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**SMITH’S LAST STAND?
FREE EXERCISE AND FOSTER CARE EXCEPTIONALISM**

*James G. Dwyer**

*Fulton v. City of Philadelphia*¹ postpones the apparent inevitable—the demise of *Employment Division v. Smith*²—with its deflationary view of the Free Exercise Clause and return to application of heightened judicial scrutiny even to laws neutral as to religion and of general applicability. In *Fulton*, the Court held unanimously in favor of a Catholic agency the City had expelled from its foster care system because of its refusal to certify same-sex couples, but the majority found a way to reach that outcome without answering calls to overturn *Smith*. Two Justices, in a concurring opinion authored by Justice Barrett, signaled disapproval of *Smith* while also expressing uncertainty about what should replace it.³ Three other Justices, in a concurring opinion authored by Justice Alito, made clear their determination to overturn *Smith* and begin applying strict scrutiny to any law “that imposes a substantial burden on religious exercise.”⁴ They chided the majority for skirting the big question of *Smith*’s survival by deciding the Philadelphia dispute on the basis of facts the City can readily change (details of its contract with private agencies and of its public accommodation law) and interpretations of state and local law that Pennsylvania courts can readily override (applicability of public accommodation law).⁵ Alito’s seventy-seven page concurrence reads like an advance draft of a *Fulton II* majority opinion.

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1 141 S. Ct. 1868 (2021).

2 494 U.S. 872 (1989).

3 141 S. Ct. at 1882–83 (Barrett, J., concurring).

4 *Id.* at 1924 (Alito, J., concurring).

5 *Id.* at 1887 (Alito, J., concurring). *See also id.* at 1930 (Gorsuch, J., concurring) (likewise noting the modifiability of state law interpretation, city ordinance, and contract and stating that “the majority’s course guarantees that this litigation is only getting started”). The majority held that the City’s action fell outside the bounds of *Smith* because it rested on a) contractual non-discrimination provisions that were, insofar as they allowed discretionary individual exceptions, not generally applicable, and b) a local public accommodation ordinance, Philadelphia Home Rule Charter, § 9-1106, that should be construed as inapplicable to foster care, because foster parenthood is highly

While free-exercise scholars endeavor to expose or fill the holes in Justice Alito's ostensibly originalist analysis,⁶ or to answer Justices Barrett and Kavanaugh's uncertainties, this Article offers a path to permanent avoidance of the *Smith* question in the foster care context, as well as in other child welfare contexts,⁷ a path down which Justice Robert's majority opinion in *Fulton* took a first step by holding that foster care in Philadelphia is not a public accommodation. In fact, the Article shows this alternative path is the only constitutionally appropriate one, because of the distinctive nature of the state child welfare system relative to other public and private operations where similar conflicts arise—in short, that it is a function the state carries out in a *parens patriae* rather than police power capacity. The Article thus explains why the path to victory for Catholic Social Services (“CSS”) in Philadelphia, and for religious agencies in similar circumstances elsewhere, should be one lit by rights of children, which the agencies should have standing to assert, rather than any rights of their own. Courts should dismiss religious foster-care agencies' First Amendment claims as simply inapposite, a category error, because the state is not constrained by First Amendment rights of third parties when acting in the fiduciary capacity that *parens patriae* authority entails. It should also recognize, however, that children have Fourth and Fourteenth Amendment rights against the government's seizing them and then treating them as distributable goods whose fate is influenced by solicitude for the sentiments and equality claims of aspiring foster parents.

Part I first situates *Fulton* within two broader contexts—the clash between social equality rights for sexual minorities and religious freedom, and a pattern of eliding children from legal contests over their lives. It then explains

selective rather than broadly open to the public. *Id.* at 1927–29 (Gorsuch, J., concurring). Alito, Thomas, and Gorsuch note that the City can now simply amend its foster-agency contracts to eliminate the allowance for exceptions, *id.* at 1887 (Alito, J., concurring), and that state courts get the final word on interpretation of state and local law, *id.* at 1887 n.21 (Alito, J., concurring).

⁶ Curiously, on the core textual question of whether “exercise of religion” should be construed narrowly to cover only worship and expression of belief, or instead so broadly as to include any conduct motivated by religious belief, Justice Alito relied only on a 1943 decision of the Court to support the latter answer. *Id.* at 1913 (Alito, J., concurring) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Moreover, Justice Alito failed to acknowledge that the historical record he cited in connection with a different question contained substantial support for the former answer (e.g., state constitutions referring specifically to worship) and almost none for the latter. *Id.* at 1898 n.33 (Alito, J., concurring) (citing N.Y. Const. art. XXXVIII (1777)) and S.C. Const. art. VIII, § 1 (1790); *id.* at 1907 (Alito, J., concurring) (citing N.Y. Const. art. XXXVIII (1777)).

⁷ The Court can avoid deciding “the big question” in a *Fulton II*, should such a case materialize, simply by holding that the City loses regardless of level of scrutiny. In another jurisdiction, however, with different facts, the level of scrutiny could be determinative.

why the standard constitutional framing of social equality versus religious freedom contests is improper when the state is acting as guardian and proxy for children or other non-autonomous persons. Part II sets out a proper framework for analyzing these conflicts, elucidating the scope and nature of the state's *parens patriae* authority—a lacuna in constitutional jurisprudence. Part III applies that framework to the foster care context, concluding that the correct practical outcome in Philadelphia from a child-welfare perspective is for the City to continue contracting with CSS, as the Supreme Court has effectively ordered, while noting how different circumstances might yield a different outcome in other localities.

I. ADULT RIGHTS AND FOSTER CARE: SQUARE PEG, ROUND HOLE

The larger social context of the *Fulton* dispute is the intensifying battle between advocates for sexual minorities and, on the other side, religious individuals and organizations who demand freedom to carry on in public life in accordance with beliefs opposed to recognition of same-sex unions or more broadly to acceptance and equal treatment LGBTQ+ persons. From government offices to bakeries to foster care agencies,⁸ the culture clash predicted by the *Obergefell* dissenters has materialized and crescendoed in the ensuing years and shows no signs of abating. The primary vehicles for it have been public accommodation laws prohibiting discrimination based on sexual orientation and, conversely, religious exemptions from non-discrimination laws. Some governments, such as the city government of Philadelphia, have enacted and imposed on all private providers of certain services non-discrimination mandates, and have thereby triggered First Amendment free exercise challenges from religious organizations and individuals.⁹ Others

⁸ See *Davis v. Ermold*, 141 S. Ct. 3 (2020), *denying cert. to* *Ermold v. Davis*, 936 F.3d 429 (6th Cir. 2019) (denying certiorari to a case in which a county clerk had refused to issue marriage licenses to same-sex couples); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719 (2018) (holding that a Colorado commission's cease-and-desist order against a baker resisting an application of public accommodation law that would ostensibly require him to make cakes for same-sex couples' weddings violated the Free Exercise Clause); *Buck v. Gordon*, 959 F.3d 219 (6th Cir. 2020) (reviewing a case in which a Catholic foster care agency had refused service to a same-sex couple).

⁹ See, e.g., *Masterpiece Cakeshop*, 138 S. Ct. 1719; *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145 (2d Cir. 2020) (holding that a Christian adoption agency had a plausible claim under the Free Exercise Clause against a regulation prohibiting discrimination on the basis of sexual orientation); *Buck*, 959 F.3d 219; *Fulton*, 141 S. Ct. 1868; *Tex. Dep't of Fam. & Protective Servs. v. Azar*, 476 F. Supp. 3d 570 (S.D. Tex. 2020) (dismissing a case brought by a Catholic archdiocese against federal regulations governing child welfare funding that prohibited discrimination on the basis of sexual orientation for lack of subject matter jurisdiction).

have attempted to accommodate religious beliefs and triggered Fourteenth Amendment equal protection and First Amendment Establishment Clause challenges from LGBTQ+ persons.¹⁰ *Masterpiece Cakeshop*, the bakery case, was the first such conflict to reach the Supreme Court, and its narrow ruling presaged a series of case-by-case resolutions.¹¹

Courts and commentators have uniformly and unreflectively presupposed the constitutional analysis should be the same across all contexts in which these clashes occur.¹² In any particular circumstance, within this normative framework, state actors must justify infringing either rights of same-sex married couples and LGBTQ+ individuals or rights of religious organizations and individual adults. In any case, the primary justification offered is the supposed rights on the other side.¹³ So every case comes to courts as a contest between ascribed rights of two sets of adults—LGBTQ+

¹⁰ See, e.g., *Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019) (partially granting a motion to dismiss a challenge brought under the Establishment Clause and Equal Protection Clause against federal subsidizing of a Catholic agency that refused to consider same-sex couple as foster care parents for refugee children); *Dumont v. Lyon*, 341 F. Supp. 3d 706 (D. Mich. 2018) (holding that a Michigan state practice of permitting religious adoption agencies to continue to operate with state funding despite their denying access to same-sex couples violated the Establishment Clause and Equal Protection Clause); *Fam. Equal. v. Azar*, Docket No. 1:20-cv-02403 (S.D.N.Y.) (filed Mar. 19, 2020) (challenging U.S. Department of Health and Human Services' Notice of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63,809 (Nov. 19, 2019) (announcing HHS's refusal to enforce certain regulations promulgated in Health and Human Services Grants Regulation, 81 Fed. Reg. 89,395 (Dec. 12, 2016) (to be codified at 75 C.F.R. pt. 300) prohibiting discrimination based on, inter alia, sex, sexual orientation, or gender identity in programs funded by HHS)). For examples of state statutes embodying religious accommodation, see, e.g., N.D. CODE 50-12-07.1 ("A state or local government entity may not deny a child-placing agency any grant, contract, or participation in a government program because of the child-placing agency's objection to performing, assisting, counseling, recommending, facilitating, referring, or participating in a placement that violates the child-placing agency's written religious or moral convictions or policies."); 10A OKL. ST. ANN. § 1-8-112 (same); VA. CODE § 63.2-1709.3(C) (similar).

¹¹ Cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts . . .").

¹² See, e.g., Lawrence Sager & Nelson Tebbe, *The Missing Equal Protection Argument in Fulton*, BALKANIZATION (July 29, 2020, 9:09 AM), <https://balkin.blogspot.com/2020/07/the-missing-equal-protection-argument.html> [<https://perma.cc/3RHG-TGMG>] (contending that it follows straightforwardly from the Supreme Court's *Obergefell* decision that Philadelphia had an Equal Protection Clause obligation to exclude CSS); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 YALE L.J. F. 201, 222 (2018) ("[L]egislation of this kind is deeply at odds with the understanding of religious accommodation that guides the Court's reasoning in *Masterpiece Cakeshop* . . .").

¹³ See, e.g., *Buck*, 959 F.3d at 223 ("St. Vincent maintains that the First and Fourteenth Amendments guarantee it the right to refrain from certifying same-sex couples for adoption. The Dumonts' position is the inverse; they claim that the State may not allow St. Vincent to turn away same-sex couples without violating prospective foster or adoptive parents' First and Fourteenth Amendment rights.").

persons seeking to marry, secure and retain employment, stay at a bed and breakfast, become foster parents, for example, versus religious persons and churches seeking to carry out their work in a manner consistent with their religious beliefs.

The most pitched of these various battles, arguably, takes place in the child welfare realm—in particular, concerning foster care and adoption. Here what is at stake for same-sex couples and gay individuals is profound—namely, whether they can fulfill the longing to occupy a parental role as to one or more children. At the same time, faith-based agencies have traditionally played an outsized role in child-welfare services, and some denominations view this work as central to their mission, identity, and sacred obligation.¹⁴

What is uniformly overlooked, including by all Justices in *Fulton*, is that the children whose lives lie at center of the practices in dispute themselves have constitutional rights at stake. Yet this should be obvious; foster care entails government employees seizing persons from their homes and choosing where and with whom they live. Such extraordinary state action ought to be constrained, from start to finish, as to when it may occur and how it is carried out, by constitutional rights of the persons seized. Foster care is nothing like a bakery, children are not cakes, applicants for foster parenthood are not consumers seeking access to a market, and private foster care agencies are not businesses open to “the public.”¹⁵ Courts should be applying a quite different legal framework to disputes such as that in *Fulton*, one in which, the analysis to follow will show, neither free exercise rights nor public accommodation law has any place.¹⁶

This is by no means the first time the legal world has treated children’s lives as a battlefield for adults’ rights. To note just two other examples: In the 1990s, the Boy Scouts of America was embroiled in litigation challenging its exclusion of gay persons from scoutmaster positions, culminating in the Supreme Court’s 2000 decision in *Boy Scouts of America v. Dale*, in which the Court held that a First Amendment right of expressive association of the

¹⁴ Cf. *Dumont v. Lyon*, 341 F. Supp. 3d 706, 716 (D. Mich. 2018) (stating that “Catholic agencies ‘handl[e] approximately twenty percent of the active foster care and adoption cases in Michigan. . . .”).

¹⁵ Cf. *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 838 (W.D. Mich. 2005), *aff’d*, 479 F.3d 403 (6th Cir. 2007) (“Unlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit.”).

¹⁶ Cf. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (“Children have a very special place in life which law should reflect. Legal theories . . . lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.”).

organization (really, of its adult national leadership) trumped a state public accommodation law prohibiting discrimination based on sexual orientation.¹⁷ There was substantial debate in the lower courts in that and similar cases about whether such private, membership-based organizations could appropriately be characterized as public accommodations, but the courts treated this as solely a question of statutory interpretation, as the *Fulton* Court did regarding foster care.¹⁸ There was no consideration whether there might be external constraints, including rights of the children who were the actual members of the organization, on what states may treat as a public accommodation and therefore as governed by rights of persons outside the organization, or whether the BSA administration's treatment of children's activities and experiences as an instrument of its expression was misplaced.

Two years later, the Supreme Court decided the fate of school voucher programs, adjudicating in *Zelman v. Simmons-Harris* a contest between taxpayers of Ohio, who claimed channeling public money to religious schools violated the Establishment Clause because it had the primary effect of advancing religion, and the State of Ohio, which defended the program principally on the grounds that it was simply facilitating parents' exercise of their constitutional rights to choose where their children go to school.¹⁹ The state did also assert that its ultimate aim was to help children in poor communities stuck in failing schools, but its program required no demonstration of academic adequacy by participating schools, and the Supreme Court devoted no attention to either the factual question of whether the program would actually result in better education for children or the legal question whether children have any constitutional rights in connection with state financing or regulation of their education—for example, against state subsidizing of any forms of schooling that could be detrimental to them from a secular perspective.²⁰ The Supreme Court assimilated vouchers for elementary school to state subsidies for adult education and treated parents rather than children as the beneficiaries of the voucher program.²¹

¹⁷ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

¹⁸ *See Dale v. Boy Scouts of Am.*, 308 N.J. Super. 516, 530–36, 706 A.2d 270, 277–81 (App. Div. 1998), *aff'd*, 734 A.2d 1196, 1208–1213 (N.J. 1999), *rev'd and remanded*, 530 U.S. 640, 656–659 (2000) (reviewing the history of judicial renderings of “public accommodation” in various cases).

¹⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 648–653 (2002).

²⁰ *Cf. JAMES G. DWYER, VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM* 207–10 (2002).

²¹ *See Zelman*, 536 U.S. at 652–653 (“It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. . . . *Mueller, Witters, and Zobrest* thus make clear that where a

And now in litigation over foster care, the courts have largely overlooked the children who are the *raison d'être* for the program at issue, not asking whether the children have any rights in connection with the foster-parent selection process and giving only superficial consideration to children's interests. They make foster care yet another part of children's lives viewed principally as a site of contest between groups of adults and their supposed rights, rather than framing the case as a contest between competing views of which City policy is most consistent with the rights and welfare of the children whom the City takes into its custody.

The central point of the Article is that a distinct set of constitutional norms should apply to state action undertaken in a *parens patriae* capacity. This point has much broader implications for constitutional law, insofar as it applies in all contexts where the state makes decisions about the lives of non-autonomous persons of a sort ordinarily left to private choice—not just how and where one receives shelter after escaping an injurious home environment, but also with whom one forms and preserves family relationships and whether and where one receives education, medical care, and other personal services. Foster care might be the clearest case, though, for casting the state's role as the fiduciary one that *parens patriae* authority embodies, a role entailing a duty of exclusive loyalty to the welfare of the non-autonomous person and exclusion of concern for all others. That state role is vital in any society,²² yet Anglo-American jurisprudence and constitutional theory have largely ignored it.²³ The next two Parts explain its distinct nature and examine the norms that should govern its operation.

II. DISTINGUISHING THE STATE'S PARENS PATRIAE ROLE

In thinking about any constitutional challenges to state laws and actions, lay persons generally assume the state is operating in a “police power” role.

government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients.”).

²² Cf. *Vidal v. Girard's Ex'rs*, 43 U.S. 127, 168 (1844) (“Take this away and we become a nation of savages. If there is no protection for the infant and the aged, the charm of civilization is lost.”); *Sohier v. Mass. Gen. Hosp.*, 57 Mass. 483, 497 (1849) (deeming it “indispensable” that the legislature be permitted to act in “[t]he best interest” of “infants . . . who cannot act for themselves”).

²³ In *In re Gault*, 387 U.S. 1, 16 (1967), the Court said of *parens patriae* that “its meaning is murky,” yet neither the Court nor legal scholars responded with clarifying analysis.

In this familiar role, government serves the interests of citizens collectively, in the course of which it must respect various individual rights, and it manages conflicts among the rights and interests of various private parties.²⁴ When it wears the police-power hat, the state must consider the interests of everyone impacted by a legal rule or policy decision, typically giving equal weight to like interests across all persons, and might recognize rights protecting interests of some among those impacted. Applied to care and raising of children, this would mean taking into account interests of anyone who wishes to play a role, as well as the interests of children, and potentially ascribing constitutional rights to persons other than children, on the basis of which those persons can object to state decision making. In *Fulton*, the court decisions and the briefing—even amicus briefs submitted by child-advocacy organizations—uniformly place foster care within this police-power rubric, resting their analyses on corporate interests of Philadelphia and on interests and rights of private parties other than the children in foster care—in particular, persons in same-sex marriages, taxpayers, and private agencies like CSS.²⁵ Indeed, the very nature of the ordinance applied to exclude CSS,

²⁴ See *Police Power*, BLACK'S LAW DICTIONARY, https://blacks_law.academic.com/37693/police_power (last visited May 31, 2022) (“An authority conferred by the American constitutional system in the Tenth Amendment, U.S. CONST., upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws. . . . The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process. Police power is the exercise of the sovereign right of a government to promote order, safety, security, health, morals and general welfare within constitutional limits and is an essential attribute of government.”).

²⁵ See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1875, 1882 (2021) (elaborating on CSS’s long-standing mission and how the anti-discrimination mandate burdens its religious exercise), 1881 (noting that the City asserted interests in “protecting the City from liability” and “ensuring equal treatment of prospective foster parents” as well as more child-centered concerns); *Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring) (“CSS’s policy has not hindered any same-sex couples from becoming foster parents” and protecting against the emotional hurt some experience “is not an interest that can justify the abridgment of First Amendment rights”), *id.* at 1925 (citing *Obergefell*’s promise to religious objectors and opining that “society can keep that promise while still responding the ‘dignity,’ ‘worth,’ and fundamental equality of all”); *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661, 683 (E.D. Pa. 2018) (motivating concern of the City ordinance is that “[d]iscrimination in places of public accommodation causes embarrassment and inconvenience to citizens and visitors of the City, creates breaches of the peace, and is otherwise detrimental to the welfare and economic growth of the City”), *id.* at 685 (“interest in ensuring that individuals who pay taxes to fund government contractors are not denied access to those services”); Brief of Children’s Rts. et al. as Amici Curiae Supporting Respondents at 18, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123)

a prohibition on discrimination in “public accommodations,” suggests a police power orientation.

Tellingly, the City had previously never treated the ordinance as applicable to foster care,²⁶ likely because it is in several ways manifestly incompatible with the law and mission of the foster care system.²⁷ The *Fulton*

(emphasizing City’s compelling interest in eradicating discrimination, and noting that allowing any agency to exclude same-sex couples would cause “great harm” to “families seeking to provide safe and diverse placement opportunities”), *id.* at 19 (“Petitioners . . . must establish . . . that the balance of equities tips in their favor and that an injunction is in the public interest.”), *id.* at 19 (“[B]est interest of the public”), *id.* at 20 (proclaiming that a court decision in favor of CSS “tells all Philadelphians that their government is unable to enforce its anti-discrimination policies or protect them from discrimination The City’s taxpayers certainly have an interest in ensuring that the millions of dollars in public funds CSS receives each year are not being used to allow that government contractor to deny services to some of those very taxpayers.”), *id.* at 33 (invoking “the ‘constellation of benefits’ guaranteed to LGBTQ people”); Brief of Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies as Amici Curiae in Support of Respondents at 3, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123) (“[R]eligiously motivated discrimination denies prospective foster parents like *amici* the opportunity to partake of government services on the same terms as everyone else; and they receive the hurtful message from a government program that their religious beliefs and their families are not of equal dignity and worth”), *id.* at 26–27 (Philadelphia “must ensure that it does not violate constitutional prohibitions” that generally apply to government in its police power role, such as the Establishment Clause and the Equal Protection Clause); Brief of Massachussets et al. as Amici Curiae in Support of Respondents at 15, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123) (expressing concern that religious exemptions “would implicate the States in the infliction of the serious dignitary harms caused by discrimination”), *id.* at 18 (“Allowing government contractors to discriminate not only threatens to diminish our pool of prospective foster parents but also involves the government in causing grave social and dignitary harms.”).

²⁶ See *Fulton v. City of Phila.*, 922 F.3d 140, 158 (3d Cir. 2019).

²⁷ Conflicts between the two sets of laws are glaring. The Fair Practices Ordinance (“FPO”) prohibits discrimination based not only on sexual orientation but also disability, religion, and race. PHILA., FAIR PRAC. ORDINANCE § 9-1100. Yet Pennsylvania foster care law requires agencies that certify foster parents to discriminate based on “ability to provide care” and “demonstrated stable mental and emotional adjustment,” 55 PA. CODE § 3700.64, which would require disfavoring applicants with mental or physical disabilities that interfere with caregiving or who adhere to a religion opposed to medical care. That these bases for discriminating are relevant to child welfare does not render their use non-discriminatory. In addition, Philadelphia Department of Human Services (“DHS”) encourages religion-matching and race-matching, which amounts to discrimination among persons once approved for fostering based on their religion (or lack thereof) and race. 11 PA. CONSOL. STAT. ANN. § 31 (West, Westlaw through 2021 Reg. Sess.); Brief for Petitioners at 13, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2020) (No. 19-123); Brief for Intervenor-Respondents at 40, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2020) (No. 19-123). All these forms of discrimination, endorsed by the City, could equally be said to “send[] the message that those discriminated against are second-class citizens in the eyes of their own government,” Brief for Intervenor-Respondents, *supra*, at 46, “denigrate[] the dignity of the excluded,” *id.* at 48, and be likely to deter many qualified people from applying. *Id.* at 50. Further, it is unimaginable that the drafters of the FPO contemplated its application to foster care, or to hiring of schoolteachers, daycare workers, public health agency policymakers, or many other service providers. Public accommodation laws are

majority recognized one aspect of the incompatibility, contrasting the “customized and selective assessment”²⁸ of potential foster parents with open access to hotels, restaurants, and buses. But the lower court opinions and the briefs to the Supreme Court were replete with characterizations of foster-parent certification as a service provided to “the public” generally, by which they meant adult residents.²⁹ Likewise, in connection with other disputes that have arisen from application of a “public accommodation” law to foster care, litigants, courts, and commentators have characterized foster-parent recruitment as a service to the public, with respect to which adult residents or taxpayers have a right of equal access.³⁰

Why is the police-power constitutional framing of these disputes mistaken? First, dispel the notion that there is a single constitutional law for a unitary and constant entity called “the state.” Federal, state, and local governments are multi-faceted, acting in a variety of capacities, and as constitutional scholars well know, various sets of constitutional rules govern state action in those different capacities, some departing more than others

fundamentally about access to physical spaces—museums, hotels, restaurants, schools, etc. *See* PHILA., FAIR PRAC. ORDINANCE § 9-1106 (prohibiting denial of “any of the accommodations, advantages, facilities or privileges of such place of public accommodation”); 42 U.S.C. § 12181(7) (defining “public accommodation” by presenting a long list of physical spaces).

²⁸ *See* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880 (2021).

²⁹ *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661, 679 (E.D. Pa. 2018) (“CSS provides professional ‘services’ to the public. . . . CSS’s services are public accommodations. . . .”); *Fulton*, 922 F.3d at 165; Brief for Intervenor-Respondents, *supra* note 27, at 10 (“CSS’s performance of a public service”), Brief in Opposition for Intervenor-Respondents at 31, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123) (quoting Brief of Massachusetts et al., *supra* note 25) (characterizing the City’s contract with private agencies as a “mechanism for fulfilling its obligations to serve the public”); Brief of Massachusetts et al., *supra* note 25, at 10 (“Philadelphia is entitled to determine the parameters of the very services that it contracts out, reflecting its own judgment regarding how best to meet its residents’ needs. . . .”), *id.* at 11 (“Governments may impose conditions on their spending programs. . . .”), *id.* at 12 (characterizing states’ operating foster care as “pursuing their proprietary interests” and noting “nondiscrimination requirements. . . . serve the plainly legitimate government interest of ensuring that government-contracted services are offered to all residents”); Brief of Support Ctr. for Child Advoc. and Phila. Fam. Pride at 1, 2, 24, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123); Brief of Prospective Foster Parents, *supra* note 25, at 3; Brief of Children’s Rts. et al. at 18, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2020) (No. 19-123); Brief of Baptist Joint Comm. for Religious Liberty et al. at 15–16, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2020) (No. 19-123); Brief for President of House of Deputies of Episcopal Church at al. at 22, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123).

³⁰ *See, e.g.*, Paula Rosenstein, Jocelyn Samuels, Alan Brownstein, & Maimon Schwarzschild, *Symposium Roundtable Lectures: Balancing LGBTQIA Rights and Religious Liberties—Commentary on the Ruth Bader Ginsburg Lecture*, 41 T. JEFFERSON L. REV. 177, 187 (2019) (“[I, Alan Brownstein,] think there is no religion liberty right for an institution to receive public funding to provide public services when the institution indicates that it is going to deny to certain members of the public the benefits they are eligible to receive under the law authorizing the funding of such services.”).

from those governing police-power state action. Which particular set of rules governs depends on which role government officials occupy when they act.

The text of the federal Constitution to some extent reflects this multiplicity with respect to the federal government. A few provisions address its dealings in the international realm,³¹ and clearly what our federal government constitutionally may do toward other nations and against individuals serving those nations is quite different from what it may do domestically toward state and local governments and toward its own citizens.³² Article I appoints Congress to act as a municipal legislature, for the District of Columbia,³³ in which capacity its acts are subordinate to its legislation qua federal legislature. Apart from those few provisions, the federal Constitution's text does primarily reflect the predominant view of the state's core function—namely, domestic police power. But other roles government serves, even domestically, are reflected in judicial doctrines that have developed special constitutional authorizations or constraints on governments in particular contexts—for example, when they act as competitive business (e.g., postal service, public transit),³⁴ employer,³⁵

³¹ U.S. CONST. art. II, § 2 (empowering the President, with consent of the Senate, to make treaties with other nations); U.S. CONST. art. I, § 8 (empowering Congress to declare war against other nations, regulate commerce with them, and punish crimes committed in international waters).

³² See generally Alina Veneziano, *Applying the U.S. Constitution Abroad, From the Era of the U.S. Founding to the Modern Age*, 46 FORDHAM URB. L.J. 602 (2019) (discussing extraterritorial application of the federal Constitution).

³³ U.S. CONST. art. I, § 8.

³⁴ Cf. Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign in Commerce*, 73 STAN. L. REV. 1101, 1108 (2021) (arguing that government should not enjoy the Constitution's protections for the sovereign when it is engaged in commercial activity); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (holding that a public bus is not a public forum for free speech purposes because it is a commercial enterprise).

³⁵ See, e.g., *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008) (rejecting “theory of one” employment discrimination claim, stating that “there is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operation.’”) (citation omitted); *Garcetti v. Ceballos* 547 U.S. 410, 421 (2006) (“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).

jailor,³⁶ speaker in the public square,³⁷ service provider,³⁸ funder of private service provision,³⁹ party to contract,⁴⁰ educator,⁴¹ and, of particular relevance here, *parens patriae* guardian of non-autonomous persons.⁴²

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- ³⁶ See Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 111 (2018) (explaining how the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987), "fundamentally reshaped the way that courts view the constitutional law of prisons").
- ³⁷ See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (explaining government speech doctrine). The district court in *Fulton* characterized the City's contractual demands on agencies as a form of government speech, to which normal First Amendment doctrine does not apply. *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661, 697 (E.D. Pa. 2018).
- ³⁸ See *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 48–49 (1983) (prescribing different free speech analysis for nonpublic fora such as internal operations of school district).
- ³⁹ See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 192–95, 203 (1991) (upholding conditions on government grants under Title X of the Public Health Service Act preventing grant programs from providing to their patients not only abortion services but also counseling or information about abortion, even though government could not otherwise prohibit such speech).
- ⁴⁰ The district court in *Fulton* itself suggested different constitutional rules apply when a government unit is contracting with private parties, to retain them to carry out government functions, than when it is doling out public benefits, noting "a distinction between cases involving essential government benefits such as unemployment compensation or the ability to hold office, and 'a state contract for . . . services.'" *Fulton*, 320 F. Supp. 3d at 686 (quoting *Teen Ranch v. Udow*, 389 F. Supp. 2d, 827, 838 (W.D. Mich. 2005)).
- ⁴¹ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) ("[T]he First Amendment rights of students in the public schools . . . must be 'applied in light of the special characteristics of the school environment.' A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school.") (citations omitted).
- ⁴² See *Parens Patriae*, NOLO'S PLAIN-ENGLISH LAW DICTIONARY, nolo.com/dictionary/parens-patriae-term.html [https://perma.cc/Q5SH-MSUU] (last visited May 31, 2022) ("Latin for 'parent of his or her country.' The power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 315 (1990) (Brennan, J., dissenting) ("Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances."); *Allen v. Illinois*, 478 U.S. 364, 373 (1986) (quoting *Addington v. Texas*, 441 U.S. 418, 429 (1979)) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.") (footnotes omitted); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) ("This prerogative of *parens patriae* is inherent in the supreme power of every State [I]t is a most beneficent function, and often necessary to be exercised . . . for the prevention of injury to those who cannot protect themselves."). Beginning in the late nineteenth century, the term "*parens patriae*" came also to be used for the very different circumstance in which a state brings suit in federal court on behalf of the people of the state, typically suing corporations for antitrust or environmental violations or other states for depletion of resources. See Wright & Miller, *State As Party—Introduction—Parens Patriae And Private Disputes*, 17 FED.

Second, recognize that when the state exerts control over the lives of non-autonomous persons because of their incapacity, to make for them kinds of decisions autonomous persons are entitled to and ordinarily do make for themselves, such as where they will receive temporary shelter after escaping an abusive home environment, the state necessarily acts in a *parens patriae* capacity.⁴³ Having determined that as a general matter those types of decisions do not properly fall within the police power, to be dictated by collective societal interests, the only warrant for the state's intrusion into private life in that way in the particular case of a child or other non-autonomous person is the needs of the non-autonomous individual. It is important to clarify, then, the nature of that role. Many judges and legal scholars refer to *parens patriae* in various child welfare contexts while appearing not to understand what it means. They say something of the "let us not forget about the children" sort and suggest adding children's interests into the mix along with competing adult interests or societal interests.⁴⁴ That is not doing *parens patriae*; that is, as an afterthought, trying not to do police power very badly, by leaving out of a broad utilitarian calculus a group of persons with the most important interests at stake. If simply not forgetting to add children to the policy mix were *parens patriae*, the concept would be entirely superfluous.⁴⁵ It would also be misleading, insofar as it would suggest that if the state does not choose to put on the *parens patriae* mantle in a given situation then it need not consider the interests of non-autonomous persons at all.

To the contrary, when the state truly carries out its *parens patriae* function, it is not acting as agent for society collectively, weighing and balancing everyone's interests. Rather, it acts as agent solely for the dependent individual, with an exclusive focus on that individual's wellbeing,

PRAC. & PROC. JURIS. § 4047 (3d ed.); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 602 (1982).

⁴³ See James G. Dwyer, *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 ARIZ. L. REV. 79, 120–121 (2012) (explaining that the state acts in a *parens patriae* capacity when it exerts authority over individuals who are incapacitated to make their own decisions, such as when the state makes child custody decisions).

⁴⁴ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("[A] parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*. . .").

⁴⁵ Cf. Sallyanne Payton, *The Concept of the Person in the Parens Patriae Jurisdiction Over Previously Competent Persons*, 17 J. MED. & PHIL. 605, 641 (1992) ("The *parens patriae* jurisdiction . . . is fundamentally unlike other powers of the state.").

as a guardian does for a ward and a lawyer does for a client.⁴⁶ As with those private fiduciaries, the duty of loyalty proscribes both self-dealing and simultaneously serving another party with potentially conflicting interests.⁴⁷ From its origins in medieval England, this is how the state's *parens patriae* role and responsibility were understood. One commentator writes regarding formerly-competent adults:

Under the law that has governed the *parens patriae* jurisdiction ever since it was created in the middle ages in England, a person whose powers of self-management have been taken from him by the state has a right that those who exercise the power to manage his affairs on his behalf do so in a fiduciary capacity. . . . The state takes jurisdiction only as a trustee: the jurisdiction has been designed to avoid vesting in the state any authority or incentive to act in a self-interested manner vis-à-vis the incompetent. . . .⁴⁸

⁴⁶ Cf. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (“Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain ‘rights,’ to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind.”); *O’Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring) (“the States are vested with the historic *parens patriae* power, including the duty to protect ‘persons under legal disabilities to act for themselves.’ . . . [H]owever the power is implemented, due process requires that it not be invoked indiscriminately. At a minimum, a particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class”); *Rogers v. Okin*, 634 F.2d 650, 661 (1st Cir. 1980) (“Following a determination of incompetency, state actions based on *parens patriae* interests must be taken with the aim of making treatment decisions as the individual himself would were he competent to do so.”); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 431 (Mass. 1977) (adopting “substituted judgment” standard).

⁴⁷ Certain private fiduciary roles, such as trustee, do entail serving multiple individuals with competing interests—with a trust, life estate holders and remainder persons. Their duty of loyalty entails an obligation of fairness between classes of beneficiaries as well as proscriptions against self-dealing or using trust property to serve interests of non-beneficiaries. A trustee is, however, a special kind of fiduciary chosen by a property owner to administer wealth gratuitously transferred, at least in part, to other persons. The non-grantor beneficiaries do not have the same moral or legal claims *vis* the trustee—in particular, that they not simultaneously serve any other person with conflicting interests—that incompetent wards have *vis* guardians appointed to assume control over central aspects of their life. Criddle and Fox-Decent posit that some private fiduciaries, including attorneys and doctors, are simultaneously fiduciaries to both individual clients/patients and society as a whole—e.g., with duties to promote values of legal and healthcare systems. See Evan J. Criddle, Evan Fox-Decent, Andrew S. Gold, Sung Hui Kim, & Paul B. Miller, *FIDUCIARY GOVERNMENT* 70–71, 79 (Evan J. Criddle et al. eds., 1st ed. 2018) (explaining fiduciary duties of attorneys and doctors to both their clients and the public). However, their characterization of the professionals’ duties to society as making the professionals fiduciaries to the state is questionable (the duties could be viewed simply as side constraints), the propriety of ascribing those duties is contested, and the authors offer no normative defense for compromising individuals’ interests by ascribing such duties to systems.

⁴⁸ Payton, *supra* note 45, at 617. See also *id.* at 616 (“[D]esigned from the beginning to be wholly fiduciary duties. . . . the state’s role has been exclusively that of trustee.”); Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 Wash L. Rev. 619, 642-43 (2020) (characterizing *parens*

Nineteenth-century American legal scholar John Norton Pomeroy wrote similarly regarding state protection of “infants”: “the exercise of the jurisdiction depends upon the sound and enlightened discretion of the court, and has for its sole object the highest well-being of the infant. . . .”⁴⁹

Thus, a quite different set of rules applies to the state’s actions and decisions in the *parens patriae* role.⁵⁰ When the state chooses to assume control over aspects of a non-autonomous person’s life that are ordinarily matters of constitutionally-protected self-determination for autonomous persons—that is, that the state may not constrain in order to gratify other persons or serve social causes, such as with whom the non-autonomous person will live and what services they will receive, and its purported justification is the need of that person for protection and assistance, rather than harm that person might cause others, it effectively steps out of its role as agent of “the people” and into that person’s shoes. All it is authorized to do is to protect and assist that person, to act as a proxy to guard and promote the dependent person’s interests, to the same extent that person would be entitled to do if capable—that is, without limitation arising from others’ interests. There is no conceivable moral or constitutional justification for the

patriae as “both the right and the duty of the state ‘to make decisions that are in the best interests of vulnerable persons.’”); Daniel L. Hatcher, *Purpose vs. Power: Parens Patriae and Agency Self-Interest*, 42 N.M. L. Rev. 159, 171–72 (2012) (“The purpose of state human service agencies to serve vulnerable populations such as abused and neglected children derives from the common law doctrine of *parens patriae* State child welfare agencies exist to protect the interests, and the rights, of abused and neglected children. . . . The agencies serve in the nature of a fiduciary for children’s rights, and the agencies’ interests and actions are intended to align with the best interests of the children.”); *id.* at 164 (“[I]n American jurisprudence . . . the *parens patriae* doctrine was quickly established as providing the foundational authority and duty of states to serve and protect the best interests of children.”); *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980) (“[W]hen the state acts as *parens patriae*, it should advance only the best interests of the incompetent individual and not attempt to further other objectives, deriving from its police power, that may conflict with the individual’s welfare.”); *id.* at 1200 (“it should exercise the *parens patriae* power solely to further the best interests of the child”); Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L.J. 195, 196 (1978) (“In regard to lunatics, the crown served as a ‘mere trustee’”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 315–16 (1990) (Brennan, J., dissenting) (“Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances.”); *J v. C* [1969] AC 668, 697 (Guest LJ) (“[T]he law administered by the Chancery Court as representing the Queen as *parens patriae* never required that the father’s wishes should prevail over the welfare of the infant. The dominant consideration has always been the welfare of the infant.”); *Smith v. Smith*, 26 Eng. Rep 977, 977 (Ch. 1745) (“It is not a profitable jurisdiction of the crown, but for the benefit of infants themselves, who must have some common parent.”).

⁴⁹ 3 JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 1307, 330 n.1 (1883).

⁵⁰ *Developments in the Law*, *supra* note 48, at 1200 (“Given the different premises and purposes of the police power and the *parens patriae* power, courts should apply different principles when they analyze laws based on these two powers.”).

state's assuming such control over the personal life of a private individual in such circumstances (i.e., where the person poses no threat of harm to others) in a liberal society *except* to protect and serve that person, to do for the person what, as best the state can tell, they would want if capable of rationally deciding for themselves.⁵¹ No sound moral or constitutional argument could support a view that a person's lack of autonomy justifies the state or anyone else exploiting them, in the sense of taking advantage of their incapacity to use them to serve interests of other individuals or of society collectively in circumstances where the state would not be permitted to so use an autonomous person. (Indeed, if and when it is appropriate for a state to use private individuals for any particular collective ends, it arguably should use autonomous persons first, as they are better able to protect themselves against inequity and over-reaching.)

Moreover, the state's power over private lives cannot extend beyond its legitimate justification.⁵² The state must not, simply because it has one proper and sufficient basis for seizing children from their homes and assuming power to decide where they will subsequently live, in connection with which it enlists private agencies to assist, view itself as thereby licensed to extend its power over the children's lives farther, to serve other purposes that are not themselves proper bases for such action—in particular, to serve interests of some group of adults or some progressive societal aims. Clearly, the state could not take possession of infants *solely* for the purpose of securing children for same-sex couples to raise, as part of a larger agenda of creating conditions of social equality for sexual minorities. Having some other legitimate purpose for taking possession of infants (i.e., removing them from

⁵¹ Cf. *In re Guardianship of Roe*, 421 N.E.2d 40, 51–52 (Mass. 1981) (“Absent an overwhelming State interest, a competent individual has the right to refuse such treatment. To deny this right to persons who are incapable of exercising it personally is to degrade those whose disabilities make them wholly reliant on other, more fortunate, individuals. In order to accord proper respect to this basic right of all individuals, we feel that if an incompetent individual refuses antipsychotic drugs, those charged with his protection must seek a judicial determination of substituted judgment.”).

⁵² Cf. Payton, *supra* note 45, at 617 (“Were it not for the fiduciary nature of this custody, which gives the ward rights against his custodians, the incompetent's disappearance as an empowered legal person would work a forfeiture exceeding any punishment imposed under the criminal law The fiduciary nature of the *parens patriae* jurisdiction over formerly competent incompetents therefore is critical to the legitimacy of the state's exercise of power over them, since the state . . . would otherwise in effect confiscate the body and property of an incompetent human being . . . on the sole ground of his incompetence.”); *id.* at 641 (“The state acquired its power as part of a medieval bargain made in the ethical structure of feudalism, under which the King became the servant, not the master, of persons whom he brought under his protection. The powers of the state over the incompetent are tolerable only if fiduciary in nature and if administered in good faith out of fiduciary motive.”).

an injurious environment or caretaker) does not transform the social equality aim into a legitimate objective the state may now strive also to serve with any children in its possession. The interests of third parties and progressive societal aims of that sort should never be any part of the state's reasoning about whether it should assume custody of children and how it should deal with any children it does take into its custody. This principle applies across all child welfare contexts in which the state's sole legitimate basis for involving itself is children's inability to act or make important decisions on their own behalf to serve their own wellbeing.⁵³ The *parens patriae* role of the state, conceived of as distinct agent solely for non-autonomous persons, is an exclusive fiduciary role, to which the norms of state police power are simply inapplicable.

At least two constitutional provisions embody rights of children against instrumental treatment in such situations.⁵⁴ The Fourth Amendment establishes a right of all persons against the state's seizing them from their

⁵³ For applications of this principle in other contexts, see James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and The Rights of Newborn Persons*, 56 UCLAL. REV. 755, 822 (2009) (“[T]he state’s proxy decision-making should not entail sacrificing the interests of the nonautonomous person in order to serve the interests or desires of other parties.”); James G. Dwyer, *Parents’ Self-Determination and Children’s Custody: A New Analytical Framework for State Structuring of Children’s Family Life*, 54 ARIZ. L. REV. 79 (2012) (discussing the viewpoint that states should only consider the interests of the child when making custody decisions); James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371 (1994) (discussing this principle in the context of school regulation). The clearest contrasting case is seizure and delinquency adjudication as to minors who commit crimes. In that context, the state has a police power justification for its actions, to protect the rest of society, as well as concern for the minors’ wellbeing, and it therefore appropriately acts in a police power role. See *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“When making any detention decision, the Family Court judge is specifically directed to consider the needs and best interests of the juvenile as well as the need for the protection of the community.”). It is a common mistake to speak of the state acting in a *parens patriae* role in the delinquency context. See, e.g., *Kent v. United States*, 383 U.S. 541, 554–55 (1966) (“The Juvenile Court is theoretically engaged in determining the needs of the child and of society The objectives are to provide measures of guidance and rehabilitation for the child and protection for society The State is *parens patriae* rather than prosecuting attorney and judge.”). If the community’s interests influence decisions, as is appropriate, then the state is operating in a police power role, which is conceptually incompatible with acting in a *parens patriae* role; it is impossible for the state to wear both hats simultaneously.

⁵⁴ It is now well-established in federal court jurisprudence that state obligations to foster children are of constitutional dimension. See, e.g., *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012) (“[F]oster children have ‘a federal constitutional right to state protection’ while they remain in the care of the State.”) (quoting *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010)).

home.⁵⁵ The Due Process Clause of the Fourteenth Amendment embodies a right of all persons against state intrusion into and exertion of control over their private lives.⁵⁶ We autonomous adults certainly have strong constitutional rights against state custody and state interdictions that presume to dictate with whom we shall live or associate, what education or other training we shall receive, and what healthcare we shall receive.⁵⁷ That some persons are less than fully autonomous does not erase these rights for them, but rather merely gives the state paternalistic warrant for infringing the rights to the limited extent of stepping in as a proxy to take action and make decisions in their behalf. This is often overlooked in connection with

⁵⁵ See *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018) (“[w]e evaluate the claims of children who are taken into state custody under the Fourth Amendment right to be free from unreasonable seizures. . . .”) (quoting *Kirkpatrick v. Cnty. of Washoe*, 792 F.3d 1184, 1189 (9th Cir. 2015)); *Rogers v. Cnty. of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007) (“Parents and children have a well-elaborated constitutional right to live together without governmental interference. . . . Officials violate this right if they remove a child from the home absent ‘information at the time of the seizure that establishes “reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.”’ The Fourth Amendment also protects children from removal from their homes absent such a showing.”) (quoting *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)).

⁵⁶ See *O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (discussing the Fourteenth Amendment right against civil commitment to a psychiatric facility); *Heller v. Doe*, 509 U.S. 312, 333 (1993) (finding it consistent with the state’s *parens patriae* obligation to mentally disabled persons subject to civil commitment to allow family members to participate as parties in the proceedings because this increases accuracy of decisions “without undermining those interests of the individual protected by the Due Process Clause”); *Reno v. Flores*, 507 U.S. 292, 314 (1993) (O’Connor & Souter, JJ., concurring) (“a child’s constitutional ‘[f]reedom from bodily restraint’ is no narrower than an adult’s”); *Parham v. J.R.*, 442 U.S. 584 (1979) (discussing a child’s procedural due process rights in connection with commitment by parent to mental hospital). See also *Washington v. Harper*, 494 U.S. 210, 223 (1990) (discussing a mentally ill prisoner’s right to refuse psychotropic drugs); *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (noting the substantive due process right of mentally-disabled persons involuntarily committed to a state institution to safe conditions, freedom from unreasonable bodily restraint, and minimally adequate training); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (“[W]hen the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties.”); *Marisol A. ex rel. Forbes v. Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996) (children in foster care “have a substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being.”), *aff’d*, 126 F.3d 372 (2d Cir. 1997); *Brown v. Cnty. of San Joaquin*, 601 F. Supp. 653, 661 (1985) (children have right to maintain relationship with foster parents, as against public agency’s plan to change placement for its own convenience); § 1:14 RIGHTS OF COMMITTED OR PLACED PERSONS, INCAPACITY, POWERS OF ATTORNEY & ADOPTION IN CONN. § 1:14 (4th ed.) (discussing committed persons’ rights).

⁵⁷ See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (“[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”). The right against health-related treatment may be infringed for the sake of preventing harm to others, as with vaccinations. *Id.* (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

children's lives,⁵⁸ and it is rarely tested in connection with non-autonomous adults,⁵⁹ but it is reflected rather explicitly in, for example, laws prohibiting potentially harmful medical experimentation on autonomy-compromised patients,⁶⁰ and it is implicit in various state laws instantiating a best-interests standard for state decisions about non-autonomous persons' lives.⁶¹

The state's acting under *parens patriae* authority is clearest when it chooses not merely to offer assistance or services to non-autonomous persons, or to impose constraints on private parties dealing with non-autonomous persons, but physically to take possession of and hold such a person in its custody ostensibly just for that person's own good. In that circumstance, the state is clearly empowered and restricted by the norms appropriate to that authority, and not by those inherent in the police-power role. Child-protection custody and foster-care placement are thus, like state custody of

⁵⁸ See, e.g., James G. Dwyer, *Adoptive Couple v. Baby Girl: Erasing the Last Vestiges of Human Property*, 93 B.U. L. REV. ANNEX 53, 54 (2013) (discussing the Indian Child Welfare Act, which explicitly treats children as a tribal "resource"); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1454–55 (2006) ("The [National Association of Black Social Workers] described whites' adoption of African American children as 'a form of race and cultural genocide' because African American children raised in white homes would associate and identify with the dominant white culture and thereby be removed from the African American community, physically and psychologically."); James G. Dwyer, *Changing the Conversation About Children's Education*, 43 NOMOS 314 (2002) (critiquing philosophical arguments and Supreme Court decisions predicating parental power over children's education which disregard children's developmental needs, including "democratic education" arguments for a collective right of adult citizens to shape the next generation).

⁵⁹ *But see, e.g., Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 286–87 (1990) (holding that the only constitutional right in connection with a life-support decision for an adult in a persistent vegetative state belongs to the patient herself, and that the state was not at all constrained by her parents' wishes).

⁶⁰ See 45 C.F.R. § 46.111(b) (including among requirements for Institutional Review Board approval of federally funded research involving human subjects: "When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.").

⁶¹ See, e.g., N.Y. DOM. REL. LAW § 70(a) ("In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly."); VA. CODE §§ 64.2-2000 (defining "guardian" as a person "who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and if not inconsistent with an order of involuntary admission, residence"), 64.2-2019-20 (specifying guardians' duties and powers). See also Brief for Historians of Child Welfare as Amici Curiae Supporting Respondents at 4, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123) ("[T]he doctrine of *parens patriae* . . . provided the foundation for the state's active role in child welfare and the post-revolutionary creation of the 'best interests of the child' standard").

or decision making for incapacitated adults who pose no threat to others,⁶² quintessential *parens patriae* state actions and have always been viewed as such.

In contrast, in other Supreme Court cases involving same-sex couples or LGBTQ+ persons, including those in which businesses or individuals have sought exemption from anti-discrimination laws,⁶³ the state action at issue was properly taken pursuant to the police power role. No non-autonomous persons were involved, and the state was appropriately balancing competing interests of different groups of private individuals.

III. REFRAMING FOSTER CARE CONTROVERSIES

In the foster care and other child welfare contexts, courts and legal theorists have paid too little attention to the norms inherent in *parens patriae* authority, but some basic and incontrovertible principles take us a long way. First, as explained above, the *parens patriae* role is that of a fiduciary for a particular individual, like a guardian.⁶⁴ A fiduciary is an agent or proxy, standing in the shoes of its principal, acting for the benefit of the principal or ward.⁶⁵ Second, a fiduciary role is inherently an exclusive role; the state

⁶² Cf. *O'Connor v. Donaldson*, 422 U.S. 563, 573–75 (1975) (stating that the only constitutionally permissible bases for maintaining custody of a mentally ill person are “to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness,” and not to serve any interests of members of the public, such as sparing them from having to look at such persons); *In re Terwilliger*, 450 A.2d 1376, 1382 (Pa. Super. Ct. 1982) (“[I]n making the decision of whether to authorize sterilization, a court should consider only the best interest of the incompetent person, not the interests or convenience of the individual’s parents, the guardian or of society”); *In re Quinlan*, 355 A.2d 647, 661–62 (N.J. 1976) (rejecting claim by parents of an adult in a persistent vegetative state that they had a right based on their religious beliefs to decide that life support would be terminated, stating “we do not recognize an independent parental right of religious freedom to support the relief requested”).

⁶³ See, e.g., *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given weight and respect by the courts.”).

⁶⁴ See *Parens Patriae*, NOLO’S PLAIN-ENGLISH LAW DICTIONARY, <https://www.nolo.com/dictionary/parens-patriae-term.html> [https://perma.cc/GD8W-4QV3] (last visited May 31, 2022) (defining *parens patriae* as “[t]he power of the state to act as guardian for those who are unable to care for themselves”).

⁶⁵ See *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 602 (1982) (“[A] State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State’s aiding in their achievement. In such situations, the State is no more than a nominal party.”); *Fiduciary*, BLACK’S

cannot coherently occupy it and a competing role at the same time. For inherent in being a fiduciary is adherence to a duty of undivided loyalty.⁶⁶ It is thus a mistake ever to speak of the state carrying out both a *parens patriae* role and a police power role at the same time in any given situation. If it is proper for the state to consider interests of other persons, as it is in the juvenile delinquency context, then it cannot act in a *parens patriae* capacity, and to speak of it as doing so is misleading. The state can and should act to further juveniles' interests in the course of delinquency disposition, while also protecting the rest of society, but that does not transform the state's role into *parens patriae*, any more than it would if the state acted to promote adult criminals' wellbeing through sentencing. Conversely, when the state is truly wearing the *parens patriae* hat, then it may not consider the interests of persons other than the one(s) for whom it is acting as fiduciary.

This is not to say a fiduciary may do whatever it wishes to serve the principal, exceeding the bounds of permissible action to which the principal would themselves be subject if acting autonomously. Rather, it means the

LAW DICTIONARY, <https://thelawdictionary.org/fiduciary/> [<https://perma.cc/9T85-WAP5>] (“[A] person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. Thus, a person is a fiduciary who is invested with rights and powers to be exercised for the benefit of another person.”).

⁶⁶ See, e.g., UNIFORM TRUST CODE § 802 (declaring that a trustee shall administer a trust solely in the beneficiaries' interests). In cases of civil commitment of persons who pose a danger to themselves or others, the state might seem to be trying to combine the *parens patriae* and police power roles. See, e.g., *Addington v. Texas*, 441 U.S. 418, 426 (1979) (“The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.”). As noted, *supra*, this is conceptually impossible. States generally attempt to deal with the inherent conflict by appointing an independent advocate for the person committed and providing a mechanism for the advocate to assert the person's rights against the institution. See, e.g., *Rogers v. Comm'r of Dep't of Mental Health*, 458 N.E.2d 308, 318, 321–22 (Mass. 1983) (concluding that persons involuntarily committed have a right to a substituted judgment treatment decision by a court before nonconsensual administration of medication, and to a finding of an emergency necessity for forcible medication over a patient's objection as a chemical restraint). States generally appoint an independent advocate for children in maltreatment actions as well, usually a lawyer styled as a “guardian ad litem” or GAL, but the GAL's involvement is limited to court proceedings and foster care review and permanency meetings; they do not include participation in or challenge to the public agency's decisions about which private foster care agencies they use. See, e.g., COURT IMPROVEMENT PROGRAM, SUPREME COURT OF VIRGINIA, ADVOCACY IN MOTION: A GUIDE TO IMPLEMENTING THE STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN (2018), 8–9 (“When appointed for a child, the guardian ad litem shall vigorously represent the child [in connection with all proceedings involved in the matter], fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.”).

fiduciary may not aim to serve its own interests or those of third parties through its decisions concerning the personal life of the principal/ward, and it is not constrained by interests of others to any greater extent than the principal would be if acting autonomously.⁶⁷ It is also not to say that a fiduciary must do everything possible, expending all its resources for the sake of the ward, but doing as much as one can for a ward with finite resources is quite different from using one's position fortuitously to serve other causes.⁶⁸

The judiciary has at times recognized these propositions in connection with foster care and adoption. For example, in *Lofton v. Secretary of the Department of Children & Family Services*, although the Eleventh Circuit Court of Appeals ultimately reached the wrong outcome due to errors in factual judgment, it got the normative framework correct when it stated:

[I]n formulating its adoption policies and procedures, the State of Florida acts in the protective and provisional role of *in loco parentis* for those children who, because of various circumstances, have become wards of the state. Thus, adoption law is unlike criminal law . . . [and] is also distinct from such contexts as government-benefit eligibility schemes or access to a public forum By contrast, in the adoption context, the state's overriding interest is the best interests of the children whom it is seeking to place with adoptive families. . . . Florida, acting *parens patriae* for children who have lost their natural parents, bears the high duty of determining what adoptive home environments will best serve all aspects of the child's growth and development. Because of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas.⁶⁹

⁶⁷ Cf. Brief for Historians of Child Welfare, *supra* note 61, at 8 (“After the American Revolution . . . courts recognized that the government was ‘a guardian of all children, and may interfere at any time and in any way to protect and advance their welfare and interests.’”); JEFFREY SHULMAN, *THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD* (2014), 56 (“As *parens patriae*, the state has plenary power to legislate on behalf of the child.”).

⁶⁸ Cf. *Reno v. Flores*, 507 U.S. 292, 305 (1993) (stating in the immigration context with respect to unaccompanied minors in federal custody that “to give one or another of the child’s additional interests priority over other concerns that compete for public funds and administrative attention—is a policy judgment rather than a constitutional imperative”); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (“Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.”); *Soc’y for Good Will to Retarded Child., Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984) (holding that a state institution for mentally disabled persons violated residents’ rights to shelter, clothing, and training of a certain quality, and to safe conditions and freedom from undue bodily restraints, but that residents did not have constitutionally protected liberty interest in visiting shops, restaurants, and recreational facilities in the outside community nor to community placements).

⁶⁹ 358 F.3d 804, 809–10 (11th Cir. 2004). In categorically banning adoptions by gays and lesbians, Florida was quite misguided in carrying out the *parens patriae* role.

In *Lipscomb v. Simmons*, which concerned foster care, four judges of the Ninth Circuit Court of Appeals stated: “[W]hen the state exercises power over children as *parens patriae*, it ‘exercises a discretion in the interest of the child.’”⁷⁰ In this role, the judges wrote, the state “takes on a grave responsibility to that child” and its decisions must be “guided by an overarching objective: maximizing the child’s welfare.” “Each child,” they explained, “is entitled to have key decisions as to its care made in light of his own best interests, rather than to serve some collateral purpose.”⁷¹ This type of “individualized standard is uniformly accepted by states as the touchstone for exercises of their *parens patriae* power . . . [T]he state’s *parens patriae* power over children is limited to actions ‘which conduce to an infant’s welfare’”⁷²

Thus, when Philadelphia or any other local government takes protective custody of abused and neglected children, it necessarily acts only in a *parens patriae* capacity, as protector of and agent for those children, and cannot (also) act in a police power capacity. It owes a duty of undivided loyalty to the children, it must to the extent reasonably possible act solely to protect the interests and advance the welfare of the children, and it is limited in doing so by interests of other parties only to the extent that an autonomous private individual would be in a comparable situation.

Therefore, many rights adults might have against government under the U.S. Constitution in other contexts, constraining the government’s actions, simply do not apply in the context of securing foster homes for individual children. With respect to other government acts, such as issuing marriage licenses or employing people, a state or local government might be prohibited from discriminating against some persons based on their religion or sexual orientation, but in providing for maltreated children in its custody the government is not so constrained, at least not by rights of those persons. No group of adults, religious or otherwise, has a basic or equality right to be part of the foster-care process for an individual child. Each child, on the other hand has a negative right against the state’s taking custody and dictating his or her residence and relationships for any purpose other than to

⁷⁰ 962 F.2d 1374, 1386 (9th Cir. 1992) (en banc) (Kozinski, J., dissenting).

⁷¹ *Id.* at 1388–89.

⁷² *Id.* at 1388 n.8 (citations omitted). *Cf.* *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149 (Me. 2004) (“When exercising its *parens patriae* power, the court puts itself in the position of a ‘wise, affectionate, and careful parent’ and makes determinations for the child’s welfare, focusing on ‘what is best for the interest of the child’ and not on the needs or desires of the parents.”).

protect and promote the child's interests. That is, therefore, the sole constitutional constraint relevant to *Fulton* and the other foster care cases.

By way of analogy, consider:

An adult victim of domestic violence calls the police. When the officers arrive, she asks them to take her to the police station. At the station, they inform her there is a network of private safe houses in the city, overseen by thirty private agencies that recruit and train shelter providers. One agency, they tell her, is Catholic and because of church doctrine has a policy of not working with same-sex married couples who wish to become providers. Except for that limitation on the pool from which it draws, the Catholic agency is regarded as the best; it does an outstanding job finding extraordinarily caring and dedicated people and preparing them to help domestic violence victims. The woman decides to appeal to the Catholic agency for help, so the police officers drive her to the agency's office.

In this scenario, the abuse victim has done nothing illegal or immoral. In acting and making choices for herself, she owes no legal or moral duty to anyone else. She is absolutely entitled to use an agency that has a discriminatory policy if she believes that will best serve her interests. Whether she approves of or shares the agency's religious beliefs is irrelevant. No one would or justifiably could fault her for her choice. Nor are the police officers to be faulted for making her aware of all the options, including one whose policies are inconsistent with a non-discrimination norm the state applies in other contexts, and transporting her to that agency.

When a state agency goes beyond merely informing abuse victims of available options, to actually making the selection itself, for the reason that the abuse victims are unable to make the selection for themselves, as with incompetent adults victimized by guardians, the agency's normative position vis third parties is the same. The agency is under no obligation to anyone but the non-autonomous person for whom it acts, so it does no wrong in choosing that same Catholic agency in the hypothetical above to find shelter for incompetent adult victims. Nor does the normative situation change if the local government, recognizing that adult abuse victims, whether autonomous or incompetent, who escape an abusive home environment frequently have no resources to pay for services, elects to subsidize shelter providers and the agencies that recruit and train them.⁷³ That the state expends public funds to carry out its *parens patriae* function does not give rise to any rights on the part of third parties; it does not entitle them suddenly to demand that the state constrain its caretaking for these dependent,

⁷³ Cf. Samuels, Brownstein, and Schwarzschild, 41 T. JEFFERSON L. REV. 177, 187 (noting that, in Brownstein's view, the fact of public funding "is a huge issue").

victimized persons in order to avoid offending or disappointing the third parties. If it did, the state could never actually operate in the *parens patriae* role, unless perhaps when it could extract from the helpless persons it protects full payment of its costs. In carrying out any of its multiple functions, the state expends public funds, and that patently does not transform them all into the same domestic police power function, constrained by the same individual rights.

Consider another analogy. Many parents, in a will or “standby guardianship” form, name someone to serve as legal guardian for their children if the parents die while the children are still minors. Some parents might discriminate in making the selection on bases such as sexual orientation, religion, or race. Yet a court called on to appoint a guardian for their children could not appropriately override the parents’ choice on the grounds that, as an arm of the state, it must not involve itself in invidious discrimination against certain potential guardians.⁷⁴ In choosing on behalf of children persons with whom they will form a new family relationship—a kind of choice private individuals ordinarily are entitled to make for themselves, the state necessarily acts in a *parens patriae* role, exclusively as a fiduciary for the child.⁷⁵ It could appropriately override the parents’ choice only on the grounds that the choice is, given circumstances at the time of appointment, contrary to the child’s welfare.

Thus, beyond the fact that the state is not constitutionally *compelled* to accommodate the wishes of any group of adults seeking to become foster parents, it *should not* even make such wishes part of its decision making. For the state to concern itself with the interests of other parties in the course of handling children it has taken into its custody detracts from its performance of the *parens patriae* role and in some circumstances will be detrimental to the children. It is a breach of the state’s fiduciary duty owed to the children and contravenes the sole purpose justifying its infringement of the children’s

⁷⁴ *Cf. id.* at 187 (presenting view of Brownstein that it is permissible for government agencies to discriminate among adoption applicants based on sexual orientation if the birth parents ask them to do so).

⁷⁵ This distinguishes this (not so hypothetical) case from *Shelley v. Kraemer*, 334 U.S. 1 (1948), where the Court acted not in a *parens patriae* but a police power role, adjudicating a dispute among autonomous persons over property rights and the implications of a contract that had adverse effects on third parties. It does not distinguish this case from *Palmore v. Sidoti*, 466 U.S. 429 (1984) (overturning award of custody to father that was motivated by hostility directed at a child in the mother’s community because of her interracial relationship), which on this view was improperly reasoned. See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 191–96 (2006).

right against being seized and subjected to government control over residence and intimate associations.

No one but foster children themselves, therefore, has any rights in connection with foster care placements. These are simply surrogate decisions for non-autonomous private persons, and no one would have a right to participate in choices regarding a person's temporary living arrangement if the person were capable of making those choices for themselves.⁷⁶ This precludes ascription of rights to private agencies wishing to be involved in recruiting and training or to individuals wishing to serve as foster parents.

Thus, courts in cases like *Fulton*, brought by faith-based agencies asserting a First Amendment right against exclusion from foster care systems, should dismiss those claims from the outset as simply impertinent, a category error, reflecting a misunderstanding of the role that the state is fulfilling. The governments in question owe no constitutional duty of non-discrimination or accommodation to any private agencies.⁷⁷ Analogously, if an abused woman seeking temporary shelter *refused* to deal with a particular agency that assists with finding such shelter, for the reason that the agency has a policy of discriminating against shelters run by people who are gay, then that is that. Such an agency has no right that she nevertheless deal with it because its discrimination is grounded in religious belief. The same is true of proxy, *parens patriae* decision making for an abused child. The First Amendment simply does not apply.

Moreover, this conclusion about private foster-care agencies having no right at stake would hold true even if government decision makers were patently hostile to a particular agency's religion. Imagine, for example, if the City of Philadelphia decided to exclude some other private agency because its religious beliefs led it to recruit only foster parents committed to instilling

⁷⁶ Cf. Brief of Ohio Ass'n of Juv. Ct. Judges as Amicus Curiae at *8, *In re Gault*, 385 U.S. 965 (1966) (No. 116), 1966 WL 100788 ("It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.").

⁷⁷ Cf. *Dumont v. Lyon*, 341 F. Supp. 3d 706, 752 (E.D. Mich. 2018) ("a state agency seeking to provide child welfare services to wards of the State has no entitlement to a contract with the State to provide those services: 'Unlike unemployment benefits or the ability to hold office, a state contract for [child welfare] services is not a public benefit [and] the State can[not] be required under the Free Exercise Clause to contract with a religious organization.'" (alteration in original) (quoting *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 838 (W.D. Mich. 2005), *aff'd sub nom.* *Teen Ranch, Inc. v. Udow*, 479 F.3d 403 (6th Cir. 2007)).

in foster children the view that females are inherently inferior to males and that a woman's only proper role in adult life is to serve a husband and children. And suppose there was ample evidence of City decision makers denigrating, ridiculing, and despising adherents to that religion. The City's decision would be appropriate despite that hostility, that agency would have no cognizable First Amendment or other constitutional claim against the City, and the City should not need to justify the impact of its decision on that agency.

At the same time, no one has a right that the state, acting in its *parens patriae* role, include them in the pool of potential foster parents for any particular child. The foster care system, contrary to what many amici in *Fulton* suggested,⁷⁸ is not for the benefit of people who wish to be foster parents. When the state takes a given child into custody, its decision about foster placement for that individual child and the process it follows to make foster homes available for that child should focus exclusively on what overall is best for that child. No concern for the impact of its decisions on any adults—not even “grave stigmatic harms”⁷⁹—should distract the state from that focus. Nor should the state's general interest in promoting social equality among groups of adults play any role. Thus, were the state routinely to pass over Christian Scientists who have offered themselves as foster parents (as some state agencies might well already do), on the grounds that they cannot be trusted to report medical problems with a child, that would not even infringe any right of those Christian Scientists, so they would have no colorable constitutional claim on their own behalf against that practice, no basis for demanding accommodation of their beliefs or justification for not accommodating. Any suit they file asserting their own rights should be immediately dismissed for failure to state a claim upon which relief can be granted. If they believe the exclusion bad for children, they can complain about it as an infringement of rights of the children.

All who have weighed in on the foster care cases would likely acknowledge the appropriateness of tolerating discrimination for the sake of children's overall wellbeing in other contexts—for example, selecting particular foster parents for a child because they are of the same religion as

⁷⁸ See, e.g., Brief of Prospective Foster Parents, *supra* note 25, at 21 (“It is the children in foster care and the prospective foster parents who wish to provide them with loving homes who are the recipients, the beneficiaries, the participants.”).

⁷⁹ *Id.* at 30; see also *Dumont*, 341 F. Supp. 3d at 720 (noting that Plaintiffs alleged stigmatic injury).

the child or the child's parents,⁸⁰ or because the applicants are a same-sex couple and the child identifies as gay. In those instances as well, the government would be discriminating in favor of some foster parents and against others, on the basis of religion and sexual orientation—something the government in its police power role is presumptively forbidden from doing, and it would be directing public money (the foster care stipend) to some people pursuant to a contract with them knowing they might have attitudes government actors are not supposed to have (e.g., viewing persons of other faiths or of no faith as benighted or worse). Yet people involved in foster care generally deem that appropriate, because they see it as consistent with children's interests.⁸¹ Implicitly, they recognize that the state operates in a different capacity than normal when making choices on behalf of a child in its custody.

Thus, to the extent governments that have ejected Catholic or other agencies from their child welfare systems have defended their actions by invoking supposed equal protection rights or interests of same-sex couples or gay individuals, and insofar as commentators have done so as well,⁸² they have been mistaken. They have misunderstood the government's role in the lives of maltreated children. That some religious agency's participation in the foster care system might have some "social and dignitary impact" on LGBTQ+ adults is unfortunate but normatively irrelevant. One might also contend that, given the facts in Philadelphia, claims about such impact were exaggerated.⁸³ CSS was only one of thirty or so agencies and was never

⁸⁰ Cf. 11 PA. STAT. & CONS. STAT. ANN. § 31 (West, Westlaw through 2021 Reg. Sess.) (mandating placement of child in foster home of same religion as parents when possible).

⁸¹ Brief of Prospective Foster Parents, *supra* note 25, at 21.

⁸² See, e.g., *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 687 (E.D. Pa. 2018) (quoting the Mayor of Philadelphia as saying "we cannot use taxpayer dollars to fund organizations that discriminate against people because of their sexual orientation or because of their same-sex marriage status It's just not right."); Brief of Prospective Foster Parents, *supra* note 25, at 25 ("Government always has a paramount interest in preventing discrimination in the administration of public programs and the provision of government services."); Brief of Massachusetts et al., *supra* note 25, at 18–19 (arguing against exemptions to non-discrimination rules on the ground that they prevent "social and dignitary harms" to certain prospective foster parents); Brief for Amici Curiae President of House of Deputies of Episcopal Church et al. in Support of Respondents & Affirmance at 12, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123) (arguing that "[p]articular religious perspectives on civil marriage and family should not . . . deny a protected class of otherwise qualified persons the opportunity to be foster parents.").

⁸³ Cf. Brief of Amici Curiae Nat'l LGBT Bar Ass'n et al. in Support of Respondents & Affirmance at 15, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015)) ("When discrimination 'becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that

approached by a same-sex couple, the City retains ultimate authority over placements and does not itself discriminate, and the City tells prospective applicants up front to search for an agency best suited to them.⁸⁴ But the essential point is that the impact on anyone other than the children is irrelevant.

Likewise, invoking corporate societal interests such as avoiding “embarrassment and inconvenience to citizens and visitors of the City” and promoting the “economic growth of the City”—which might actually have been the core motivation for the City’s action—is inappropriate.⁸⁵ So, too, with ensuring taxpayers can benefit from services for which they indirectly pay,⁸⁶ and generally “eradicating discrimination.”⁸⁷ Such objectives are pertinent to state decision making in a police power role, but not in a *parens patriae* function such as foster care. For the City and the courts to apply a law enacted to further interests in tourism and business development to the City’s foster care system—that is, to its function as custodians and caretakers for children who have suffered abuse and neglect, is beyond inappropriate; it is condemnable. Yet lower courts in *Fulton* deemed these also legitimate bases for the City’s action.⁸⁸

Only one of the numerous justifications Philadelphia offered in the lower courts was specific to foster care and resembled a child-welfare rationale: “[I]n the context of foster care and adoption, [the City’s Department of

soon demeans or stigmatizes those whose own liberty is then denied.’ Constitutionalizing the ability to exclude same-sex couples . . . perpetuates demeaning stereotypes . . .”).

⁸⁴ See *Fulton*, 141 S. Ct. at 1875 (“No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.”). See also MICH. COMP. LAWS ANN. § 722.124e(1)(b)-(d) (West, Westlaw through 2021 Reg. Sess.) (“[T]here are 105 licensed adoption and foster care agencies in this state” and they “represent a broad spectrum of organizations and groups, some of which are faith based and some of which are not faith based”); *Dumont*, 341 F. Supp. 3d at 715 (“DHHS retains ultimate supervisory responsibility in all cases”)

⁸⁵ *Fulton*, 320 F. Supp. 3d at 683; see also *id.* at 684–85 (citing the City’s interests in ensuring “that when contractors agree to terms in a government contract, the contractors adhere to those terms,” “that when its contractors voluntarily agree to be bound by local laws, the local laws are enforced,” “that when they employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the services,” and that it avoid “likely Equal Protection Clause and Establishment Clause claims” that would arise if it allowed some contractors to discriminate).

⁸⁶ *Id.* at 685.

⁸⁷ *Fulton v. City of Philadelphia*, 922 F.3d 140, 163 (3d Cir. 2019) (stating “[i]t is black-letter law that ‘eradicating discrimination’ is a compelling interest” and citing in support a precedent addressing police power legislation); see also *id.* at 164 (internal citation omitted) (“The harm is not merely that gay foster parents will be discouraged from fostering. It is the discrimination itself.”).

⁸⁸ *Fulton*, 922 F.3d at 165; *Fulton*, 320 F. Supp. 3d at 683–85, 703–04.

Human Services (“DHS”) and Philadelphia have a legitimate interest in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers.”⁸⁹ Yet the district court devoted no space to determining whether exclusion of CSS actually furthers that interest, or any of the other asserted interests. Given the posture of the case at that point (a motion for immediate, temporary injunctive relief) and the generally undemanding nature of rational basis review, the court simply noted that, in light of the multiple supposedly legitimate interests asserted, CSS’s challenge was unlikely ultimately to succeed.⁹⁰ Most of the factual dispute was instead about whether the City’s decision manifested particular hostility to religious, or more specifically Catholic, organizations, which might have triggered a more demanding scrutiny of the City’s action, and whether CSS’s exercise of religion was substantially burdened.⁹¹ This is a clear example of just how distorted analysis of child-welfare matters becomes when the state’s role is misunderstood and rights are mistakenly ascribed to adults and their organizations.

Importantly, erasing the rights of agencies and potential foster parents from the equation does not leave the issue one of mere policy choice. As noted above, children, like adults, have Fourth and Fourteenth Amendment rights against the state’s taking them into its custody, and the state may justifiably infringe that right of a child only if and insofar as the state does it out of necessity to protect and promote the child’s wellbeing. Contrariwise, it is generally not constitutionally permissible for the state to seize a person and then use the person to serve interests of other persons or of society collectively.⁹² Moreover, this right we all have against the state seizing us is a fundamental one, and so courts should apply a relatively demanding level of review to state action that infringes the right. Thus, if permitting CSS to continue operating as one agency among many is on the whole good for children whom the City takes into custody, because it generates a net increase

⁸⁹ *Id.*

⁹⁰ *Id.* at 685–86.

⁹¹ *Id.* at 683, 686–90; *see also Fulton*, 922 F.3d at 156–59, 163.

⁹² The familiar exceptions are incarceration to protect the public and conscription to protect the country, and their special justifications obviously do not apply to seizure of children whose welfare has been rendered fragile by parental abuse and neglect. The Supreme Court has at times taken the position that minors have less interest against seizure by the state, because they are always in somebody’s custody, but it has justified its own greater incursions on minors’ liberty relative to adults’ liberty by reference to the government’s responsibility to protect youth, *Schall v. Martin*, 467 U.S. 253, 263 (1984), and it has never suggested that this means the state may use children in its possession instrumentally.

in quantity and quality of available foster homes, and detrimental to no children, then that is what the City should do, and no other parties should be deemed to have a right to stop this.⁹³

One might wonder how such a right of children would ever be enforced—that is, how would such a complaint against a government, when it makes a decision relating to foster care that is contrary to the welfare of foster children, ever come before a court? Typically, juvenile courts appoint a legal representative for any child whom the state takes into protective custody, but challenging policies is generally not within the scope of the representative’s duties. There are two mechanisms, however, for an agency or individual to bring suit in federal court on behalf of children—third-party standing and “next friend” representation—which are especially well-received when children are in state custody and cut off from family support.⁹⁴ CSS could have challenged Philadelphia’s exclusion of it as a violation of children’s rights by one of those means. If the City now amends its contracts to eliminate discretionary exemptions from non-discrimination requirements or amends its public accommodation ordinance to make it explicitly applicable to foster care, and then attempts to exclude CSS again, CSS should mount a challenge on this child-centered basis in a second round of litigation. Another possibility, which already exists in some states, is empowerment of an ombudsperson for children to bring suit challenging government actions violative of children’s rights.⁹⁵

Many will find this view, that no one but the child has any rights at stake in these heated controversies over foster care and adoption, difficult to accept as applied to one party or the other. However, if one accepts it as to one party then one should accept it as to the other as well. In both cases, it is based on the same principle—that is, that the state operates solely in a *parens*

⁹³ *Cf.* Brief for Voice for Adoption et al. as Amici Curiae in Support of Respondents at 3, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2020) (No. 19-123) (“[G]overnmental child welfare agencies, including Philadelphia’s, are obligated to continue to adopt, follow, and enforce policies that are in the best interests of the children they serve.”).

⁹⁴ In limited circumstances, persons or organizations may initiate a lawsuit in federal court asserting constitutional rights of others—for example, when the former stand in such a relationship with the latter that the former’s interests are impacted by infringements of the latter’s rights. *See, e.g.*, *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (white property owners precluded by restrictive covenant from selling to Black persons may assert the latter’s rights). In addition, Federal Rule of Civil Procedure 17(c)(2) allows any appropriate persons to file suit against the state as “next friend” representative of one or more children, asserting rights of the children.

⁹⁵ *See Children’s Ombudsman Offices*, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/research/human-services/childrens-ombudsman-offices.aspx> [https://perma.cc/P5KM-P28R] (last visited May 31, 2022).

patriae role when securing foster care and adoptive placements for individual children. Some consolation for both sides, should courts adopt the view advanced here, would come from the fact that it entails ascribing to the state a duty owed to each child to act in the child's best interests. Both sides in these disputes confidently assert that children's interests are best served by their getting what they want—that is, not contracting with agencies that have discriminatory policies or not excluding an agency that, despite declining to deal with same-sex married couples, is highly successful in recruiting, preparing, and supporting a large number of high-quality foster homes for children. Those are the correct sorts of arguments to make in this context, but they should support an argument about rights of children rather than about rights of adults. Religious agencies should be arguing that governments are violating children's constitutional rights by illicitly injecting concern for same-sex couples into their fulfillment of the *parens patriae* role. The LGBTQ+ community should be arguing that governments' *parens patriae* duty to do what is best for children compels them to exclude from participation in the program any agency that on the whole unduly diminishes the pool of potential foster parents available to children in their care. Framed as such, there would be no disagreement between the parties on legal issues, the outcome should turn purely on factual determinations, and so the case would never reach the Supreme Court, which generally does not take cases to review findings of fact. The final Part below sorts out the competing factual claims, which the *Fulton* Court only cursorily addressed.

IV. APPLYING THE PROPER FRAMEWORK

How should these cases be resolved? Was it proper, from a child-centered perspective, as opposed to the adults-rights perspective of the courts in *Fulton*, for the City of Philadelphia to refuse to renew CSS's contract? In this and any similar situation, in Philadelphia or other jurisdictions where private agencies are used, the answer is highly fact dependent, and it is unlikely anyone who does not understand how child protection and foster care systems work could accurately assess the evidence.⁹⁶ The Supreme

⁹⁶ See, e.g., Netta Barak-Corren & Nelson Tebbe, *Does Harm Result When Religious Placement Agencies Close Their Doors? New Empirical Evidence from the Case of Boston Catholic Charities*, BALKANIZATION (Oct. 27, 2020), <https://balkin.blogspot.com/2020/10/does-harm-result-when-religious.html> [<https://perma.cc/N5AU-VKK5>] (blog post by two law professors who are not specialists in child welfare law and policy, who previously advocated on other grounds for an outcome favorable to the City in *Fulton*, claiming to draw inferences about the impact of one agency's departure from

Court's treatment of the facts was correct but cursory, so this Part offers a more thorough explanation of why ordering Philadelphia to renew CSS's contract is best for foster children in that city, and it suggests which different circumstances in other jurisdictions might yield a different conclusion.

A child-centered assessment of whether it is proper to include in the foster care system private agencies that discriminate on certain bases could depend in part on how the process for matching children with foster parents works—in particular, whether the public agency overseeing the system itself selects the foster parents for each child from among all whom the private agencies have made available or instead leaves that decision to each private agency with respect to any children whom the public agency channels to it. The Court of Appeals opinion in *Fulton* suggested Philadelphia takes a hybrid approach, under which the public agency refers a child to a private agency, and then the latter selects a placement with foster parents from among those whom the private agency has recruited and trained, but subject to the public agency's power to veto the private agency's choice and to transfer a child at any time to a different private agency in order to secure a more appropriate placement.⁹⁷ CSS's brief to the Supreme Court, on the other hand, states that DHS chooses as to each child, after informing all the private agencies about a given child just taken into custody and asking the private agencies what foster parents they have available.⁹⁸ The Supreme Court majority adopted the latter depiction.⁹⁹ Whether the public agency's supervision of placements is robust or nominal might affect one's assessment of the plausibility of numerous assertions that the involvement of religious agencies with discriminatory policies reduces the number of foster homes available to

Philadelphia's *foster-care* program in 2018 from: a) interviews with a couple of former employees of an *adoption* agency (a quite different operation) that ceased operations in Boston thirteen years earlier, and b) state-wide data on children's average time spent in foster care, with no explanation of how that data reflects the quantity or quality of foster homes and no recognition of the numerous factors that influence such figures, which can vary greatly from year to year and place to place). For the perspective of someone familiar with foster care systems, see David Smolin, *Setting the Record Straight: Fulton v. City of Philadelphia*, MIRROR OF JUST. (Jan. 23, 2021), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2021/01/setting-the-record-straight-fulton-v-city-of-philadelphia.html> [<https://perma.cc/3TGZ-EJ57>].

⁹⁷ *Fulton*, 922 F.3d at 147 (“Once the City refers a child to an agency, that agency selects an appropriate foster parent for the child, although Human Services can oppose a child’s placement with a particular foster parent if necessary.”).

⁹⁸ Brief for Petitioners, *supra* note 27, at 6.

⁹⁹ *Fulton*, 141 S. Ct. at 1875.

children.¹⁰⁰ Most likely, though, regardless of how the process works in practice, in Philadelphia or elsewhere, those assertions are false and, in fact, the opposite is true.

Supposing a public agency's control of placements is merely nominal, so that a child assigned to a particular private agency, such as CSS, would be put in whatever placement the private agency chooses, from among the foster parents it has recruited and approved, there would be concern that the private agency's discrimination reduces the pool available to each such child. This would be problematic, because the state's fiduciary obligation extends to each child individually. As to any given child Philadelphia takes into custody and assigns to CSS, the pool of available foster homes would be diminished to an extent by exclusion of same-sex couples. CSS has emphasized that no same-sex couple ever approached it,¹⁰¹ but that is meaningless if it is so simply because everyone knows of CSS's policy, as is likely true.¹⁰² If same-sex couples make up a substantial percentage of all persons who wish to be foster parents, this would be a significant limitation that, in and of itself, would be contrary to the welfare of a child assigned to CSS, because likely to lower the average quality of care.¹⁰³

¹⁰⁰ See, e.g., Brief of Nat'l LGBT Bar Ass'n et al., *supra* note 85, at 14; Brief of Children's Rts. et al., *supra* note 29, at 20 (emphasis in original) ("CSS's refusal to certify same-sex couples as foster parents hurts *all* children because it unnecessarily narrows the pool of prospective parents."); *id.* at 24 ("Allowing discriminatory practices undermines the availability of suitable family-based settings for children in foster care and puts youth at increased risk of institutional placement."); Brief of Prospective Foster Parents, *supra* note 25, at 25 ("Allowing contractors to shrink this already-too-shallow pool by imposing religious tests is contrary to the City's duties and the children's needs."); Brief of Nat'l LGBT Bar Ass'n et al., *supra*, at 17; Brief of Baptist Joint Comm. for Religious Liberty et al., *supra* note 29, at 18; Brief of Support Ctr. for Child Advocates, *supra* note 29, at 2–4; Brief for Voice for Adoption, *supra* note 94, at 2; Movement Advancement Project, Child Welfare League of Am., & Nat'l Ass'n of Social Workers, *Kids Pay the Price: How Religious Exemptions for Child Welfare Services Harm Children*, MOVEMENT ADVANCEMENT PROJECT (Sept. 2017), <https://www.lgbtmap.org/kids-pay-the-price-report> [<https://perma.cc/K74Q-AR4X>]; see also *Dumont v. Lyon*, 341 F. Supp. 3d 706, 717–18 (D. Mich. 2018) ("Plaintiffs allege that the loss of these potentially qualified families exacerbates the shortage of potential foster and adoptive families. . . .").

¹⁰¹ Reply Brief for Petitioners at 21, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123).

¹⁰² See Brief for Nebraska et al. as Amici Curiae in Support of Petitioners at 32, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123) ("the organization's views on marriage are well known . . . as evidenced by the absence of any same-sex couple ever applying to foster through Catholic Social Services").

¹⁰³ See, e.g., Brief of Nat'l LGBT Bar Ass'n et al., *supra* note 85, at 12 ("In Massachusetts, for example, between fifteen and twenty-eight percent of adoptions from foster care each year over a ten-year period involved same-sex parents."); Brief of Children's Rts. et al., *supra* note 29, at 23–24.

However, there is good reason to believe any such lowering of quality inherent in CSS's exclusion of one category of applicants would be more than outweighed by several virtues CSS displays, and this could be true with particular private agencies in other locales as well. CSS asserted, and no one denied, that it has an extraordinary ability to recruit, train, support, and retain excellent foster parents.¹⁰⁴ Its success appears to reflect at least four things. First, it has over a century of experience.¹⁰⁵ Second, as a robustly Catholic entity affiliated with the Archdiocese of Philadelphia, it is uniquely situated to reach the huge Catholic population in that metropolitan area—for example, by working closely with local parish leaders to solicit congregation members.¹⁰⁶ Third, a faith-based devotion to service pervades its work and the lives of Catholic families in the Philadelphia area that it recruits.¹⁰⁷ That is an important element of initial commitment to and continuation of fostering despite its serious challenges.¹⁰⁸ Numerous anecdotes in briefs filed in support of CSS attested to the special character of CSS's work and of agencies like them in other parts of the country, and of

¹⁰⁴ See Brief for Petitioners, *supra* note 27, at 5; see also Brief of Amici Curiae Former Foster Child. & Foster Parents & Cath. Found. at 1–20, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2020) (No. 19-123) (relating stories of foster homes that received extraordinary support from CSS).

¹⁰⁵ *Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019).

¹⁰⁶ Cf. Brief of Amici Curiae Former Foster Child. & Foster Parents & Cath. Found., *supra* note 105, at 19 (stating that for many potential foster families, a necessary condition for their enrollment and continuation is that they are dealing with an agency of their faith, sharing their pastoral outlook); see also *id.* at 25–26.

¹⁰⁷ See *Fulton*, 922 F.3d at 147 (“As an affiliate of the Catholic Church, CSS sees caring for vulnerable children as a core value of the Christian faith and therefore views its foster care work as part of its religious mission and ministry.”). Cf. Judy Fenster, *Race, Religion, Altruism, and the Transracial Adoption Debate: A Survey of Catholic, Protestant, and Jewish Social Workers*, 22 SOCIAL THOUGHT 45, 57 (2003) (finding “Whites who view themselves as more altruistic tend to have more positive attitudes toward transracial adoption than those who view themselves as less altruistic. . . . Among whites, Catholic respondents were more altruistic than were either Protestant respondents (p= .033) or Jewish respondents (p= .009).”); Naomi Schaefer Riley, *Bureaucrats Are Ripping Foster Families Apart*, NAT'L REV. (Oct. 29, 2020) (discussing reasons for CSS's success and citing research finding foster parents recruited and supported by faith-based agencies last on average 2.6 years longer than other foster parents).

¹⁰⁸ See Brief of Nebraska et al., *supra* note 103, at 3 (“By appealing to prospective foster parents based on a shared religious calling, faith-based groups have been particularly effective at recruiting foster parents. And by providing strong community support based on a common faith, those organizations have excelled at retaining foster parents for the long haul. In addition, foster parents who work with faith-based agencies tend to perform well, foster more children, and volunteer for some of the most difficult placements.”), 11 (“because fostering children is difficult work, people often require a deep level of comfort and support before they commit to the task”), 12 (“religious foster-care organizations excel at recruiting and retaining a diverse roster of first-rate foster parents”), 13 (“recruitment through religious groups like churches is “particularly influential . . . with African-Americans.”), 16–17 (noting very high turnover rate because of burnout, which CSS is especially effective at countering with spiritual, emotional, practical, and material support).

the homes they provide children. One need not be Catholic or religious at all to appreciate the value this faith element adds. Fourth, CSS and other Catholic organizations fully support trans-racial foster care arrangements and adoptions,¹⁰⁹ making them especially attractive to white applicants who wish to foster as a possible pathway to adoption, as well as to applicants of other races.¹¹⁰ In contrast, an ideology hostile to trans-racial adoption pervades many public foster-care agencies—in particular, those in large

¹⁰⁹ Cf. Br. Pet. 5 (“CSS serves all children in need, regardless of religion, race, sex, or sexual orientation.”); Fenster, *supra* note 108, at 55 (finding stronger support for trans-racial adoption among Catholic social workers than among Protestant social workers), 59 (speculating that “explanation for Catholic support of TRA may lie in the influence of Catholic religious teaching, which is fervently anti-abortion”), *id.* at 59 (citing prior study finding parents who chose to adopt transracially scored higher on a scale of altruism than those who adopted same-race children); Samuel L. Perry, *Contact, Congregations, and Children of Color: The Effects of Interracial Contact in Religious Settings on Whites’ Attitudes Toward Transracial Adoption*, 42 J. COMPARATIVE FAMILY STUDIES 851–69 (2011) (likewise finding support for trans-racial adoption higher among Catholics than among Protestants, and also that degree of religiosity correlates positively with support for TRA). Many Catholic adoption agencies, though not posting online an explicit policy statement on transracial adoption, depict an interracial adoption on their web homepage. See, e.g., CATH. SOC. SERV. OF PHILA., <http://adoption-phl.org/> [<https://perma.cc/RCK8-VZYE>] (last visited May 31, 2022); “Adopt a Child,” CATH. CHARITIES DIOCESE OF ARLINGTON, <https://www.cdda.net/need-help/pregnancy-and-adoption/adopt-a-child/> [<https://perma.cc/6G4Y-2WFP>] (last visited May 31, 2022); CATH. CHARITIES DIOCESE OF E. VA., <https://cceva.org/adoption/> [<https://perma.cc/UQ5Z-X8VE>] (last visited May 31, 2022).

¹¹⁰ Cf. Samuel L. Perry, *The Effects of Race, Religion, and Religiosity on Attitudes Toward Transracial Adoption*, 41 J. COMPAR. FAM. STUD. 837–54 (2010) (finding level of religiosity positively correlated with support for trans-racial adoption).

urban areas,¹¹¹ likely including Philadelphia,¹¹² and undoubtedly also infects some non-Catholic private agencies. Together these four virtues likely made both the number and the average quality of foster homes CSS provided to children in Philadelphia on the whole, and despite its exclusion of same-sex couples, significantly higher than what would be available to children in the absence of CSS's participation.¹¹³ Many anecdotes in the briefs filed in the case support that conclusion, as does public agencies' experience with faith-based organizations in many other jurisdictions.¹¹⁴

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- ¹¹¹ Cf. Riley, *Bureaucrats Are Ripping Foster Families Apart*, *supra* note 108; Fenster, *supra* note 108, at 22 (finding “black social workers, on average, manifested a relatively unfavorable attitude toward transracial adoption, whereas the white social workers, on average, manifested a relatively favorable attitude”); *id.* at 58 (citing a prior study finding the same result by race among the general population); *id.* at 60 (“altruistic impulses may play a lesser or insignificant role in black social workers’ views of transracial adoption”); A.R.L. v. Norfolk Dept. Hum. Serv., 4:20-cv-00110 (E.D. Va. 2020) (alleging violation of the Inter-Ethnic Placement Act, 42 U.S.C. § 1996b(1)(B) (1996), which prohibits race matching); Diane Bernard, *A White Couple, A Mixed-Race Baby and A Forbidden Adoption*, WASH. POST, Mar. 10, 2019; Ralph Richard Banks, *The Multiethnic Placement Act and The Troubling Persistence of Race Matching*, 38 CAP. U. L. REV. 271, 274 (2009); Susan K. Livio & Mary Jo Patterson, *The Colors of Love: Outside Walls and Warmth of a Happy Home, Debate Swirls About Crossing the Racial Divide*, STAR-LEDGER (N.J.), Dec. 27, 2005, at 1 (“We heard it over and over, there were social workers who were engaging in the systematic race-matching of kids. African-American children would be available, but they wouldn’t be made available if the homes belonged to white parents, . . .”); Nat’l Ass’n of Black Soc. Workers (“NABSW”), *Preserving Families of African Ancestry* 4 https://cdn.ymaws.com/www.nabsw.org/resource/collection/0D2D2404-77EB-49B5-962E-7E6FADBF3D0D/Preserving_Families_of_African_Ancestry.pdf [https://perma.cc/4EDM-C8RT] (urging repeal of the federal Inter-Ethnic Placement Act because it prohibits race matching); NABSW, *Position Statement on Trans-Racial Adoptions*, Sept. 1972, 1 (statement by organization for Black social workers, who make up most of the staff of child welfare agencies in urban areas with large Black population, from which it has never retreated, declaring its “vehement stand against the placement of Black children in white homes for any reason”).
- ¹¹² Cf. *Fulton*, 922 F.3d at 158 (noting and not rejecting CSS’s contention that the City’s “Human Services will consider factors such as race or disability when placing foster children with foster parents.”); Brief for Petitioners, *supra* note 27, at 13 (“Philadelphia considers disability and race when making foster placements. J.A.305-316.”). The Court of Appeals’ response that “consideration of race or disability when placing a foster child” does not mean that the public agency “refuses to work with individuals because of their membership in a protected class” is questionable. *Fulton*, 922 F.3d at 158. If that agency engages in categorical race matching, and if one looks at the matter in terms of its decision as to a particular black child; a categorical race-matching policy would amount, in connection with that child, to refusing to work with non-black applicants.
- ¹¹³ See Brief of Nebraska et al., *supra* note 103, at 17 (reporting 50% drop in non-relative foster homes in Illinois after the state chose to exclude several faith-based foster care agencies).
- ¹¹⁴ See *id.* at 14–15 (discussing survey in Arkansas finding “36 percent of foster parents recruited through the CALL said that they would not have become foster parents without the group’s work, and 40 percent were not sure”) (citing Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, 19 J. OF PUB. MGMT. & SOC. POL’Y 168, 176–77 (2013)); *id.* at 15 (“[S]ome people of faith cannot commit to the demanding task of fostering

Analogously, a contracting agency might choose not to deal with potential foster parents who do not speak English or who are deaf and only use sign language—also characteristics of no inherent relevance to capability as caregivers.¹¹⁵ It might do so because it is unable to accommodate the need for translation in every aspect of recruiting, training, and supporting. As a result, such an agency will draw from a smaller pool and the average quality will therefore be less than what it would be absent the discrimination. And any agency's discrimination on a linguistic basis might be just as likely to discourage a group of people as discrimination based on sexual orientation allegedly does. Yet it might well be that the public agency would be wise to contract with that private agency anyway, because on balance it does a terrific job providing a large pool of high-quality foster homes. Yet on the view advanced by Philadelphia and most of the amici in *Fulton*, it should be assumed bad for children that a public agency contracts with any private agency that excludes any significant number of parents on any basis that inherently is "unrelated to parenting ability" or suitability.¹¹⁶ That it is quite irrational.

Conversely, exclusion of a highly successful private agency in and of itself patently reduces significantly the total number of foster homes available to children the state takes into custody, relative to what it would be if it continued fully to include that agency, for the reasons noted above. CSS, as a Catholic agency affiliated with the local Catholic archdiocese, can better reach the fourth of Pennsylvania's adult population that is Catholic.¹¹⁷ No other agency capable of doing that has stepped into the breach left by CSS's departure.

The federal district court found, apparently just on the basis of one City official's testimony, that excluding CSS did not result in more children entering congregate care or spending time in DHS's "childcare room"—that is, a non-family facility for children for whom foster families have not yet been located.¹¹⁸ But even if that uncorroborated testimony is accurate, it

children—work they consider central to their religion—if they are unable to partner with an organization that shares their beliefs"); *id.* at 18–19 (citing research finding that religiously-motivated foster parents are on average more altruistic, more highly regarded, and more willing to take in the highest-need children than others).

¹¹⁵ *Cf.* Cert. Petition, 6 ("Some agencies specialize in serving the Latino community . . ."); *id.* at 13 (noting referrals to agencies based on tribal affiliation or lack thereof of applicants).

¹¹⁶ Brief of Massachusetts et al., *supra* note 25, at 17.

¹¹⁷ See *Adults in the Philadelphia Metro Area*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/metro-area/philadelphia-metro-area/> [<https://perma.cc/7YYM-ETGN>] (last visited May 31, 2022).

¹¹⁸ *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661, 674 (E.D. Pa. 2018).

would tell us nothing about *why* numbers did not increase in congregate care or the childcare room. In particular, it would not demonstrate that the number or quality of foster homes available had remained constant.¹¹⁹ Someone familiar with child welfare systems would ask several questions before attempting to draw any inference from the official's testimony: Did the agency simply remove far fewer children from their homes?¹²⁰ Did it divert more children to homes of relatives not certified as foster parents? Did the federal Family First Act of 2018, which severely reduced funding for congregate care, have an impact? Further, the testimony would not address CSS's point that whatever the current number of children in congregate care, it could be significantly lower than that if the City continued to accept foster homes recruited by CSS—this is, the contention presupposed the wrong baseline.¹²¹

An additional concern with Catholic agencies' policies and the beliefs underlying them, however, is that the families they do recruit might share their views about sexual orientation and so be bad placements for LGBTQ+ youth,¹²² who make up a disproportionate share of teens entering foster care.¹²³ Philadelphia appeared not to have that concern, because it decided on child-welfare grounds to continue existing placements that CSS was overseeing and to place additional children through CSS when necessary to unite siblings.¹²⁴ In any event, as discussed further below, any public child protection agency ought to be, and presumably is, identifying such youth at intake, just as they do or should identify children with disabilities or for whom continuity of religious practice is important,¹²⁵ and assigning them to

¹¹⁹ In Pennsylvania as a whole, the number of total homes (existing plus new) declined substantially between 2018 and 2020, from nearly twenty thousand to less than fifteen thousand. See “Who Cares—Pennsylvania,” THE IMPRINT, <https://www.fostercarecapacity.com/states/pennsylvania> [<https://perma.cc/GW34-6MZP>] (last visited May 31, 2022).

¹²⁰ Cf. *id.* (showing that the number of youth in foster care in Pennsylvania declined by about one seventh from 2018 to 2020).

¹²¹ Reply Brief for Petitioners, *supra* note 102, at 22 (“Respondents have no answer for the 250 children they admitted need to be moved out of institutions—but who won’t be placed in the empty homes CSS can provide today.”).

¹²² See Brief for Voice for Adoption, *supra* note 94, at 2.

¹²³ See Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2403–04 (2019) (citing two studies finding that roughly one in five adolescents in foster care are LGBTQ+).

¹²⁴ *Fulton*, 320 F. Supp. 3d at 673.

¹²⁵ See Brief for Voice for Adoption et al., *supra* note 94, at 10 (“Under well-established child welfare standards, [placing a child] involves matching the characteristics and needs of the child with the strengths and capabilities of available foster parents.”). Cf. 23 PA. CONS. STAT. § 6375 (requiring local agencies to develop an individual service plan for each child they take into custody); 55 PA.

agencies and homes best suited to meet their particular needs.¹²⁶ State law requires Philadelphia DHS also to monitor each child's wellbeing and to change placements if the initial one is inappropriate.¹²⁷ Additionally, there seems to be implicit in much of the advocacy for excluding discriminatory faith-based agencies an unwarranted assumption that LGBTQ+ youth assigned to any agency that has taken the non-discrimination pledge will be in good hands, yet there is no basis for supposing that those other agencies do anything to ensure all foster parents they recruit are welcoming to LGBTQ+ youth or that such youth are assigned to same-sex fostering couples or single gay persons.¹²⁸ Nor is there any reason to suppose public agency caseworkers overseeing placements in any jurisdiction are sensitive to the needs of LGBTQ+ youth.¹²⁹ There appears to be some scapegoating of CSS and other faith-based agencies that distracts attention from a more pervasive problem in which public agencies are likely complicit.

In sum, with respect to the facts of the *Fulton* case, it seems CSS made a great number of high-quality homes available to children, many of which likely would not have been brought into the system without CSS's involvement in recruiting and qualifying foster parents. The City's action cut off that supply and, if one assumes its choices of private agencies send some signal to City residents about who is welcome as foster parents, signaled

CODE § 3700.64(a) (“The FFCA shall consider the following when assessing the ability of applicants for approval as foster parents: . . . (b) (3) The applicant’s ability to care for children with special needs, such as physical handicaps and emotional disturbances.”); 11 PA. STAT. & CONS. STAT. ANN. § 31 (West, Westlaw through 2021 Reg. Sess.) (“It shall be the duty of the duty of the society, to whom a commitment shall be made . . . to select, so far as it may be possible, families of the same religious denomination as that to which the parents of children committed to its care shall belong.”).

¹²⁶ Cf. 23 PA. STAT. § 6386(4) (mandating, in cases of positive toxicology detection in newborns, “[i]dentification, informed by an assessment of the needs of the child . . . of the most appropriate lead agency responsible for developing, implementing and monitoring a plan of safe care”).

¹²⁷ See 23 PA. STAT. § 6372 (requiring each local public agency to be “vigilant of the status, well-being and conditions under which a child is living and being maintained” and “[w]here the county agency finds that the placement for any temporary or permanent custody, care or treatment is for any reason inappropriate or harmful in any way to the physical or mental well-being of the child, it shall take immediate steps to remedy these conditions including petitioning the court.”).

¹²⁸ Cf. Woods, *supra* note 123, at 2348–49 (noting “the backdrop of a public welfare system that is already fraught with LGBTQ-based inequalities and commonly fails LGBTQ youth in need of help from the state—an especially vulnerable segment of the LGBTQ population. . . . LGBTQ youth are more frequently rejected or unwanted by foster families, adoptive parents, and group homes . . . [and] experience discrimination from child welfare providers and frontline caseworkers . . . [and] suffer higher rates of physical, sexual, and verbal abuse in foster families and group homes.”).

¹²⁹ Cf. *id.* at 2349 (“Many LGBTQ youth also experience discrimination from child welfare providers and frontline caseworkers . . .”).

to Catholics that they are now unwelcome.¹³⁰ It therefore likely eliminated a substantial number of excellent potential placements for the children whom the City takes into its custody. The City presented no evidence that it replaced those potential homes with others of equal or better quality. And its reasons for doing this appear principally to have been to serve interests of a group of adults—namely, same-sex couples wishing to foster maltreated children—and corporate interests like attracting tourists and businesses. It showed no child-welfare necessity to its decision. The soundest conclusion is therefore that the City violated its fiduciary obligation to the children in its custody. It improperly stepped outside its proper role, treating children instrumentally in the service of adult interests.

Now consider the situation when a public agency itself selects the placement for each child, from among all those made available to it by private agencies, as the Court assumed to be the case in Philadelphia.¹³¹ If, as is true in Philadelphia and most other locations where these disputes have arisen, there are many agencies who do welcome same-sex married couples, then the claim that participation of one or two agencies who do not qualify such couples diminishes supply is even more clearly fanciful. It must entail a factual premise that the local government's willingness to contract with an agency that discriminates scares off many potential foster parents, so that they decline to become foster parents *at all* through *any* private agency, and that the number of people it scares off exceeds the number of foster parents that private agency recruits that other agencies would not reach. The briefs filed in support of Philadelphia in *Fulton*, though many expressed concern

¹³⁰ See Brief of Nebraska et al., *supra* note 103, at 32 (“For the city to brand Catholic Social Services’ religious beliefs as discriminatory and compel the organization to close its foster-care ministry impugns the faith that it and its fellow believers hold.”).

¹³¹ See Brief for Petitioners, *supra* note 27, at 6 (“When DHS needs a foster home for a child, it sends out a request, called a referral, to private agencies. These agencies check to see which foster families are available, then notify DHS of any potential match. Agencies provide information about the foster family, and DHS compares that with information about the foster child. DHS then determines which private agency has the most suitable foster family, based upon factors including race, age, family relationships, and disability. J.A.266-267, J.A.307-310, J.A.79-81. After DHS makes that match, the child is placed with the foster family.”); Reply Brief for Petitioners, *supra* note 102, at 11 (“Philadelphia places a child in a home. . . . Philadelphia made no such delegation and instead, by law, ‘shall not authorize any placement’ until it makes its own independent determination of the family’s qualifications. PHILA. CODE § 21-1801; see also J.A. 84-85, 98 (confirming Philadelphia does so). Philadelphia is reserving authority to make its own decision about families.”).

that this could happen,¹³² provided no evidence that it actually did.¹³³ Certainly there is no evidence of any same-sex couple in Philadelphia being “turned away” or “rejected” altogether upon applying to become foster parents. The City sensibly encourages all potential foster parents to research online the available private foster care agencies and find one that is a good fit for them, in light of whatever agency priorities or specialization might matter to them.¹³⁴ That no same-sex couple has ever approached CSS suggests this works well. For the same reasons, the claim that CSS’s involvement in foster care reduces diversity within the pool of foster parents is also fanciful.¹³⁵ If there were any reality underlying the “scaring off” concern, then one would expect the City to have provided evidence of an

¹³² See, e.g., Brief of Massachusetts et al., *supra* note 25, at 26 (“[E]ncountering such discrimination might well discourage prospective foster parents from seeking out another agency after experiencing a painful rejection”); Brief of Nat’l LGBT Bar Ass’n et al., *supra* note 85, at 14–15 (“If child placement agencies receiving public funding were permitted to reject qualified same-sex couples, it is likely that at least some qualified potential parents will not pursue foster parenting at all due to the additional confusion atop a complex child welfare system that is already often unwelcoming to same-sex couples.”); Brief of Children’s Rts. et al., *supra* note 29, at 28; Brief for Voice for Adoption et al., *supra* note 94, at 15. The several amici who signed on to the National LGBT Bar Association brief cite “a national survey of gay and lesbian adoptive parents [that] found that nearly half of the respondents reported experiencing bias or discrimination from a child welfare worker or birth family member during the adoption process.” Brief of Nat’l LGBT Bar Ass’n et al., *supra*, at 15; see also Brief of Children’s Rts. et al., *supra*, at 27–28 (citing a “2019 study gathering data from hundreds of LGBTQ adults who experienced disruptions in the adoption or foster care process [that] concluded that anti-LGBTQ discrimination ‘may lead some LGBTQ people to abandon foster care or adoption as a means of building their families’”). This evidence actually undermines the claim that discriminatory recruiting agencies diminish the pool; it shows there are more direct obstacles in the system that have nothing to do with recruiting agencies and that gay and lesbian caregivers are overcoming those obstacles.

¹³³ Cf. Reply Brief of Petitioners, *supra* note 102, at 23 (“States accommodating religious agencies like CSS have not experienced a decline in LGBTQ fostering, but instead have seen that accommodating religious providers creates win-win outcomes. Tex. Br. 24–29; Nebraska Br. 10–19.”); Brief of President of the House of Deputies of the Episcopal Church et al. at 12–16, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123) (demonstrating that “The Inherent Dignity Of LGBT Persons And Their Families Informs The Theology Of A Wide Cross-Section Of American Religious Traditions”).

¹³⁴ See Petition For a Writ of Certiorari 7 (noting Philadelphia tells potential foster families to research agencies based on comfort and fit); see also *Dumont v. Lyon*, 341 F. Supp. 3d 706, 716 (E.D. Mich. 2018) (stating that faith-based agencies in Michigan, like CSS, refer to other agencies any applicants with whom they cannot, for reasons of religious belief, work); *New Hope Fam. Servs., Inc. v. Poole*, 493 F. Supp. 3d 44, 51 (N.D.N.Y. 2020) (quoting Complaint at 156, *New Hope Fam. Servs.*, 493 F. Supp. 3d 44 (No. 18-CV-1419) (“Whenever a same-sex couple or unmarried couple is interested in a referral, New Hope refers them to the appropriate county social services officer or another provider.”).

¹³⁵ Brief of Family Equal. & PFLAG Nat’l at 33, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021) (No. 19-123); Brief of Support Ctr. for Child Advoc. & Phila. Family Pride at 2–3, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123); Brief of Child. Rts. et al. at 16–17.

increase in applications from same-sex couples as a result of CSS's exit, but it did not. And if there were any reality to the concern, the City might address it by other means, such as special outreach to the gay community emphasizing its own openness and that of numerous private agencies,¹³⁶ rather than by cutting off a major supplier of high-quality homes for children, which might reduce diversity within the pool in different ways (e.g., religious, national origin).

Absent such a scaring off and inability to address the concern by other means, courts should assume the agencies who agree to a non-discrimination policy fully accommodate all the same-sex couples interested in fostering.¹³⁷ For state agencies to have a "sufficient pool" of foster parents who are "welcoming of LGBTQ youth,"¹³⁸ they do not need every single private agency with whom they contract to be recruiting such foster parents. Similarly, they do not need every single private agency to recruit foster parents well-suited to dealing with any other special need some foster children might have—for example, foster parents fluent in particular languages, or specially trained to manage behavior disorders or allergies, or dedicated to the continuity of observance in every religion. Thus, if this other assignment mechanism is at work, the net effect of excluding a private agency that has been highly successful is again most likely to diminish the total foster parent pool in quantity and quality, to the detriment of children.¹³⁹ This surmise is strengthened when one considers the possibility that excluding Catholic agencies because of their faith-based position on marriage will "scare off" Catholics from pursuing service as foster parents, because they perceive exclusion of CSS as manifesting general hostility to Catholics.

Of course, in some other locality, or with respect to special types of foster homes, circumstances might be different. One can hypothesize a situation

¹³⁶ Cf. MICH. COMP. LAWS ANN. § 722.124e(4) (West, Westlaw through 2021 Sess.) (prescribing special efforts to welcome into the system any applicants not accepted by some private agency for religious reasons).

¹³⁷ See *Fulton v. City of Philadelphia*, 320 F. Supp. 3d. 661, 669 (E.D. Pa. 2018) ("Presently, DHS has contracts with thirty private foster care agencies."); Brief of Massachusetts et al., *supra* note 25, at 29 ("In the *Amici* States, the vast majority of foster care and adoptive services providers, including faith-based organizations, readily comply with inclusionary policies that disallow discrimination in these services . . .").

¹³⁸ Brief of Massachusetts et al., *supra* note 25, at 23.

¹³⁹ The response that amici states supporting the City give to this speculation is illogical. Claiming that no data supported the suggestion that Illinois experienced a "precipitous decline in foster homes" after the state imposed a non-discrimination rule that caused Catholic Charities Illinois to cease foster-care operations, the states argue there is no connection between those two things because "such declines were not unique to Illinois," a glaring non sequitur. *Id.* at 31.

in which another private agency that is, except for the discriminatory policy, identical to the agency excluded—in particular, having like access to the same population—stands ready to jump into the breach left by the discriminating agency's departure and fully replicate its efforts. Then it might be consistent with the state's fiduciary role to exclude the discriminatory agency, if the replacement possibility made that agency entirely superfluous, to ensure no scaring off of same-sex couples. There is no evidence, however, that that is the case in Philadelphia with respect to CSS or in the other locations where the disputes have arisen. Conversely, one can also hypothesize a situation in which an agency like CSS is the only private agency in a town and refusing to give it a contract would dramatically diminish the foster care population in size and quality. The local government agency might find it very difficult to create its own foster care recruitment function, or to recruit as many foster families as the private agency does. In addition, the local government agency might have its own biases—in particular, it might be inclined to engage in covert, illegal race-matching that excludes white applicants from consideration for placement of Black children—¹⁴⁰ whereas the Catholic agency might be free of that bias. Respondents and the many amici who support them should explain why it would be morally or constitutionally requisite for the local government to refuse to use that agency even though that refusal is, all things considered, bad for children entering foster care. Having only that one agency would be non-ideal for children, to be sure, because some great potential foster parents (same-sex couples) are excluded, but the fix for that problem would be even worse for children, just as would be the case if the only agency in town left out some other group of potential foster parents (e.g., deaf, non-English speakers, physically disabled, etc.). The *parens patriae* nature of the government's role in the foster care context means that it owes the children in its custody an obligation to create the best total pool of foster homes that it reasonably can in given circumstances, in light of existing resources, without concern for its impact on other private individuals. In Philadelphia

¹⁴⁰ Cf. Dov Fox, *Race Sorting in Family Formation*, 49 *FAM. L.Q.* 57, 60–61 (2015) (“In adoption, the overriding emphasis on parent-child racial continuity undermines the placement of children with stable families who love them. Minority children are vastly overrepresented among those without homes, while minority parents are vastly underrepresented among those in a position to provide a permanent home. The insistence that children be placed with parents of the same race predictably leaves thousands of minority children, who might otherwise be placed with families of a different race, languishing in foster care as their chances diminish for ever being adopted at all. Race-matching in adoption is pernicious because it entrenches racial disparities among families by singling out minority children for exclusion from stable homes and deprivation of enduring parental relationships.”).

and in many other locales, that appears to mean allowing private foster-care agencies to continue operating as they have been even if they have faith-based or pragmatic reasons for not accepting some category of applicants.

I close by addressing a few additional arguments voiced in support of Philadelphia in *Fulton*, not addressed by the Court in its decision but potentially considered on a future occasion, depending on which level of scrutiny courts apply:

Exemptions are inefficient:¹⁴¹ In carrying out its functions, it is appropriate for a public agency to consider budget constraints and what practices are most efficient. Exemptions and tailoring of contracts typically entail some loss of efficiency and raise costs (though perhaps less so than does terminating relationships with existing contractors and developing new relationships with others, or than does auditing private agencies to ensure their signing of a non-discrimination pledge is not disingenuous). If no one has any rights constraining the government, then it is free to balance competing considerations as it sees best. But this Article has explained why children the government takes into its custody do have rights that constrain it, fundamental rights in fact. Ordinarily, such an efficiency concern cannot suffice to compromise a fundamental right, at least when the added cost is modest, hardly crippling. In addition, governments can obviate this efficiency concern simply by returning to the regime in which they did not treat foster care as a public accommodation subject to anti-discrimination rules.

Agency discretion. Courts should defer to some degree to the judgement of specialized public agencies as to how best to carry out their mission. In Philadelphia and other jurisdictions, however, the public agencies have clearly misunderstood their mission. Their efforts at a child-welfare justification are an unconvincing afterthought. Viewed from a children's-rights perspective, because a fundamental right is at stake, the degree of deference due is less. They should be judged by a professional judgment standard.¹⁴² In Philadelphia, DHS had ample concrete evidence

¹⁴¹ Brief of Massachusetts et al., *supra* note 25, at 9–10.

¹⁴² See Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs., 959 F.2d 883, 894 (10th Cir. 1992) (applying professional judgment standard to public agency's choice and inadequate oversight of foster placement); T.M. ex rel. R.T. v. Carson, 93 F. Supp. 2d 1179, 1187 (D. Wyo. 2000) (same); Brian A. ex rel. Brooks v. Sundquist, 149 F. Supp. 2d 941, 954 (M.D. Tenn. 2000) (applying same standard to agency's carrying out of a variety of responsibilities); LaShawn A. v. Dixon, 762 F. Supp. 959, 960 (D.D.C. 1991), *aff'd sub nom.* LaShawn A. by Moore v. Kelly, 990 F.2d 1319 (D.C. Cir. 1993) (same); Braam ex rel. Braam v. State, 81 P.3d 851, 858-59 (Wash. 2003) (en banc)

that CSS made a large and very valuable contribution to the agency's true mission of serving foster children. Against that, it had mere speculation about same-sex couples being discouraged from becoming foster parents. A professional administrator truly devoted to children's welfare would not have concluded from this evidence that the agency should exclude CSS.

Government money should not be used to pay for discrimination:¹⁴³ First, it is not. No private agency gets paid for turning applicants away, nor do private agencies receive a lump sum for simply being in the foster care business.¹⁴⁴ In fact, they do not, strictly speaking, get paid for their foster-parent recruiting efforts at all. The public agency pays a private agency for all or part the cost of taking a child into its care and then overseeing the foster home.¹⁴⁵ And to the extent excluding same-sex couples is economically irrational, meaning it raises the private agency's cost of recruiting foster parents, that agency internalizes that cost. In addition, by cutting itself off from a valuable segment of the foster-parent supply pool, such a private agency makes it easier/less costly for other agencies to recruit good candidates for fostering; a discriminating agency takes itself out of the competition for those candidates it excludes on grounds not relevant to qualification. More importantly, however, as noted above, that the state uses public funds to carry out its *parens patriae* functions does not give rise to any right on the part of third parties to complain; *in that role*, the state owes no duties to any group of applicants for foster care not to subsidize a practice of discriminating against them.

(adopting professional judgment standard and noting that although several other federal courts have applied a "deliberate indifference" standard, "[s]everal of the federal courts explicitly qualified that they were *not* deciding the standard for injunctive relief, or that they had not been asked to consider a professional judgment standard"), *id.* at 859 ("[W]e hold that 'deliberate indifference' is not well suited for analyzing the claims of the class. Foster children are entitled to a high standard.").

¹⁴³ Brief of Nat'l LGBT Bar Ass'n et al., *supra* note 85, at 17; Brief of Children's Rts. et al., *supra* note 29, at 16.

¹⁴⁴ *See* *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 671 (E.D. Pa. 2018); M.C.L.A. 722.124e(h) ("[A] private child placing agency does not receive public funding with respect to a particular child or particular individuals referred by the department unless that agency affirmatively accepts the referral").

¹⁴⁵ *See* *Fulton v. City of Philadelphia*, 922 F.3d 140, 147–48 (3d Cir. 2019); *Dumont v. Lyon*, 341 F. Supp. 3d 706, 715 (D. Mich. 2018) ("[A]fter an agency accepts a child's case from DHHS, it immediately begins receiving per diem compensation from the State."), 746–47. The state might well have determined the amount it would pay, however, by taking into account agencies' recruitment costs.

LGBTQ+ youth are harmed by licensing a biased private agency:¹⁴⁶ If, as explained above, a religious foster care agency increases the overall size of the foster-home pool despite a policy against recruiting same-sex couples, there is no purchase to an argument that accommodating its religious beliefs harms LGBTQ+ youth by reducing the overall supply of foster homes. In addition, the briefs filed in *Fulton* suggest by their silence that there is no evidentiary basis for believing any of the foster parents Catholic agencies recruit would be disposed to reject or otherwise harm LGBTQ+ youth who end up in their care.¹⁴⁷

Moreover, even if there were basis for that concern, the public agency would, unless it is completely incompetent, not assign such youth to the Catholic agency following their entry into foster care. Children come to the attention of the child welfare system as a result of a report of abuse or neglect to a hotline.¹⁴⁸ Hotline workers elicit as much information they can about what happened and why. If they deem a report valid—that is, stating facts that, if true, fall within the state’s definition of maltreatment, they pass all information received to caseworkers. Federal law mandates that at that point caseworkers make “reasonable efforts” to prevent removal of the child from

¹⁴⁶ Brief of Fosterclub & Former Foster Youth at 5, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123) (“[T]urning away qualified LGBTQ+ families creates serious stigma and psychic harm not just for those families, but also LGBTQ+ foster youth”); Brief of Children’s Rts. et al., *supra* note 29, at 16 (“Requiring the City contractually to allow agencies to discriminate based on sexual orientation would also send a harmful message to vulnerable children in foster care—as well as potential LGBTQ foster parents—that the City will not protect them from discrimination.”); *id.*, at 30-31 (“[I]t would also harm LGBTQ youth in foster care by sending a message that LGBTQ people are considered unsuitable to provide loving homes. The rejection same-sex couples suffer when being turned away from a foster care agency trickles down to LGBTQ youth and perpetuates a cycle of stigmatic harm.”).

¹⁴⁷ Cf. Reply Brief for Petitioners, *supra* note 102, at 5 (“CSS Section 3.21 permits discretionary ‘exception[s] from the requirement ‘not to reject a child or family’ based upon ‘their actual or perceived race, ethnicity, color, sex, [or] sexual orientation.’”); Pl. Catholic Charities’ Mot. Prelim. Inj. 3, *Catholic Charities v. Mich. Dep’t Health & Human Servs.*, 2:19-CV-11661-DPH-DRG (E.D. Mich.) (“Catholic Charities ministers to over 21,000 individuals each year without regard to race, religion, sex, marital status, gender identity, sexual orientation, or any other protected characteristic.”); *U.S. Catholics Open to Non-Traditional Families*, PEW RSCH. CTR. (Sept. 2, 2015), <https://www.pewforum.org/2015/09/02/u-s-catholics-open-to-non-traditional-families> [<https://perma.cc/W8QJ-A9JT>] (“[F]ully two-thirds of American Catholics think it is acceptable for same-sex couples to raise children, including 43% who say a gay or lesbian couple with children is just as good as any other kind of family.”); Frank Newport, *LGBT Population in U.S. Significantly Less Religious*, GALLUP (Aug. 11, 2014), <https://news.gallup.com/poll/174788/lgbt-population-significantly-less-religious.aspx> [<https://perma.cc/BPC4-ZUWW>] (finding 20% of the American LGBTQ community identifies as Catholic).

¹⁴⁸ For elaboration of the process described here and the underlying legal mandates, see Richard J. Gelles, *The Child Protection System*, in *THE OXFORD HANDBOOK OF CHILDREN AND THE LAW* (James G. Dwyer ed.) (2020), 393–414.

the home. To do that, they must learn all they can about the child's situation and about the underlying cause of the maltreatment. The 2018 Family First Act places renewed emphasis on this process and enables states to tap into more federal funding to do so. To remove a child from a home after making reasonable efforts, caseworkers must substantiate the allegations in the report by conducting an investigation and relate all the information they have collected to a court in order to get a judge to approve the removal and grant legal custody to the public agency. The agency would then do a special-needs assessment to determine an appropriate placement. If in the course of this entire process, public agency employees fail to recognize youths who self-identify as LGBTQ+ or whose family members regard them as such, they should be fired. And when they do recognize it, they should be informing the private foster care agencies of that fact and asking them which of their foster parents are especially well prepared to give those youths the positive nurturing they need, just as they do with other special needs. This is not rocket science.

Also worth noting: Implicit in this argument is an implausible assumption that all families other agencies recruit are accepting of sexual minorities, simply because the agencies agreed to sign the non-discrimination pledge.¹⁴⁹ The amicus brief filed by "Fosterclub and Former Foster Youth" mostly relates stories of gay youth who suffered terribly in foster homes because of their sexual orientation; tellingly, none indicated that those homes were operated by Catholic agencies. There is no evidence in the record of *Fulton* or the other foster care cases that have been percolating in federal courts that other private agencies try to exclude applicants who are uncomfortable or worse with respect to a youth who is gay.¹⁵⁰ If agencies did that it would raise a different and more genuine problem regarding the size of the pool; undoubtedly, that would dramatically reduce the total number of foster homes. Taken to its logical conclusion, the normative position LGBTQ+ advocates advance--that discrimination against sexual minorities must be eliminated from the foster care system, and that the City should not direct any foster-care dollars to anyone with negative attitudes toward sexual minorities--would mean making a LGBTQ+-friendly attitude a prerequisite

¹⁴⁹ Cf. Sarah Warbelow, *LGBT Youth Legal Landscape*, 23 TEMP. POL. & C.R. L. REV. 413, 427 (2014) ("Only 9 percent of foster families surveyed said they would accept LGBT youth.").

¹⁵⁰ Pennsylvania's amicus brief states foster care agencies are directed to assess "a prospective foster parent's ability to provide care and nurturing to a child," but does not indicate whether attitudes regarding sexual orientation are a part of this assessment. Brief of Amicus Curiae Commonwealth of Pennsylvania in Support of Respondents at 3, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123).

for anyone to be approved as a foster parent. That might well cut the number of available foster homes by a third or more. Extending the underlying premise to other discriminatory attitudes (racism, sexism, religious bigotry, hostility to atheists, etc.)—in short, making all agencies and all foster parents pass a test of liberal purity—would decimate the roster of foster families. Faith-based agencies might naturally wonder why they are being singled out for condemnation because they would not pass that test.

In addition to the baseless conjecture that Catholic agencies' participation diminishes the supply of foster homes, and the unwarranted implicit assumption that all homes prepared by a Catholic agency are homophobic whereas all homes prepared by other private and public agencies are LGBTQ+-friendly, advocates for LGBTQ+ youth make implausible claims about psychological harm to youth arising from the state simply having a contract with an agency that discriminates. They offer no factual support for the supposition that youth who end up in a good placement through some other agency are somehow aware of and impacted by the Catholic agency's policy.¹⁵¹ Do they imagine that caseworkers in Philadelphia are, for no fathomable reason, telling children about CSS and how horrible it is that there is this one foster care agency out there among the dozens with which the City contracts that has this policy? Or that foster parents are going out of their way to make sure children in their care are aware of this phenomenon that is completely irrelevant to their lives? Implausible speculations of this sort make those who raise the concern appear motivated by ideological commitment to the gay rights cause more so than by genuine concern for children's welfare.¹⁵² It is a pervasive problem in child-welfare policy that people and organizations with adult-centered agendas endeavor to disguise their primary objective by straining to translate

¹⁵¹ See, e.g., Brief for Intervenor-Respondents, *supra* note 27, at 49 n.16 (“[P]ermitting CSS’s policy would send a ‘very strong signal to . . . [LGBTQ foster] youth that while we support you now, we won’t support your rights as an adult.’”); Brief of Children’s Rts. et al., *supra* note 29, at 31 (“Forcing the City to allow agencies to discriminate would send a loud and powerful message that LGBTQ people are not valued and that the City is unable to protect them from discrimination. That dangerous message will undoubtedly make LGBTQ youth fearful of coming out, of realizing their identity, and of being rejected by the very providers on whom they depend.”); Brief Amici Curiae of Scholars of Const. Rights & Int. of Children at 16–17, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123) (“[W]hen discrimination against same-sex couples occurs in the context of the public child welfare system—a government program—it sends a message that stigmatizes and humiliates LGBT foster children . . . [and] exacerbate[s] the psychic trauma that many LGBT foster children already carry with them.”).

¹⁵² Cf. Brief of Scholars of Const. Rts. & Int. of Child., *supra* note 152, at 22 (“This Court has drawn ‘upon principles of liberty and equality to define and protect the rights of gays and lesbians,’ and their families. And it should do so here to protect same-sex couples . . .”).

their position into child-welfare terms, fabricating facts that serve their agenda.¹⁵³ The campaign to drive private agencies like CSS out of child welfare systems appears to be, on the whole, just another instance of this.

CONCLUSION

Same-sex couples represent a wonderful source of much-needed foster parents. So, too, do religious private foster care agencies, despite limitations they might have as to whom they recruit. Any large-city foster care system can easily and fully welcome them both. These controversies and conflicts are entirely unnecessary, occasioned by a failure to understand the state's proper role in caring for children whom the state removes from their homes.

Neither litigants nor the innumerable *amici* in cases like *Fulton* have squarely addressed the rights of the children and the demands of the *parens patriae* role. Rather, most operate from the perspective that foster care is simply another service the state provides to "the people," like public transportation or libraries.¹⁵⁴ A fundamental reframing of these disputes is needed. The government system for aiding abused and neglected children is not a public accommodation, for reasons that go far beyond its selectivity. Allowing its focus to shift to adults' interests and the City's image, Philadelphia has treated instrumentally the fragile children in its custody, betraying them. There is little chance the Supreme Court will ever see this situation through a children's-rights lens; it has rarely looked at child welfare issues that way. But perhaps the gay community and other cities that use private foster care agencies can be convinced to stop politicizing child welfare.

The main point here is that treating such an important area of child welfare as a battleground for adult rights is wrong. Whoever is left out of the foster care system or feels stigmatized by the policies governing it, either religious agencies because public accommodation laws are applied or same-sex couples because religious agencies are given an exemption, should instead

¹⁵³ See James G. Dwyer, *The Most Dangerous Branch of Science? Reining in Rogue Research and Reckless Experimentation in Social Services*, 87 MO. L. REV. 1, 12–29 (2022); Elizabeth Bartholet, *Contested Child Protection Policies*, in OXFORD HANDBOOK OF CHILDREN AND THE LAW (James G. Dwyer ed.) (2020), 415–429 (discussing the tension between parent-focused value systems and child-focused value systems).

¹⁵⁴ The brief of Generation Justice in *Fulton* does not develop an argument for children's rights or *parens patriae* decision making per se but presents a forceful child-centered perspective on the conflict. See Brief of Generation Justice as Amicus Curiae in Support of Petitioners, *Fulton v. City of Philadelphia*,

challenge the government's decision as a violation of children's rights. Any court contest should be resolved solely by reference to reliable evidence of that decision's impact on the quantity and quality of available foster homes and on children's welfare. A proper understanding of the state's role when it takes children from their homes and keeps them in custody compels this approach.