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 GOVERNMENT CONTRACTS PROFESSOR AND PRACTITIONER RICHARD C. LOEB AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus Richard C. Loeb is a practitioner and scholar of federal public procurement law. Currently an adjunct professor of government contract law at the University of Baltimore School of Law, he served in senior government contracting legal and policy positions during most of his thirty-six year government career, including as Acting Deputy Administrator of the Office of Federal Procurement Policy in the Office of Management and Budget, Executive Office of the President, the highest ranking career contracting position in that office.

Because this case addresses First Amendment issues in the context of a contract for government services—specifically, a challenge to the government's authority to establish how those services must be provided—it could dramatically alter the authority and effective ability of government entities at the local, state, and federal level to contract with private actors. I take no position on the relative merits of the City of Philadelphia's Fair Practices Ordinance, other than to observe that there does not appear to be any question that it was within the City's authority to enact. The City was thus well within its authority to incorporate

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae or his counsel made a monetary contribution to fund the preparation or submission of this brief. Counsel for Petitioners and Intervenor-Respondents have consented to the filing of this brief by request; Respondent City of Philadelphia filed a blanket letter of consent with the Court.

the ordinance and contractual no discrimination provision into its procurement contracts and to refuse to either remove the requirement or grant an exemption.

To find for the Petitioners here would represent a radical departure from the foundational principles recognizing that government entities must have the practical authority to manage their own affairs, particularly the authority to dictate how public works are to be carried out and how taxpayer dollars are going to be spent.

SUMMARY OF ARGUMENT

(1) An essential principle of government contracting law and practice is that the government dictates the requirements of its own contracts. The Court has long recognized that government must have the authority to control how public services are to be carried out, whether directly through its own employees or through a contractor. *Atkin v. Kansas*, 191 U.S. 207, 221-23 (1903); *Ellis v. United States*, 206 U.S. 246, 255-56 (1907). It has also long recognized that, like all contracting parties, the government determines what goods and services it needs and wants, and with whom it will deal. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-28 (1940). No party is required to contract with the government if it does not like or cannot meet those terms, but neither is the government compelled to change them.

First Amendment precedents have also recognized that because the government must be able to manage its own internal affairs and carry out its work, even if that at times conflicts with the liberty interests of its employees or contractors. *See*, *e.g.*, *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961) (citing *Perkins*, 310 U.S. 113); *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 598-99 (2008) (quoting *Cafeteria & Rest. Workers*, 367 U.S. at 896); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 684 (1996); *Garcetti v. Ceballos*, 547 U.S. 410, 418, 422-23 (2006); *NASA v. Nelson*, 562 U.S. 134, 150 (2011). While there must be some balancing of the relative interests involved, it is clear that employees and contractors cannot assert their constitutional rights to override the government's wishes as to how the work is to be performed. *Garcetti*, 547 U.S. at 422.

Petitioners fundamentally misunderstand either the public nature of the work at issue here, or that as a contractor, Catholic Social Services (CSS) has no inherent right to perform that work on its own terms. Petitioners assert, for instance, that the City of Philadelphia (the City) is attempting to "usurp" foster care services that are already under the City's authority and control by law. *See* Petitioners' Br. at 51-52. But whatever religious or historical significance CSS may place on performing this work, these are *government services*, not CSS's private religious ministry. CSS does not have the power to dictate how *the City's* services should be carried out, nor should the First Amendment be held to give it one.

All CSS is entitled to from the City is a fair opportunity to provide services that it is qualified and willing to provide. The City has given CSS that fair opportunity. CSS has not been—nor should it be—excluded from contracting with the City on the basis of its religious beliefs, practices, or speech. Indeed, the City continues to contract with CSS to provide other social services on the City's behalf. Rather, CSS objects to fulfilling the material terms of one specific contract, because it believes that fulfilling certain material terms would conflict with its religious beliefs and practice. CSS is under no compulsion to enter into a renewed contract with the City to provide services on terms that it objects to, for any reason. But by the same token, the City must continue to have the exclusive authority to set the terms under which the City's services will be carried out, whether by City employees or by a contractor.

To find otherwise—particularly by overturning the Court's precedent in *Employment Division v. Smith*, 494 U.S. 872 (1990), as Petitioners have urged—would not only turn government contracting on its head but would also be entirely out of step with the Court's recognition of the important government interest to manage its own affairs. *Engquist*, 553 U.S. at 598-99; *NASA*, 562 U.S. at 150; *Garcetti*, 547 U.S. at 422; *Atkin*, 191 U.S. at 222. If strict scrutiny applied to every possible religious objection to its actions, "government simply could not operate," much less hope to harmonize countless competing religious convictions.

See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

(2) The veto power that Petitioners urge the Court to give to religious contractors could turn the government contracting industry, at all levels, on its head. Public contracts, whether at the federal, state, or local level, are both generally governed by ordinary common law contract principles, and specifically governed by a complex framework of statutes and regulations, as well as Constitutional concerns, that dictate the relative rights and obligations of both the government and those who wish to contract with it. Modern procurement law—particularly at the federal level—is primarily focused on ensuring that the applicable laws are not only observed but that contractors are placed on an equal footing, so that the procurement process remains fair and open and ensures good use of taxpayer dollars.

If bidders were permitted to change the statement of the U.S. Government's requirements based on their religious beliefs or objections, at least four major problems could result: (i) the U.S. Government would not be able to ensure that the procurement would satisfy the U.S. Government's requirements; (ii) bidders making religious objections to government requirements could gain an unfair advantage in the competition; (iii) the source selection decision-making would become extremely complex, if not impossible; and (iv) there would likely be more legal challenges to the award decisions, known as "bid protests," which would burden the procurement system.

I urge the Court to avoid opening up that possibility.

ARGUMENT

I. The Government's Well-Established Authority to Determine and Enforce Its Own Contracting Requirements Should Govern the Outcome in This Case

This case involves a contract for services within the City's authority over the foster children in its custody, for whose care it is required by Pennsylvania law to provide. *See* Brief of City Respondents at 4 (citing 62 Pa. Stat. §§ 2301(a), 2305; 42 Pa. Cons. Stat. § 6351(a)(2)(iii); 55 Pa. Code §§ 3130.12, 3130.67(b)(7)(i); 11 Pa. Stat. § 2633(4), (18)-(19)). The City has chosen to carry out some of its foster care services through contracts with private organizations, but it could instead opt to perform the same services directly through its own employees.

Petitioners fundamentally misapprehend CSS's role as a contractor vis-à-vis these public services—construing the services themselves as CSS's own rightful "ministry," from which it is being wrongfully excluded due to the City's assertion of its standard contractual requirements over those services. *See* Petitioners' brief at 51-52. Petitioners have it backward. Under well-established government contracts principles, whether the City chooses to perform its public services itself or through a contractor alters neither the

public nature of the services nor the City's authority to control the performance of them.

Nothing in the Court's First Amendment precedents suggests that there should be a different result. Indeed, these cases have similarly held that the government must have the ability to manage its own affairs. Nor do the facts of this case suggest that a dramatic change in the government's authority to contract and to otherwise manage its internal affairs is warranted. That CSS has historically performed important and necessary social services work as a contractor for the City of Philadelphia's foster care system does not change the fact that it *is* a government contractor. CSS has not been generally excluded from contracting with the City because of its religious beliefs and practices—and the one contract that has not been renewed was declined at CSS's option, because it objects to a material term as applied to those specific public services. There is no evidence that the City exercised its contracting powers to discriminate against either CSS or religious organizations generally, or that it attempted to assert control over CSS's activities or speech beyond its contractual obligations. The sympathetic history of CSS's social services work should not distract from the truly extraordinary proposition its claims present from a government contracts perspective.

A. The Court Has Long Recognized that the Government's Exercise of Authority to Dictate and Enforce Its Own Contract Requirements Does Not Impede a Contractor's Liberty Interests

The Third Circuit correctly observed that "the remedy CSS seeks—an injunction forcing the City to renew a public services contract with a particular private party—would be highly unusual." *Fulton v. City of Philadelphia*, 922 F.3d 140, 153 n.8 (3d Cir. 2019). Indeed, I am not aware of *any* authority supporting that proposition, which is antithetical to foundational principles of public procurement laws.

Nearly one hundred and twenty years ago, this Court recognized that whether public work is "done by the state directly or by one of its instrumentalities, the work [i]s of a public, not private character," and that "it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Atkin*, 191 U.S. at 221-23. Accordingly, "[i]t cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State." *Id.* at 222. The Court soon extended the analysis in *Atkins* to the federal government:

> We see no reason to deny to the United States the power thus established for the states. Like the states, it may sanction the requirements made of contractors employed upon its public

> works by penalties in case those requirements are not fulfilled. . . . Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way.

Ellis, 206 U.S. at 255-56.

The Court has also long recognized that "[w]hen a State buys or sells, it has the attributes of both a political entity and a private business," and that "'[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.'" *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 n.12 (1980) (quoting *Perkins*, 310 U.S. at 127-28). *See also Martin Marietta Materials, Inc. v. Kansas Dep't of Transp*., 810 F.3d 1161, 1178 (10th Cir. 2016) (quoting *Perkins* at 127-28); *Coyne-Delany Co. v. Capital Dev. Bd.*, 616 F.2d 341, 342 (7th Cir. 1980) ("[G]overnment enjoys a broad freedom to deal with whom it chooses on such terms as it chooses; no one has a 'right' to sell to the government that which the government does not wish to buy.") (citing *Perkins* at 127).

B. The Court Applied the Same Principle to Find that the Government Must Have "Significantly Greater Leeway" to Manage Its Internal Operations

Similar considerations apply to the government's "dispatch of its own internal affairs." *Cafeteria & Rest. Workers*, 367 U.S. at 896 (citing *Perkins*, 310 U.S. 113). The Court has long accorded the government "significantly greater leeway" to direct how its employees and contractors conduct the government's work because of the "crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist*, 553 U.S. at 598-99 (quoting *Cafeteria & Rest. Workers*, 367 U.S. at 896); *see also NASA*, 562 U.S. at 150 (no significant distinction when government's work is performed by a contractor rather than an employee); *Umbehr*, 518 U.S. at 684 (finding no "difference of constitutional magnitude" between government employees and government contractors for evaluating free speech claims).

This "extra power" also reflects the practical reality that the government "could not function" if it were effectively unable to dictate how its employees and contractors carry out the government's work. *See Engquist*, 553 U.S. at 598-99 (citations omitted). The Court has instead sought to "strik[e] [an] appropriate balance" between "the asserted employee right" and "the requirements of the government as employer." *Engquist*, 553 U.S. at 600. Under that framework,

those who voluntarily agree to perform government services do not forfeit their constitutional rights altogether, but they do forfeit "the right to perform their jobs however they see fit." *Garcetti*, 547 U.S. at 422.

C. Cases Addressing the Government's Authority as a Contracting Party and as the Manager of Its Own Internal Affairs Should Decide this Case

As strictly a matter of government contract law, the Petitioners' position is a non-starter. A contract with the City of Philadelphia to perform services as a foster family care agency (FFCA) is unquestionably a contract for the performance of work "of a public, not private character," *see Atkin*, 191 U.S. at 221-23, under the City's authority and affirmative duty under state law. The City therefore must have the authority to determine the conditions for the performance of this public work, including the power to insist that it be carried out consistent with the City's public policy. *See id.*; *Ellis*, 206 U.S. at 255-56; *see also Perkins*, 310 U.S. at 127.

These early cases addressing the government's power to control the performance of public services recognized that "[i]t cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State." *Atkin*, 191 U.S. at 222. Later First Amendment cases applied that same principle to hold that the government has "extra power" to exercise

control over the work of its employees and contractors, recognizing that the constitutional analysis is different in the context of the government's management of its own affairs. *See Engquist*, 553 U.S. at 598-99; *see also NASA*, 562 U.S. at 150; *Garcetti*, 547 U.S. at 422. While these later cases specifically involve individual employees and contractors, the analysis is derived from foundational cases addressing government's ability to dictate how a contracting entity will perform the government's work. There is no reason under these precedents to find that CSS has any more autonomy to "perform the work as [it] sees fit" contrary to the government's instructions than an individual employee would. *See Garcetti*, 547 U.S. at 422; *Engquist*, 553 U.S. at 598-99.

Moreover, the fact that CSS's contract has expired and has not been renewed should make the case even simpler from a pure contracting perspective. Like any private entity, the City may properly refuse to enter into a contract with a party that expressly refuses to perform a material term of that contract—as CSS has done here.[2] *See Perkins*, 310 U.S. at 127; *cf. Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991) (recognizing that the "power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use."). Short of circumstances not present in this case indicating a

[2] Indeed, discussed in Section II, under modern federal contracting law, a federal agency *cannot* award a contract when it knows that the contractor cannot or will not meet material terms of the contract.

deliberate attempt to exclude or discriminate against a contractor willing and able to perform the contract for services, the government should have the authority and discretion to decide with whom it will contract and on what terms. *Perkins*, 310 U.S. at 127; *Engquist*, 553 U.S. at 598-99; *NASA*, 562 U.S. at 150; *Garcetti*, 547 U.S. at 422; *Atkin*, 191 U.S. at 221-23; *Ellis*, 206 U.S. 246 at 255-56.

Petitioners argue that the Court should look to Free Exercise authorities that, from my perspective, have no relevance in the context of an objection to an otherwise lawful requirement of a contract for government services. In particular, I have significant concern that if the Court accepts Petitioners' invitation to overturn Justice Scalia's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), particularly in the context of a contract for government services, it would severely undermine the government's ability to effectively contract and manage its own affairs, for all of the reasons recognized in *Engquist*, *Atkin*, and the other cases discussed above.[3] To put it plainly, Petitioners

[3] Petitioners have the misconception that CSS, not the City, has rightful authority to direct these services. *See* Petitioners' Br. at 51-52 (characterizing (i) the City's exercise of its authority to manage its own public services as an attempt to "usurp a field long ago developed by religious institutions," and "exclude CSS from its historical ministry of caring for foster children," (ii) the City's efforts to convince CSS to renew its contract to provide FFCA services as an attempt to "interfere with the decision-making of a church, [and] telling a Catholic ministry how to interpret Catholic doctrine," and (iii) the natural consequence of CCS's refusal to accept the City's contract terms for providing FFCA services (i.e., its contract was not renewed) as a "penalty").

argue that, contrary to these precedents, the Free Exercise clause gives religiously-affiliated contractors veto power over the government's contract terms. That proposition is out of step with the entire concept of public procurements.

The Court has long recognized that the government has—and *must* have—significantly greater latitude to manage its internal affairs, including the exercise of its contracting authority. *Engquist*, 553 U.S. at 598-99; *NASA*, 562 U.S. at 150; *Garcetti*, 547 U.S. at 422; *Atkin*, 191 U.S. at 222. The Court should decline the Petitioners' invitation to deviate from its previous recognition that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires," and because the First Amendment applies to all citizens, "it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452.

II. Permitting Contractors to Alter or Ignore Lawful Government Contract Requirements Would Have Broad, Catastrophic Consequences

As the Court recognized in the cases discussed in the previous Section, it is a practical necessity that government agencies, when acting as buyers of goods or services, have the authority to determine their own purchasing needs, whether acting under their own discretion or complying with a statutory requirement. Federal government procurement law has never

allowed vendors to challenge the legitimate government requirements for goods or services—and changing that status quo as Petitioners suggest would place agencies in an impossible situation.

This is not a trivial issue. The U.S. Government, for example, had 5,896,139 contract actions in fiscal year 2019, constituting approximately $600 billion in expenditures (approximately 50% of the entire annual discretionary federal budget).[4] While many of these six million awards are routine and repetitive transactions, it is estimated that at least 250,000 are significant transactions involving a carefully drafted statement of the U.S. Government's requirements.[5] Government personnel who prepare the statement of requirements possess special training, knowledge, and experience in the area. Most of these contract awards are made through a competitive process, as is required by the federal procurement statutes discussed below. The U.S. Government makes these awards based on criteria set forth in the solicitation, including price as well as other

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[4] USASpending.gov at https://www.usaspending.gov/#/search/ef1721c131f6d8921ef94d762c84a174 (showing federal procurement expenditures data for 2019) (last accessed August 17, 2020); *see also* Richard C. Loeb, *Caveat Emptor: Reversing the Anti-Competitive and Over-Pricing Policies that Plague Government Contracting* (American Economic Liberties Project, Working Paper Series on Corporate Power No. 4, June 2020), 4 & n.8 (available at https://www.economicliberties.us/wp-content/uploads/2020/06/Working-Paper-Series-on-Corporate-Power_4.pdf) (last accessed August 17, 2020)).

[5] Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, 42 Pub. Cont. L.J. 489, 494-95 (2013).

factors listed in the solicitation. It is foundational to fair competition that all competitors bid or offer based on the same requirements.

A. The Federal Procurements Process Is Complex But Generally Structured to Ensure Government Needs Are Met as Efficiently as Possible

Simply put, under established notions of public procurement law, government agencies may fairly describe their requirements, i.e., what goods and services they plan to purchase from non-government sources, in any combination of quantities and/or qualities designed to effect a public purpose in an efficient and effective manner, provided that the objectives to be obtained through the process are otherwise lawful, and as long as the process does not unlawfully restrict competition for the contract award.

In practice, public contracting is anything but simple—in part by design, to help ensure the overall integrity of the process. In the United States, public contracting is highly structured and governed by a host of explicit legal requirements. At the Federal level, with which I am most familiar, the primary statutory requirements are set by one or more of the following: the Armed Services Procurement Act of 1947, codified at 10 U.S.C. §§ 2301-2314, the Federal Property and Administrative Service Act, codified at 40 U.S.C. §§ 471-514 and 41 U.S.C. §§ 251-260, and the Competition in Contracting Act (CICA), which is

codified in various sections of titles 10, 31, 40, and 41 of the U.S. Code. These three statutes are the foundation of federal government contract law and the basis for the federal government's contracting process.[6]

These three basic statutes in turn are enabled through the government wide Federal Acquisition Regulation (FAR), codified at 48 C.F.R., Chap. 1, Parts 1-53. The FAR, along with additional agency supplemental regulations, govern all aspects of agency requirements determination, solicitation of bids or offers, evaluation of bids or offers received, and ultimately, the award of a resulting contract(s).

In particular, CICA requires federal agencies to seek to obtain "full and open competition" wherever possible in the contract award process. Competition is considered a lynchpin for ensuring the integrity of the entire system of federal procurements. As a Senior Judge of the U.S. Court of Federal Claims recently explained,

> The central purpose of federal procurement law is to ensure that competition for government contracts, which are funded by tax payer dollars, is fair to both the government and to contractors. Only when competition is fair and open can the government get what it pays for, and can the contractor receive fair value for

[6] Additional statutory requirements may apply for contracts with specific agencies, or for procurement of specific type of goods or services. *See*, *e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1971 (2016) (addressing application of 38 U.S.C. § 8127 to procurements by the Department of Veterans Affairs).

> the work and goods it provides. If the system is not fair, the tax payer will be cheated, and honest contractors will be unwilling to contract with the government.

AECOM Mgmt. Servs., Inc. v. United States, 147 Fed. Cl. 285, 287 (Fed. Cl. 2020). An essential component of this system is the ability of disappointed bidders "to challenge arbitrary and irrational government decisions," acting effectively as "private attorney generals." *Id.* While undoubtedly this bid protest process is expensive for all concerned, "Congress has . . . decided that the cost of expensive bid protest litigation is less than the cost of a corrupt or irrational decision-making process dealing with tens of billions of dollars." *Id.* However, because Congress and the Executive Branch have bestowed on federal agencies the authority to manage the government's procurements, the review is highly deferential, particularly with regard to the agency's determination of its requirements. *Id.*

Despite a general ability to challenge the government's other decisions, as discussed at length in Section I, it is well established that the government has the sole authority to determine its own requirements. Exceptions are limited, such as when the U.S. Government has defined its requirements in an unduly restrictive manner, which is subject to a deferential reasonableness standard. *See*, *e.g.*, *Matter of Desktop Alert, Inc.*, B-408196, 2013 CPD ¶ 179 (Comp. Gen. 2013) (solicitation specifying a brand name product was overly restrictive where the agency failed to demonstrate a reasonable basis for the restriction).

The highly deferential standard applied to the government's definition of its requirements means that such challenges are rarely successful. *See*, *e.g.*, *Air USA, Inc.*, B-409236, 2014 CPD ¶ 68 (Comp. Gen. 2014) (solicitation requirement did not unduly restrict competition where the requirement was reasonably related to the agency's needs).

Further, the government is required to select a contactor that can and will meet the stated requirements of the government's solicitation. *See*, *e.g.*, *Centech Group, Inc. v. U.S.*, 554 F.3d 1029, 1039 (Fed. Cir. 2009); *Allied Tech. Grp., Inc. v. United States*, 649 F.3d 1320, 1331 (Fed. Cir. 2011) ("[A]n agency may accept a quotation's representation that indicates compliance with the solicitation requirements, where there is no significant countervailing evidence reasonably known to the agency evaluators that should create doubt whether the offeror will or can comply with the requirement.") (quoting *In re Spectrum Sys., Inc.*, B-401130, 2009 CPD ¶ 110, 2009 WL 1325352, at *2 (Comp. Gen. 2009)).

This means that under the current system, the federal government can typically have a high degree of confidence that its contractors will perform as expected, in accordance with the contract terms as drafted by the government.

B. The Petitioners' Proposed Regime Would Undermine the Government's Ability to Effectively Meet Its Needs Through the Procurement Process

Petitioners want to upend this system by saddling the government with a constitutional obligation to alter its contracting requirements to accommodate a particular vendor's religious beliefs or practices. This would lead to at least four major problems for federal procurements: (1) the U.S. Government would not be able to ensure that, however carefully the solicitation is drafted and sourced, the procurement will satisfy the U.S. Government's requirements; (2) bidders making religious objections to government requirements would have an unfair advantage in the competition; (3) the source selection decision-making process would become extremely complex, if not impossible to conduct fairly; and (4) there would likely be more legal challenges to the award decisions, known as "bid protests," challenging the inequities caused by claimed religious exemptions—including challenges to the validity of the religious exemption claims, which would burden a procurement system unaccustomed to addressing First Amendment claims. Together, these problems may make the contracting process so inefficient that agencies may choose to bring more of their work back "in house" to be performed by government employees, while contractors—particularly those with no religious affiliations—may prefer to shift their focus to serving private sector needs.

To give one rather simplistic example, under the principles that CSS is asking the Court to accept, vendors of kosher or halal foods could object to supplying pork products under a Department of Defense solicitation to supply various types of meat to a military dining facility, even though that solicitation requires vendors to supply some pork products, because supplying pork would violate their sincerely held religious beliefs. Under current practice, that refusal would simply cause these bids to be rejected—or more likely, neither vendor would even consider submitting a bid in the first place. Under Petitioners' proposed rule, however, the government would be constitutionally required to entertain these facially deficient bids, and *treat them equally with conforming bids*, which in turn will lead to awards to contractors who explicitly will not fulfill the government's requirements. This will create a bizarre circumstance where the government then may have to award a contract to a contractor or vendor that it already knows is not going to fulfill all of the needs defined in the solicitation, meaning that the government's need might not be met at all, or that the government will have to issue yet another solicitation to fulfill that need.[7]

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[7] This would add significant expense and complexity at the federal contracting level—costing more taxpayer dollars to achieve the same goal. At the state and local levels, it may be much less feasible for state and local governments to issue multiple solicitations as a potential solution to this problem. This may make them more likely to opt to perform their services with government employees rather than contractors.

Making matters worse, in addition to simply making it more costly and time-consuming for the government contract, it would also make it impossible for an agency to fairly evaluate proposals received from competing vendors on an equal basis, as it is bound by statute to do. As noted above, at present, one important aspect of fair treatment is that the government must reject proposals that are deficient on their face or when the government has knowledge that the vendor cannot or will not perform. *See*, *e.g.*, *Centech*, 554 F.3d at 1039; *Allied Tech. Grp.*, 649 F.3d at 1331.

Under the Petitioners' proposed regime, however, the government would be obliged to make exceptions to material contract requirements for some contractors, while requiring others to meet all material requirements. This is inherently unfair, as is considering a deficient bid to be on an equal footing with a fully conforming bid, which is why that is currently prohibited by statute. Yet Petitioners argue that the First Amendment requires the government to treat the two equally, giving a distinct competitive advantage to one while disadvantaging the other, and eviscerating the concept of treating contractors on an equal footing.

The high potential for inherently unequal treatment of bidders and offerors, in turn, is likely to lead to additional bid protest litigation challenging the validity of religious objections that cause competitive disadvantages for other bidders, and/or arguing that the agency's efforts to mitigate valid religious objections were unduly harmful to competing bidders. This litigation would originate mostly in administrative forums

not well-equipped to address Free Exercise claims, much less to be regularly "in the business of determining whether the 'severe impact' of various laws on religious practice" justifies "constitutionally required religious exemptions" from government contract requirements. *See Smith*, 494 U.S. at 888 n.5. Many such cases would eventually find their way to the federal courts—a circumstance Justice Scalia aptly described as "horrible to contemplate," *id.*, but given the competitive and litigious federal contracting arena, one that is not nearly so unlikely as Petitioners have urged.

CONCLUSION

This case presents no reason to alter the government's well-established authority to dictate the lawful requirements of its own contracts for public work. The Court has long recognized that such authority is a practical necessity, as well as reflective of the voluntary nature of the contractual relationship. The Court has also recognized that—precisely because of our First Amendment freedoms—ours is a society of widely diverse religious beliefs and practices, many of which directly conflict, making it impossible for the government to function if it were to attempt to accommodate all of them in every government action. I urge the

Court to avoid making the drastic change to the government's authority to contract that Petitioners advocate.

Respectfully submitted,

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