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 GENERATION JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

BOOKS AND OTHER LEGAL/HISTORICAL MATERIALS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

STATEMENT OF INTEREST[1]

Generation Justice ("Gen Justice") works in legislatures and courtrooms to protect abused children. Gen Justice has been instrumental in shepherding various reforms to the states' child welfare systems. Through its children's law clinic, Gen Justice provides legal assistance to over 200 children each year, including no-cost representation and legal training regarding the dependency process and the rights of families involved in foster care.

This case is of special importance to Gen Justice, as it implicates a core mission of the organization—to strengthen children's constitutionally-protected interests in forming nurturing familial relationships.

SUMMARY OF ARGUMENT

As the parties seek the balance between the right to free religious exercise and the interest in freedom from discrimination, this Court should not lose sight of

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties participating in this litigation have granted written consent to the filing of this brief, directly to counsel for *amicus* or via blanket consent lodged with the Clerk.

what may be the most critical matter at stake—the children's profound interest in forming familial bonds.

The warehousing of parentless children, until their release into a world for which they are unprepared, is a national disgrace. The consequences of long-term institutional or revolving-door foster care are disastrous for each impacted child and for society at large. Every parent—foster, adoptive, or biological—will hold at least some views that offend large segments of society, and perhaps transmit those views to their children. Such is life in a pluralistic society. But impeding access to quality foster care, a gateway to timely adoption, hurts children. It has serious, permanent consequences that vastly outweigh the interests of aspiring foster parents to work through a particular organization that does not share their values.

Children's interests in forming familial bonds for their protection, development, and well-being are not merely factors to be weighed in balancing the parties' competing First Amendment arguments. These interests have an independent constitutional dimension. A subject of concern to the Fourteenth Amendment's framers, protection of the child's interests in having a family is rooted in the amendment's original understanding and two lines of this Court's due process precedent. The children's constitutional interests in familial relationships should guide the outcome of this case.

ARGUMENT

I. Children urgently need access to more, not fewer, foster parents and families.

Any governmental action that reduces the availability of quality foster parents and families has dire consequences for children.

Each year, over a quarter-million infants and children, unable to safely live at home, become dependent on the state.[2] When biological relatives are not available to provide safe homes for abused or abandoned children, states rely upon caring adults who are willing to open their homes and care for displaced children. These "foster families" are vital to providing a family setting for vulnerable children, and often become permanent families for children who are unable to return home. In 2018, 52% of adoptions out of foster care were by foster parents.[3]

Adoption is not a panacea, but "[t]here is little question that adopted children are better off than they would be in long-term foster or institutional care."[4] Children in long-term institutional care are at higher risk of running away and becoming victims of child sex

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[2] U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report* 1 (Aug. 22, 2019), https://bit.ly/2TyozH1.

[3] *Id.* at 6.

[4] Nicholas Zill and W. Bradford Wilcox, *The Adoptive Difference: New Evidence on How Adopted Children Perform in School*, Institute for Family Studies (Mar. 26, 2018), https://bit.ly/3c4xzda.

trafficking than are children living with foster families. Children who are never adopted fare worst of all.

In 2019, state agencies reported to the National Center for Missing and Exploited Children ("NCMEC") that over 20,000 children had gone missing from foster care.[5] Agencies categorize most of these missing children as runaways.[6] Teenagers in their first state placement are not likely to run away, but the greater number of placements, the greater the likelihood of running away.[7] The child sex trafficking trade absorbs many of these missing children.[8] NCMEC estimates that 16 percent of runaway children are likely victims of trafficking.[9]

If there is good news in those statistics, it is that children living with foster families are less likely to run away and less likely to be exploited than are

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[5] *Children Missing from Care: 2019 Update*, National Center for Missing and Exploited Children 2 (Nov. 13, 2019), https://bit.ly/2X2WBVU.

[6] *Id.* at 3.

[7] Fred Wulczyn, et al., *Understanding the Differences in How Adolescents Leave Foster Care*, The Center for State Child Welfare Data 1-2 (Nov. 2017), https://bit.ly/3gnl1kz.

[8] National Council of Juvenile and Family Court Judges and National Center for Missing and Exploited Children, *Missing Children, State Care, and Child Sex Trafficking* 2-3, https://bit.ly/3emUphZ (last visited June 2, 2020).

[9] *Children Missing from Care*, National Center for Missing and Exploited Children, https://bit.ly/2XyeMld (last visited June 2, 2020).

children assigned to group homes and institutions.[10] Children living with foster families are more likely to graduate high school,[11] less likely to be arrested,[12] and are better prepared to thrive in a permanent home.[13]

But 10% of foster children—over 47,000 children—are currently housed in non-family congregate care settings.[14] Foster youth in group homes are 2.4 times more likely than their peers to become delinquent, have lower test scores in English and math, are more likely to drop out of school, and are at greater risk for further physical abuse.[15]

As of August 2018, 125,422 abused and abandoned children living in the foster care system were "waiting to be adopted."[16] For many, that wait would prove futile. More than 17,000 foster children age out each year without a family.[17] The prospects for these children are poor. Children who age out are more likely to go to prison than finish college. One survey showed only 11% of these women and 5% of these men had even an

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[10] Mark Courtney, et al., *Youth Who Run Away from Out-of-Home Care*, Chapin Hall, University of Chicago Center for Children 2 (March 2005), https://bit.ly/3gp3fh1.

[11] Annie E. Casey Foundation, *Every Kid Needs a Family* 5 (2015), https://bit.ly/3d15aGs.

[12] *Id.*

[13] *Id.*

[14] *AFCARS Report*, *supra* n.2, at 1.

[15] Casey Foundation, *supra* n.11, at 5.

[16] *AFCARS Report*, *supra* n.2, at 1.

[17] *Id*. at 3.

associate's degree by age 26,[18] although 23.7 percent of this cohort had spent at least one night in a correctional facility within a year of aging out.[19] That study also revealed that 39.4% of the aged-out children had been homeless and/or couch-surfed by age 23 or 24.[20] Children who age out are nearly two and a half times more likely to become pregnant by age nineteen,[21] may be at increased risk for substance abuse disorders,[22] and display high incidents of mental health issues.[23]

Despite increased state and federal efforts to preserve families and prevent entry into foster care, the number of children in foster care has been rising, mainly driven by the opioid crisis.[24] From 2012–2016

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[18] Mark Courtney, et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 26*, Chapin Hall, University of Chicago 113 (2011), https://bit.ly/36xdlYy.

[19] Mark Courtney, et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 19*, Chapin Hall, University of Chicago 61 (Table 58) (May 2005), https://bit.ly/3d5c0e3.

[20] Amy Dworsky & Mark Courtney, *Assessing the Impact of Extending Care beyond Age 18 on Homelessness: Emerging Findings from the Midwest Study*, Chapin Hall, University of Chicago 3 (March 2010), https://bit.ly/2LWBdLG.

[21] Courtney, *supra* n.19, at 54.

[22] Jordan Bracidzewski & Robert Stout, *Substance Use Among Current and Former Foster Youth: A Systematic Review*, Nat'l Institutes of Health (Dec. 1, 2012), https://bit.ly/36w4uWV.

[23] Courtney, supra n.18, at 51-61.

[24] Angélica Meinhofer & Yohanis Angleró-Diaz, *Trends in Foster Care Entry Because of Parental Drug Use, 2000 to 2017*, JAMA PEDIATRICS 882-83 (Sept. 1, 2019), https://bit.ly/3gq8m0o.

alone, the number of children in foster care increased by 10 percent.[25]

The ongoing COVID-19 pandemic will likely make matters worse. Data from the Great Recession of 2007-09, the closest approximation to current economic events, suggests an upcoming surge in severe abuse and a subsequent increase in foster care entries. A study of "four geographically disparate pediatric hospitals detected a nearly two-fold increase in abusive head trauma" related to the recession.[26] A second comprehensive study, examining state-level unemployment statistics and child abuse data over an 18 year period, "found that each percentage point increase in state-level unemployment was associated with an increase in child abuse reports of approximately .50 per 1000 children."[27] Indeed, hospitals are already

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[25] U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report* 1 (Oct. 20, 2017), https://bit.ly/2Xww4zh.

[26] Katherine Sell, et al., *The Effect of Recession on Child Well-Being*, Policylab, Children's Hospital of Philadelphia 29 (Nov. 2010), https://bit.ly/36A365U (punctuation omitted) (citing Rachel Berger, et al., *Abusive Head Trauma During a Time of Increased Unemployment: A Multicenter Analysis*, PEDIATRICS (Oct. 2011), https://bit.ly/3c4kscf).

[27] *Id.* (citing Jay Zargosky, et al., *What Happens to Child Maltreatment When Unemployment Goes Up?*, Conference Paper, American Academy of Pediatrics National Conference and Exhibitions (Oct. 3, 2010), San Francisco, CA).

reporting steep increases in serious child abuse trauma linked to the current pandemic.[28]

This is not the time to reduce access to foster homes, which serve as lifelines for abused children. Respondents would justifiably oppose barring members of the LGBT community from fostering and adopting children not just because such practices would violate the prospective parents' equal protection rights, but because restricting the number of available quality homes exacts a "terribly high price to children."[29] Discouraging faith-based agencies ("FBAs") from offering foster homes is likewise devastating.

FBAs "are an active and substantial part" of the Nation's child welfare capability.[30] "[T]hey may be able to tap into faith communities and attract new populations of foster and adoptive parents," and they sometimes provide supplemental funding and training to foster families beyond what government agencies

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[28] *Severe Child Abuse Cases Continue to Rise with 3 Year Old's Death on Easter*, Cook Children's Checkup Newsroom, Cook Children's Health Care System, Ft. Worth, TX (Apr. 15, 2020), https://bit.ly/2XtfuAt; Amanda Castro, *Arnold Palmer pediatric doctor sees uptick in child abuse cases during COVID-19 pandemic*, WKMG News 6, Orlando, FL (Apr. 10, 2020), https://bit.ly/2X2aun7.

[29] Leslie Cooper & Paul Cates, *Too High A Price: The Case Against Restricting Gay Parenting*, American Civil Liberties Union Foundation 75 (2d ed. 2006), https://www.aclu.org/files/images/asset_upload_ file480_27496.pdf.

[30] Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, Heritage Foundation 3 (May 22, 2018) (internal quotation marks omitted), https://herit.ag/2Xnn6Wq.

supply.[31] "Some FBAs also excel at placing children who may have a more difficult time finding adoptive homes, including older children, sibling groups, and children with special needs."[32] And "[p]racticing Christians may be over twice as likely to adopt compared to the general population . . . 50 percent more likely to become foster parents—and almost twice as likely to consider becoming a foster parent."[33]

Respecting Petitioners' religious views does not bar any prospective parent from participating in Philadelphia's foster care program; LGBT people can pursue fostering and adoption through agencies that do not share Catholic teachings. But diminishing the role of faith-based agencies will decrease the pool of available foster placements, depriving countless children of temporary and permanent families.

II. The Fourteenth Amendment secures children's interests in joining and forming families for their protection, education, and well-being.

The Thirteenth Amendment abolished slavery as a formal institution, but it took the Fourteenth Amendment to secure the newly-freed Americans' fundamental rights and prevent the reimposition of slavery in all but name. Natural familial rights, violated by slavery

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[31] *Id.* at 2-3.

[32] *Id.* at 3.

[33] *Id.* at 8.

and by the efforts at its practical revival, were never far from the minds of the amendment's framers.

This Court has long acknowledged the individual's constitutional interest in family formation and maintenance. Children, no less than the potential foster parents whose interests Respondents assert, share this basic aspect of human nature. The Fourteenth Amendment is not "for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 74 (1976) (citations omitted); Benjamin Vaughn Abbott, JUDGE AND JURY: A POPULAR EXPLANATION OF THE LEADING TOPICS IN THE LAW OF THE LAND 50 (1880) ("At birth [a person] is of age to receive full protection in rights of person").

At least intuitively, this Court has understood that familial interests are not reserved to adults. It has thus been careful to avoid making precedent that might diminish children's familial rights. In *Reno* v. *Flores*, 507 U.S. 292 (1993), this Court rejected a claim that children awaiting deportation proceedings should be released from custody to the care of private, temporary guardians. The government's facilities provided basic, but constitutionally adequate care. However, this Court noted that the children's would-be hosts were unwilling to become permanent guardians, *id.* at 303; it thus rejected only a right to "nonadoptive" private custody, *id.* at 304. As framed, the only children's

interest in *Reno* was the interest in being temporarily cared for by others while awaiting legal process.

Indeed, *Reno* suggested that a child's best interest may be a "*constitutional* criterion" often balanced against the interests of others. *Id.* at 304. It would not be "an absolute and exclusive constitutional criterion," *id.*, but then few liberty interests are.

Gen Justice does not suggest that children have a positive right to state-supplied adoptive parents, any more than adults' rights to marry and procreate (or not) compel states to provide spouses, fertility treatments, contraceptives, or abortion. Nor are children's familial rights equal to those possessed by adults. *Cf. Morse* v. *Frederick*, 551 U.S. 393, 396-97 (2007) (schoolchildren's rights "are not automatically coextensive with the rights of adults in other settings") (internal quotation marks omitted). For example, at least some maturity is required to form the capacity for making coherent, mutually uplifting marital decisions.

In this sense, children's familial "rights" might be a misnomer. "The focus of discussion should not be on whether there is a right to adopt or be adopted per se, but on whether there is a constitutionally protected liberty interest either in being adopted or in the state's not erecting arbitrary and unduly burdensome barriers to adoption." Mark Strasser, *Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context*, 15 DUKE J. GENDER L. & POL'Y 223, 223 (2008). It seems

plain enough that children have keen *interests* in forming, maintaining, or dissolving familial relationships. Under the Fourteenth Amendment, they have the right to have those interests considered and respected.

"In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted; to ascertain the old law, the mischief and the remedy." *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 723 (1838) (citations omitted). The treatment of children, freed and born to the newly-freed, as well as the freedmen's interests in familial maintenance and formation, concerned the Fourteenth Amendment's framers. This concern animated the framers' efforts, and is reflected in their ratified work product. Precedent likewise compels this Court to take children's interests in forming familiar relationships into account where, as here, those interests are implicated.

A. The Fourteenth Amendment's framers were concerned about state hostility to familial rights and children's interests.

It is impossible to reflect upon American slavery without acknowledging that institution's horrific impact on family life. Chief among slavery's many evils was its corrosive attack on natural familial bonds. Revulsion at this aspect of slavery fueled abolitionist sentiment.

The publication of Harriet Beecher Stowe's UNCLE TOM'S CABIN, a novel focusing largely on slavery's separation of children from parents, "caused a remarkable upsurge of antislavery sentiment in the North" and "dramatically deepened national divisions over slavery." 5 THE OXFORD HISTORY OF THE NOVEL IN ENGLISH: THE AMERICAN NOVEL TO 1870 380 (J. Gerald Kennedy & Leland S. Person, eds., 2014). Stowe "so stirred the hearts of the Northern people that a large part of them were ready either to vote, or, in the last extremity, to fight for the suppression of slavery." Booker T. Washington, FREDERICK DOUGLASS 175 (1907). "The value of UNCLE TOM'S CABIN to the cause of Abolition can never be justly estimated." *Id.* Abolitionist legal activists likewise stressed familial themes, decrying "the shriek of the slave mother, torn from her babe . . . the wailing of children forced from the affectionate embrace of their parents . . . the deep, unutterable groan and anguish, of the heart-broken husband and father, as he surveyed the disolation of his household." Joel Tiffany, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 141 (1849).

The victorious North's desire to protect people's ability to form familial bonds did not disappear with slavery. Some read the Thirteenth Amendment narrowly, conceding that it ended formal slavery but claiming that it did nothing to afford the freedmen any further legal protection. Speaking in support of the Civil Rights Act of 1866, Senator Howard Jacob expressed a different understanding: that the abolition of slavery necessarily confirmed the freedmen's

fundamental rights. Congress could thus enact legislation securing the freedmen's fundamental rights—including the right to bond with one's children.

The slave, said Howard, "had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children." Cong. Globe, 39th Cong., 1st Sess., 504 (1866). "[T]he absurd construction now forced upon" the Thirteenth Amendment, denying its security of fundamental rights, "leaves him without family," among other indignities; states could deny every former slave "the right or privilege . . . of having a wife and family." *Id.* But the Thirteenth Amendment's framers intended "to make him the opposite of a slave, to make him a freeman." *Id.*

"And what are the attributes of a freeman according to the universal understanding of the American people? Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word 'freeman' that does not include these ideas?" *Id.* The right to familial relations fit comfortably within the rights to be secured by the new Civil Rights Act. "[C]ivil rights are the natural rights of man." *Id*. at 1117 (Rep. Wilson). It was with this view in mind that Congress "declared" the freedmen "to be citizens of the United States," affording them the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." 14 Stat. 27 (April 9, 1866).

Not far from Capitol Hill, Maryland officials demonstrated that apprehension about the South's treatment of former slave children was well-founded. The state had long empowered its orphans' courts to seize "the child or children of lazy, indolent and worthless free negroes, and bind them out as apprentices." Md. Sess. Laws 1808, ch. 54. Unlike contracts for the labor of white orphans, indentures respecting free African-American children often omitted the master's requirement to educate the child, and the practice of compensating indentured African-American children in lieu of education eventually fell by the wayside. James M. Wright, *The Free Negro in Maryland 1634-1860*, 97 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW 130, 138 (1921). "The free negroes lived and worked like the slaves, and in the public mind their lot was associated with that of the slaves. What the public desired, therefore, was that negro apprentices should be treated about as well as slaves were treated. . . ." *Id.*

By 1860, the law formally "discriminated between black and white apprentices by relieving planters of the responsibility of educating black children and by permitting them to transfer the latter to other employers without parental consent." Richard Paul Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family under Pressure in Post-Emancipation Maryland*, 62 AGRICULTURAL HISTORY 57, 63 (1988); *see* Md. Code of Pub. Gen. Laws art. 6, §§ 36, 37 (1860). "Courts were expressly barred from apprenticing the children of parents who were capable of supporting them, but the judges, not parents, assessed such capacity." Fuke

at 63; Md. Code of Pub. Gen. Laws art. 6, § 33 (1860). "The 'voluntary' consent of many parents was clearly forced," Fuke at 64, and courts rarely recorded parental protests, with separation sometimes effected "under extreme duress," *id.* at 65.

When emancipation came to Maryland,[34] the former slave owners vacuumed freed children into the "apprenticeship" system en masse. "Almost immediately" upon emancipation, "many of the freed people of Talbot county were collected together under some local authority, the nature of which does not clearly appear, and the younger persons were bound as apprentices, usually, if not always, to their late masters." *In re Turner*, 24 F. Cas. 337, 339 (C.C.D. Md. 1867) (Chase, C.J.).

The scene repeated throughout the state:

> Within weeks of emancipation nearly one thousand children were indentured in Anne Arundel and Calvert Counties alone. . . . A year later, a traveller on the Eastern Shore found it common in some areas that "the whites, the ex-masters of the slaves, had the children probably of about two-thirds of the families of the freedmen."

Fuke at 63 (citations omitted). Conservative estimates of the number of children seized range from 2,519 to

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[34] Maryland having remained in the Union, its slaves were unreached by the Emancipation Proclamation. They were freed only upon ratification of Maryland's 1864 constitution. Md. Const. art. 24 (1864).

4,000. *Id.* n.29. In the words of one judge, the effect was "to destroy the family relation among a portion of the freemen of the State; and to deprive by force the parents of the labor and comfort and society of their children." *Id.* at 71-72 (internal quotation marks omitted).

The Army responded by placing freed children under "special military protection." That "put an end to wholesale apprenticing by county orphans' courts but did nothing to free children already bound out." Fuke at 72. Legal attacks on this child theft proved inconclusive in the state's courts. Leah Coston successfully wrested back her two children, Simon and Washington, from involuntary apprenticeship to their former master, but the master's appeal set no substantive precedent as it was dismissed on technical grounds. *Coston* v. *Coston*, 25 Md. 500 (1866).

Vindicating Senator Howard's vision, the 1866 Civil Rights Act saved Maryland's freed children from this virtual re-enslavement. Riding circuit, Chief Justice Chase held that the apprenticeship of African-American children amounted to involuntary servitude forbidden by the Thirteenth Amendment; that the apprenticeship system's racial inequality violated the 1866 Act, which was constitutionally enacted to enforce the amendment's prohibition; and that "[c]olored persons equally with white persons are citizens of the United States." *Turner*, 24 F. Cas. 339-40. Chase thus freed Elizabeth Turner, a child indentured to her former master only two days following emancipation. "Armed with Chase's decision, the [Freedmen's] Bureau forced reluctant planters to release most of their

apprentices by the summer of 1868." Fuke at 73 (citation omitted).

But some were concerned that, however beneficial, the Civil Rights Act was a mere statute. "Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks." *McDonald* v. *City of Chicago*, 561 U.S. 742, 775 (2010) (footnote omitted). "[T]he first time that the South with their copperhead allies obtain the command of Congress it will be repealed," but "they will hardly get" the two-thirds majorities necessary to repeal a constitutional amendment. Cong. Globe, 39th Cong., 1st Sess., 2459 (Rep. Stevens). Indeed, the act proved inadequate to the task of securing fundamental rights, as recalcitrant Southern courts held it unconstitutional. *McDonald*, 561 U.S. at 775 n.24.

Even sympathetic Northerners acknowledged that states could not be compelled to respect constitutionally-guaranteed rights absent a specific mandate per *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Ohio Representative John Bingham believed this to be a serious impediment to the civil rights cause. "I should remedy [civil rights violations] not by an arbitrary assumption of power, but by amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future." Cong. Globe, 39th Cong., 1st Sess., 1291.

And that is exactly what Bingham proceeded to do by authoring the Fourteenth Amendment's first section.

B. The protection of children's interests in familial relationships is within the Fourteenth Amendment's original meaning.

The Fourteenth Amendment's framers understood its text to secure an array of natural rights, including those pertaining to the formation and maintenance of families. The states ratified "the universal understanding of the American people" that free individuals have "the right of having a family, a wife, children [and] home," Cong. Globe, 39th Cong., 1st Sess., 504, into the Constitution. It remains there today.

"[A]n amendment to the Constitution should be read in a sense most obvious to the common understanding at the time of its adoption, . . . For it was for public adoption that it was proposed." *Adamson* v. *California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (internal quotation marks omitted), *overruled on other grounds, Malloy* v. *Hogan*, 378 U.S. 1 (1964). As constitutions "are written to be understood by the voters," this Court should take into account what "ordinary citizens at the time of ratification would have understood" about the meaning of the Fourteenth Amendment's text. *McDonald*, 561 U.S. at 813 (Thomas, J., concurring in part and concurring in the

judgment) (internal quotation marks and citations omitted).[35]

Before the Civil War, a theme of Abolitionist legal thought maintained that states violated the Article IV, Section 2 rights of free African-Americans by denying a broad array of individual federal rights. *See, e.g.*, Journal of the Ohio Senate, 36th Genl. Assembly, 1st Sess. 536 (1838). Bingham shared this view. *See, e.g.*, Cong. Globe, 35th Cong., 2nd Sess., 984-85 (1859).

Consequently, it was no accident that Bingham modeled the Fourteenth Amendment's substantive civil rights guarantee on the language of Article IV, Section 2. *See Saenz* v. *Roe*, 526 U.S. 489, 502 n.15 (1999). He and the other framers particularly venerated, as had the Abolitionists, the definition of "privileges" and "immunities" given by Justice Washington

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[35] Gen Justice acknowledges that under *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Privileges or Immunities Clause secures only so-called rights of national citizenship, a theory that excludes protection of children's natural familial interests. And although "[v]irtually no serious modern scholar—left, right, and center—thinks that [*Slaughter House*] is a plausible reading of the Amendment," Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001), this case is not the vehicle to correct that mistake. Nonetheless, two branches of this Court's substantive due process doctrine also call for upholding children's familial interests. *See* Part II.C, *infra*. Whatever controversies attend that doctrine, the Court should know that its effect here is fully consistent with the Fourteenth Amendment's original public meaning.

in *Corfield* v. *Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), the day's leading precedent interpreting Article IV, Section 2.

Corfield broadly defined the rights secured by Article IV as "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union. . . ." *Id.* at 551. The "fundamental principles" so protected fell under the categories of "[p]rotection by the government; the enjoyment of life and liberty, with the right . . . to pursue and obtain happiness and safety," subject to the police power. *Id.* at 551-52.

Introducing the Fourteenth Amendment in the Senate, Sen. Howard explained what rights it secured by quoting *Corfield*'s description of Article IV, Section 2 rights. Cong. Globe, 39th Cong., 1st Sess., 2765. "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution." *Id.*

The voters heard and understood this interpretation. Howard's speech was broadly published and encapsulated in newspapers throughout the country. David Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866-1868*, 30 WHITTIER L. REV. 695, 713-17 (2009).

In turn, advocates for the Fourteenth Amendment's ratification used *Corfield*'s language in describing the rights that would obtain constitutional protection. *See* "Madison," *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2, cols. 2-3.

Citation to *Corfield* was not a new development for the Reconstruction Congress. One member had offered *Corfield*'s definition of the rights secured by Article IV, Section 2 in explaining what rights would be protected by the 1866 Civil Rights Act. "If the States would all practice the constitutional declaration" of Article IV, Section 2, "and enforce it, as meaning that the citizen has [*Corfield*'s description of rights] we might very well refrain from the enactment of this bill into law." Cong. Globe, 39th Cong., 1st Sess., 1117-18 (Rep. Wilson). That *Corfield* helped define the Fourteenth Amendment's meaning was thus consistent with Bingham's intent for a constitutional amendment to do the work that the 1866 Civil Rights Act had meant to accomplish, but could not.

"[T]he Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866." *McDonald*, 561 U.S. at 775 (citations omitted). "As I understand it, [the Fourteenth Amendment] is but incorporating in the Constitution of the United States the principle of the civil rights bill." Cong. Globe, 39th Cong. at 2465 (Rep. Thayer). "All who will vote for [the Fourteenth Amendment] . . . voted for [it] in another shape, in the civil rights bill." *Id.* at 2498 (Rep. Broomall). Opponents

agreed, denouncing the amendment as "no more nor less than an attempt to embody in the Constitution . . . that outrageous and miserable civil rights bill." *Id.* at 2538 (Rep. Rogers).

And just as Senator Howard had understood the rights first secured by the Civil Rights Act, and then the Fourteenth Amendment, to encompass familial relations, so, too did the Fourteenth Amendment's opponents. "The right to marry is a privilege. . . ." *Id.* This view was prescient. "[W]ithin five years of the Amendment's ratification, racial-endogamy laws either did not exist or were not in force, in both a clear majority of states and a super-majority of the states that had ratified the Amendment," owing to the view "that the [Fourteenth] Amendment and/or the Civil Rights Act precluded the making or enforcing of such laws." David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L. Q. 213, 259-60 (2015). The unraveling of that understanding by *Slaughter House* contributed to the reversal of that progress. *Id.* at 281-84.

Questions of which unenumerated rights are protected by the Constitution, of the legitimacy of recognizing such rights, and of the consequences of doing so, are understandably difficult. Even so, children's interests in familial relationships lie comfortably within the Fourteenth Amendment's original meaning. The framers and their opponents agreed that the amendment secures at least some familial interests. And if "the universal understanding of the American people" holds that adults have the "right of having a family [and]

children," Cong. Globe, 39th Cong., 1st Sess. 504, as it surely does, it follows that children have a meaningful interest in having a family and parents.[36]

That children's familial interests are "in their nature, fundamental," that they are typically the subject of "[p]rotection by the government," and that they relate to "the enjoyment of life and liberty" and "pursu[ing] and obtain[ing] happiness and safety," *Corfield*, 6 F. Cas. at 551-52, is self-evident.

"The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person." James Kent, 2 COMMENTARIES ON AMERICAN LAW 159 (1827) ("Kent").

> It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.

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[36] This is not to suggest that a child's interest in having a parent equals that of a potential parent in having or adopting children. "If anything, the child's interest in being adopted may be more compelling than the interest of potential parents in adopting. State adoption proceedings center upon the best interest of the *child*, not the desires, however intense, of potential parents to add to their family by adoption." *Lindley* v. *Sullivan*, 889 F.2d 124, 133 (7th Cir. 1989).

Lehman v. *Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 513-14 (1982). Decades of research bear out that the critical skills necessary to function in adult society, relating to self-regulation, social competence, and the ability to learn, require that children form healthy attachment relationships with their elders. Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 24-29 (2011) (footnotes omitted) ("Jackson & Fasig").

"The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). And there has scarcely been a human society that did not arrange for the care of orphaned or abandoned children. "[T]he origins and practices of adoption can be traced back hundreds of thousands of years and can be found among many nations and cultures." Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 Cap. U. L. Rev. 297, 309 (2005) (footnotes omitted) ("Woodhouse"). "[R]eferences to adoption are found in ancient codes, laws, and writings of the Babylonians, Romans, Hindus, Japanese, Hebrews, and Egyptians." *Id.* at 310 (footnote omitted). "Civilizations and cultures occupying lands that are now American soil" have long "recognized the practice of adoptions." *Id.* at 312.

Americans, too, followed the human instinct to care for children in need long before the legal system formalized and regulated adoption. Slaves reacted to the destruction of their familial relationships by

forming extended, fictive families to care for children, a practice that continued after the Civil War to care for children "excluded from the benefits of formal adoption." *Id.* at 313 (footnotes omitted). And "in the mid-nineteenth century, child-saving organizations . . . sought to remove children from a life of poverty, vagrancy, and neglect by placing them with 'women devoted to charity' or families out west that needed an extra hand." *Id.* at 315 (footnote omitted). "[I]nstead of creating parent-child relationships, the adoption laws of early America merely formalized already existing methods of establishing families." *Id.* at 309 (footnote omitted).

Anglo-American legal tradition has always recognized the child's need for familial support, from long before the advent of modern adoption laws and regulations. "According to the language of Lord Coke, it is 'nature's profession to assist, maintain and console the child.' " Kent at 160 (citation omitted in original); *cf.* 2 Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND 563 (1797). Blackstone explained that parents owed their children duties of maintenance, protection, and education. "The duty of parents to provide for the maintenance of their children is a principle of natural law. . . . The municipal laws of all well-regulated states have taken care to enforce this duty." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 447 (3d ed. 1798). The duty of protection enabled parents to maintain their children's litigation, and privileged parental use of force in defense of their children. *Id.* at 450. "[O]f far the greatest importance of any" was the duty of

providing children "an education suitable to their station in life." *Id.*

Again, none of this is to argue that children are positively entitled, as a constitutional matter, to receive maintenance, protection, and education. But the Fourteenth Amendment secures children's interests in forming familial relationships that would provide such support. Consequently, the state bears a heavy burden to justify restrictions on children's access to foster and adoptive parents. Respondents' disagreement with Catholic teaching does not come close to meeting that burden.

C. The Due Process Clause bars Respondents from frustrating children's ability to form familial relationships.

Two lines of this Court's substantive due process doctrine bar Respondents from arbitrarily diminishing children's access to foster and adoptive families: the states' duty to care for children within their custody, and the liberty interest in family formation.

1. This Court has held that the Due Process Clause does not impose an affirmative duty to protect children from harm—as a general matter. *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Svcs.*, 489 U.S. 189 (1989). But "[h]ad the State by the affirmative exercise of its power removed [the child] from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an

affirmative duty to protect." *Id.* at 201 n.9 (citations omitted).

Following this suggestion, all twelve regional circuits have held or assumed the existence of a duty to protect foster children. "[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" enforceable under 42 U.S.C. § 1983. *Nicini* v. *Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc).

> [T]he analogy between foster children on the one hand and prisoners and institutionalized persons on the other is incomplete . . . [but] any distinctions between children placed in foster care and [prisoners and the institutionalized mentally ill] are matters of degree rather than of kind.

Id. (citing *Norfleet* v. *Arkansas Dep't of Human Servs.*, 989 F.2d 289, 292 (8th Cir. 1993) ("the situations are sufficiently analogous")); *see also Smith* v. *District of Columbia*, 413 F.3d 86, 95 (D.C. Cir. 2005); *Connor B.* v. *Patrick*, 774 F.3d 45, 53 (1st Cir. 2014); *Doe* v. *New York City Dep't of Social Services*, 649 F.2d 134, 141-42 (2d Cir. 1981); *Doe* v. *S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 175 (4th Cir. 2010); *M.D.* v. *Abbott*, 907 F.3d 237, 249-50 (5th Cir. 2018); *Meador* v. *Cabinet for Human Resources*, 902 F.2d 474, 475-77 (6th Cir. 1990); *Reed* v. *Palmer*, 906 F.3d 540, 552 (7th Cir. 2018); *Tamas* v. *Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010); *Gutteridge* v. *Oklahoma*, 878 F.3d 1233,

1238-39 (10th Cir. 2018); *H.A.L.* v. *Foltz*, 551 F.3d 1227, 1231 (11th Cir. 2008).

Those affirmative duties include respecting children's attachment relationships. Because custodial children "have a substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being," *Marisol A. by Forbes* v. *Giuliani*, 929 F. Supp. 662, 675 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997) (per curiam), one court recognized a due process claim for "failure to provide reasonable services and placements that protect custodial plaintiffs' right of association with their biological family members." *Id.* at 677. Another held that children stated a claim against officials who "pursued policies which caused them injuries by impairing their relationships with their siblings. The fact that the plaintiffs' injuries are psychological rather than physical is of no moment." *Aristotle P.* v. *Johnson*, 721 F. Supp. 1002, 1010 (N.D. Ill. 1989) (citations omitted).

Indeed, "courts have consistently concluded that *Youngberg* [v. *Romeo*, 457 U.S. 307 (1982)]," which held that states must assist institutionalized individuals in pursuing their liberty interests, "requires the state to protect foster children in its custody . . . [from] the psychological and emotional harms that repeated disruption of attachment relationships causes." Jackson & Fasig at 12 (citing *LaShawn A.* v. *Dixon*, 762 F. Supp. 959, 992-93 (D.D.C. 1991), *rev'd on other grounds sub nom. LaShawn A. ex rel. Moore* v. *Kelly*, 990 F.2d 1319 (D.C. Cir. 1993); *B.H.* v. *Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989); *Doe ex rel. Johanns* v. *N.Y.C. Dep't*

of Soc. Servs., 670 F. Supp. 1145, 1175 (S.D.N.Y. 1987); *Braam* v. *State,* 81 P.3d 851, 857 (Wash. 2003)).

In sum, psychological, emotional, and developmental concerns inform an affirmative duty to respect children's existing familial relations and avoid disruption of constructive foster placements. Logic thus dictates that "laws that unreasonably prevent a parentless child from attaining a permanent family relationship implicate constitutional concerns, both by prolonging the child's confinement in state custody, and by exposing the child to serious harm from the repeated detachments that typify foster care throughout the United States." Jackson & Fasig at 13 (footnotes omitted).

To be sure, "[i]ncidental psychological injury that is the natural, if unfortunate, consequence of being a ward of the state does not rise to the level of a substantive due process violation." *M.D.*, 907 F.3d at 251. But limiting children's potential to form familial bonds inflicts tremendous life-altering harm. Doing so because of political or religious disagreement with the parents who would save them from the system is not the product of considered professional judgment serving the children's constitutional interests. It is also deliberately indifferent to the children's interests, were that the applicable standard. Jackson & Fasig at 6-7 & n.32. By expelling Catholic Social Services from its foster program, Respondents violated the substantive due process right of Philadelphia's children to protection from harm while in state custody.

2. "The Constitution promises liberty to all within its reach, a liberty that includes certain specific

rights that allow persons, within a lawful realm, to define and express their identity." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2593 (2015). The rights and interests inherent in the parent-child relationship easily fit within this concept of liberty. "[C]hoices concerning . . . family relationships . . . procreation, and childrearing, all of which are protected by the Constitution . . . are among the most intimate that an individual can make." *Obergefell*, 135 S. Ct. at 2599 (citation omitted).

"The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984) (citation omitted). "The personal affiliations that exemplify these considerations . . . are those that attend the creation and sustenance of a family." *Id.* at 619. Indeed, the Constitution protects marital interests in part because marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. . . . Marriage also affords the permanency and stability important to children's best interests." *Obergefell*, 135 S. Ct. at 2600 (citations omitted).

The importance ascribed to the liberty interest in family formation cannot be overstated. These "personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." *Roberts*, 468 U.S. at 618-19 (citations omitted).

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 619.

"[A] parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection." *Lassiter* v. *Dep't of Social Svcs.*, 452 U.S. 18, 27 (1981) (internal quotation marks omitted). This "is an interest far more precious than any property right." *Santosky* v. *Kramer*, 455 U.S. 745, 758-59 (1982). But "to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Troxel* v. *Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (footnote omitted). As with marriage, the rights and interests attendant to a parent-child relationship are shared by both parties to the union.

Because the parental relationship is so valuable, precedent extolls the right to form it—the right to decide "whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (citations and footnote omitted). The ability to procreate is "one of the basic

civil rights of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), falling within the constitutionally-protected "dignity and personality and natural powers" of human beings, *id.* at 546 (Jackson, J., concurring).

Procreation is not the only way to form familial bonds. As discussed *supra*, adoption, like marriage, is a natural phenomenon that "has existed for millennia and across civilizations." *Obergefell*, 135 S. Ct. at 2594. The lower courts have resisted finding a right of adults to adopt, *see*, *e.g.*, *Lindley*, 889 F.2d at 131, but that does not mean that children lack interest in being adopted. "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *Bellotti* v. *Baird*, 443 U.S. 622, 633-34 (1979) (internal quotation marks omitted).

Parentless children, unlike adults, have no marital or procreative path to family formation; for them, adoption is the only means by which they might form essential familial bonds. And blood relations do not exclusively define parental bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children." *Smith* v. *Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977) (internal quotation marks and bracket omitted).

It would be incongruent and irrational to hold that while adults are protected in forming families via marriage and procreation, children whose interests in being parented are far more critical to their "individual dignity and autonomy, [and] personal identity and beliefs," *Obergefell*, 135 S. Ct. at 2597 (citations omitted), have no constitutional interest in being adopted. They do. Respondents' disapproval of prospective parents' religious beliefs is not a constitutionally valid reason to deny children the opportunity "to define and express their identity," *id.* at 2593, through fostering and adoption.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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