No. 19-123

In the Supreme Court of the United States

SHARONELL FULTON, et al.,
Petitioners,
v.
CITY OF PHILADELPHIA, et al.,
Respondents.

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

BRIEF OF REPUBLICAN LEGISLATORS, ELECTED OFFICIALS, AND LEADERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT *

The issues raised in this dispute are deeply important to *amici curiae*, who are current and former Republican legislators and elected officials, as well as Republican leaders. *Amici* also include Conservatives Against Discrimination, which is a coalition of conservative Americans who believe LGBTQ Americans should be free from discrimination. A list of the individual *amici* and their official positions is appended to this brief.

Amici are profoundly committed to religious freedom, but *amici* do not support the provision of religious exemptions to faith-based agencies when those agencies are providing child welfare services under a taxpayer-funded government contract. Many of the *amici* state legislators voted against legislation that would have provided a religious exemption to nondiscrimination requirements to child welfare agencies similar to those at issue here. *Amici* believe such exemptions would open a Pandora's Box of problems and the purported fix would only create future problems for this Court to address.

While not all of the *amici* share all of the concerns raised in this brief, *amici* file this brief to emphasize their shared view that the exemption from the contractual nondiscrimination obligation that Petitioners seek should not be granted. Discrimination, in any form, threatens to undermine basic principles of this nation.

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* This brief is submitted with the written consent of all parties pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or part, and no party other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. See Supreme Court Rule 37.6.

Amici in particular share concerns about discrimination against religious entities and individuals. But when an organization, including a religious institution, voluntarily contracts with the government to provide a government service, it is not discriminatory to require the organization to comply with contractual terms equally required by the government of all contractors within the scope of the funded activity.

ARGUMENT

Amici strongly support religious freedom. But this case does not involve government restrictions on religious belief, government intrusion into religious practice, or government suppression of religious speech. Rather, it is about whether those paid by the government to assist the government in fulfilling its obligations to care for children in the government's custody can refuse to comply with generally applicable terms of the government contract they voluntarily entered, when those terms exist to maximize the pool of available foster parents and to prevent taxpayer funded discrimination in the delivery of government services. This brief highlights three reasons *amici* believe those who choose to enter such government contracts should not be able to refuse to comply with those contracts' terms.

The first relates to the specific context of this case: providing optimal care for the children who have been removed from their families' homes and placed in government custody for their safety and protection until they can be safely reunited with their families or adopted into a loving home. In this case, the City of Philadelphia ("City") decided to meet its obligation to care for the children in its custody by contracting with private agencies to assist it in performing the government function of finding appropriate, temporary homes

for these children and affording tools to foster parents to provide an environment where these children can thrive.

Amici are concerned that, if the Court were to mandate that the City allow those it contracts with to provide public child welfare services to discriminate in violation of those contracts, the pool of available foster parents will be reduced and children will be left to languish in group care settings—in violation of the City's paramount obligation to act in the best interests of those children.

Second, *amici* worry about the burden on and costs of government administration of contracts if religious exemptions to various terms were to be required.

Third, *amici* oppose taxpayer funds being used to support discrimination against constituents paying those taxes and are concerned that requiring the government to allow discrimination that is religiously motivated could result in government-supported discrimination by religious entities against members of other religions or no religion.

These reasons for rejecting the claimed right to discriminate in violation of the generally applicable terms of the contract are discussed below.

I. ALLOWING AGENCIES TO DISCRIMINATE WOULD NOT BE IN THE BEST INTERESTS OF THE CHILDREN IN THE CITY OF PHILADELPHIA'S CARE.

All parties, as well as numerous *amici*, understand that there is a need for more foster families to care for children who cannot safely remain in their families' care. Pet. Br. at 12 (noting the "chronic shortage of foster homes" in the City). Given this unfortunate reality, in order to act in the best interests of these chil-

dren, it is imperative that the pool of qualified foster parents is not needlessly shrunken. The rule Petitioners ask the Court to adopt is contrary to that goal, because allowing agencies to discriminate against otherwise qualified same-sex parents (or other families that do not meet an agency's religious standards) would reduce the number of parents available to children in need of placement. Moreover, losing the services of an agency that believes it cannot abide by the City's nondiscrimination policy will not have a detrimental effect on child placements.

A. Discrimination has a chilling effect on finding potential foster parents.

The foster-parent pool is already too small, and actions that compound or exacerbate this problem should be avoided. In 2017, The Economist reported that "around 80% of those who try to foster a child give up within two years."[1] The reason given: "[T]he reluctance of prospective parents to deal with the often needlessly bureaucratic public foster agencies."[2] If those agencies may refuse to certify otherwise qualified parents due to their status as a same-sex couple, same-sex couples seeking to become foster parents would face not only those bureaucratic challenges, but also the very real prospect of discrimination based on their identity. Forcing prospective same-sex parents to undergo such discrimination may deter same-sex couples from even seeking to become a foster family. This

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[1] *Adoptions in America are declining: Meanwhile, more children need foster care*, The Economist (June 24, 2017), *available at* https://perma.cc/DV36-KXXD.

[2] *Ibid.*

would reduce the pool of potential foster parents, and ultimately harm the children in the foster care system.

Congress previously recognized the potential detrimental effect of discrimination on the timely placement of adoptive and foster children. In 1994, Congress passed the Howard M. Metzenbaum Multiethnic Placement Act ("MEPA"). Section 553 of MEPA allowed "race matching" of foster and adoptive parents with children.[3] Just two years later, however, Congress passed a bill, sponsored by Texas Congressman Bill Archer, to repeal Section 553 (H.R. 3448). The new law was signed by President Clinton on August 20, 1996. Section 1808 of the Act, entitled "Removal of Barriers to Interethnic Adoption," "affirms and strengthens the prohibition against discrimination in adoption or foster care placements," and clarified Congress' "intent to ***completely eliminate delays in placement where they were in any way avoidable***."[4] Accordingly, under these federal laws, "[r]ace, culture or ethnicity may not be used as the basis for any denial of placement, nor may such factors be used as a reason to delay any foster or adoptive placement."[5]

The same rationale applies to discrimination against same-sex couples seeking to become foster parents. Where the intent is to "completely eliminate de-

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[3] H.R. 3448 Conference Report (1996).

[4] U.S. Health and Human Services, Office for Civil Rights, Memorandum from Director re: Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996 (June 4, 1997), *available at* https://www.hhs.gov/civil-rights/for-individuals/special-topics/adoption/interethnic-adoption-provisions/index.html (emphasis added).

[5] *Ibid.*

lays in placement where they [are] *in any way avoidable,*" sexual orientation discrimination against prospective foster parents—like any discrimination—is anathema to that intent. And, given a system already hindered by bureaucracy and delays, the knowledge by a same-sex couple that they also could face discrimination has the potential to deter many even from applying. Put differently, when considering whether to apply to be foster parents, same-sex couples aware that their substantial effort to complete the foster application process could, in one stroke, be wiped out by discrimination against same-sex couples, may be less likely to start the process in the first place.[6]

In some state systems other than Pennsylvania's, the state may assign children to a particular contracted agency, and the agency makes the foster placement for that assigned child.[7] In those types of systems, once a child has been assigned to an agency, that child may lose access to otherwise qualified parents, if the assigned agency is one that is allowed to discriminate

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[6] As discussed in Section III.B, this problem is compounded by other forms of discrimination prospective parents may face. That is, prospective same-sex foster parents may be even less willing to start the application process if they know that they will face not only sexual orientation discrimination, but perhaps also discrimination based on their religion. See, *e.g.*, *Rogers* v. *United States Dep't of Health and Human Servs.*, No. 6:19-cv-01567-TMC, Dkt. 81 (D. S.C. May 8, 2020) (addressing claims of discrimination by prospective foster parents who were rejected because they were a same-sex couple and practiced a religion other than the evangelical Protestant Christian faith).

[7] See HHS, Office of the Assistant Secretary for Planning and Evaluation, *Evolving Roles of Public and Private Agencies in Privatized Child Welfare Systems* (Mar. 1, 2008), *available at* https://aspe.hhs.gov/basic-report/evolving-roles-public-and-private-agencies-privatized-child-welfare-systems.

against same-sex couples or other parents due to the agency's firmly held religious beliefs. Those agencies cannot serve the best interests of the children because the agencies would turn away qualified couples for reasons that have nothing to do with their fitness as a foster parent. Accordingly, in states where children are assigned to a particular agency for placement, an agency that is allowed to discriminate would not be acting in the best interests of the children assigned to them.

B. There are enough agencies that are willing to serve *all* qualified parents.

Petitioners suggest that children will suffer if CSS is not permitted to enter into a contract with the City of Philadelphia that allows Catholic Social Services ("CSS") to discriminate. Pet. Br. at 12. But CSS is not Philadelphia's only foster care agency for child placements, and, while Philadelphia would have preferred that CSS continue to provide services to all so that Philadelphia could continue to contract for child placement services with it, losing CSS—or any other agency that is unwilling to abide by Philadelphia's nondiscrimination policy—would not have an adverse effect on the children's access to qualified foster families. As the district court found, "the closure of CSS's intake of new referrals has had little or no effect on the operation of Philadelphia's foster care system." Pet. App. 128a. This is consistent with the experience of numerous other States, where a placement agency stopped providing government-contracted foster care services, other agencies filled the gap. See Brief of Massachusetts, et al. as Amici Curiae in Support of Philadelphia at 24, *Sharonell Fulton, et al.* v. *City of Philadelphia, et al.*, No. 18-2574 (3d Cir. Oct. 4, 2018), ECF No. 003113052217. Given that other contracted agencies can fill CSS' role if CSS believes it cannot abide by

Philadelphia's non-discrimination policy, child placements will not suffer. Indeed, the "dozen families ready to provide foster care" through CSS' placement that Petitioners refer to in their brief could be served by any of the other contracted agencies. There is no reason why any prospective parents, including those who are awaiting placements through CSS, may not "transfer to other agencies and continue using their skills to provide foster care to children." Pet. App. 128a. CSS' unwillingness to contract with Philadelphia on the terms applicable to all other agencies would not adversely affect children's access to qualified foster families.

II. HAVING VOLUNTARILY ENTERED INTO A TAXPAYER-FUNDED GOVERNMENT CONTRACT, CSS CANNOT UNILATERALLY EXEMPT ITSELF FROM SPECIFIC TERMS.

The City and County of Philadelphia, as with all counties of the Commonwealth of Pennsylvania, owe a duty to provide child protective services to children and youth in their jurisdictions through the formation of county agencies. 23 Pa. C.S. § 6373. As has been set forth in the record, the Philadelphia Department of Human Services (DHS) has chosen to meet its municipal obligation by contracting with private agencies to assist it in recruiting, screening, training and certifying foster families in accordance with eligibility standards established by Pennsylvania law. See 23 Pa. C.S. § 6344(d); 55 Pa. Code § 3700.64.

A. The City of Philadelphia is allowed to meet its governmental obligation to care for children by contracting with private agencies in accordance with eligibility standards established by Pennsylvania law.

CSS chose to enter into an agreement with the City voluntarily. Governmental entities are entitled to set the terms of their contracts so long as contractual standards are generally applicable and applied neutrally in a way that does not "impose special disabilities on the basis of religious status."[8] See, *e.g., Espinoza* v. *Montana Dep't Re*v.*,* 140 S. Ct. 2246, 2254 (2020) (quoting *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2021 (2017)). Upon executing the contract with Philadelphia, CSS was obligated to abide by all of the contract's terms, which were religiously neutral and of which CSS was aware when it executed the contract. See Pet. App. 59a, 86a ("Article XV incorporates provisions of the Philadelphia Fair Practices Ordinance relating to non-discrimination and serving all-comers who might seek services from CSS"); ("Article XV, § 15.1 of the Services Contract makes no reference to religion except that § 15.1 would protect individuals receiving services under the Services Contract from religious discrimination * * * [and] the legislative history and intent of the Fair

[8] Importantly, Philadelphia has not imposed a special disability upon religious organizations by way of its contract. Bethany Christian Services (BCS), a religious foster care agency, articulated a similar objection as that voiced by Petitioners. It ultimately agreed to comply with the City's nondiscrimination provision and not to exclude same-sex couples from certification on that ground. As a result, BCS remains a contractor for the City to this day, and it certifies all qualified families who meet the Pennsylvania legislature's certification criteria.

Practices Ordinance similarly supports a finding of neutrality.").

The Philadelphia DHS contract is as similar to the Montana scholarship program recently evaluated by this Court in *Espinoza* as apples are to fried chicken. In *Espinoza*, the Montana legislature allotted $3 million annually to fund tax credits to any taxpayer who donated to a student scholarship program, and that program then used the funds to award tuition to children for use at private schools. The Montana legislature prohibited the scholarships from going towards tuition at sectarian schools. *Espinoza*, 140 S. Ct. at 2252. Although Montana owes educational services to its minor residents similar to Pennsylvania owing child protective services to its minor residents, that is where the similarities cease. The *Espinoza* case did not involve contracts to provide services on behalf of the government. And unlike the situation in *Espinoza*, nowhere in the Philadelphia DHS contract is the municipal entity treating contractors with religious affiliations differently from those with secular backgrounds. If a contractor wants to support Philadelphia's obligation to resident children, it can enter into an agreement to do so. If it does not want to, it can pass and seek to serve children in other ways, and another contractor will step in to provide the exact same services in accordance with Philadelphia's legislatively mandated evaluation criteria. By contrast, if the parents of a Montana child wanted her to attend a religious elementary school, obtained a scholarship for her for such purpose, but were prohibited from using the funds at the school of their choice, the family is injured, even if the child could find as good or better education elsewhere. It is not the school that is choosing to accept or reject her; it is the state that is undermining the family's choice and

imposing a special disability on the family because of the family's religious status.

Because the government cannot discriminate on invidious grounds against those to whom it provides its services, non-discrimination provisions have become commonplace as a way to ensure neutrality in the delivery of those services. Federal government contracts obligate contractors not to discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin (with the limited exemption of allowing religious entities to prefer employees of their own religion). See 41 C.F.R. §§ 60-1.4 – 60.1.5; see also 15 C.F.R. § 8.5 (applicable to federal grants, loans or contracts pursuant to Title VI of the Civil Rights Act of 1964, and not providing for any religious exemption).

Non-discrimination provisions are also a routine inclusion in contracts with the Commonwealth of Pennsylvania. See 16 Pa. Code § 49.101 (requiring contractors and subcontractors to have employment nondiscrimination policies because of race, color, creed, national origin, ancestry, sex or age as a condition of entering into contracts with the Commonwealth of Pennsylvania); Pa. Exec. Order No. 2016-05 (Apr. 6, 2016, amended June 18, 2018) (designating the Department of General Services as the agency responsible for ensuring nondiscrimination on the basis of "race, gender, creed, color, sexual orientation, gender identity or expression, or participation or decision to refrain from participation in protected labor activities does not exist with respect to the award, selection, or performance of any contracts or grants issued by Commonwealth agencies"). Within this framework, Philadelphia's practice of including non-discrimination language in its contracts should not raise any curiosity. After

all, the ability to ensure that local services are not provided in a discriminatory way is a widely accepted principle of a municipality's police powers. See*, e.g.,* *Building Owners and Managers Ass'n of Pittsburgh* v. *City of Pittsburgh*, 603 Pa. 506, 512 n.12 (2009) (observing that Pennsylvania municipalities have authority to enact anti-discrimination laws).

When a governmental entity is involved in contract negotiations, any flexibility may be limited to the edges of the agreement, such as total funds allocated, timing, or method of performance, but this does not make it an unenforceable contract of adhesion. Both parties retain bargaining power. If they cannot agree on material terms, either party can walk away, and the government can enter into a contract with another contractor for the same services. See*, e.g., Chepkevich* v. *Hidden Valley Resort, L.P.*, 607 Pa. 1, 27 (2010) ("An adhesion contract is a 'standard-form contract prepared by one party, to be signed by the party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms.'") (quoting Black's Law Dictionary 342 (8th Ed. 2004)). CSS is not being compelled to enter into the contract or to adopt any particular position. Rather, CSS is merely standing in the place of Philadelphia and performing a government service on behalf of the City by applying evaluation criteria developed by the Pennsylvania legislature. See *New Hope Family Services* v. *Poole*, 966 F.3d 145, 164 (2d Cir. 2020) ("[T]he relationship between CSS and Philadelphia was contractual and compensatory. By contrast, while New Hope is authorized by New York to provide adoption services, it does not do so pursuant to any government contract, nor does it receive any government funding.") (citation omitted). If Petitioners believe that CSS' religious tenets preclude CSS from complying with the agreement's terms, CSS' recourse

is not to enter into the contract. CSS will remain free to express its beliefs and serve children in other ways—as it continues to do in other capacities with the City—that CSS can perform without engaging in contractually prohibited discrimination.

It is a cardinal principle of contract law that a contract is a written manifestation of the parties' intent to be bound to the terms therein. *Sturges* v. *Crowninshield*, 17 U.S. 122, 197 (1819) ("A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract."). As conservatives, *amici* believe that the obligations of contracts should be respected. Allowing a party to pick and choose the provisions with which it will comply after the contract has been signed, absent an agreed-upon modification of the underlying contract, undercuts these fundamental principles, particularly when the contract is entered into by sophisticated parties. *Sun Oil Co.* v. *Traylor*, 407 Pa. 237, 243 (1962) ("If this change of horses in the middle of the stream of contractual obligations were to be permitted, simply because one of the parties was dissatisfied with what he had agreed to do, very few contracts would reach the other side of the stream dry and staunch enough to carry on with the rest of the legal journey."). Although the *Sun Oil* matter involved the sale of property, essential governmental services are no less in need of predictability than is the sale of commercial realty.

B. Principles of good governance require governmental entities to treat its constituents, including potential contractors, impartially.

As a general principle of good government, government entities must treat their constituents equal-

ly.[9] Therefore, government entities that engage contractors must treat those contractors with impartiality and, in turn, may require those contractors to follow the same anti-discrimination laws or policies by which the government itself would have to abide if the government were delivering the services itself.

Moreover, allowing a private agency to honor only the terms of a contract that the agency does not deem to be in violation of the agency's religious beliefs would likely result in greater government costs ultimately borne by taxpayers and the necessity of bigger government. If government entities are required to afford religious exemptions claimed by private contractors, there would likely be considerable administrative burdens with regards to maintaining and enforcing those contracts. Or, conversely, to ensure that its constituents are treated equally, government entities would likely have to deliver services itself, thereby reducing the number of public-private partnerships, while sim-

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[9] "Good governance" does not have a singular meaning, although in the international law context, "almost everyone knows, or could know, the essential elements of good governance." Thomas M. Franck, *Democracy, Legitimacy and the Rule of Law: Linkages* 16, N.Y. Univ. Sch. L, Public Law and Legal Theory Working Paper Series, Working Paper 2 (1999), *available at* http://papers.ssrn.com/paper.taf?abstract_id=201054. It has been defined as "legitimate, accountable, and effective ways of obtaining and using public power and resources in the pursuit of widely-accepted social goals." Michael Johnston, *Good Governance: Rule of Law, Transparency, and Accountability* 2, UNESCO's International Institute for Educational Planning (2002), *available at* https://etico.iiep.unesco.org/sites/default/files/ unpan010193.pdf. The United Nations includes among its major characteristics "equity and inclusiveness" and "effectiveness and efficiency." United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance?, available at* https://www.unescap.org/sites/default/files/good-governance.pdf.

ultaneously increasing the size and costs of government and a corresponding increase in taxes. Furthermore, allowing Petitioners to prevail in the instant case would set a precedent allowing all private entities with a religious affiliation to require government entities to recognize and allow for any religious exception to any contractual term.

1. ***Allowing contractors to dictate which terms of an otherwise standard contract are applicable to that contractor would impose a substantial administrative burden on government entities and, by extension, would likely impose a greater tax burden on taxpayers.***

If private entities demand that certain terms of a contract be held inapplicable to them, government costs would certainly increase. At the outset, a template or standard contract would probably never be used as is, given the likelihood that other religious-based entities might claim religious exemptions to different terms of that same contract. The inability to use a template contract would initially require increased legal fees for the drafting and review of those contracts that would likely be different for each potential contractor. In addition to the added costs to the government for legal review, the management and record-keeping of those contracts could balloon into an unwieldy bureaucracy. Instead of a standard contract, government entities would have to maintain records as to which contractors have claimed exceptions and how those exceptions were claimed and justified. An increase in the administrative oversight required to manage an overburdened contract system could result in staffing shortages and a need to hire additional per-

sonnel in order to carry out this recordkeeping. Along with the increased administrative workload and its cost, permitting a variety of contracts also creates the potential for confusion and error among government employees who would no longer have the ability to rely on a template contract.

Should there be future changes in law or policy, template agreements provide a more efficient base from which to make amendments reflecting those changes. If private entities are permitted to demand exceptions, contracts become variable and open to negotiation each and every time a party is engaged. This would undoubtedly result in greater delays before necessary governmental services are made available to the public, and money that would otherwise be directed to serving the government's constituents would have to be directed toward legal and administrative costs as well as to other contractors willing to provide the requisite services.

With the added burden of managing various contracts with differing terms, government entities might choose, instead, to avoid the administrative hassle of contracting out these services. See Jonathan Levin & Steven Tadelis, *Contracting for Government Services: Theory and Evidence from U.S. Cities*, 58 J. Indus. Econ. 507, 535 (2010) (concluding in an analysis of government contracting in U.S. cities that "contracting difficulties" such as the need to monitor contract performance or the need for flexibility and "high transaction costs of contracting" generally result in less use of private entities). Doing so would necessitate additional employees, leading to bloated government and a reduction in public-private partnerships. Governmental partnerships with private entities should help govern-

ments run with greater efficiency rather than further burden the government.

Whether a government entity chooses to take on the task of handling a more complex contract system or chooses to no longer contract out certain services, either option is in conflict with the governmental goal of running efficiently to meet the needs of its constituents, while simultaneously availing itself of the resources available to it (including by contracting with private entities). In either case, there will almost certainly be a need for greater staff and greater action by the government. Not only does the increased cost to the government potentially limit the services that it can provide, increased government cost creates fiscal implications for the citizenry. A greater cost to the government, whether to manage contracts or to cease contracting in order to provide certain services itself, would, in all likelihood, impose a greater tax burden on the government's constituents.

2. *If Petitioners were to prevail, other contractors would have precedent to exempt themselves from the terms of contracts with governmental entities that could put them at an advantage over competing contractors.*

If CSS is permitted to exempt itself from specific terms of a contract with the City of Philadelphia, this case would set a precedent allowing private entities to regularly demand exemption from certain contract terms based on their religious beliefs. Not only would this result in different contractors being treated differently by a government entity and lead to the increased cost to government, it also would permit private entities to claim religious exemptions that would allow them the advantage of not having to

provide the full range of services that a non-religiously associated organization would be required to provide. If CSS is permitted to exempt itself from Philadelphia's requirement that an agency vetting potential foster parents not discriminate against same-sex couples, it relieves itself of a service that other contractors must perform. There would not appear to be any limiting principle that would keep other organizations from claiming religious exemptions. Allowing Petitioners to prevail would permit a contractor affiliated with a religion that observes the Biblical Sabbath to refuse to provide services once a week when the contract requires services to be provided seven days a week, and while other organizations would be expected to provide services on all seven days. Or a contractor founded on Christian Science principles providing foster services for children could refuse to take sick children in its care to health care providers or to be vaccinated.

Permitting organizations to claim religious exemptions from their government contracts as Petitioners are trying to do risks the "anarchy" Justice Scalia described in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In *Smith*, respondents took the position that "governmental actions that substantially burden a religious practice" could be valid only in light of a "compelling government interest." *Id*. at 883, 885. However, Justice Scalia warned "[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs." *Id*. at 888. That warning is certainly still applicable in the instant case. Allowing any religiously affiliated private entity to claim religious exemptions could prove untenable, forcing governmental entities to abandon such partnerships.

III. CSS SHOULD NOT BE ALLOWED TO DISCRIMINATE IN VIOLATION OF THE TERMS ON WHICH IT OBTAINS PUBLIC FUNDS, AND THE EXEMPTION THAT PETITIONERS SEEK WILL UNDERMINE RATHER THAN PROMOTE RELIGIOUS LIBERTY.

A. Because CSS takes public funds, it should not be allowed to discriminate in violation of the terms on which those public funds are provided.

Under the Court's teachings, the City of Philadelphia cannot compel CSS to adopt its views on same-sex marriage. See *Agency for Int'l Development* v. *Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 218-221 (2013). The City also could not have refused to contract with CSS due to its religious views. See *ibid.* However, the City may fund contracts that comport with its own views on matters. See *Rust* v. *Sullivan*, 500 U.S. 173, 201 (1991) (upholding conditions on government grants under Title X that prevent the provision of abortion services and counseling about abortion).

Refusal by CSS to accept same-sex couples for screening makes it more difficult for those couples to obtain a government benefit than for equally situated different-sex couples. It does not matter that there may be other foster care agencies that do not share CSS' views: when the government erects a barrier making it more difficult for members of one group to obtain a benefit than for members of another group, there is injury to the affected party. See*, e.g.*, *NE Fla. Chapter of the Associated Gen. Contractors* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993). The ruling Petitioners seek—that a contracting entity can cherry pick which parts of government contracts it wants to follow, or not follow, based on its religious beliefs—has no logical stopping

point. In some jurisdictions across the country that have delegated foster care placements to private agencies, a significant percentage of those agencies are religious entities.[10] If the Court holds that such entities can deny foster care placement services to same-sex couples, that ruling would reduce those couples' ability to become foster parents, and it may shut them out from foster care altogether in some areas.

To allow a private entity to engage in such behavior would result in the incongruous outcome of the tax dollars of certain constituents funding that entity to engage in behavior discriminatory against those constituents. It hardly seems an appropriate result, for example, for a same-sex couple to pay taxes that the City of Philadelphia ultimately uses to pay CSS to carry out a service that CSS will not provide to the same-sex couple. Principles of good government require that a governmental entity ensures that its constituents are treated equally.[11]

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[10] See*, e.g.,* Samantha R. Lyew, *Adoption and Foster Care Placement Policies: Legislatively Promoting the Best Interest of Children Amidst Competing Interests of Religious Freedom and Equal Protection for Same-Sex Couples*, 42 J. Legis. 186, 199 (2016) (noting two faith-based Michigan agencies facilitate 25-30% of the state's foster care placements); Benjamin Hardy, *One faith-based group recruits almost half of foster homes in Arkansas*, Arkansas Times (December 1, 2017) (finding religious group operates in forty-four counties in Arkansas with plans for expansion), *available at* https://arktimes.com/news/arkansas-reporter/2017/12/01/one-faith-based-group-recruits-almost-half-of-foster-homes-in-arkansas?oid=12248165.

[11] In contracting with the City of Philadelphia for the provision of public services, CSS must abide by the fundamental principle that the liberty protected by the Fifth and Fourteenth Amendments prohibits the government and its agents from denying equal pro-

B. Petitioners' argument undermines rather than promotes religious liberty, by allowing religious organizations to discriminate against individuals on the basis of their religion.

Finally, accepting Petitioners' claimed constitutional right for CSS to opt out of non-discrimination requirements that conflict with its faith would undermine, rather than promote, religious liberty, for two reasons.

First, the logical outcome of such a holding is that religious organizations that contract to administer government programs (like the City's foster program) would be able to discriminate against members of other religions in deciding whether to allow them access to such benefits. To be clear, CSS does not presently have a religious objection to certifying families of different faiths or non-faith (though as explained below, see *infra*, page 25, CSS originally did have a clergy letter requirement that effectively barred non-religious couples from being certified). But other religious organizations that provide foster services under government contracts *do* engage in precisely that kind of religious discrimination against putative foster parents, as detailed below.

The nature of the exemption that Petitioners seek—the right for CSS to opt out of providing government-sponsored services to particular categories of individuals on the basis of the organization's religious beliefs—will necessarily sanction religious discrimination as well as sexual orientation discrimination, since a different organization may well have sincere reli-

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tection of the laws to any person. See *United States* v. *Windsor*, 570 U.S. 744, 774 (2013).

gious objections to certifying a foster couple that follows a different religion than the organization, or to certifying a couple that is inter-faith, or that is atheist.

Shutting out Americans from government-funded programs like this one on the basis of their religious beliefs runs afoul of core First Amendment principles, and of the basic notion that all Americans—no matter their religious creed—should be free to exercise the same rights and to enjoy the same benefits as their fellow Americans. See*, e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (collecting "decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity.").

Second, requiring the City to grant such an exemption is likewise fundamentally incompatible with another core First Amendment principle: that the government must not favor any particular religion, and that, particularly when it comes to providing government benefits, the government must treat all individuals equally no matter what religious beliefs (if any at all) they hold. See*, e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978) (the "Government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.") (Brennan, J., concurring in judgment); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2025 (2017) (discrimination on the basis of religion "is odious to our Constitution.").

1. *The proposed exemption would allow religious organizations that contract with the government to discriminate against members of the public on the basis of religion.*

Amici do not question that Petitioners hold a genuine religious belief that marriage is a union between a man and a woman only. *Amici* also do not doubt that Petitioners believe that those religious beliefs preclude CSS from certifying a same-sex married couple as foster parents.

But if CSS does have sincere objections to participating in the City's tax-funded program that conditions receipt of government funds on CSS' compliance with the City's non-discrimination requirements, the simple solution is for CSS not to provide foster care services on the City's behalf. Indeed, that is what this Court has consistently held in the past, including in cases where the conditions placed on government funds raised First Amendment concerns in particular. See, *e.g.*, *Alliance for Open Society Int'l*, 570 U.S. at 214 ("As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. *This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights.*") (emphasis added); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 546 (1983) (rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State") (internal quotation marks omitted). And there is all the more reason to apply that settled precedent in this case, given legitimate concerns that allowing CSS to opt out of providing services to same-sex Philadelphia taxpayer couples will put those couples in the unenviable position of funding

the City's foster program with their tax dollars, even as they are excluded from accessing that program through CSS. Cf. *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 668, 690 (2010) (finding a public school's concern that student clubs that were financially supported by mandatory student activity funds would not exclude any student on discriminatory grounds to be "reasonable," because doing so "ensures that no * * * student is forced to fund a group that would reject her as a member"); *Norwood* v. *Harrison*, 413 U.S. 455, 463 (1973) ("[t]hat the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

Rather than follow this settled precedent, however, Petitioners urge this Court to adopt a new and "highly unusual" solution to this problem. Pet. App. 25a n.8. Specifically, Petitioners argue that to accommodate their religious beliefs, the City should be required to enter into a new public services contract with CSS, free of the City's anti-discrimination requirement. *Ibid.* Setting aside the fact that there is no need for the Court to blaze new trails in its First Amendment jurisprudence in light of precedent like *Alliance for Open Society International*, the Court should decline Petitioners' request, because the solution that Petitioners propose harms rather than promotes religious liberty.

Petitioners seek a new First Amendment right: for a religious organization to be able to selectively refuse to provide services to members of certain groups under a government tax-funded program, when to do otherwise would require it to "speak and act" against its religious beliefs. Pet. Br. 17. Recognizing this right means that religious organizations would be able to discriminate against individuals on the basis of their

religion, so long as the organization can legitimately say that to do otherwise would require it speak and act against its religious beliefs. Consider, for instance, a Baptist organization that contracts with the government to provide foster services and that has a sincere religious belief against certifying a non-Baptist couple as foster parents. Or consider a Catholic organization that sincerely believes that a foster child is best raised by Catholic parents, or that a foster child should not be raised by atheist parents, and thus refuses—again, on the basis of those sincerely-held religious beliefs—to certify non-Catholics or atheists as foster parents. If Petitioners prevail in their request for the right to turn away same-sex couples in Philadelphia from the City's foster services program solely because Petitioners believe that certifying such couples as foster parents runs counter to CSS' religious beliefs, there is nothing to prohibit a different religious organization in some other city from turning away prospective foster parents solely because those parents hold religious beliefs that are different than those of the religious organization.

This kind of religious discrimination is by no means a purely hypothetical concern. In fact, as part of the application process, CSS previously required putative foster parents to provide a letter from the clergy that attested to their religious observance; applicants who did not provide such a letter would not be certified. Pet. App. 55a n.4, JA215-216, JA 715. During litigation, CSS told the court below that it would drop that requirement. *Ibid.* But if Petitioners prevail, CSS may well resume this practice, which would effectively exclude all non-religious applicants who cannot provide such a letter.

And creating this new First Amendment right that Petitioners seek will have consequences beyond this

case as well. A number of religious organizations that enter into government contracts to provide foster services—including large organizations that are responsible for a significant portion of foster placement services in their locales—*do* engage in precisely this kind of religious discrimination already, by refusing to provide their services to families that do not share the organization's religious views. See *Maddonna* v. *United States Dept. of Health and Human Services, et al.*, No. 6:19-cv-3551, Dkt. 43 (D. S.C. Aug. 10, 2020), at 1, 5-7 (addressing a challenge by a putative foster parent to the foster placement practices of Miracle Hill Ministries, "a faith-based ministry" and "the largest CPA [child placement agency] in both the state [South Carolina] and the upstate South Carolina region," where plaintiff alleged that Miracle Hill "receives government funding" but "refuse[d] to provide services as a licensed child-placement agency to families who did not adhere to its evangelical Christian beliefs and those that did not attend Miracle Hill-approved Christian churches," including plaintiff, a practicing Catholic). Indeed, Miracle Hill Ministries *to this day* makes clear that it will not place children with foster parents unless those parents "follow[] * * * Jesus Christ" and "agree in belief and practice with [Ministry Hill's] doctrinal statement." *Foster Care Inquiry Form: Agreement with Doctrinal Statement*, Miracle Hill Ministries, *available at* https://perma.cc/VL2Q-N8ZF ("As an evangelical Christian foster care agency, we believe foster parents are in a position of spiritual influence over the children in their homes. Therefore, we *require* that foster parents who partner with us be followers of Jesus Christ, be active in and accountable to a Christian church, and agree in belief and practice with our doctrinal statement.") (emphasis added).

Amici respect religious views like those held by Miracle Hill Ministries and by Petitioners here. But *amici* strongly believe that allowing organizations to obtain exemptions from government contracts on the basis of their religious beliefs will lead to the unacceptable result of those organizations discriminating against Americans on the basis of *their* religious beliefs, thus depriving individuals of the opportunity to live to their fullest potential regardless of their personal beliefs and characteristics. And particularly given the Court's long-standing (and appropriate) reluctance for the judiciary to evaluate or second-guess whether a particular set of religious beliefs by a particular organization is indeed significant, the potential here for religious-based discrimination is clear—since courts should not be in the business of probing whether a specific organization that contracts with the government believes that its religious beliefs preclude it from providing services to certain groups of individuals who do not share that organization's beliefs. See*, e.g.*, *Mitchell*, 530 U.S. at 828 (finding a proposed "inquiry into the recipient's religious views * * * offensive" and "profoundly troubling," and noting that "[i]t is well established * * * that courts should refrain from trolling through a person's or institution's religious beliefs.") (plurality opinion); *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Smith*, 494 U.S. at 887 ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'") (citation omitted).

In short, the Court should decline Petitioners' invitation to create an exemption that would allow a reli-

gious organization that enters into a government contract to provide tax-funded services to deny those services to certain individuals on the basis of the organization's religious beliefs.

2. *The proposed exemption will result in the government favoring particular religions over others.*

Requiring the City to grant the exemption that Petitioners seek would also run counter to another longstanding First Amendment principle: that the government must not favor any particular religion and that the government must treat all individuals equally no matter what religious beliefs (if any at all) they hold. See*, e.g.*, *Espinoza*, 140 S. Ct. at 2255 (a state "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving" public benefits) (quoting *Everson* v. *Board of Ed. of Ewing*, 330 U.S. 1, 16 (1947)) (emphasis in *Espinoza*).

This second point is inextricably tied to the first. The foster services that Petitioners contracted to provide are ultimately a taxpayer-funded government benefit. The exemption that Petitioners seek would allow it to deny that government benefit to certain individuals on the basis of CSS' religious beliefs. And although *CSS* itself does not discriminate between individuals who share CSS' religious beliefs versus those who do not in deciding whether to deny those benefits, *other religious organizations* (like South Carolina's Miracle Hills Ministries) unquestionably do—and the exemption that Petitioners seek here would apply with full force to the discriminatory practices of those other organizations. Thus, under Petitioners' proposed out-

come, some individuals will be denied a government benefit solely on the basis of their religion.

That presents an intolerable conflict with the well-settled principle that the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel*, 435 U.S. at 639; cf. *Trinity Lutheran Church*, 137 S. Ct. at 2025 (excluding a church "from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution * * * and cannot stand."). Under Petitioners' proposal, some individuals would receive a government benefit like foster placement services *because* their religious beliefs happen to align with those of the placement agency; other individuals would be denied that same benefit *because* their religious beliefs are different. Tying the receipt of government benefits to a person's religion is anathema to this Court's First Amendment jurisprudence.

Finally, it is no answer to say (as Petitioners seem to suggest) that the situation here is somehow different because it is not the government itself that denies the benefit to an individual—and rather, the denial here is one step removed since it is done by an organization with whom the government contracts. In reality, that is no distinction at all. If, say, a Jewish couple is barred from becoming foster parents solely because they do not share the Christian views of a religious placement agency, it surely would be cold comfort for them to learn that their *city* did not deny this benefit directly, and that instead this benefit was denied by an entity *with whom the city contracted* to provide those government benefits. No one would argue that the government itself could pick and choose religious favorites in deciding who can access taxpayer-funded public benefits. A private organization that contracts with

the government to administer those benefits should not be able to engage in that kind of discrimination either.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

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APPENDIX

APPENDIX

Amici curiae, whose affiliations are listed for identification purposes only, are as follows.

Organizations

- **Conservatives Against Discrimination** (https://www.freedomforallamericans.org/conservatives-against-discrimination/)

Republican Legislators, Elected Officials, and Leaders

- **Vance Aloupis, Jr.,** Member of the Florida House of Representatives, 115th District, 2018-Present
- **Michael Berlucchi,** City Council, Virginia Beach, 2019-Present
- **Michael N. "Mike" Callton**, Member of the Michigan House of Representatives, 87th District, 2011-2016
- **Craig Cates,** Monroe County Commissioner, District 1, 2019-Present, and Mayor of Key West, 2009-2018
- **Charles Wesley "Chuck" Clemons, Sr.,** Member of the Florida House of Representatives, 21st District, 2016-Present
- **Cynthia H. Coffman,** Colorado Attorney General, 2015-2019
- **Jordan Cunningham,** Member of the California State Assembly, 35th District, 2016-Present
- **Carlos Curbelo,** United States Representative, Florida, 26th District, 2015-2019
- **Sarah Davis,** Member of the Texas House of Representatives, 134th District, 2011-Present

- **Heather Fitzenhagen,** Member of the Florida House of Representatives, 78th District, 2012-Present
- **J. John Fluharty,** Executive Director of the Republican Party of Delaware, 2012-2015
- **Angie Gallo,** School Board Member, District 1, Orange County Public Schools, 2018-present
- **Betty I. Gay,** Member of the New Hampshire House of Representatives, Rockingham District 8, 2016-Present
- **Sheila Harrington,** Member of the Massachusetts House of Representatives, 1st Middlesex District, 2011-Present
- **Daniel E. Innis,** Member of the New Hampshire Senate, 24th District, 2016-2018
- **Jason Janvrin,** Member of the New Hampshire House of Representatives, Rockingham District 37, 2018-Present
- **Fred Karger,** United States Republican Presidential Candidate, 2012
- **Aaron Kaufer,** Member of the Pennsylvania House of Representatives, 120th District, 2015-Present
- **Sam H. Killebrew,** Member of the Florida House of Representatives, 41st District, 2016-Present
- **John W. "Jack" Lyle Jr.,** Member of RI House of Representatives, District 46, 2018- Present; Member Rhode Island State Senate 1980-1986 and 1990-1994
- **Jennifer Nassour,** Co-Founder & President at Pocketbook Project, Inc; Former CEO, ReflectUS; Former Chair, MassGOP

- **Jess Olson,** Member of the South Dakota House of Representatives, 34th District, 2019-Present
- **Casey Pick,** Former Programs Director of Log Cabin Republicans and Legislative Counsel to American Unity Fund
- **René "Coach P" Plasencia,** Member of the Florida House of Representatives, 50th District, 2014-Present
- **Holly Raschein,** Member of the Florida House of Representatives, 120th District, 2012-Present
- **John Reagan,** Member of the New Hampshire Senate, 17th District, 2013-Present
- **Ileana Ros-Lehtinen,** United States Representative, Florida, 27th District, 1989-2019
- **Claudine Schneider,** United States Representative, Rhode Island, 2nd District, 1981-1991
- **Christopher Shays,** United States Representative, Connecticut, 4th District, 1987-2009
- **Alan K. Simpson,** Member of the United States Senate from Wyoming, 1979-1997
- **Wendi J. Thomas,** Member of the Pennsylvania House of Representatives, 178th District, 2018-Present
- **Kathleen "KC" Tomlinson,** Member of the Pennsylvania House of Representatives, 18th District, 2020-Present
- **Stephen H. Urquhart,** Member of the Utah Senate, 29th District, 2009-2016
- **Jill Holtzman Vogel,** Member of the Virginia Senate, 27th District, 2008-Present
- **Dan Zwonitzer,** Member of the Wyoming House of Representatives, 43rd District, 2005-Present