

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

AIMEE MADDONA
Plaintiff

vs.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,
Defendants

Civil Action No. 6:19-cv-03551-JD

**BRIEF OF THE COALITION FOR JEWISH VALUES, THE CALL, LIFELINE
CHILDREN'S SERVICES, FAITHBRIDGE FOSTER CARE, AND ELIZABETH KIRK
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS**

WAGENMAKER & OBERLY, LLC

Matthew Brown*
145 River Landing Dr., Suite 202
Charleston, SC 29492
Tel: 312-626-1600
matthew@wagenmakerlaw.com

*Admitted *Pro Hac Vice*

MINGLEDORFF & PATTERSON, LLC

Christopher Mingledorff
245 Seven Farms Drive, Suite 310
Charleston, SC 29492
Tel: 843-471-1015
chris@mptrial.com

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*¹

The Coalition for Jewish Values (“CJV”) is the largest Rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, and does so through education, mobilization, and advocacy, including by filing *amicus curiae* briefs in defense of equality and freedom for religious institutions and individuals.

The CALL is an Arkansas-based non-profit working to educate, equip, and encourage the Christian community to provide a future and a hope for children in foster care in Arkansas. Founded in 2007, The CALL has recruited and trained two-thirds of all foster families in Arkansas; those families have adopted 1,500 children and cared for 18,000 children in foster care. The CALL actively recruits foster families in chronically under-served rural counties. The CALL does not certify foster families or place children. The CALL works closely with the Arkansas Department of Children and Family Services to provide state-mandated pre-service training and continuing education for foster families, free of charge. The CALL also provides wrap-around services and support for foster families in Arkansas.

Lifeline Children’s Services (“Lifeline”) is an Alabama-based ministry dedicated to providing Gospel-centered service to vulnerable children, women, and men experiencing crisis pregnancies and to broken families in need of restoration. Lifeline provides state-mandated pre-service training, home studies, and continuing education for foster families. Lifeline also places children with foster families. Lifeline emphasizes family reunification, and to that end, Lifeline has mobilized churches in ten states to provide county- and state-approved parenting classes as

¹ Defendants have consented to the filing of this *amici* brief. Plaintiff has indicated that she does not oppose the motion for leave to file this *amici* brief but takes no position as to whether the court should grant the motion. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

part of reunification plans for foster children. Lifeline licenses its training program to churches on the condition that the churches provide that training to families free of charge.

FaithBridge Foster Care (“FaithBridge”) is one of the largest private child placement agencies in Georgia, and its Christ-centered beliefs are core to every part of its work. Founded in 2007, FaithBridge recruits, trains, and licenses adoptive and foster care families in Georgia. FaithBridge also partners with local churches to provide wrap around services and support to FaithBridge foster families in the local community. Our model engages church partners, adoptive, and foster families in therapeutic skills acquisition through in-person training and our online learning management platform, FaithBridgeU. FaithBridge is focused on having adopted and foster children in the best possible place to heal, advance in their development and education, and be reunited with their birth families or become adopted into their forever home.

Elizabeth Kirk, J.D. is the Director of the Center for Law & the Human Person at The Catholic University of America Columbus School of Law, where she also serves as a Research Associate and Lecturer and teaches Family Law. She is also an associate scholar for the Charlotte Lozier Institute, serving as a legal policy expert, with a special interest in adoption law and policy.²

² Elizabeth Kirk submits this brief in her individual capacity, not as a representative of The Catholic University of America or the Charlotte Lozier Institute.

SUMMARY OF ARGUMENT

One of the *amici* relays the following true story:

A pastor and his wife took in a foster child who, at just eleven years old, had already been in more than a dozen foster care placements. It is common for a foster child—particularly one traumatized by an unstable foster care experience—to test the foster family’s limits: “Do they love me, or will they get rid of me when I misbehave, just like everyone else?” This child chose a particularly difficult test. Every day he entered the pastor’s home study and urinated on the floor. Day after day, the pastor and his wife cleaned up the mess and reaffirmed that they would love this child no matter what he did. And after seven urine- and tear-stained weeks, something clicked. The child finally felt secure enough in his foster parents’ love and stopped peeing on the floor.

Two things sustained those foster parents through an extraordinarily difficult time: the firm conviction that loving this child was a *decision* and a *calling* rather than merely an emotion or a job, and the steady support of the community of faith around them.

Religious faith is not a purely emotional exercise or mere intellectual assent to a series of propositions. It is instead living and active, *necessarily* engaging the hands along with the head and heart. For that reason, people of faith have led the charge in caring for vulnerable children in America for nearly three hundred years. They view it as a calling, obligation, and ministry, and not merely as an altruistic or “feel-good” social service. These religious beliefs both motivate people of faith to engage in child welfare work and inform the way in which they carry it out.

The government first seriously entered the field of child welfare in the 1930s. And until recently, governments and faith-based organizations have cooperated to care and serve vulnerable families and children. Plaintiff would have South Carolina (and other governments) declare an end to that era of cooperation. Plaintiff’s theories would give faith-based agencies two choices: Abandon the field of caring for children, or abandon some of the very beliefs about faith, family, and ministry that motivate them to serve and which make those organizations

uniquely effective. That choice infringes on religious exercise. *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876 (2021). And either option will visit devastating consequences on society's most vulnerable children and the families who are eager to give them stable homes.

But the Court may chart a third course in the cooperative spirit that reflects the best aspects of our pluralistic society—and the First Amendment compels it: Preserve for people of faith the right to exercise their beliefs by caring for children *without* giving up the very beliefs that move them to action.

This is a case about exclusion and harm—but not of the type Plaintiff alleges. Plaintiff seeks to require the State of South Carolina to exclude Miracle Hill from providing foster care services based on its religious beliefs. If such exclusion is upheld, then religious agencies will be excluded from their historical and present role as partners to government in service to vulnerable children and families. Indeed, if Plaintiff's action is successful, religious *persons* may be excluded from being foster parents, due to their religious views.

Exclusions like the one sought here harm vulnerable children and families, and will continue to do so. The child welfare system—and the families it serves—depends on the voluntary participation of agencies and persons to do most of the difficult work of caring for vulnerable and traumatized children and families. Many of those agencies and individuals are animated by deep religious convictions; excluding them will also send a clear message of government stigma and disapproval to religious persons. On the other hand, sustaining the role of religious agencies and persons will not in any way exclude persons of other faiths from participating as foster parents, nor in any way exclude the many agencies that facilitate their participation. Disagreements on religious doctrine should not be used as a wedge to prevent us from working together as a society to assist vulnerable children.

ARGUMENT

I. Religious foster agencies are motivated by comprehensive religious beliefs about the nature of families.

The First Amendment “protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through ‘the performance of (or abstention from) physical acts.’ *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022) quoting *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) (“The principle that government may not enact laws that suppress religious belief *or practice* is so well understood that few violations are recorded in our opinions.”) (emphasis added). And for good reason; thinkers ranging from theologians³ to business consultants⁴ agree that a satisfying life or an effective organization will combine intellectual conviction, passion, and action (*i.e.* head, heart, and hands).

For hundreds of organizations across the country, caring for vulnerable children is a ministry, calling, and command from God.⁵ There is robust debate among different faiths and denominations about the proper theological foundations for foster care.⁶ It would come as no

³ Dennis P. Hollinger, *Head, Heart and Hands: Bringing Together Christian Thought, Passion and Action* (2005).

⁴ Jim Hemerling, Julie Kilmann, and Dave Matthews, *The Head, Heart, and Hands of Transformation*, The Boston Consulting Group (November 2018), https://image-src.bcg.com/Images/BCG-The-Head-Heart-and-Hands-of-Transformation-Nov-2018%20%281%29_tcm9-206341.pdf.

⁵ Take for example the mission statements of *amici*:

The CALL: “To educate, equip and encourage the Christian community to provide a future and a hope for children in foster care in Arkansas. <https://thecallinarkansas.org/about-us/mission-vision/>

Lifeline: “The mission of Lifeline Children’s Services is to equip the Body of Christ to manifest the gospel to vulnerable children.” <https://lifelinechild.org/what-we-believe/>

FaithBridge: “Our mission is to mobilize, organize, and equip local churches to solve their community’s foster care crisis.” <https://www.faithbridgefostercare.org/about/our-vision-and-mission/>

⁶ See, e.g., David M. Smolin, *Of Orphans and Adoption, Parents and the Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement*, 8 Regent J. Int’l L. 267 (2012); Elizabeth Kirk, *A Mother’s Day Reflection: Don’t Be Afraid of Adoption*, The Leaven (May 12, 2017) <https://perma.cc/KCT8-CT89>.

surprise that Baptists, Catholics, Mormons, Muslims, and Jews might have different bases for engaging in child welfare, given their unique religious traditions and sources of authority. But despite those differences, all religious child welfare organizations believe that their mission is a lived expression of religious belief.

Religious conviction permeates the entire existence of a faith-based child welfare organization and informs all of its activities. For example, religious faith forms the basis on which an organization like FaithBridge appeals to the potential foster families it recruits every year.⁷ Religious conviction inspires many people to volunteer or make financial contributions to support the work of faith-based organizations. Such charity relieves the government and child welfare systems of some of the enormous financial burden of training families and caring for vulnerable children. And religiously informed beliefs about children and family life motivate the faith communities that rally to support foster families.

It is important here to emphasize that these religious agencies are not motivated by a generic faith, but by specific religious histories and traditions that are embodied in their work. There are (at least) two consequences of this. First, it is important to be mindful of the reality that the work of these agencies on behalf of vulnerable children is the public expression of people of faith, inspired by specific, *shared* religious traditions. In other words, the child welfare organization, the potential foster families they work with, and the community set up around those families work effectively together to promote their common mission, in part because they are aligned on and inspired by basic matters of belief. They share commitments such as the nature of God, how God should be worshipped, and the manner in which God should be served through

⁷ As FaithBridge explains, “We believe the answer to solving the foster care crisis is the church. This is why we partner with local churches. A Christ-centered foster care ministry not only allows churches to care for vulnerable children and their families but also provides a way to support foster families and involve the local church and community in meeting the need.” <https://www.faithbridgefostercare.org/about/why-faithbridge/>.

ministry to one's fellow human beings. Thus, while most faith-based agencies serve children in need of any and all (or no) faith tradition, unsurprisingly, they will hire employees, recruit volunteers, or partner with families and faith communities that share their particular religious convictions (usually embodied in a basic statement of faith).⁸

Second, every system of belief—whether religious, atheistic, or secular—contains some kind of philosophical understanding of the nature of the human person and human sexuality. In the child welfare system, this is manifest in the reality that every organization, whether secular or religious, agrees that children need and deserve healthy, stable families. In our pluralistic society, there are a variety of beliefs (again, both religious and secular) about what conditions and family structures make for a healthy, stable family. For example, the belief that children flourish best with both a mother and a father is not a negative discriminatory principle, but rather an expression of religious understanding about the very nature of the family and the resultant rights of the child.⁹ Therefore, unsurprisingly, many people of faith have *religiously informed* views on such matters, and those views are embodied in the child welfare work that they do.

Everyone, religious and non-religious alike, would agree that children deserve healthy, stable families. But there are a variety of beliefs about what makes for a healthy, stable family.

⁸ It is true that some faith-based organizations will partner with volunteers or families outside the organization's particular religious tradition. But it is not a state government's place to dictate whether an organization *must* do so, or even where that organization may draw its partnership boundaries.

⁹ See, e.g., Pope Francis, *Address to Humanum: An Interreligious Dialogue on the Complementarity of Man and Woman*, (Nov. 17, 2014) ("The family is the foundation of co-existence and a remedy against social fragmentation. Children have a right to grow up in a family with a father and a mother capable of creating a suitable environment for the child's development and emotional maturity.") Complete text of the address is available at <https://perma.cc/9HAA-FPS2>.

II. Faith-based agencies have long played an indispensable role in caring for vulnerable children.

Motivated by a sincere faith and sense of calling, religious groups have served as the backbone of foster care since our country's origins. For the last three centuries, private, predominately faith-based organizations shouldered the load of caring for vulnerable children.

A. Faith-based agencies pioneered the field of care for vulnerable children before state and local governments were involved.

In 1729, a group of Ursuline nuns founded the first orphanage in North America. David Gates, *History of the Orphanage*, Newsweek (Dec. 11, 1994, 7:00 PM) <https://perma.cc/C9XA-B28R>. Lutherans founded the first orphan asylum in the British colonies in 1738, in Georgia's Ebenezer colony. Timothy A. Hasci, *Second Home: Orphan Asylums and Poor Families in America* 17-18 (1997). Moved by a visit to the Ebenezer orphanage, Methodist preacher George Whitfield opened a home in Bethesda, Georgia. *Id.* Between 1790 and 1800, private (often religious) associations opened orphanages in New York City, Philadelphia, Baltimore, and Boston. *See also* Defendants Henry McMaster's and Michael Leach's Motion for Summary Judgment and Memorandum in Support at 3-7. Faith communities expanded their efforts in subsequent years. "By 1830, there were over thirty institutions for dependent children in the United States, almost all of which were either Protestant or Catholic. *Id.*, at 19. The first Jewish association caring for dependent children emerged in 1822. *Id.*, at 25.

Throughout early American history, faith-based organizations responded to tragedies by opening their arms to orphaned and dependent children. A bad winter in 1829 prompted a Catholic priest to open a new orphanage in Philadelphia. *Id.*, at 24. Cholera outbreaks across the country led to new orphan asylums throughout the 1840s and 1850s. *Id.*

In 1853, a Methodist minister fueled the movement to place displaced children with loving families rather than in orphanages, becoming the "father of the modern foster care

movement.” *Charles Loring Brace*, *New World Encyclopedia*. Throughout the latter half of the 1800s, private agencies—overwhelmingly religious—continued to lead the way in caring for America’s dependent children. *Hasci, supra*, at 27.

B. Faith-based agencies remained effective partners after state and local governments entered the field of child welfare.

State and local governments generally entered the field of child welfare after the Civil War, creating a few county- and state-run asylums. *Hasci, supra*, at 27. But government involvement largely consisted of providing funding to private (still predominately religious) orphanages and institutions. *Id.*, at 31-34.

The federal government authorized the first federal grants for child welfare services in the Social Security Act of 1935. States responded by setting up their own child welfare agencies. Kasia Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, Pew Charitable Trusts. But faith-based groups remained at forefront of child welfare. While orphanages declined in the wake of the 1935 Act, and because of evolving understandings of the best environment for children, many organizations shifted to foster care or to specialized care for children with particular health or behavioral needs. *Hasci, supra*, at 47-48.

The modern foster care system finally began to take shape in light of three developments in the 1960s. First, amendments to the Social Security Act in 1961 codified reimbursements to state and local governments for foster care expenditures. Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 *Ohio St. L.J.* 1295, 1307 (1999). Second, all states enacted reporting laws requiring certain professionals to report suspected child abuse; states also set up regulatory regimes for investigating reports and protecting the abused children. *Id.* at 1308. And third, further amendments to the Social Security Act allowed states to contract with private nonprofit agencies for foster care services. *Id.*, at 1309. State and local governments

largely responded by contracting with the very same private (usually religious) organizations that were already caring for children. *Id.* As explained below, the close partnership between faith-based agencies and local governments continues to this day. Kelsi Brown Corkran, *Principal-Agent Obstacles to Foster Care Contracting*, 2 J.L. Econ. & Pol’y 29, 31-32 (2006) (“Although some states have created public agencies that directly place children in foster homes and employ social workers to monitor their care, most continue to contract these services out to private nonprofit organizations.”).

III. In order to carry out the mission of caring for vulnerable children, faith-based organizations must partner with state and local governments.

A. State and local governments are the exclusive gatekeepers of the child welfare system.

While state and local governments are relative latecomers to child welfare work, *see* § II, *supra*, they are now the gatekeepers. Foster care is unique within the social safety net in that regard. Private organizations can operate everything from schools to soup kitchens, and homeless shelters to hospitals without contracting with the government. But there is no such thing as a completely “private” foster care system; private agencies must operate in cooperation (typically through a license or under a contract) with a state or local department of family services. *See* Hannah Roman, *Foster Parenting As Work*, 27 Yale J.L. & Feminism 179, 186-189 (2016); Mangold, *supra*, at 1313. If a foster care organization is barred from being licensed by, working with, or contracting with a local government, then it is excluded from the foster care system altogether.

B. To engage with the child welfare system at any level, an organization must cooperate with state and local authorities.

Amici represent different levels of engagement with the foster care system. FaithBridge and Lifeline are full-service or child placing agencies: they recruit foster families, they are

authorized to conduct home studies and assist prospective foster families to obtain licenses, they provide state-mandated pre-service and continuing education for foster families, and they assist with the placement of children who enter the foster care system. The CALL is a bridge organization: like FaithBridge and Lifeline, it recruits foster families and provides state-mandated pre-service and continuing education, but it does not conduct home studies or assist with the placement of children. But both full-service and bridge organizations must interact with—and cooperate with—state authorities at every stage of their work.

A full-service or child placing agency must itself be licensed by the state.¹⁰ In some states, full service agencies may in turn license foster families, subject to state guidelines and state approval.¹¹ In South Carolina, the State has even more control as it is the sole licensor of both the agencies and the foster families.¹² The licensing process for families generally includes an intensive home study to assess whether the prospective foster family can provide a safe and stable environment for vulnerable children.¹³ Foster families must complete pre-service training, including first aid and CPR certification, as well as annual in-service training (typically between 15 and 30 hours per year).¹⁴ Foster care agencies and foster families partner with the state long before the family receives a foster child.

¹⁰ Ala. Code § 38-7-4; Ark. Code Ann. § 9-28-407; Ga. Code Ann. § 49-5-12. *Amici* rely on the laws of the states where they operate, which are similar to other state laws nationwide.

¹¹ Ala. Code § 38-7-4; Code Ark. R. 016.15.2-210; Ga. Code Ann. § 49-5-12.

¹² See Defendants Henry McMaster's and Michael Leach's Motion for Summary Judgment and Memorandum in Support at 3-7.

¹³ Under regulations from the Arkansas Department of Human Services, a home study requires two in-person visits with the foster parent applicants, and a wide-ranging assessment of the foster family's motivations, household composition, housing, housekeeping standards, home safety hazards, six years of employment history, income, expenses, debts, insurance, health of each member of the household (down to how often they see a physician), educational attainment and future plans, parenting classes attended, childcare arrangements, child-rearing practices (including purposes of behavior management, how the family shows affection and handles stress, allowance, chores and homework), the family's daily schedule, social history (marriages, divorce, support system, future plans), religious interests, social organizations, activities with children, and family roles. See Code Ark. R. 016.15.2-207.

¹⁴ See generally Ala. Admin. Code 660-5-29-.02, .07; Code Ark. R. 016.15.2-207, -210; Ga. Comp. R. & Regs. 290-2-5-.13.

IV. Faith-based agencies play a unique and irreplaceable role in the foster care system.

Just as faith-based foster care agencies cannot operate without working with state governments, state governments could not operate their foster care systems effectively without faith-based organizations. Faith-based agencies are prolific recruiters of foster families, they provide the essential community support that allows families to foster longer and more effectively, and they play an innovative and indispensable role in family reunification efforts.

A. Faith-based agencies are uniquely effective in recruiting and sustaining foster families.

Across the country, faith-based organizations are the most effective recruiters of new foster families. For example, since its founding in 2007, The CALL has recruited and trained two-thirds of all non-kinship foster families in Arkansas. Families recruited or trained by The CALL have adopted more than 1,500 children and cared for 18,000. The CALL has been particularly effective in recruiting families in rural counties in Arkansas.

The Deputy Director of the Arkansas Division of Children and Family Services (“DCFS”) described it this way: before The CALL began recruiting families in Lonoke County, a social worker who removed a child “might be in [the] office for seven hours trying to find a placement. Then you might end up with that child in an emergency shelter or a placement just for the night, and you start all over the next day.” But thanks to The CALL’s efforts, the Lonoke DCFS office can now find placements “within an hour.” Benjamin Hardy, *In Arkansas, One Faith-Based Group Recruits Almost Half of Foster Homes*, The Chronicle of Social Change (Nov. 18, 2017) <https://perma.cc/BJF9-TJDP>. And in Cleburne County, Arkansas, The CALL’s efforts led to a five-fold increase in open foster homes between 2009 and 2017. *Id.*

In recent years, the top three sources of new foster homes in Georgia have been faith-based organizations: FaithBridge, United Methodist Children’s Home, and Uniting Hope for

Children. In 2019, FaithBridge alone licensed 100 new foster families. *FaithBridge Foster Care 2019 Annual Report* <https://f7h2s3c3.stackpathcdn.com/wp-content/uploads/2020/05/2019-FaithBridgeAnnualReport.pdf>. FaithBridge families cared for 463 children in foster care—a 12% increase over the previous year. *Id.*¹⁵

Faith-based organizations are prolific recruiters precisely because of their religious convictions. Religious faith is often a strong motivation to become a foster parent. Michael Howell-Moroney, *The Empirical Ties between Religious Motivation and Altruism in Foster Parents: Implications for Faith-Based Initiatives in Foster Care and Adoption*, *Religions*, Vol. 5, No. 3, at 720-737 (2014). Indeed, in one study, more than 90% of individuals who were contacted by a faith-based child welfare organization reported that after that contact, they were “highly aware” of a *religious* mandate to care for orphans and of the need for foster families in their community. Michael Howell-Moroney, *On the Effectiveness of Faith-Based Partnerships in Recruitment of Foster and Adoptive Parents*, *J. of Pub. Management & Social Policy*, No. 19, Vol. 2, 176 (2013). More than a third of foster families recruited by The CALL report that they likely would not have become foster parents but for their exposure to The CALL’s faith-based call to foster, while another forty percent report that they were on the fence about fostering before exposure to The CALL’s programing. *Id.*, at 177.

Faith-based agencies do not rely on a religious message alone. They also partner with local faith communities, providing the critical support that prospective foster families need to begin fostering—support that the government cannot easily replicate. To take one example, Lifeline partners with Homewood Church of Christ in Homewood, Alabama to recruit and

¹⁵ While much of life ground to a halt during the COVID-19 pandemic, organizations like *amici* are undeterred. During April and May 2020, 124 people signed up for FaithBridge’s online training sessions—up from 47 during the same period a year earlier. Emil Moffat, *Alpharetta Foster Care Agency Sees More Families Signing Up For Online Training* (May 21, 2020) <https://perma.cc/9M3X-UD3R>.

support its foster families. Earlier this year, the church approached Lifeline with a vision to help prepare bedrooms in the homes of families that were in the process of becoming licensed foster parents. Lifeline connected the church with four families that were undergoing foster care training with Lifeline. The families asked for things ranging from a single item to supplies for an entire room, and the church rallied to supply their needs. In another case, a prospective foster family had to halt their licensing process because they could not afford to put a fence around the pool in their back yard. Lifeline reached out to the family's home church—another Lifeline church partner—and the church rallied to help the family erect the fence and continue with foster care licensing.

Faith-based agencies are effective recruiters *precisely because* they are faith based. Without this fundamental, motivational component, faith-based agencies lose their *sine qua non*. The governmental body that would require faith-based agencies to abandon their most fundamental commitments will jeopardize a health stream of potential foster families. And it will do so to the detriment of the children the government purports to serve.

B. Faith-based agencies provide critical community and support for foster families.

Opening new homes is only part of the battle. One quarter of first-time foster homes close within four months of opening. Fred Wulczyn, et al., *The Dynamics of Foster Home Recruitment and Retention* 9, The Center for State Child Welfare Data (Sept. 2018) <https://perma.cc/Z5UR-CRAG>. Half close within nine months, and three-quarters close within two years. *Id.* Foster parents often stop fostering because they do not feel included in decision-making about the foster child's life, a lack of communication or other frustration with state agencies, or a lack of formal peer-network support. *CHAMPS Policy Playbook 2nd Edition*, 19-26 (Jan. 2019) <https://playbook.fosteringchamps.org/wp-content/uploads/2019/01/champs-playbook.pdf>.

But faith-based organizations are uniquely effective in keeping foster families open. Families who hear about fostering through a church or religious organization foster for years longer than other foster parents. Mary Ellen Cox, Cheryl Buehler, & John Orme, *Recruitment and Foster Family Service*, J. Soc. & Soc. Welfare Vol. 29, No. 3, 166-168 (2002). This is because faith-based agencies are adept at stepping in to meet the needs that would otherwise drive families out of foster care.

Caring for vulnerable children is a months, years, or life-long commitment, and it is a chaotic and difficult endeavor. Nearly 60% of children in foster care are school-age or older. *Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2018 data*, U.S. Department of Health & Human Services. Most have been in foster care for a year or longer. *Id.* Foster situations often involve sibling groups, or traumatized children with significant behavioral problems. In short, foster care is not simply a matter of pouring love on cuddly newborns—foster care often involves caring for children with extraordinary emotional, psychological, physical, medical, and social needs.

For that reason, fostering simply cannot be sustained without support. Foster families need community—something that faith-based agencies are uniquely positioned to provide to foster families who share their religious motivation and beliefs. Organizations like The CALL, Lifeline, and FaithBridge intentionally recruit communities to surround foster families. They often recruit and partner with a church—an entire faith community—before recruiting individual families. *See* n.6, *supra*. State governments are not designed to recruit or forge communities. Despite their best intentions, there is no government agency designed to reinforce the family’s religious calling and divine motivation for caring for vulnerable children when a traumatized elementary school kid urinates on the floor in the study.

Ensuring a good fit between foster agency and foster family is a priority during the recruitment process and leads to future success that benefits the children. For *amici* and other foster agencies, the recruitment and home study process is an intensive lifestyle assessment where the foster agency makes subjective assessments of the potential foster family’ home environment and fitness many of which are required by law.¹⁶ These assessments necessarily determine whether the potential foster family and agency will work well together. Different agencies, motivated by different traditions and embodying diverse understandings of human nature, will of course have different conclusions about the best environments for children. The fact that most states contract with a variety of child placement agencies demonstrates that this cooperative, multiplicity-based approach makes for a robust child welfare system.

Faith-based organizations intentionally recruit and train a like-minded community who will provide wrap around services to foster families. What does this look like? In *amici*’s experience, whole churches—organized and mobilized by faith-based agencies—cut grass, clean laundry, provide meals, babysit, and transport children to case management visits, physician appointments, and therapy sessions in order to support foster families.¹⁷ In *amici*’s experience, the cliché is true: it takes a village to raise a [foster] child. Faith-based agencies, themselves corporate expressions of *shared* religious belief, are designed to create and sustain the village.

¹⁶ For example, Arkansas requires that foster parents “be physically, mentally, and emotionally capable of caring for children,” and “the stability of the foster family shall be evaluated and determined to be appropriate.” Code Ark. R. 016.15.2-206. To that end, Arkansas directs foster agencies to assess a potential family’s motivations for fostering, the parents’ educational attainment and parenting classes attended, child rearing practices (including “behavior guidance practices, how they show affection, how they handle stress, allowance, chores, and homework”), social history, religious interests, social organization, and family roles. Code Ark. R. 016.15.2-207. Georgia likewise requires foster agencies to evaluate “family interaction patterns,” “parenting knowledge, attitudes, and skills,” “current child-rearing practices,” “emotional and mental health status of each member of the prospective foster family,” “anticipated adjustment of each foster family member to a foster child,” “willingness to cooperate with the placement agency,” the support network available to the foster family, and “religion.” Ga. Comp. R. & Regs. 290-2-5-.13.

¹⁷ *Amici* routinely recruit these vital supports for foster families in their communities. FaithBridge, for example, describes this model as the “Community of Care.” <https://vimeo.com/359372494/cbae2e90ec>.

C. Faith-based agencies are effective partners in family reunification plans.

Many of the faith-based organizations targeted by exclusionary policies like the one advanced by the Plaintiff share the belief that the optimal environment for a child is to live with his or her married, biological parents. And as a product of that very commitment, many faith-based organizations are innovative leaders in family reunification efforts.

Take Lifeline as one example. Lifeline does not market itself as a foster care agency. Rather, Lifeline pursues family restoration, with foster care as one of several ministries oriented toward that goal. Through its “Families Count” ministry, Lifeline offers parent education classes designed to meet the standards for state-approved, court-mandated parenting classes. *Families Count*, Lifeline Children’s Services <https://lifelinechild.org/families-count/>. Lifeline trains churches to mentor and care for parents who are working through court-ordered reunification plans, and to intervene with parents who are at risk of having their children removed.

The U.S. Department of Health and Human Services highlighted FaithBridge as an exemplar of best practices for utilizing foster care as a support for birth families. *Foster Care as a Support to Families*, U.S. Department of Health & Human Services (Apr. 29, 2020) <https://www.acf.hhs.gov/sites/default/files/cb/im2006.pdf>. FaithBridge believes that it is in the best interest of children for their foster families to partner with their birth parents. *Id.* So in order to be licensed by FaithBridge, a foster family is expected to be willing to work alongside birth families. *Id.*, at 16. FaithBridge teaches foster families to understand the importance of the parent-child relationship despite the reasons for a child’s removal, and FaithBridge asks its foster families to recognize and respect the ongoing role of the birth parents in the child’s life. *Id.* FaithBridge also believes that both foster and birth families thrive when surrounded by a community of support. *Id.* To that end, FaithBridge assigns every family to a Community of Care—working through local churches—to support families, birth parents, and children in foster

care. *Id.* The result? “The agency’s data indicate that reunification rates improved significantly when resource [foster] families worked closely with families and nearly 25% of families maintained a relationship post-reunification.” *Id.*

V. Excluding faith-based agencies concretely harms vulnerable children and the families who care for them.

State child welfare systems could not operate effectively without the support and resources of faith-based organizations. Faith-based organizations cannot live out their ministry calling to care for children without cooperating with state governments. Faith-based organizations are uniquely effective partners, precisely because of their religious convictions about children and families.

In this case, the Plaintiff wants the State of South Carolina to force faith-based agencies into an untenable choice: give up their religiously motivated ministry to vulnerable children, or give up the religious convictions that make them effective organizations in the first place. Unsurprisingly, people of faith are not willing to give up their convictions at the behest of the state—and the First Amendment guarantees that they do not have to do so. But if the Plaintiff and others successfully exclude faith-based organizations from the child welfare system, the consequences will be devastating for both vulnerable children and people of faith.

A. Excluding faith-based organizations will lead to fewer foster homes, exacerbating an existing crisis.

As explained in § IV.A-B, *supra*, many families would not begin fostering or continue to foster without the partnership of faith-based organizations. Accordingly, it should be self-evident that excluding faith-based organizations will lead to fewer foster homes. But one need not rely on syllogisms alone.

In 2011, Illinois enacted its “Religious Freedom Protection and Civil Union Act,” which effectively prevented the state from partnering with faith-based agencies who hold traditional

beliefs on marriage.¹⁸ Before the law even became effective, the Illinois Attorney General notified faith-based foster care providers in the state of the new requirements. Multiple Catholic Charities organizations in Illinois challenged the law but abandoned their appeal after the Illinois Department of Child and Family Services notified them that their cases would be immediately transferred *en masse*. Three Catholic Charities organizations chose to facilitate the smooth transfer of their cases to other organizations while two other organizations chose to sever ties with their dioceses to continue offering foster care services under the new law. All five of these Catholic Charities organizations were forced to choose between operating according to their religious beliefs and continuing to serve the more than 2,500 vulnerable children whose cases they managed. See *Brief of Amici Curiae, Catholic Charities of the Diocese of Springfield in Illinois, and Catholic Charities of the Diocese of Joliet, Inc., in Support of Petitioners, Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2020) (No. 19-123).

Between 2012 and 2017, Illinois lost 1547 foster homes—more than any other state reporting data during that period. *Foster Care Housing Crisis*, The Chronicle of Social Change, Appendix A at 13-14 <https://perma.cc/9SK8-WFXA>.

B. Excluding faith-based organizations will harm foster children of all religious backgrounds.

Many states have “religious matching” statutes that direct foster care agencies to make a reasonable effort to place a child with a foster family of the same religious faith as the legal parents. Kelsi Brown Corkran, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. Chi. L. Rev. 325, 327 (2005) (collecting

¹⁸ Tim Townsend, *Catholic Charities in Springfield, Ill., transfers its foster care*, St. Louis Post-Dispatch (Jan. 10, 2012) <https://perma.cc/G6JA-WGQK>.

statutes). In states without matching statutes, state agencies still typically consider religious affiliation as part of foster care placement. *Id.*

It is right and proper for local governments to make a good faith effort to place children in homes that share their (or their parents') religious faith. Both foster children and their biological parents have Free Exercise rights that the government is obliged to respect. To take one example, the Orthodox Jewish faith maintains a number of particular religious practices that distinguish Orthodox Judaism from other faiths, including other Jewish traditions. One of these religious practices is Jewish children be taught Torah. This requirement will likely not be followed if a Jewish child is not placed in a Jewish household. A state should not casually disregard a Jewish foster child's faith (or the faith of the family from which he comes) by making no effort to find a compatible foster family.¹⁹

Further, removing a child from her home is traumatic enough *without* placing her in an alien faith community. It would be highly improper to remove an Orthodox Jewish child from her home and place her with a Mormon foster family for long term care (or *vis versa*)—not because Mormons (or Orthodox Jews) are incapable of being good foster parents (quite the opposite), but because it would represent a tremendous shift in religious faith and practices that neither the foster child nor the foster family can reasonably be expected to navigate.²⁰ Having already ripped a child away from her family, it would be too much to also remove the patterns, practices, rituals, faith—even dietary considerations—that characterize her daily life.

¹⁹ If a state is obliged to provide kosher and halal meals to its Jewish and Muslim prison inmates, then surely it cannot ignore the religious dietary needs of its Jewish and Muslim foster children by placing them with foster families that cannot or will not meet those needs.

²⁰ It is hard to imagine that the Free Exercise and Establishment clauses teach that religion is simply *immaterial* to a child's upbringing.

By ignoring religious considerations in foster care placement, the government may also create immense, unnecessary obstacles to eventual family reunification. It is not unusual for a child to spend years in foster care before being reunited with his or her birth family.²¹ A child who is separated from his parents' faith (and his own faith) for that long may very well be alienated from the faith by the time he is reunited with his birth family.

Faith-based organizations are indispensable if a state is going to meaningfully respect the religious beliefs of the children and families it serves. Faith-based agencies are more likely to recruit foster families of the same faith, *see* § IV.A., *supra*, which gives a state government a viable pool of potential placements. And faith-based agencies streamline the process of finding a religiously compatible placement; if a state agency must place a Jewish child into a foster home, it is an order of magnitude more efficient to *first* call the state's Jewish foster agency to find a placement, rather than to contact each of its potentially dozens of organizational partners and ask them to each comb through their list of families to find a Jewish home.²²

C. Excluding faith-based organizations will cut off continuity of care and delay permanence for vulnerable children.

Entering the foster care system is a traumatic experience for a child. There are no positive reasons to be in foster care: it involves a state determination that the child has been a victim of abuse or neglect and that the home environment is unsafe or unsuitable. The child is then taken

²¹ The U.S. Department of Health & Human Services collects data on the timeline to reunification (i.e. the length of time between placing a child in foster care and returning that child to his or her birth family) in state foster care systems. <https://cwoutcomes.acf.hhs.gov/cwodatasite/fourOne/index>. In Georgia, 41% of reunifications in 2017 took more than a year (i.e., a child spent more than 12 months in foster care before returning home). In Pennsylvania, nearly 30% of 2017 reunifications involved more than a year in foster care. And in Illinois, 72% of family reunifications in 2017 took more than a year, and 30% took more than two years.

²² *Amicus* Coalition for Jewish Values explains that Jewish foster agencies are *essential* to providing foster care placements for Jewish children. As *amicus* explains, an Orthodox Jewish family will likely serve *only* Orthodox Jewish children, recognizing that the cultural and religious shock would be overwhelming and unhelpful for a child of any other faith—it is no small matter to keep a kosher diet or attend a Synagogue. As such, an Orthodox Jewish family seeking to serve as a foster family will likely work with an Orthodox Jewish foster care agency, or not serve at all. If state and local governments refuse to work with Orthodox Jewish foster care agencies, it is unlikely that the state will have available placements for Orthodox Jewish children in foster care.

out of his home environment and typically placed with strangers for an indeterminate length of time. Sibling groups can be split across multiple homes. Children are then re-traumatized by the often unstable nature of foster care placements (instability that is increased if foster families do not have adequate support).

Children cannot begin to heal without a stable home. Children who experience multiple foster care placements fall behind academically. Jessica Lahey, *Every Time Foster Kids Move, They Lose Months of Academic Progress*, *The Atlantic* (Feb. 28, 2014). They are at an increased risk of behavioral problems. David Rubin, Amanda O'Reilly, & Xiangun Laun, *The Impact of Placement Stability on Behavior Well-Being for Children in Foster Care*, *Pediatrics* (Feb. 2007).

Unfortunately, many foster children do not find stable homes. The Department of Health & Human Services defines “placement stability” as having two or fewer placements in a single foster care episode. See *Child Welfare Outcomes 2016: Report to Congress*, U.S. Department of Health & Human Services <https://www.acf.hhs.gov/sites/default/files/cb/cwo2016.pdf>. In 2016 (the HHS Report), 84% of children who were in foster care for less than twelve months had placement stability. *Id.*, at 46. That number dropped the longer a child remained in foster care; only 39% of children who had been in foster care for two years or longer had achieved placement stability. *Id.*

In contrast 95% of children placed in FaithBridge homes last year found stability in just *one* placement—well exceeding the national average. *FaithBridge 2019 Annual Report*, *supra*. And as outlined in § IV.B, *supra*, families recruited by faith-based agencies foster longer than other foster families, further promoting stable placements. If state and local governments exclude faith-based caregivers, children will lose out on their best opportunity to find long-term stability.

VI. Excluding faith-based entities will marginalize people of faith in other sectors as well.

The case under consideration poses two important questions for the Court and for society as a whole: First, must an individual or organization abandon their religiously compelled associational beliefs before serving children in foster care? Second, can society accommodate people with different convictions about important issues and still labor together for the good of vulnerable children (or any other social welfare cause)?

As to the first, the answer is undoubtedly no. If the Establishment and Free Exercise Clauses of the First Amendment mean anything at all, it must be that a person does not have to agree with the government or anyone else on matters of religious conviction in order to participate in public life. *See Blais v. Hunter*, 493 F. Supp. 3d 984 (E.D. Wash. 2020) (enjoining a State of Washington policy encouraging licensors to consider a potential foster family’s religious beliefs and stances on LGBTQ+ rights because it forced families forsake their religion to get a foster care license). Plaintiff wants the State of South Carolina to exclude Miracle Hill from the foster care system because Miracle Hill holds specific religious beliefs including beliefs about the employees and prospective foster parents with whom it partners in ministry. If the State declares that Miracle Hill is unfit to *find* foster families because of its religious beliefs, it unavoidably sends the message that families who share those same religious beliefs are unfit to *be* foster families. Such a message “would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions.” *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2074 (2019) (cleaned up); see also Kennedy, 142 S. Ct. at 2427 (“Nor does the [Establishment] Clause compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious.” (cleaned up)). Surely it cannot send the

message that certain religious views are unwelcome by stating outright, through its express motivation from excluding Miracle Hill from child welfare, that those views are unwelcome. The answer to the second question—whether society can accommodate people with different convictions about important issues, and still labor together for the good of vulnerable children—is equally clear. Since our nation’s inception and as recently confirmed by a unanimous Supreme Court, the answer is a resounding *yes*. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

No one is served by closing doors to people and agencies who, inspired by and informed by their faith, have historically shouldered the burden of caring for vulnerable children. Requiring the State of South Carolina to exclude Miracle Hill from the child welfare system sends an ominous message to all people of faith serving in *any* social service ministry that interacts with the state (whether it be education, health care, prison ministry, or anti-poverty work): fall in line, or get out of our way.

CONCLUSION

Faith-based organizations have carried the burden of caring for vulnerable children for centuries, as an expression of deep religious conviction. Plaintiff’s position effectively means that the government may take over the space created by people of faith (here, child welfare), and then exclude them from the field altogether if they do not bow to the popular orthodoxy on matters of faith. State Defendants’ motion for summary judgment should be granted.

Respectfully submitted,

WAGENMAKER & OBERLY, LLC

By: /s/ Matthew Brown
Matthew Brown*
145 River Landing Dr., Suite 202

Charleston, SC 29492
Tel: (312) 626-1600
Fax: (312) 626-1610
matthew@wagenmakerlaw.com

**Admitted Pro Hac Vice*

MINGLEDORFF & PATTERSON, LLC

By: /s/ Christopher Mingledorff
Christopher Mingledorff
D.S.C. Bar No: 12034
245 Seven Farms Drive, Suite 310
Charleston, SC 29492
Tel: 843-471-1015
chris@mptrial.com

Counsel for Amici Curiae

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