No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,
v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation is interested in this case because it exemplifies a recurring problem in the clash between religious liberty and same-sex relations.

SUMMARY OF ARGUMENT

Placing a child in foster care can be a traumatic experience, both for the parents and for the child. What kind of home will my child go to? What kind of foster parents will care for my child? What kind of influence will they have on my child. What kind of person will my child be after he returns home -- if he returns home?

Unlike adoption, in which a parent relinquishes his parental rights forever, children are placed in foster care temporarily with the assumption that those children will eventually be reunited with their parents. The right of a parent to exercise some control over the kind of foster home his children are

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

placed in, is therefore at least as or more substantial than the right of a parent to exercise some control over who adopts his children.

Many parents believe in traditional marriage and would not want their children to be raised by a same-sex couple. This is especially true of Catholic parents who want their children raised with a Catholic understanding of marriage. Their right to raise their children to believe in traditional marriage is impossible to exercise, without the option of working through agencies like Catholic Social Services that will ensure their children are placed with opposite-sex married couples.

The Free Exercise Clause, which was adopted to protect the first and foremost of our God-given liberties, exists to protect parents like these and their children as well, foster parents like Petitioners Sharonelle Fulton and Toni Simms-Busch, and religious organizations like Catholic Social Services. But because the Free Exercise Clause has been downgraded by *Employment Division v. Smith,* 494 U.S. 872 (1990), it currently is not allowed to give these plaintiffs the strong protection it was intended to give.

The Foundation therefore urges this Court to overrule *Employment Division v. Smith* and restore to the Free Exercise Clause the high level of protection it was intended to provide.

ARGUMENT

I. *Employment Division v. Smith* Does Not Do Justice to the Framers' Vision of Religious

Liberty.

The Foundation filed an amicus brief at the certiorari stage in this case, detailing the purpose and history of the Free Exercise Clause of the First Amendment and urging this Court to grant certiorari and consider whether to overrule *Employment Division v. Smith.*

Rather than repeating what we said in our certiorari brief, we will invite the Court's attention to our certiorari brief, summarize the argument for overruling *Smith,* and then address other matters.

The Framers might well view with skepticism the preoccupation of today's courts with tiers and tests. But they would be utterly incredulous that the Court in *Employment Division v. Smith* would downgrade the Free Exercise Clause to a "lower tier" right that, unlike other rights, can be infringed with merely a rational basis.

The Foundation questions whether even strict scrutiny is sufficient to protect this first and foremost of our liberties. But unless and until the Court reconsiders the whole issue of tiers and tests, at the very least Free Exercise should be given the strict scrutiny protection it rightfully deserves.

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. Leo Pfeffer, *Church, State and Freedom* 74 (1953). Chief Justice Burger seemed to share that view, writing in *Meek v. Pittinger,* 421 U.S. 349 (1975), "One can only hope that at some future date the Court will come to a more enlightened and tolerant

view of the First Amendment's guarantee of free exercise of religion...." *Id.* at 387 (Burger, C.J., concurring in judgment in part and dissenting in part).

Professor Lawrence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle." Lawrence H. Tribe, *American Constitutional Law* 833 (1978).[2] Voluntarism is central to the case at hand, for Philadelphia's policy compels Catholic Social Services to act involuntarily in contravention of their most basic beliefs. This is a violation of the right to free exercise at its very core.

This Court appeared to accord strict scrutiny in early free exercise cases. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court held:

> ...the [first] amendment raises two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Certain conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible

[2] *Cf.* 2d ed. at 1160.

> end, unduly to infringe the protected freedom.

310 U.S. at 303-04. The Court seems to say even as early as *Cantwell* that infringements on free exercise are subject to some higher standard than lower-tier reasonable relationship to a legitimate state purpose.

The strict scrutiny test was further articulated in *Sherbert v. Verner,* 374 U.S. 398 (1963), and developed into a three-part test in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). But in *Employment Division v. Smith,* 494 U.S. 872 (1990), the Court appeared to limit *Yoder* to cases in which either (1) the law was directly aimed at religion, or (2) the free exercise claim was asserted as a hybrid right alongside another right such as privacy or free speech.

Unlike *Yoder*, *Smith* was decided by a sharply divided Court. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justice Blackmun dissented, joined by Justices Brennan and Marshall, arguing that the strict scrutiny test must be preserved in free exercise cases. Justice O'Connor wrote a concurrence that sounded much more like a dissent: she excoriated the majority for departing from the strict scrutiny test but concurred because she believed there was a compelling interest in regulating controlled substances.

Smith received harsh criticism from the beginning. A massive coalition, ranging from liberal organizations like the American Civil Liberties Union

to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist Convention, joined together to denounce the decision and call for a return to the *Yoder* standard. Congress responded by passing the Religious Freedom Restoration Act of 1993, 42 U.S. Code §2000bb-3, in the House by a voice vote and in the Senate 97-3, which was signed into law by President Clinton, and which was struck down 6-3 as applied to the states in *Boerne v Flores*, 521 U.S. 507 (1997), but unanimously upheld as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

Following *Flores,* in 2000 the American Civil Liberties Union worked with a coalition of organizations to secure passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§2000cc et seq. RLUIPA prohibits the imposition of burdens on the free exercise rights of prisoners and limits the use of zoning laws to restrict religious institutions' use of their property.

Twenty-one states including Pennsylvania have adopted state versions of the Religious Freedom Restoration Act requiring their state governments to apply the compelling-interest/less-restrictive-means test, and ten additional states have incorporated the principles of the Act by state court decision.[3]

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[3] States which have adopted "mini-RFRA" statutes include Connecticut, Rhode Island, Pennsylvania, Virginia, South Carolina, Florida, Alabama, Mississippi, Louisiana, Tennessee, Kentucky, Illinois, Indiana, Missouri, Kansas, Oklahoma,

Scholars have likewise criticized *Smith*. Professor Michael McConnell cogently observes that the Court effectively decided *Smith* on its own, as none of the parties had asked the Court to depart from the *Yoder* test in deciding the case.[4] Jane Rutherford, writing in the *William and Mary Bill of Rights Journal,* argues that *Smith* leads to the unfortunate result of subjecting minority faiths to the power of the majority and decreasing the rights of minorities to express their individual spirituality.[5] John Witte, Jr., of Emory University, writing in the *Notre Dame Law Review,* demonstrates that *Smith* is at odds with the basic principles that underlie the religion clauses, especially liberty of conscience, free exercise,

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Texas, New Mexico, Arizona, and Idaho. Similar proposals are pending in other states. The state courts of another ten states (Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin) have incorporated the principles of the Act by state court decision. *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[4] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990). Professor McConnell also notes that "over a hundred constitutional scholars" had petitioned the Court for a rehearing which was denied. *Id.* at 1111. See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

[5] Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 Wm. & Mary Bill Rts J. 303 (2001).

pluralism, and separationism.[6]

Aden and Strang document the failure of lower federal courts to follow *Smith* by routinely ignoring the "hybrid rights" exception.[7] According to Aden and Strang,

> One would assume, *a priori*, that the Supreme Court's pronouncement in *Smith*--that when a plaintiff pleads or brings both a free exercise claim with another constitutional claim the combination claim is still viable post-*Smith*--is the law. In fact, litigants assumed just that, but the appellate courts have been thoroughly unreceptive to hybrid right claims.[8]

After discussing numerous cases in which hybrid rights claims have been denied, Aden and Strang suggest reasons the circuit courts have not followed *Smith*: (1) the hybrid exception was created in what many view as a post-hoc attempt to distinguish controlling precedent; (2) hybrid claims simply suffer a continuation of that reluctance to excuse conduct because of religious belief; (3) the analytical difficulty in conceptualizing how hybrid claims fit into free

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[6] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1966).

[7] Stephen H. Aden and Lee J. Strang, *When a 'Rule' Doesn't Rule: the Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 Penn St. L. Rev. 573 (2002).

[8] *Id.* at 587.

exercise jurisprudence; and (4) growing hostility to exemptions from state anti-discrimination laws with ever-increasing numbers of protected classes.[9]

Additional reasons may be "the courts' deeply ingrained reticence to grant exemptions based on religious claims,"[10] "persons with traditional religious beliefs (especially evangelical Christians) seeking exemption from laws or regulations synchronous with the judges' leanings,"[11] and "the increasing regulation of private life by state governments through anti-discrimination statutes."[12]

Furthermore, the *Smith* hybrid-rights doctrine makes no sense. If the right asserted with free exercise is a fundamental right, it can stand on its own independent of a free exercise claim.[13] As Justice Souter said in his concurring opinion in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah,* 508 U.S. 520 (1993) concerning the hybrid-rights doctrine,

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional

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[9] *Id.* at 602.

[10] *Id.* at 602-03.

[11] *Id.* at 604.

[12] *Id.*

[13] The meaning of the hybrid-rights doctrine may be that if free exercise is asserted along with a nonfundamental right, the combined weight of the two rights requires that they be given strict scrutiny.

> right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.[14]

In summary, *Employment Division v. Smith*:

* Was adopted *sua sponte* without request, argument, or briefing from the parties.

* Was adopted by a bare majority over a strong dissenting opinion by three Justices and a concurring opinion that rejected the *Smith* rationale and concurred only in the result.

* Rests upon a strained attempt to reconcile its reasoning with that of *Yoder* and other decisions.

* Was sharply criticized by a wide spectrum of the legal and religious community of the nation.

* Was criticized by a wide spectrum of constitutional scholars.

* Was repudiated by an overwhelming vote of

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[14] *Hialeah*, 508 U.S. at 566-67 (Souter, J., concurring in part and concurring in judgment).

Congress in adopting the Religious Freedom Restoration Act which was signed into law by President Clinton but partially invalidated by this Court in *Flores*.

* Was repudiated by (thus far) thirty-one states through the adoption of mini-RFRA statutes or state constitutional amendment or state court decisions.

* Has been ignored, strained, or limited by many circuit courts and other courts.

* Has proven unfair and unworkable in practice.

* Is manifestly contrary to the Framers' elevated view of religious liberty because it reduces this most-cherished right to mere lower-tier status.

* Involves a "hybrid-rights" doctrine that is nonsensical because other fundamental rights can stand on their own.

Because of all of these factors, it is clearly time for this Court to reconsider *Employment Division v. Smith*.

II. Biological Parents Have a Liberty Interest in Their Children's Foster Care.

Catholic Social Services (CSS), a religious organization, clearly has an interest in this case because the City of Philadelphia is trying to force CSS to violate its religious convictions. Sharonelle Fulton and Tony Lynn Simms-Busch also have an interest in this case because, as foster parents, they care for foster children through CSS and might not be able to do so if CSS is forced to close.

But it is also appropriate for an amicus brief to present to the Court the interest of persons or groups of persons who may not be parties to the case but who nevertheless have an interest in the case and rights that this case may affect. The Foundation therefore asks this Court to consider the rights of parents whose children are be placed in foster care. These parents are in most cases the biological or adoptive parents of their children and are still the legal custodians of their children. Their children are being taken from them, in theory temporarily, and often through no fault of their own. Their parental rights include the right to exercise some control over who their child's foster parents will be and how those foster parents will raise, train, and educate their child. Many of these parents have strong religious and/or moral beliefs about same-sex marriage and related issues, and their rights may be violated when their children are placed with same-sex foster parents who will raise and educate their children with very different religious and moral worldviews. To safeguard their parental rights, these parents need to be able to work through an agency like Catholic Social Services that will ensure that their children are placed with foster parents whose religious and moral values are similar to their own.

(A) Parental Rights Are Unalienable Natural Rights.

Family has been the most fundamental unit of the community to care, control, and custody of the children since the very early beginning of the world.

The Foundation believes God gives this highest authority and duty to parents to bring up and nurture their children in Godly way. When Adam was created, God created Eve as well, and Adam and Eve began the history of the world by constituting a family. God did not command to establish the country first and then constitute systems to take care children. Even before people recognized the concept of "nation," families existed and parent took the role as governors of each family and took care of their children.

On October 4, 1982, Congress passed Public Law 97.280, declaring 1983 the "Year of the Bible." The proclamation opens with the words, "Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States." One of these concepts is the institution of the family:

> Fathers, do not provoke your children to anger, but bring them up in the discipline and instruction of the Lord. Ephesians 6:4
>
> 4 "Hear, O Israel: The Lord our God, the Lord is one. 5 You shall love the Lord your God with all your heart and with all your soul and with all your might. 6 And these words that I command you today shall be on your heart. 7 You shall teach them diligently to your children, and shall talk of them when you sit in your house, and when you walk by the way, and when you lie down, and when you rise. Deuteronomy 6:4-7

> **20** Children, obey your parents in everything, for this pleases the Lord. Colossians 3:20
>
> **8** Hear, my son, your father's instruction, and forsake not your mother's teaching, **9** for they are a graceful garland for your head and pendants for your neck. Proverbs 1:8-9
>
> **20** My son, keep your father's commandment, and forsake not your mother's teaching. **21** Bind them on your heart always; tie them around your neck. **22** When you walk, they will lead you; when you lie down, they will watch over you; and when you awake, they will talk with you. Proverbs 6:20-22

John Locke, whose *Second Treatise of Civil Government* influenced many of our Founding Fathers, declared:

> "Adam was created a perfect man, his body and mind in full possession of their strength and reason, and so was capable, from the first instant of his being, to provide for his own support and preservation, and govern his action according to the dictates of the law of reason which God had implanted in him. From him the world is peopled with his descendants, who were all born infants, weak and helpless, without knowledge or understanding: but to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents were, by the law of nature, under an obligation to preserve, nourish, and

> educate the children they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them…."

Second Treatise of Civil Government (first published in 1689).

Locke's idea about the natural rights inspired Thomas Jefferson when he drafted the Declaration of Independence.

> "It seems highly unlikely to us that an unenumerated rights natural law jurisprudence would have existed in the state courts in 1868 without there being any reference to the twenty-four Lockean Natural Rights Guarantees--provisions that, as we demonstrate below, inspired the famous natural rights language of the Declaration of Independence itself."

Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1311 (2015). The natural rights language referred to above is the following:

> "We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are

instituted among Men . . ."

The Declaration of Independence para. 2 (U.S. 1776).

Also, US courts traditionally cited or referred these Lockean natural rights guarantees, especially when they were discussing the Fourteenth Amendment:

> "State constitutional case law from 1776 up to 1868 is thus potentially of great relevance to understanding American history and tradition because by 1868, the year the Fourteenth Amendment was ratified, two-thirds of the existing state constitutions contained what we refer to as 'Lockean Natural Rights Guarantees,' provisions protecting life, liberty, and property and guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type."

Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299 (2015).

Just as other natural rights, parental rights has been recognized by US courts' rulings as one of the unalienable natural rights. In *Meyer v. Nebraska*, the court ruled, "it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws." *Meyer v. Nebraska*, 262 U.S. 390, 400, (1923). And in *Parham*,

the Court ruled "More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J. R.*, 442 U.S. 584, 602, (1979).

The determination whether the Fourteenth Amendment's protection of liberty and property applies is upon the nature of the interest at issue. *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 841 (1977) (holding that "But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.") Parental rights is one of such liberties protected by due process because it is a "private realm of family life." *See.* Id at 842. ("It is, of course, true that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974). There does exist a "private realm of family life which the state cannot enter," *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), that has been afforded both substantive and procedural protection.")

Likewise, the traditional American understanding has been that parental authority is given by God, and thus, unalienable natural rights must be protected under the Fourteenth Amendment.

(B) This Court has recognized parents' fundamental liberty interests in the care, custody, and control of their children.

Among various parental rights in each different area, this Court has long recognized that parents have a fundamental right to the care, custody, and control of their children. The Foundation believes parental rights include the right of parents to choose a foster care agency that holds values similar to their own and will arrange foster care with foster parents whose religious beliefs and oral values are compatible with their own. The doctrine of parental rights has been clearly and forcefully articulated in numerous decisions of this Court, i.e., *Troxel v. Granville*, 530 U.S. 57 (2000).

We see the courts' recognition of parental rights in education, religion, and the adoption process. The courts should recognize parental rights in foster placement as well.

(1) Education and Religion

This Court has repeatedly recognized the authority of parents to direct the education of their children. Under the Liberty Clause of the Fourteenth Amendment, "the power of parents to control the education of their own [children includes] ... the right of parents to engage [an instructor] so to instruct their children." *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Pierce v. Society of the Sisters*, 268 U.S. 510, 535 (1925), this Court stated:

> Under the doctrine of *Meyer v. Nebraska ...,* we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Cf. *Farrington v Tokushige,* 273 U.S. 284, 298 (1927):

> … the School Act … give[s] affirmative direction concerning the intimate and essential details of such schools, in trust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books. Enforcement of the act … would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful.

And in *Wisconsin v. Yoder* 406 U.S. 205 (1972), this Court held that "a State's interest in universal education, however highly we rank it, is not totally

free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children."

(2) Adoption

Parental rights include at least a limited right to determine who adopts their children. Like foster care, adoption is is related to the placement of children, and sometimes foster parents even adopt the children who have been placed in their care. The difference, of course, is that foster care is theoretically temporary, while adoption is permanent. When children are placed in foster care, the intent is that those children will eventually be returned to their parents, whereas when children are adopted their legal ties to their biological parents are commonly permanently severed.

Some jurisdictions have statutes recognizing the biological parents' preference and opinion, and in many cases, including in Pennsylvania, courts have considered the parents' opinion and preference regarding their children's placement.

In *Adoption of St. George*, a Pennsylvania court ruled for the natural father who objected to the adoption, holding that "it is necessary to have the consent of the natural parents, if living and of sound mind, except in cases of abandonment" under section 2(*b*) of the Adoption Act of July 2, 1941, P. L. 229.

Adoption of St. George, 45 Pa. D. & C. 387, 390 (Orph. 1943).

Also, under the California statutes, biological parents may choose either "agency adoption" or "independent adoption", and in both adoptions, they have an initial right to choose the prospective adoptive parents. For example, Cal. Fam. Code § 8700 (West):

> (f) The relinquishing parent may name in the relinquishment the person or persons with whom the relinquishing parent intends that placement of the child for adoption be made by the department, county adoption agency, or licensed adoption agency.

See Adoption of Baby Boy D., 93 Cal.App.4th 1, 10 (2001) ("[I]t is well established that a prospective adoptive parent with whom a child has been placed for adoption has a liberty interest in continued custody"); see also *Punsly v. Ho*, 87 Cal. App. 4th 1099, 1107, 105 Cal. Rptr. 2d 139 (2001) ("A constitutional due process challenge based on an alleged infringement of this fundamental right requires the court to apply a strict scrutiny test. The statute at issue must serve a compelling state interest, and it must be narrowly tailored to serve that interest.")

A Tennessee court ruled in favor of a lesbian prospective mother because a biological mother surrendered her right in favor of the lesbian mother. The court reasoned that Tennessee statutes allow

biological parents to surrender their parental rights to a child in favor of a particular person or agency and the prospective mother was a fit person "to have the care and custody of the child and that it is in the best interest of the child for this adoption to occur." *In re Adoption of M.J.S.*, 44 S.W.3d 41, 50 (Tenn. Ct. App. 2000).

Another Tennessee court held that "In sum, where a parent chooses to surrender his or her parental rights directly to the adoptive parents, and where the Court has additionally granted partial guardianship of the child to the adoptive parents, as was done here, the adoptive parents (the Thurmans) are clearly not in the same legal position as the former foster parents (the Riddles), who had custody of the child removed from them for reasons not set forth in this record." *In re Don Juan J.H.,* No. E2010-01799-COA-R3JV, 2011 WL 8201843, at *2 (Tenn. Ct. App. Sept. 7, 2011)

A Kansas court granted a native American child's adoption by non-native American adoptive parents because the "strong preference of mother" is "a good cause to the contrary" to modify the statutory preference to the extended family in an Indian child's adoption. *In re Adoption of B.G.J.,* 133 P.3d 1, 5 (Kan. 2006)

In Florida as well, birth parents have decision-making power until the court has actually terminated their parental rights to children. See. F.S. 63.082(6)(a). In *Y.G. v. Dep't of Children & Families*,

246 So. 3d 509 (Fla. Dist. Ct. App. 2018), *reh'g denied* (July 5, 2018), the court held that "In deference to the parent's constitutional right to the care, custody, and control of their children, a trial court may not compare the selected prospective adoptive parents with other placements the court or Department of Children and Families (DCF) might otherwise choose, in dependency proceedings when consent to adoption has been given before parents have lost their parental rights."

See Teri Dobbins Baxter, *Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 Rutgers U.L. Rev. 905, 914–15 (2015), ("The decision to place the child in the care, custody and control of particular prospective adoptive parents is an exercise of their fundamental rights as parents.")

In *Stanley v. Illinois,* 405 U.S. 645 (1972), this Court held that even an unwed noncustodial father is entitled to strict scrutiny (an individualized determination of unfitness) before his parental rights are terminated. *See* Josh Gupta-Kagan, *The Strange Life of* Stanley v. Illinois: *A Case Study in Parent Representation and Law Reform*, 41 N.Y.U. Rev. L. & Soc. Change 569, 614–15 (2017) ("Although the academy quickly opined on *Stanley*'s application to private family law disputes, it remained largely silent regarding its application in foster care cases. As a result, child protection law focused on policy questions, while the constitutionality of agencies' and courts' treatment of non-offending parents received

scant attention.")

(3) Foster Care

If parents have a right to determine who adopts their children, reason would dictate that parents have an even greater right to determine who serves as foster parents for their children. When children are given up for adoption, the biological parents give up their parental rights forever, and the adoptive parents become the child's parents in every legal sense of the word. But foster care is intended to be temporary. The parents retain their parental rights to the child, and the expectation (though sometimes not the reality) is that the child will eventually be returned to the biological parents.

Moreover, the foster parents who are in the place of natural parents, affect children's education, religion, moral values, worldview, general lifestyle, and self-image of child during the period of foster care, and that influence inevitably continues thereafter. It makes sense, therefore, that parents who are placing their children for foster care should have an even greater right to determine the placement of their children than parents who are giving up their children for adoption.

Sometimes children are placed in foster care because of their parents' misconduct, abuse, or neglect. However, that does not necessarily mean the termination of parental rights. In 1977 the Court noted that the biological parents whose child is in foster care still retain rights and obligations. See

Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 827-828 (1977) ("[T]he natural parent's placement of the child with the agency does not surrender legal guardianship; the parent retains authority to act with respect to the child in certain circumstances. … even when a child is in foster care, the biological parents may continue to have rights and obligations with respect to that child.")

Furthermore, sometimes foster care is needed even though the parents are not at fault. Some parents are not able to care for children despite their desire to do because the parent has an extended illness, or is impoverished through no fault of his/her own. *See Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 824, 97 S. Ct. 2094, 2099, 53 L. Ed. 2d 14 (1977) (holding that "Most foster care placements are voluntary. They occur when physical or mental illness, economic problems, or other family crises make it impossible for natural parents, particularly single parents, to provide a stable home life for their children for some limited period.")

A single parent who serves in the Guard may be activated and deployed to a remote assignment and have no spouse or family member who can care for the child. Even though that parent is neither unfit nor at fault, temporary foster care may be necessary.

And even if the parent is at fault, that parent has not yet been found to be unfit and his/her parental rights have not yet been terminated. At least

theoretically, the goal in foster care is to help the parents and the children to overcome their problems and be reunited as a family again. While the child is in foster care, the biological parents commonly visit their children, interact with the foster placement agency and sometimes with the foster parents, and can be required to pay child support. *See Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394–95, 71 L. Ed. 2d 599 (1982) (holding that "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

The natural parent, not the state, is the primary actor whose parental rights are at stake. States are representative on behalf of the parents unless parents voluntarily terminate their parental rights or courts terminate the parental rights. Lynn D. Wardle & Laurence C. Nolan, *Fundamental Principles of Family Law* 608 (2d ed. 2006) ("Actual child removal and termination of parental rights constitute the most extreme measure used to protect state interests and a child's welfare. Courts usually decline to terminate parental rights 'unless rehabilitation of the parent is hopeless.").

In conclusion, the parental interest in the foster care placement of his or her children is at least as important as the parental interest in placement for

adoption.

(C) Parents Have a Constitutional Right to Choose a Foster Care Agency That Will Place Their Children with Foster Parents Who Share Their Basic Values.

Placing one's biological children in foster care will always be difficult. The separation from their children will fill parents with anxiety. Will their children ever return, and if they do, will we ever be a normal family again?

Their anxiety should not be multiplied by the additional fear that their children may come back from foster care as totally different people, children whose values, perceptions, and religious beliefs have been fundamentally changed by living with foster parents whose beliefs, worldview, and lifestyle are diametrically opposite their own. Mark Strasser, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Contex*t, 15 Duke J. Gender L. & Pol'y 223, 240–41 (2008) ("After all, most of the foster care placements were presumably voluntary, and a parent might be less willing to place her children temporarily with the state if she believed that foster parents might acquire protected interests in those children as a result of that placement.").

States cannot unduly interfere with parental rights, because parents have a fundamental personal right to raise their children under the Fourteenth Amendment substantive due process right. See *Miller v. Mitchell,* 598 F.3d 139, 73 A.L.R.6th 719 (3d Cir. 2010). When legislation infringed with such fundamental right, the courts has applied strict scrutiny. See *Skinner v. Oklahoma, ex rel. Williamson,* 316 U.S. 535 at 536 (1942); *Shapiro v. Thompson,* 394 U.S. 618, at 634 (1969); *Dunn v. Blumstein*, 405 U.S. 330 at 338-343 (1972). This has expressly stated that familial rights are fundamental and that parental rights are one of the basic familial rights. See Miranda Perry, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs,* 63 U. Chi. L. Rev. 727, 753 (1996), ("Further, the Supreme Court has enunciated certain 'privacy' rights as fundamental, thereby subjecting infringements on them to strict scrutiny. These privacy rights include basic familial rights (for example, decisions regarding procreation, marriage, and living arrangements) that are strikingly similar to parental liberty interests.") The state must have a compelling interest to prevail over parental authority, and even then only if no less restrictive means are available. See *J.S. ex rel. Snyder v. Blue Mountain School Dist.,* 650 F.3d 915 (3d Cir. 2011). A state acting with parens patriae power should have a compelling interest in order to accomplish certain objectives by infringing on a fundamental parental rights. Aaron E. Zurek, *All the King's Horses and All the King's Men: The American Family After* Troxel,

the Parens Patriae Power of the State, A Mere Eggshell Against the Fundamental Right of Parents to Arbitrate Custody Disputes, 27 Hamline J. Pub. L. & Pol'y 357, 404–05 (2006) ("Since *Troxel*, the courts have begun (in accordance with Justice Thomas' concurring opinion) to exercise strict scrutiny as the appropriate standard of review. … an exceedingly persuasive justification or a compelling interest is necessary for the parens patriae power to trump the fundamental rights of the parents to raise their children.")

Depriving parents of fair opportunity to choose their children's instructors may be the infringement on parental rights. See *Farrington v. Tokushige*, 273 U.S. 284, 298, 47 S. Ct. 406, 408–09, 71 L. Ed. 646 (1927) (holding that "Enforcement of the act … would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful." Justice Stevens in his *Troxell* dissent noted the "bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests." *Troxell*, 530 U.S. at 86. This Court has noted that courts presume that "fit parents act in best interest of their children." *Troxel* at 68-69, and even if children have been removed because of their parents' wrongdoing, parents have not been found to be unfit until their parental rights are terminated. And as noted earlier, sometimes children are placed in foster care because of circumstances that are no fault of their parents.

See John T. Pardeck, *Children's Rights: Policy and Practice*, 24 (2006) ("Another problem with state intervention into family life is that the standards that guide this intrusion are not very clear and at times arbitrary. An excellent example of this is the "best interest'" standard that has emerged in the field of child welfare. According to Westman (1991), this standard is often based on middle-class values and may at times be seen as a reason for placing children in more affluent or educated families. What this means is that children may be removed from a family because the family is simply poor.") That is why some scholars are concerned about the current inclination to focus on the states' policy rather than upon constitutional rights.

Until now, if Catholic parents, or others who believe in traditional marriage, need to place their children in foster care, they can place their children through Catholic Social Services with the assurance that their children will reside with foster parents whose beliefs and lifestyles are compatible with their own. But if the City of Philadelphia prevails in this case, Catholic Social Services (even if CSS does not close down) will be unable to give any such assurance. This violates the constitutional rights of Catholic Social Services, of foster parents like Sharonelle Fulton and Tony Lynn Simms-Busch, and of biological parents who need to place their children in foster care but want assurance that the foster family shares their basic values.

Many parents still believe that marriage is

between one woman and one man, and even *Obergefell v. Hodges,* 135 S.Ct. 2584, 2607 (2015), recognized that these parents are entitled to their beliefs. Either because of religious reasons or other reasons, if parents want to let their children learn traditional marriage values, the Constitution guarantees their right to make that choice. That is the true meaning of "diversity."[15]

It is not only about the marriage. If some parents want to let their children learn some values which the parents think is important, parents should be able to choose places who has the same values and beliefs with them for their children unless the place does not meet the minimum standard to the state's interest in a children's education. That is the basic idea that the US Supreme Court decided in *Pierce, Meyer, and Yoder*, and what the state courts above have held in adoption cases.

III. The Court Should Not Usurp the Function of Deciding What Beliefs Are or Are Not Central to One's Religion.

The Third Circuit concluded that Petitioners are not entitled to the protection of the Pennsylvania Religious Freedom Protection Act (RFPA, 71 Pa. Stat. Ann. § 2403 because Philadelphia's new policy does not impose a "substantial burden" upon the exercise of their religious beliefs. To reach this conclusion, the

[15] There is no evidence that Philadelphia LGBTQ parents or foster parents have any difficulty finding foster care agencies that will work with them.

Third Circuit held that caring for children is not an activity which is "fundamental to the person's religion."

Many if not most religious persons would be shocked at this statement, because caring for children, and especially providing for their religious and moral training, is a central religious responsibility. Besides the Scripture verses cited (Deuteronomy 6:4-7, Proverbs 6:20-22, Proverbs 1:8-9, Ephesians 6:4, Colossians 3:20), In *Wisconsin v. Yoder,* previously cited, the Court held that interference with the Amish system of training their children was a substantial burden upon the free exercise of their religion

Justice Jackson's words in *Everson v. Board of Education of Ewing Township,* 330 U.S. 1 (1947) demonstrate that the Roman Catholic Church, with which Petitioner Catholic Social Services is affiliated, definitely considers the care and training of children to be a central religious function:

> I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on

> which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.

This Court has been cautious to make religious interpretations in rulings. *Thomas v. Review Board,* 450 U.S. 707 (1981). *See* Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts,* 53 Hous. L. Rev. 909, 911 (2016) ("the Court has consistently manifested ambivalence not only about what qualifies as religion but also about whether state officials are competent to determine which beliefs and practices are religious and which not.") Especially, when the court has to specify whether the certain practice is a central activity of a religious belief, this inclination becomes greater. In *Smith*, the court concluded that the centrality of particular practices is not the question for the court. *See Employment Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 887, 110 S. Ct. 1595, 1604, 108 L. Ed. 2d 876 (1990) ("As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner,* 490 U.S., 680 at 699, 109 S.Ct., at 2148".(1989)) Telling people what beliefs and practices are and are not "central" to their religion is tantamount to telling that person what their religious beliefs are.

Christianity is a full-orbed religion that includes

much more than holding worship services in a church building. An exercise of faith includes specific work in the world.

> 14 What good is it, my brothers, if someone says he has faith but does not have works? Can that faith save him? 15 If a brother or sister is poorly clothed and lacking in daily food, 16 and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what good is that? 17 So also faith by itself, if it does not have works, is dead. *James* 2:14-17

Teaching and caring for children can be a central facet of missionary work:

> 11 And he gave the apostles, the prophets, the evangelists, the shepherds and teachers, 12 to equip the saints for the work of ministry, for building up the body of Christ, *Ephesians* 4:11-12

Dedicated foster parents like Petitioners Sharonell Fulton and Toni Simmis-Busch may well understand their foster care assignments as a form of ministry.

The Third Circuit's use of *Ridley Park United Methodist Church v. Zoning Hearing Board Ridley Park Borough*, 920 A.2d 953 (Pa. Commw. Ct. 2007) is misplaced as the case involved a day care zoning issue with indeterminate results. The Court should not hesitate to say the Pennsylvania Religious

Freedom Protection Act should apply to this case, because (1) Centrality is not an appropriate issue for courts to decide in religious freedom issues, and (2) If centrality were an appropriate issue, the Court could clearly find that the care and training of children is central to the Roman Catholic faith.

CONCLUSION

For Catholic parents and others with similar values, having to place their children in foster care can be one of life's most gut-wrenching, faith-testing experiences. At the very least, parents who face this ordeal should have the assurance that their children will not be placed in situations that contravene their most deeply held beliefs and values.

This Court should recognize that free exercise, free association, and parental rights are entitled to the highest protection afforded by the law. The Court can best do this by overruling *Employment Services v. Smith* and giving free exercise of religion the full recognition the Framers intended.

Respectfully submitted,

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