No. 19-123

In the
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL.,
Respondents.

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

BRIEF OF ALAN BROWNSTEIN, MELISSA ROGERS, AND RABBI DAVID SAPERSTEIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici have dedicated their careers to scholarship, advocacy and public service in furtherance of safeguarding religious liberty.

Alan Brownstein, a nationally-recognized constitutional law scholar, is Professor of Law Emeritus at U.C. Davis School of Law, and has written extensively on issues of church and state and free exercise rights.

Melissa Rogers is co-author of *Religious Freedom and the Supreme Court* and a visiting professor at Wake Forest University School of Divinity. From 2013-2017, she served as executive director of the White House Office of Faith-Based and Neighborhood Partnerships.

Rabbi David Saperstein is Director Emeritus of the Religious Action Center of Reform Judaism, the former U.S. Ambassador at Large for International Religious Freedom, and taught church-state law for 25 years at Georgetown University Law Center.

Amici affirm the critical role religious organizations play in American public life, and

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[1] Pursuant to Supreme Court Rule 37.3, *amici curiae* certify that counsel of record of all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* also certify that no counsel for either party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to its preparation or submission.

strongly believe that the First Amendment protects the equal right of all Americans to exercise their faith as dictated by their conscience and not by the state. *Amici* have criticized the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and support its reconsideration in an appropriate case. This case, however, is not the proper vehicle to do so. Where, as here, the government contracts with and delegates governmental authority to private actors to further specific state goals, such actors do not have a free exercise right to demand the government contract with them to exercise that authority on their own terms.

SUMMARY OF ARGUMENT

Catholic Social Services ("CSS") makes valuable contributions to the City of Philadelphia's foster care system. CSS cannot, however, demand that the City contract with it despite its refusal to adhere to the City's neutral, generally applicable nondiscrimination requirements set out in a standard contract for foster family care agencies ("FFCA"). Respondents may legally require an organization with which they contract for the exercise of delegated governmental authority to comply with specific mandates relating to the performance of the contract, including adhering to the City's constitutionally permissible nondiscrimination policies.

The City of Philadelphia has the legal authority and duty to arrange for the care of children who, because of abuse or neglect, cannot remain at home with their parents. It does so partially through the operation of a foster care system. The Pennsylvania Department of Human Services ("DHS") conditionally delegates some of its governmental authority and responsibilities in the foster care system to private, institutional conduits that operate under the auspices of contracts with local authorities, which provide government funding for the exercise of this delegated authority. In the specific and limited matter in dispute in this case, DHS delegates the authority to, and the City of Philadelphia contracts for and funds, the evaluation and certification of prospective foster families to determine their eligibility for this role. These are intrinsically

governmental functions that determine the rights of private individuals. Private agencies have the authority to perform these certification functions based on the terms of their contracts with the City and the State's delegation of authority.[2]

City contractual requirements prohibit private organizations engaging in this work from discriminating against potential foster parents based on their sexual orientation, among other characteristics. By neutrally setting the requirements for private actors to contract for and participate in delegated state action, the City does not infringe upon the free exercise rights of those that decline to adhere to the contractual requirements it sets out. That is particularly so where private actors remain free to exercise their religion in numerous ways, including by playing other supportive roles in the foster care system, often with state support.[3] Limiting government funding and the delegation of state authority to only those private agencies that agree to abide by the City's contractual requirements does not substantially burden the Free Exercise rights of agencies who, for religious reasons, refuse to comply with such contractual requirements.

Amici deeply respect and appreciate the role that religious institutions play in serving people in need, and believe strongly that religious convictions and

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[2] *See, e.g.*, 23 Pa. Cons. Stat. § 6344(d)(2).

[3] *See generally* Brief for City Respondents' ("Resp'ts' Br.") at 6-9.

practices should be respected as a matter of law. However, as with other constitutional provisions, the Free Exercise Clause has limits. This Court has never held that the Free Exercise Clause forces government to contract with and delegate legal authority to parties even when those parties refuse to comply with neutral, generally applicable nondiscrimination conditions while making use of taxpayer funds and exercising delegated governmental authority.

If the Court requires Respondents to contract with CSS, notwithstanding CSS's refusal to comply with such nondiscrimination conditions, then religious organizations that partner with the government will be able to unilaterally reject countless conditions in government contracts, and demand that the government provide them with funding and delegated authority on their own terms. The result would be constitutionally-mandated religious exemptions from government contract obligations of almost every conceivable kind, at the expense of the government's policy priorities and, ultimately, the populations served by these agreements. The First Amendment's guarantee of free exercise does not require this result.

ARGUMENT

I. THE GOVERNMENT MAY ENFORCE A CONTRACTUAL NONDISCRIMINATION PROVISION AGAINST PRIVATE ACTORS EXERCISING DELEGATED GOVERNMENTAL AUTHORITY

The alleged violation of CSS's free exercise right is the inclusion of a clause in the contract between the City of Philadelphia and CSS requiring CSS (just like any other counterparty to the City's FFCA contracts) to agree that it will not discriminate against prospective foster parents on the basis of sexual orientation.[4] CSS argues that the City's nondiscrimination requirement violates CSS's First Amendment free exercise rights by compelling CSS to certify same-sex couples' eligibility to be foster parents.[5] The Free Exercise Clause, however, does not allow CSS to avoid the obligations set out in government contracts offered to private parties as a condition to their receiving government funding and delegated government power.

The responsibility and legal authority to place children with eligible foster families rests with the State and the City.[6] The State elects to delegate

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[4] DHS, Section 15.1: *Foster Care Contract*, https://www.phila.gov/media/20200811124050/DHS-Section-15.1-Foster-Care-Contract.pdf (last visited Aug. 19, 2020).

[5] Brief for Petitioners ("Pet'rs' Br.") at 19.

[6] *See Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019); Pet'rs' Br. at 6.

some of its authority over the foster care system – specifically the evaluation and certification of families as eligible foster care parents – to private agencies, which operate under contracts with local authorities.[7] In this system, the government has the right to set criteria for the evaluation of potential foster parents to be referred to it by foster care agencies.[8]

Critical to this case is the recognition that all private agencies in Philadelphia – secular and religious alike – derive their authority to evaluate and certify prospective foster care parents solely through contracts with the City and the delegation of State authority.[9] Any private agency thus has the authority to certify prospective foster care parents only because the State has delegated this authority and the City has contracted with the agency for the performance of these governmental functions.[10]

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[7] 55 Pa. Code § 3700.61 ("The Department delegates its authority under Article IX of the Public Welfare Code (62 P.S. §§ 901-922) to inspect and approve foster families to an approved FFCA [(Foster Family Care Agency)]."). *See also* Resp'ts' Br. at 4-6.

[8] *Fulton*, 922 F.3d at 147 (citing 55 Pa. Code § 3700.62 et seq.).

[9] *Id.*

[10] Pet'rs' Br. at 5-7 ("CSS has no preexisting right to determine the fate of Philadelphia's abused and neglected children, whose care is entrusted by law to the government.") (internal quotation marks and citation omitted).

A. THE CITY'S CONTRACTUAL REQUIREMENTS PROHIBITING DISCRIMINATION IN CERTIFYING FOSTER CARE PARENTS DO NOT SUBSTANTIALLY BURDEN FREE EXERCISE RIGHTS

The City of Philadelphia has the right to ensure that FFCAs adhere to a policy of nondiscrimination as set forth in the contract governing the relationship between such parties. Not only are such policies constitutionally permissible, they are recognized as furthering particularly important governmental interests. It is undisputed that if the government did not operate through a private conduit in certifying prospective foster care parents, but instead acted through its own agencies and officials, the adoption of nondiscrimination policies similar to the ones referenced here would not violate any constitutional requirements. It is constitutionally permissible for the government to require any private conduit acting in the government's stead and exercising governmental authority to follow the same constitutionally acceptable rules the government would employ if it were acting on its own behalf.[11]

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[11] *Cf. e.g.*, *United States v. S. A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797, 807 (1984) (holding that the Federal Aviation Administration in delegating its authority to private persons to complete a compliance review and certification for aircrafts may require that all such private contractors are "guided by the same requirements, instructions, and procedures as FAA employees").

The City's commitment to nondiscrimination policies for itself and for parties with which it contracts does not penalize or substantially burden CSS's free exercise rights. As with any other voluntary contractual obligation, CSS may elect not to contract with the City of Philadelphia to provide the specific foster care services the City is seeking.[12] No applicable legal precedent requires Respondents to fashion an exception to their neutral, generally-applicable nondiscrimination requirements in contracts with an agency that refuses to comply with those requirements due to its religious beliefs.

A long line of cases stands for the principle that the government is not constitutionally obligated to fund the exercise of constitutional rights when they will be exercised in a manner contrary to the government's goals and policies.[13] The government neither obligates a contractual counterparty to accept funding nor enter into an agreement with it to

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[12] *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l Inc.*, 570 U.S. 205, 213-214 (2013) (explaining that the government, by including conditions in contracts between the government and private parties controlling the implementation of the government-funded program, does not infringe the fundamental rights of the contracting parties because they are free to decline to enter into the contract.).

[13] *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) ("The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected[.]"); *see also Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 690 (2010); *Harris v. McRae*, 448 U.S. 297, 318 (1980); *Maher v. Roe*, 432 U.S. 464, 475 (1977).

provide services; rather, when an actor chooses to engage the government as a potential partner, it must assume that the government – like any contracting party – will reserve the right to condition the contract and the benefits it provides on performance being carried out in a particular manner.[14]

CSS's status as a religious organization does not alter this long-established understanding. The Free Exercise Clause, like the Free Speech Clause and Due Process Clause, does not obligate Respondents to subordinate government policies to CSS's religious convictions when the City contracts with it to exercise governmental authority. The City's refusal to renew its contract with CSS reflects the City's determination to effectuate the policies it deems important when it contracts with private agencies instead of acting under its own auspices. This Court has recognized repeatedly that the government need not subsidize through contracts or grants the exercise

[14] Because this case involves government-delegated authority and funding rather than private activity, it is distinct from *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the state's interest in mandating formal high school education gave way to the constitutional right of Amish parents to provide private educational opportunities for their children instead of public education. Here, there is no private right or private alternative to the government's custodial responsibilities for its foster care system. Instead, CSS argues that the government must accept a religious organization's claim that it has a right to administer a public function, the certification of foster care parents, as it sees fit. The constitutionally-protected right in *Yoder*, as asserted by the parents of the school-aged children, has no corollary in this case. *Id.* at 213.

of fundamental rights that conflict with the government's policy commitments. No infringement of a contracting party's rights occurs when, within the confines of a government-funded contract or program, the government declines to support the exercise of the contracting parties' constitutional rights.[15] As the Court has emphasized,"[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."[16] "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[17]

Free Exercise precedent is not to the contrary. This Court ruled in *Sherbert v. Verner* that the government may not turn away an applicant for generally available subsidy benefits due to such applicant's religious beliefs or practices.[18] In *Sherbert*, however, the government had no interest in how the recipients of generally available unemployment compensation benefits used the funds they received. Here, State funds are provided to a limited class of contracting parties for the explicit purpose of carrying out particular duties in accordance with the government's specifications.

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[15] *Rust*, 500 U.S. at 196-199. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549-50 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right[.]").

[16] *Rust*, 500 U.S. at 193 (quoting *McRae*, 448 U.S. at 317 n. 19).

[17] *Id.* at 193 (quoting *Maher*, 432 U.S. at 475).

[18] *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

CSS highlights that its contract with the City of Philadelphia has been renewed annually for more than 50 years.[19] The longevity of this relationship does not, however, endow CSS with any future rights for the continuation of its contractual relationship with the City. Government interests and policies change over time. This is particularly true with regard to nondiscrimination policies, which have expanded during the last half century to provide protection to classes defined by race, gender, sexual orientation and gender identity. When new government policies conflict with religious commitments by private agencies, such changes do not alter the basic constitutional calculus.[20] There is no free exercise obligation on the part of Respondents to accommodate CSS by guaranteeing that the government will never condition the authority it is delegating, nor the contractual certifications it is funding, on requirements that may conflict with CSS's, or any other contracting parties', religious convictions.[21]

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[19] Pet'rs' Br. at 5; J.A. 504-05.

[20] Respondents cite nondiscrimination requirements in prior contracts as well. *See* Resp'ts' Br. at 4-9.

[21] This case is distinct from *McDaniel v. Paty* as CSS does not have a right to a government contract in the way that one has a right to run for office. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). In addition, the state provision in *McDaniel* denied the right to serve as a delegate to a state constitutional convention because of an individual's religious activity outside that function (serving as a minister). There is no comparable restriction here.

Thus, it should be clear that the nondiscrimination requirements at issue in this case do not present CSS with an unconstitutional choice between religious exercise and the loss of a benefit to which it would otherwise be entitled. CSS is neither deprived of private interests nor public entitlements by the loss of the contract in dispute. CSS has no private right or power to determine whether individuals are legally eligible to be foster parents. Similarly, it is not entitled to a government contract providing taxpayer funds and the delegation of State authority to determine foster parent eligibility when it rejects the conditions prescribing obligations to exercise such authority under a contract with the City.

To the contrary, the government is permitted to selectively fund programs that encourage certain behaviors and promote goals that it considers to be in the public interest.[22] In the context of free speech rights, for example, this Court has been clear that by contracting with organizations that agree to act consistently with the state's public policy interests, "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."[23] Such a government policy decision does not constitute the abridgement of a fundamental right; it is, instead, a permissible condition preventing a grantee from engaging in conduct inconsistent with how the

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[22] *Rust*, 500 U.S. at 192-93.

[23] *Id.*

government intends to execute the project it is funding.[24] The government does not discriminate against the exercise of constitutional rights when it funds a program involving alternative behavior. A contrary holding would make many government programs unconstitutional and would lead to absurd results. For example, the Court has observed that such a holding would require Congress to fund a program that encourages other countries to adopt communism and fascism because it has funded the National Endowment for Democracy.[25]

Respondents here have clearly articulated their interest in and policy orientation toward protecting people from discrimination. The City of Philadelphia plainly has an interest in how CSS exercises its delegated authority to determine the eligibility of foster care parents entrusted to care for minors for whom the City is responsible. The City of Philadelphia is under no constitutional obligation to fund such delegated authority in a manner that undercuts its goals and policies. Accordingly, Respondents may make decisions that further this nondiscrimination policy, including by funding only those private organizations that agree to honor that policy while exercising delegated authority.[26] By trying to override the City's stated policy goals

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[24] *Id.* at 194.

[25] *Id.*

[26] *See, e.g.*, *Maher*, 432 U.S. at 475 ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.").

embedded in the contract offered to it, CSS is not challenging a substantial burden on the exercise of its faith. Rather, it is seeking funds and delegated authority to which it has no constitutionally-recognized entitlement to use such funds and exercise such authority in a manner that is contrary to the City's stated objectives. As such, it is demanding "preferential, not equal, treatment; [and it] therefore cannot moor [its] request for accommodation to the Free Exercise Clause."[27]

B. THE CITY IS NOT DISCRIMINATING AGAINST CSS BECAUSE OF ITS RELIGIOUS AFFILIATION OR BELIEFS

CSS seeks to avoid the stark reality that its religious beliefs and practices are not substantially burdened by the City's contractual conditions by asserting that the City is discriminating against CSS for its religious views. As noted, however, the City is applying the same neutral condition of nondiscrimination to all foster care agencies with which it contracts.[28] The City's nondiscrimination policy is aimed at the *act* of rejecting same-sex couples from serving as foster parents, not the religious motivation underlying CSS's actions.[29] The

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[27] *See Martinez*, 561 U.S. at 697 n.27.

[28] *See id.* at 694-96.

[29] *Id.* at 696; *see also Locke v. Davey*, 540 U.S. 712, 721 (2004) (religious claimant properly excluded from a scholarship because of what he proposed to do with the government funding: train for the ministry).

City of Philadelphia works with a number of religiously affiliated organizations to provide foster care services.[30] Despite CSS's assertions that Respondents' actions were a "rush to penalize" religious freedoms,[31] the record indicates that such actions were intended to ensure that contractors were acting in accordance with the City's objective of ensuring equal treatment for prospective parents in the foster care system – that is, a neutral policy generally applicable to all similarly situated foster care agencies.[32] It is CSS's "conduct–not its Christian perspective–[that] stands between [it] and [the City's contract]."[33]

Similarly, CSS's argument that the City of Philadelphia's policies are subject to individualized secular exemptions should fail.[34] CSS cannot and does not identify any exemptions from the nondiscrimination condition at issue in this case. Because this condition applies fully to all contractors,

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[30] *Fulton*, 922 F.3d at 164.

[31] Pet'rs' Br. at 1.

[32] *Fulton*, 922 F.3d at 152 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990)); *see also Martinez*, 561 U.S. at 695 ("[A] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.") (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[33] *See Martinez*, 561 U.S. at 696.

[34] Pet'rs' Br. at 25-30.

religious and secular alike, secular exemption arguments are inapposite.[35]

In support of its argument, CSS relies primarily on *Church of the Lukumi Babalu Aye*, the leading case where this Court applied secular exemption analysis.[36] But the Florida regulations outlawing animal slaughter at issue in *Lukumi* were so riddled with exemptions that they evidenced religious gerrymandering and invidious discrimination against a minority faith.[37] By contrast, this case involves a straightforward application of a common nondiscrimination condition that applies to all City contractors, religious and secular alike. Indeed, the evidence in this case indicates that the City wanted to continue working with CSS so long as it abided by that condition.[38] And the City continues to work

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[35] Resp'ts' Br. at 18.

[36] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[37] *Id.* at 542 ("The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n.*, 138 S. Ct. 1719, 1729 (2018) (finding "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [plaintiff's] objection").

[38] *See Fulton*, 922 F.3d at 150 ("[T]he City reaffirmed that it did not want to see its 'valuable relationship with CSS . . . come to an end," but instead hoped that CSS would agree to comply going forward . . . .").

with CSS in other ways.[39] As Intervenor-Respondents note, "CSS continues to provide congregate care and case management services for children in the City's custody, for which the City pays CSS approximately $17 million annually."[40]

Thus, the *Lukumi* case, as well as other cases such as *Masterpiece Cakeshop* where the Court's decisions were animated by impermissible targeting or hostility toward religion, do not support CSS's free exercise claims.[41] The Respondents here acted with respect toward the religious beliefs of CSS and the many other religious organizations seeking Government funds.[42] And unlike cases such as *Trinity Lutheran* and *Espinoza,*[43] where the Court found that the government turned away an applicant for funding due to the applicant's religious status, the City of Philadelphia here applied the same standards and conditions to both religious and secular contractors. Therefore, contrary to Petitioners' arguments, this is not a case where the state is

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[39] *Id.* at 149 ("Nor did it affect other aspects of CSS's relationship with the City.").

[40] *See* Brief for Intervenor-Respondents at 6.

[41] *See Lukumi*, 508 U.S. at 534; *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

[42] *Fulton*, 922 F.3d at 150.

[43] *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020).

"impos[ing] special disabilities on CSS because of its religious beliefs."[44]

C. REJECTING CSS'S FREE EXERCISE CLAIM PROPERLY RECOGNIZES THE INTERESTS OF BOTH RELIGIOUS LIBERTY AND DEMOCRATIC SELF-GOVERNMENT

Acknowledging the inadequacy of CSS's arguments in this case does not undermine the constitutional framework for protecting religious liberty. It recognizes and promotes the proper sphere of autonomy for both religious institutions and democratic government. When religious institutions receive private funds to exercise private power to pursue their religious missions, the Constitution permits them to use those funds in furtherance of their religious purposes without state interference.[45] However, religious institutions do not have a constitutional right to prevent the government from

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[44] Pet'rs' Br. at 22; *see also McDaniel*, 435 U.S. at 618; *Smith*, 494 U.S. at 877.

[45] *See Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2055 (2020) ("The First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.") (internal quotation marks and citation omitted); *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 188-89 (2012) (holding that the Religion Clauses prohibit government involvement in "ecclesiastical decisions"); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

conditioning the expenditure of public funds and the delegation of government power through contracts in a manner consistent with the government's public policy goals.

Amici support a continued role for organizations such as CSS in the foster care system through the delivery of other government-funded services, including congregate care homes and case management services. *Amici* further note that nongovernmental organizations always remain free to organize privately-funded efforts to encourage the participation of potential foster parents and to donate goods or services for the benefit of foster families and foster children such as clothing, food, educational and day care opportunities, camping opportunities and counseling services.

CSS's demands in this case, however, go too far. CSS's position, if taken to its logical conclusion, would allow religious organizations to assert that they are entitled to contract with the government even when they reject numerous contract conditions, so long as they do so for religious reasons.[46] For

[46] The Constitution requires certain religious accommodations, *see, e.g.*, *Lukumi*, 508 U.S. at 520; *Sherbert*, 374 U.S. at 398, and forbids others, *see, e.g.*, *Estate of Thornton v. Caldor*, 472 U.S. 703, 710-11 (1985); *Tex. Monthly v. Bullock*, 498 U.S. 1, 24-25 (1989). Still other religious accommodations are constitutionally permitted. *See, e.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 439 (2006) (requiring exemption under the federal Religious Freedom Restoration Act); *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (requiring exemption under Religious Land Use and Institutionalized Persons Act). *Amici* support many such discretionary accommodations.

example, the government would have to contract with a religious organization that will not certify particular couples as foster parents because the couples do not share the organization's faith, are interfaith, are not religious, or do not share specific religious beliefs of a contractor, such as adhering to certain dietary practices or believing that a sacred text should be interpreted literally. Indeed, CSS previously had a policy of refusing to certify potential foster parents who did not have a "letter from a pastor" demonstrating a "commitment to their faith."[47] Interpreting the Free Exercise Clause in this way would severely limit the ability of government to effectively utilize private institutional conduits to perform delegated public duties in a manner consistent with the government's obligations to serve its most vulnerable populations.

II. *SMITH* SHOULD BE RECONSIDERED IN AN APPROPRIATE CASE – NOT HERE

Amici are critics of the Supreme Court's holding in *Employment Division v. Smith*. They believe *Smith* was wrongly decided, and have long advocated for overruling *Smith* in an appropriate case.[48]

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[47] Resp'ts' Br. at 10 (internal quotation marks and citation omitted).

[48] *See, e.g.*, Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 Case W. Res. L. Rev. 55, 57 (2006) (hereinafter "Brownstein, *Taking Free Exercise Rights Seriously*"); Melissa Rogers, *Faith in American Public Life* (Baylor University Press 2019); David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 Harv. L. Rev. 1353, 1385 (2003).

However, this case, involving the validity of a nondiscrimination condition in a government contract, does not present the appropriate vehicle to do so. Here, by requiring all contracting parties exercising delegated governmental authority to abide by neutral and constitutionally permissible policy requirements, the City does not substantially burden free exercise rights. The Court should wait for a case involving a conventional regulation that substantially burdens religious exercise and reconsider *Smith* in resolving that case.

The *Smith* decision has raised a host of issues. By limiting the application of the Free Exercise Clause to government action that intentionally or overtly discriminates against religious practices, *Smith* weakened the rights of all religious groups (and in particular, minority and unpopular religious groups) to practice their faiths. As a reaction to *Smith*, some courts have adopted, and some scholars have advocated for, problematic counter-measures to circumvent its holding, including the expansive secular exemption arguments relied on by CSS here.[49]

Seeking to expand this Court's concerns regarding individualized exemptions or invidious religious gerrymandering, some scholars, advocates and jurists

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[49] *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J. of L. & Pol. 119, 193-203 (2002) (hereinafter "Brownstein, *Protecting Religious Liberty*") (describing problems arising from an expansive secular exemption framework).

have argued for a categorical approach requiring strict scrutiny of the denial of any religious exemption if there are any secular exemptions to the challenged law, or alternatively, a "most favored nation approach." [50] This proposed approach is deeply problematic, as it would apply to virtually any law, require a rigorous review of the challenged law's asserted purpose and result in arbitrarily disparate analysis of facially similar laws.[51]

Expansive secular exemption arguments are a misguided attempt to circumvent difficult issues presented by the holding in *Smith*. Rather than attempting to move forward on this path, the Court should reconsider *Smith* in an appropriate case that will serve as the foundation for principled, doctrinal development of free exercise jurisprudence.

Moreover, *Smith* cannot sensibly just be overruled and replaced with a blanket commitment to strict scrutiny review of every law that substantially burdens religious exercise. [52] As Justice Scalia observed, the pre-*Smith* case law was chaotic, with

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[50] *See* Br. of United States as *Amicus Curiae*; Br. of New Hope Family Servs., Inc. as *Amicus Curiae*; Br. of The Bruderhof as *Amicus Curiae*; Br. of Nat'l Jewish Comm'n on Law & Public Affairs as *Amicus Curiae*; Br. of Rutherford Institute as *Amicus Curiae*.

[51] Brownstein, *Protecting Religious Liberty*, at 193-203; *see also* Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 Calif. L. Rev. Online 282, 294 (2020); Eugene Volokh, *A Common-Law Model for Religious Exemption*s, 46 UCLA L. Rev. 1465, 1540 (1999).

[52] *See* Pet'rs' Br. at 50.

the Court rarely following the strict scrutiny standard then purportedly in effect.[53] While acknowledging that strict scrutiny review was theoretically applicable in free exercise cases, in many of the cases it decided, the Court determined that strict scrutiny should not be applied for reasons never conceptualized into a coherent doctrinal framework.[54]

Justice Scalia warned that to apply strict scrutiny to all laws that substantially burden religious exercise would undermine the rule of law to the point of "courting anarchy," requiring "religious exemptions from civic obligations of almost every conceivable kind."[55] But the Court in *Smith* swung the pendulum too far back in the other direction, limiting free exercise challenges to neutral and generally applicable laws to highly deferential rational basis review without considering alternative doctrinal frameworks.

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[53] *See Smith*, 494 U.S. at 882-84.

[54] *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (sustaining a prison's refusal to excuse inmates from work requirements to attend worship services without mentioning strict scrutiny); *Bowen v. Roy*, 476 U.S. 693 (1986) (declining to apply strict scrutiny analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (rejecting application of strict scrutiny to military dress regulations); *see generally* Brownstein, *Taking Free Exercise Rights Seriously*, at 90; Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. Rev. 117, 118-23 (1993).

[55] *Smith*, 494 U.S. at 888.

Because religious belief and practice is pervasive in American society, free exercise rights will conflict with numerous public interests in a variety of circumstances. Accordingly, if and when the Court reconsiders *Smith* in an appropriate case, it should develop a multi-faceted framework that takes context into account and draws lines based on various factors that appropriately respect both religious liberty rights and the government and public interests that may conflict with the exercise of these liberties.[56] When the exercise of rights is so broad and pervasive that it will often conflict with many varied governmental and public interests, the protection provided to the right cannot be meaningfully cabined into a simplistic, all-or-nothing constitutional framework under which all challenged laws are subject to either strict scrutiny or rational basis review.

Nuanced analysis of this type is recognized in fundamental rights jurisprudence. For example, to determine the appropriate standard of review to apply when speech is burdened, free speech doctrine requires courts to consider the nature of the state action or regulation at issue,[57] the kind of speech being restricted,[58] the location where speech occurs[59]

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[56] Brownstein, *Taking Free Exercise Rights Seriously*, at 57.

[57] *See, e.g.*, *Ward*, 491 U.S. at 797; *Boos v. Barry*, 485 U.S. 312, 316-21 (1988).

[58] *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

and special contexts such as public employment.[60] Strict scrutiny is not generally applicable in all circumstances. Equal protection analysis similarly applies internal distinctions to identify the applicable standard of review.[61] Courts can and should manageably develop and employ doctrinal distinctions in the free exercise context that parallel the analysis they use when adjudicating the scope of freedom of speech or equal protection guarantees. Comparably complex rights merit comparably complex analysis.

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[59] *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 480 (2009); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 796 (1985).

[60] *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

[61] For example, racial classifications receive strict scrutiny, *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984), while gender classifications receive intermediate scrutiny, *Craig v. Boren*, 429 U.S. 190, 197-98 (1976), and age classifications receive rational basis review, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

CONCLUSION

For the foregoing reasons and those set forth in Respondents' brief, the decision below should be affirmed.

Respectfully submitted,

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