of 1964, for example, segregationists complained that the bill would infringe upon a “constitutional freedom not to associate with racial minorities.”<sup>25</sup> While Congress was considering the legislation, later-Judge Robert Bork authored a column in *The Chicago Tribune* urging opposition to the bill on the grounds that it would “enforce associations between

---

<sup>24</sup> For example, prior to its abolition, courts, politicians and pastors justified slavery in the name of faith. *See, e.g., Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852) (casting the introduction of slavery as “the providence of God” to rescue an “unhappy race” from Africa and place them in “civilized nations”); CONVENTION OF MINISTERS, AN ADDRESS TO CHRISTIANS THROUGHOUT THE WORLD 14 (1863), *available at* <https://tinyurl.com/ConvMin> (“We regard abolitionism as an interference with the plans of Divine Providence.”); William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665-72 (2011).

<sup>25</sup> Eskridge Jr., *supra* note 24, at 675.

private individuals which would ... destroy personal freedom.”<sup>26</sup> Likewise, opponents to the bill in the House of Representatives objected that the Act would “seriously impair the civil rights” of Americans, such as the right of public accommodations to “freely carry on their business in the service of their customers” and “[t]he right of freedom of speech.”<sup>27</sup>

However, as this Court previously has recognized in the context of race discrimination, public accommodation and other anti-discrimination laws directed at recipients of public benefits do not violate First Amendment rights. In *Bob Jones University*, for example, a university defended its policies prohibiting interracial relationships as emanating from their “genuine[] belie[f] that the Bible forbids interracial dating and marriage,” 461 U.S. at 580, and that “[c]ultural or biological mixing of the races is regarded as a violation of God’s command,” *id.* at 583 n.6. The Court rejected the petitioners’ First Amendment defense to the denial of a tax exemption, explaining that, even under strict scrutiny, the government had established a “compelling governmental interest” that outweighed the university’s interest in religious freedom (and any burdens thereto) and making clear that “no less restrictive means” were available to achieve that interest. *Id.* at 604.<sup>28</sup>

---

<sup>26</sup> *Id.* (quoting Robert H. Bork, *Against the Bill*, CHI. TRIB., Mar. 1, 1964, § 1, at 1).

<sup>27</sup> H.R. Rep. No. 88-914, at 64-65 (1963).

<sup>28</sup> See JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 242 (4th ed. 2016) (“*Bob Jones* was decided in a strict scrutiny era, before *Em-*  
(footnote continued)

Other cases reach the same result. In *Newman v. Piggie Park Enterprises*, for example, a restaurant owner who mandated racial segregation in his restaurants in violation of Title II argued that “his religious beliefs compel him to oppose any integration of the races whatever,” and thus he “ha[d] a constitutional right to refuse to serve members of the Negro race in his business establishments.” 256 F. Supp. 941, 944-45 (D.S.C. 1966). The district court rejected that argument, holding that “he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens.” *Id.* at 945. On appeal, addressing the standard for an award of attorney fees, this Court noted: “[T]his is not even a borderline case” because the defendant advanced “patently frivolous” arguments, including that application of Title II “contravenes the will of God’ and ‘constitutes an interference with the ‘free exercise of the Defendant’s religion.’” *Newman*, 390 U.S. at 402 n.5 (quoting *id.*, 377 F.2d 433, 438 (4th Cir. 1967) (Winter, J.)).

Efforts to use the First Amendment as a shield for discrimination against people of color continues to this day, but has rightly been rejected by the courts. For instance, the Pennsylvania Human Rights Commission (PHRC) investigated in 2015 a student’s complaint against his former college, a Catholic institution, alleging that the college had expelled him for racially discriminatory reasons. *Chestnut Hill Coll. v. Pennsylvania Human Relations*

---

*ployment Division v. Smith* (1990) rendered rational basis review the norm in free exercise cases; even so the [petitioners] lost.”).

*Comm'n*, 158 A.3d 251, 256 (Pa. Commw. Ct. 2017). The PHRC filed a lawsuit against the college for violating the state public accommodations law. While the college claimed that enforcement of the public accommodations law would violate the First Amendment, the court held such a defense invalid. *Id.* at 261, 266-67; *see also Fatimah v. Neal*, No. 16-cv-00058, Dkt. 97 (Order) at \*10 (E.D. Okla. Dec. 19, 2018) (rejecting First Amendment defense to claim of discrimination for denying service to Muslims).

Petitioners' arguments, which in many ways mirror the failed First Amendment defenses of the past, should be rejected here too. There is no plausible basis to permit a private entity seeking to contract with the government to eschew anti-discrimination law and discriminate against LGBT people under the shield of the First Amendment.

## **II. MAINTAINING THE UNIFORMITY OF ANTI-DISCRIMINATION REQUIREMENTS IN THE CONTEXT OF GOVERNMENT CONTRACTS IS OF PARTICULAR IMPORTANCE**

Even if the Court limits its inspection solely to the context of awarding government contracts (and explicitly excludes other contexts from its reach), the impact of a decision in petitioners' favor would still be devastating. Petitioners ask that a state actor be precluded from ending its contractual relationship with a private entity that provides government services when that entity engages in behavior the government itself would be constitutionally precluded from engaging in. Discrimination by government contractors, like discrimination by the government, is opprobrious not only because it is discrimination

but because it is discrimination that is funded in part by the very people it harms.

At the threshold, requiring public contractors to abide by anti-discrimination policies ensures that citizens are not required to fund discrimination against themselves. “Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 329 n.9 (1978) (Brennan, J., concurring in the judgment in part) (quoting 109 Cong. Rec. 11161 (1963)); *cf. Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 688 (2010) (state law school had interest in ensuring that no student would be “forced to fund a group that would reject her as a member”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (recognizing state’s “compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice”). Thus, as the district court found, the state has an interest in “ensuring that when [it] employ[s] contractors to provide governmental services, the services are accessible to all.” Pet. App. 90a. Because taxpayers, through the government, spend vast sums of money funding the work that public contractors provide, which on the federal level accounts for hundreds of billions of dollars in recent years,<sup>29</sup> the ruling petitioners seek here would have far-reaching implications.

---

<sup>29</sup> *Federal Government Contracting for Fiscal Year 2018*, U.S. GOV’T ACCOUNTABILITY OFF.: WATCHBLOG (May 28, 2019), <https://tinyurl.com/WB-FedGov>.

Further, including anti-discrimination provisions in public contracts provides the most reasonable means to ensure the government receives the best goods or services, uninhibited by discrimination. *Cf. Roberts*, 468 U.S. at 625. Anti-discrimination requirements in public contracts seek to secure for the government and its citizens the same benefits as when the government hires employees directly: “access to, and ultimately benefits from, the best qualified and most efficient employees.”<sup>30</sup> As has been recognized for decades, “discriminatory practices ... might tend to deprive the United States of the services of an important segment of the population in the performance of its contracts.”<sup>31</sup> States have an interest in ensuring that, “when contractors agree to terms in a government contract, the contractors adhere to those terms,” because otherwise public contracting would deprive the government of these benefits. Pet. App. 90a.

An inability to fulfill this purpose here would have devastating effects on the children who need foster parents. Particularly in light of the shortage of prospective foster parents, it is critical that the government be permitted to take all necessary steps for “ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need.” Pet. App. 90a. CSS’s sought ex-

---

<sup>30</sup> Discrimination on the Basis of Sex, Final Rule, 81 Fed. Reg. 39,108, 39,109 (June 15, 2016).

<sup>31</sup> Validity of Executive Order Prohibiting Government Contractors from Discriminating in Employment Practices on Grounds of Race, Color, Religion, or National Origin, 42 Op. Att’y Gen. 97 (1961), *available at* 1961 WL 4913.



emption would require Philadelphia to accept that its own services be rendered less efficient, with qualified individuals being denied or delayed the opportunity to be foster parents to the detriment of the vulnerable children Philadelphia seeks to serve.

More broadly speaking, invalidating anti-discrimination provisions in public contracts would deprive the government of an important tool to advance its policy interest. Mandating that government contractors not discriminate has been an important feature of government action seeking to eradicate discrimination. As early as 1941, the federal government prohibited discrimination on the basis of “race, creed, color or national origin” by federal defense contractors; in 1943, that prohibition expanded to include *any* federal contractor. Exec. Order No. 8,802, 6 Fed. Reg. 3109 (June 5, 1941) (defense contracts); Exec. Order No. 9,346, 8 Fed. Reg. 7183 (May 27, 1943) (all federal government contracts). During the height of the Civil Rights Movement, President Kennedy issued an executive order making a condition of federal contracts both refraining from discrimination and “tak[ing] affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin.” Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

Soon after, the obligations expanded to also include sex and religion, Exec. Order No. 11,375, 32 Fed. Reg. 14303 (Oct. 13, 1967), and ultimately sexual orientation and gender identity, Exec. Order No. 13,672, 79 Fed. Reg. 42971 (July 21, 2014). Many states have similar executive orders prohibiting discrimination by businesses with which they

contract, including based on sexual orientation.<sup>32</sup> And the federal government established decades ago an office within the Department of Labor dedicated to implementing and enforcing anti-discrimination and affirmative action obligations, which still serves this mission to this very day. Secretary’s Order No. 26-05, 31 Fed. Reg. 6921 (May 11, 1966).<sup>33</sup> These measures are examples of the government lawfully “dangling the carrot” of receiving public business, not “wielding the stick of prohibition.” *Christian Legal Soc’y*, 561 U.S. at 683 (public school may condition recognition and use of funds on requirement of adherence to school’s anti-discrimination policy).

The ability to enforce anti-discrimination policies through provisions in government contracts plays an important role in carrying out such policies simply because of the sheer number of government contractors. State and federal contracts cover large numbers of employees, rendering anti-discrimination protections particularly important in carrying out anti-discrimination laws and ordinances. Approximately one-fifth of the U.S. workforce constitutes employees of federal contractors.<sup>34</sup> While little data is available on state government contractors, em-

---

<sup>32</sup> See MOVEMENT ADVANCEMENT PROJECT, *Employment Nondiscrimination Protections for State Employees* (last updated July 1, 2020), <https://tinyurl.com/MAP-StateEEs> (noting, *inter alia*, that executive orders in Kentucky, Massachusetts, North Carolina, and Pennsylvania expressly prohibit discrimination based on sexual orientation in state contracts).

<sup>33</sup> See also OFCCP, *About Us*, U.S. DEP’T OF LABOR, <https://tinyurl.com/OFCCP-DOL>.

<sup>34</sup> OFCCP, *History of Executive Order 11,246*, U.S. DEP’T OF LABOR, <https://tinyurl.com/DOL-11246>.

ployees of those contractors likely make up a significant proportion of the U.S. workforce as well. For example, New York State alone currently has 1,500 active contracts with hundreds of different businesses.<sup>35</sup> Because these measures protect millions of employees throughout the United States, they represent important bars to discriminatory conduct.

Discrimination, whether against people of color, or women, or LGBT people, is unfortunately not a thing of the past; it continues to deprive its victims of both dignity and equal access to opportunities. Anti-discrimination provisions in public contracts continue to play an important role, including by precluding the government from entering discriminatory contracts paid for by the very victims of that discrimination.

### **III. OPENING THE DOOR TO DISCRIMINATION AGAINST LGBT FOSTER CARE APPLICANTS WILL DISPROPORTIONATELY HARM PEOPLE OF COLOR, AND ESPECIALLY CHILDREN OF COLOR**

Even limiting the inquiry to the narrow factual circumstances raised in this case, permitting private foster care services to avail themselves of government contracts without being held to anti-discrimination measures will result in real and practical harms to people of color, and especially children of color. This is so for several reasons.

---

<sup>35</sup> N.Y. STATE OFFICE OF GEN. SERVS., *Complete Listing of All Statewide Contracts* (last updated Aug. 3, 2020), <https://tinyurl.com/NYStateTCs>.

*First*, permitting discrimination against LGBT couples in foster care not only would harm all children by creating a smaller pool of “qualified” applicants, but would disproportionately harm children of color. LGBT people are more likely than different-sex couples to foster or adopt children of color. For example, according to one study, “same-sex adoptive parents are significantly more likely [than different-sex couples] to adopt [B]lack children.”<sup>36</sup> Denying LGBT applicants the ability to foster or adopt children therefore will harm children of color.

The most recent data indicate that there are over 437,000 children in foster care nationwide, the majority of whom are children of color.<sup>37</sup> Black children

---

<sup>36</sup> Elizabeth Raleigh, *Are Same-Sex and Single Adoptive Parents More Likely to Adopt Transracially? A National Analysis of Race, Family Structure, and the Adoption Marketplace*, 55 SOCIO. PERSPS. 449, 449 (2012); *see also, e.g.*, Rachel Farr & Charlotte Patterson, *Transracial Adoption by Lesbian, Gay, and Heterosexual Couples: Who Completes Transracial Adoptions and With What Results?*, 12 ADOPTION Q. 187, 195-96 (2009); Abbie E. Goldberg, *Lesbian and Heterosexual Pre-adoptive Couples’ Openness to Transracial Adoption*, 79 AM. J. ORTHOPSYCHIATRY 103, 113 (2009).

<sup>37</sup> CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., REPORT NO. 26, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM 1-2 (August 22, 2019) (“2019 HHS REPORT”), <https://tinyurl.com/HHS-FosterCareRep> (estimating that 44% of children in foster care are white, and 56% are non-white). Foster care and adoption services in the U.S. have their own sordid history of discrimination. For example, “Black people often were excluded from the mainly white Charity Organization Societies and settlement houses during the 1800s and 1900s. ... [B]lacks created their own agencies in response to exclusion.” Patricia Turner Hogan & Sau-Fong Siu, *Minority Children and the Child Welfare System: An Historical Perspective*, 33 SOC. WORK 493, 494 (1988).

comprise about 14% of all children in the United States, yet make up 23% of children in the U.S. foster care system.<sup>38</sup> On average, they remain in the foster care system about nine months longer than white children.<sup>39</sup> In addition, Black children are overrepresented in congregate care (*e.g.*, group homes)—although many children are placed in congregate care settings based on their “specialized behavioral and mental health needs or clinical disabilities,”<sup>40</sup> Black children without any clinical indicators are overrepresented in congregate care (31.7%) in comparison to the overall population of foster children.<sup>41</sup> Allowing discrimination against LGBT couples in applying to be foster care parents will therefore not only reduce the number of children placed in foster homes and shrink the pool of potential foster parents, but will exacerbate existing racial disparities and disproportionately deprive children of color of that opportunity.

*Second*, people of color seeking to be foster parents will disproportionately be harmed because peo-

---

<sup>38</sup> See Annie E. Casey Foundation, *Child population by race in the United States*, KIDS COUNT DATA CTR. (AUG. 2019), <https://tinyurl.com/ChildPopByRace>; 2019 HHS REPORT, *supra* note 37, at 2.

<sup>39</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 1, 4 (July 2007), available at <https://tinyurl.com/HHS-GEOReport>.

<sup>40</sup> CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., A NATIONAL LOOK AT THE USE OF CONGREGATE CARE IN CHILD WELFARE 17 (May 13, 2015), <https://tinyurl.com/HHS-NatLook>.

<sup>41</sup> *Id.* at 1, 4, 11.

ple of color are more likely to identify as LGBT. While Gallup reports show that more than 11.3 million adults (4.5%) in the U.S. identify as LGBT, people of color are over-represented in that population: 6.1% of Hispanics, 5.0% of Black people, and 4.9% of Asian people identify as LGBT, compared to 4.0% of white respondents.<sup>42</sup> That is, people of color are more likely than white people to identify as LGBT, with people of color comprising 42% of all LGBT-identified adults.<sup>43</sup> Permitting foster care agencies to discriminate against potential LGBT applicants thus disproportionately harms LGBT people of color.

Moreover, LGBT people—and particularly, people of color—are more likely to foster and adopt children than their non-LGBT counterparts. For example, a 2018 study found that same-sex couples are *seven times* more likely to be foster parents (2.9% of households) than different-sex couples (0.4%).<sup>44</sup> LGBT couples are also seven times more likely

---

<sup>42</sup> Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://tinyurl.com/Newport-LGBT>; see also KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (July 2020), <https://tinyurl.com/WillInst2020> (estimating more than 11.3 million LGBT adults in the U.S., approximately 4.5%, based on 2017 Gallup data).

<sup>43</sup> Newport, *supra* note 42; WILLIAMS INST., LGBT DEMOGRAPHIC DATA INTERACTIVE (Jan. 2019), <https://tinyurl.com/WillInstData>.

<sup>44</sup> SHOSHANA K. GOLDBERG & KERITH J. CONRON, WILLIAMS INST., HOW MANY SAME-SEX COUPLES IN THE US ARE RAISING CHILDREN? 2 (July 2018), <https://tinyurl.com/WillInst2018>. As of 2016, an estimated 114,000 same-sex couples (16.2%) were raising biological, step or adopted children. *Id.* at 1.

(21.4% of households) to be raising adopted children than different-sex couples (3.0%).<sup>45</sup> Such trends are even more pronounced for LGBT couples of color. Same-sex couples of color, for example, are more likely to be raising children than white same-sex couples,<sup>46</sup> and same-sex couples who become foster parents are more likely to be people of color than different-sex foster parents.<sup>47</sup>

*Third*, permitting foster care services to discriminate against LGBT applicants also opens the door to other forms of invidious discrimination, such as against interracial couples. Prejudice against interracial couples continues to this day<sup>48</sup>—in fact, a 2018

---

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *See, e.g.*, GARY J. GATES, WILLIAMS INST., DEMOGRAPHICS OF MARRIED AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 5 (Mar. 2015), <https://tinyurl.com/Gates-2013Demo> (“More than a third (35%) of racial or ethnic minority women in same-sex couples are raising children under age 18 compared to 24% of their White counterparts. For men, the same comparison is 16% versus 6%, respectively.”); BLACK FUTURES LAB, WHEN THE RAINBOW IS NOT ENOUGH: LGB+ VOICES IN THE 2019 BLACK CENSUS 5 (June 2019), <https://tinyurl.com/BFL-2019Census> (“Black same-sex couples are more likely to raise children than same-sex couples of any other race or ethnicity.”).

<sup>47</sup> MOVEMENT ADVANCEMENT PROJECT, LGBT FOSTER AND ADOPTIVE FAMILIES: FINDING CHILDREN FOREVER HOMES 3 (June 2012), <https://tinyurl.com/MAP-Forever> (51% of same-sex foster parents are people of color vs. 41% of different-sex unmarried couples and 39% of different-sex married couples).

<sup>48</sup> *See, e.g.*, Alejandra Gavilanes, *Interracial couples face discrimination, cultural differences*, DAILY TEXAN (Jan. 29, 2020), <https://tinyurl.com/Gavilanes-DT>; *50 years later, interracial couples still face hostility from strangers*, CBS NEWS (June 12, 2017), <https://tinyurl.com/CBS-50Yrs>.

study found that almost 20% of Americans believe that interracial marriage is “morally wrong.”<sup>49</sup> That belief leads to discrimination: in 2019, for example, a wedding venue turned away an interracial couple who wanted to hold their reception there. On video, an employee explained: “We don’t do gay weddings or mixed race [weddings] ... because of our Christian race—I mean our Christian belief.” Only after widespread media coverage and condemnation did the venue apologize and reverse course.<sup>50</sup> That lasting prejudice is reflected in the long history of discrimination against interracial couples in the context of foster care, adoption, and child custody.<sup>51</sup>

\* \* \* \* \*

For decades, this Court has upheld the enforcement of civil rights statutes against First Amendment challenge because they are narrowly tailored to achieve the compelling government interest of eradicating discrimination. As a result, underrepresented communities including people of color have been granted some relief from the scourge of discrimination.

Now petitioners ask this Court to undo that precedent, invoking the First Amendment to secure a

---

<sup>49</sup> Tim Marcin, *Nearly 20 Percent of Americans Think Interracial Marriage is ‘Morally Wrong,’ Poll Finds*, NEWSWEEK (March 14, 2018), <https://tinyurl.com/Marcin-20>.

<sup>50</sup> See P.R. Lockhart, *A venue turned down an interracial wedding, citing “Christian belief.” It’s far from the first to do so*, VOX (Sept. 3, 2019), <https://tinyurl.com/Lockhart-Venue>.

<sup>51</sup> See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding unconstitutional the denial of child custody solely on the basis of the parent being in an interracial relationship).



government contract while providing discriminatory—and therefore inefficient—services. But petitioners put forth no novel legal arguments; they make the same claims that a half-century ago were made and rejected in opposition to prohibitions on race discrimination. The outcome they seek cannot be reconciled with the reasoning of this Court that has sustained the vitality of the anti-discrimination provisions that protect people of color.

Opening the door to the First Amendment exemptions sought here will inevitably multiply discrimination against marginalized groups who now, as much as ever, need the protection of uniform antidiscrimination protections.

**CONCLUSION**

*Amici* respectfully urge this Court to affirm the judgment below.

Respectfully submitted,

VANITA GUPTA  
MICHAEL ZUBRENSKY  
GAYLYNN BURROUGHS  
THE LEADERSHIP  
CONFERENCE ON CIVIL  
AND HUMAN RIGHTS  
1620 L Street NW  
Suite 1100  
Washington, DC 20036

KRISTEN CLARKE  
JON GREENBAUM  
DARIELY RODRIGUEZ  
NOAH B. BARON  
LAWYERS' COMMITTEE FOR  
CIVIL RIGHTS UNDER LAW  
1500 K Street NW  
Suite 900  
Washington, DC 20005

TODD ANTEN  
*Counsel of Record*  
KATHLEEN M. SULLIVAN  
ELLYDE R. THOMPSON  
JOMAIRE A. CRAWFORD  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Ave.  
22nd Floor  
New York, NY 10010  
(212) 849-7000  
toddanten@  
quinnemanuel.com

*Counsel for Amici Curiae*

August 20, 2020

## **APPENDIX**

**APPENDIX**

**List of *amici curiae***

1. American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME)
2. Andrew Goodman Foundation
3. The Center for Constitutional Rights
4. Clearinghouse on Women's Issues
5. Equal Justice Society
6. Feminist Majority Foundation
7. FORGE, Inc.
8. GLSEN
9. Impact Fund
10. LatinoJustice PRLDEF
11. Lawyers' Committee for Civil Rights Under Law
12. The Leadership Conference on Civil and Human Rights
13. League of Women Voters of the United States
14. Legal Aid at Work
15. Matthew Shepard Foundation
16. National Center for Law and Economic Justice
17. National Crittenton
18. National Employment Law Project
19. National Employment Lawyers Association
20. National Health Law Program
21. National Homelessness Law Center
22. National LGBTQ Task Force

2a

23. National Organization for Women Foundation
24. National Queer Asian Pacific Islander Alliance (NQAPIA)
25. NETWORK Lobby for Catholic Social Justice
26. 9to5, National Association of Working Women
27. Public Advocacy for Kids (PAK)
28. Rabbinical Assembly
29. Southern Poverty Law Center (SPLC)
30. Treatment Action Group