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 LEE C. BOLLINGER, ERWIN CHEMERINKSY, BURT NEUBORNE, ROBERT C. POST AND GEOFFREY STONE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are law professors who teach or have taught courses in constitutional law or the First Amendment and have devoted significant attention to studying freedom of speech issues, including by publishing books and law review articles on the subject. They comprise the First Amendment scholars below.

Professor Lee C. Bollinger—Professor Bollinger became Columbia University's 19th president in 2002 and is the longest serving Ivy League president. Bollinger is Columbia's first Seth Low Professor of the University, a member of the Law School faculty, and one of the nation's foremost First Amendment scholars. His latest book, *The Free Speech Century*, co-edited with Geoffrey R. Stone, was published in the fall of 2018 by Oxford University Press. Bollinger is a director of Graham Holdings Company (formerly The Washington Post Company) and serves as a member of the Pulitzer Prize Board. From 2007 to 2012, he was a director of the Federal Reserve Bank of New York, where he also served as Chair from 2010 to 2012. From 1996 to 2002, Bollinger was the President of the University of Michigan. He led the university's historic litigation in *Grutter v. Bollinger* and *Gratz v. Bollinger*, Supreme Court decisions that upheld and clarified the

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief.

importance of diversity as a compelling justification for affirmative action in higher education.

Professor Erwin Chemerinsky—Professor Chemerinsky is Dean of Berkeley Law School. Among other previous positions, Professor Chemerinsky was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law. Professor Chemerinsky has authored eleven books including, *Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable* and *Free Speech on Campus*, and is the author of more than 200 law review articles.

Professor Burt Neuborne—Professor Neuborne is the Norman Dorsen Professor of Civil Liberties and a founding Legal Director *emeritus* of the Brennan Center for Justice at New York University Law School. Professor Neuborne served as National Legal Director of the ACLU from 1981 to 1986. He has written and taught extensively on the First Amendment. His most recent book on the First Amendment is *Madison's Music: On Reading the First Amendment*.

Professor Robert C. Post—Professor Post is the Sterling Professor of Law at Yale Law School. He served as the School's 16th dean from 2009 until 2017. Before coming to Yale, he taught at the University of California at Berkeley School of Law. Professor Post specializes in constitutional law, with a particular emphasis on the First Amendment. In addition to publishing regularly in legal journals and

other forums, he has written and edited numerous books, including *Citizens Divided: A Constitutional Theory of Campaign Finance Reform*; *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State*; *For the Common Good: Principles of American Academic Freedom* (with Matthew M. Finkin); and *Prejudicial Appearances: The Logic of American Antidiscrimination Law*.

Professor Geoffrey Stone—Professor Stone is the Edward H. Levi Distinguished Service Professor at the University of Chicago Law School. After clerking for Supreme Court Justice William J. Brennan, Jr., he joined the Chicago Law School faculty in 1973 and served as Dean of the Law School from 1987 to 1993. Professor Stone has authored and co-authored numerous books on constitutional law including *The Free Speech Century; Top Secret: When Government Keeps Us in the Dark*; *Perilous Times: Free Speech in Wartime*; and *Eternally Vigilant: Free Speech in the Modern Era*. He has received multiple awards for his First Amendment work, including the First Amendment News Award and the American Civil Liberties Union's Harry Kalven Freedom of Expression Award.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The City of Philadelphia (the "City") acknowledges as among its most important governmental tasks the responsibility for determining the legal custody and care of abused and neglected children in Philadelphia who can no longer live with their legal parents. Once such a determination has been made, the City immediately seeks to provide the child-in-

need with alternative, legally sanctioned living arrangements—placement with foster parents in a supervised home care setting; or, if home care is not available or appropriate, placement in an appropriate congregate care facility. In order to carry out its responsibilities to such children in need, the City contracts with child welfare experts to identify, screen, and certify eligible foster parents and to identify, supervise, and operate humane and nurturing congregate care facilities.

As government contractors assisting in the performance of the inherently governmental function of determining the legal custody of a child-in-need, child welfare experts enter into contractual agreements with the City to provide services to these children in exchange for taxpayer-funded payments. Among the most important of those contractual provisions is a duty imposed pursuant to the Philadelphia Fair Practices Ordinance, Phila. Pa. Code §§ 9-1101 to 9-1133 (2020), to provide child welfare services on a nondiscriminatory basis.

Petitioner Catholic Social Services ("CSS") is a child welfare organization that has contracted with the City to provide expert assistance in placing children-in-need in an appropriate foster home or, if necessary, in a congregate care facility. No argument exists over CSS's performance of its congregate care duties. Despite the disagreement between the parties concerning foster care, CSS continues to assist the City in placing abused and neglected children in congregate care facilities.

A dispute has arisen, however, in connection with CSS's performance of its foster care duties. Invoking the First and Fourteenth Amendments, CSS argues that it has a right under both the Free Exercise and Free Speech clauses to a religiously based exemption from its contractual duty to investigate and assess the fitness of same-sex married couples.[2]

Arguing that many of its contractual duties involving investigation, evaluation, and assessment of prospective foster parents are necessarily carried out by verbal communication, CSS claims that, in honestly assessing the fitness of same-sex couples, it would have to engage in speech contrary to its beliefs. Based on that claim, CSS seeks a categorical exemption from the contractual agreement with the City that would require it to place the resulting honest conclusions in written form. Even on the (dubious) assumption that these contractually mandated services would require CSS to endorse foster parents' same-sex relationships, *but see* City Resp. Br. at 43-46, this effort to turn CSS's religiously-based opposition to same-sex marriage into a free speech defense to carrying out its contractual duties as an agent of the government fails on multiple levels.

First, when government agents—including, as here, those contracting with the government—engage in speech integral to the performance of a lawful governmental act, the government agent is not engaged in classic private speech protected by the free speech clause of the First Amendment. *See Garcetti v. Ce-*

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[2] This brief *amici curiae* is limited to the free speech issues raised by petitioners.

*ballos*, 547 U.S. 410, 421-22 (2006). Were it otherwise, virtually every government activity dependent on verbal communication would find itself hostage to the political or social beliefs of the government agents called upon to perform it.

Second, when, as here, the government contracts with a private entity to carry out a defined government program involving communication, the private contractor does not possess a First Amendment right to re-define the government program by refusing to engage in speech related to its fulfillment. *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991). While a private contractor retains the First Amendment right to speak on unrelated topics and to engage in private criticism of the program, it may not subvert or alter the program by refusing to comply with its defined limits. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001); *cf. FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376-81 (1984). That is so because, in carrying out the verbal aspects of such a government program, the private contractor delivers a governmental, as opposed to a private, message.

Third, where performance of a governmental function involves communication, the government may impose conditions on that communication in assuring that the government function—including the communication aspects needed to carry it out—is performed in an efficient, nondiscriminatory manner. It is plainly constitutional to impose conditions so long as they apply to the government program and not to the private speech of the government contractor outside of that program. Because the City's application

of its nondiscrimination provision to CSS's performance of foster care services under the contract meets all of these criteria, this Court should reject CSS's free speech argument.

The implications of CSS's argument are highly troubling. If the straightforward principles the Court has previously articulated are not controlling, then a public school teacher would have a First Amendment right not to teach certain aspects of history that she dislikes; a lawyer retained by a city to represent it in certain matters would have a First Amendment right not to make certain arguments on the city's behalf if he disagrees with those arguments; and a judge's law clerk would have a First Amendment right not to draft opinions making arguments she rejects. However robust the protections of freedom of speech, they do not extend to such circumstances. The same is true here.

## ARGUMENT

CSS is not a private speaker expressing itself in the public square. Rather, to the extent it is using words to fulfil its contractual duty to perform the core governmental function of providing nondiscriminatory governmental custodial services to children in need, CSS is functioning as the paid agent of the government.

From a free speech perspective, CSS is not distinguishable from literally thousands of government agents, ranging from teachers, to computer programmers, to census takers, who contract with the government every day to engage in speech or conduct to carry out government programs. Whether one

views those words or actions as incident to the performance of a government service, or as the communication of a government message, this Court repeatedly has held that paid government agents may not invoke the First Amendment to re-write a government program to accord with the agent's individual beliefs.

## I. THE GOVERNMENT MAY IMPOSE LIMITATIONS ON THE MANNER IN WHICH ITS CONTRACTORS PERFORM A PUBLIC FUNCTION, INCLUDING CONDITIONS THAT REQUIRE COMMUNICATION OF A MESSAGE RELATED TO THAT FUNCTION

### A. The government is entitled to impose conditions on its contractors to assist in the performance of a governmental function

Nearly thirty years ago, the Court made clear that a government contractor or grantee can be required to tailor its speech consistent with the objectives of the government program it is implementing. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court delineated this principle by upholding conditions restricting the speech of recipients of Title X funding. *See id.* at 194-95. The Court explained that the appropriate lens to view a speech restriction of a government grantee is as a condition placed on the grantee's decision to participate in a government program and not as a content-based restriction on speech. The Court explained that "we have here not the case of a general law singling out a disfavored

group on the basis of speech content, but a case of the Government refusing to fund activities, including speech [abortion services and counseling or information about abortion], which are specifically excluded from the scope of the project funded." *Id*.

The Court reinforced this principle in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), explaining that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id*. at 833.

When a private agency like CSS chooses to enlist as a paid government contractor to assist in the performance of a governmental function, the government may articulate its expectations for services to be provided and establish parameters for the program. And where the government's expectations are embodied in conditions that restrict speech, the Court has deemed those conditions constitutional provided they "are designed to ensure that the limits of the federal program are observed." *Rust*, 500 U.S. at 193.

The Court distilled this principle in *Agency for International Development v. Alliance for Open Society International, Inc.* 570 U.S. 205 (2013) ("*AOSI*"). There, in invalidating a condition requiring organizations receiving federal funds to combat HIV/AIDS to adopt a policy explicitly opposing prostitution, the Court explained that "the relevant distinction that has emerged from our cases is between conditions

that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech *outside the contours of the program itself*." *Id.* at 214-15 (emphasis added).[3] Under *AOSI, Rust*, and other cases, *see, e.g., Velazquez*, 531 U.S. 533 (invalidating government restriction on private speech), the former type of condition is constitutional and the latter is not.

### B. When a private contractor performs public services, messages conveyed pursuant to those services are attributable to the government

Restrictions on speech imposed on government contractors and grantees in carrying out government programs are constitutional because the restricted speech is that of the government, and not that of the contractor. As the Court has observed, "*Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding." *Legal Servs. Corp.*, 531 U.S. at 541. *See also Rosenberger*, 515 U.S.

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[3] The Court applies similar principles in the context of government employment, where restrictions on speech are permissible if they are related to the government's role as an employer. *See Garcetti*, 547 U.S. at 418 ("A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."); *see also Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (allowing the government to impose restrictions on speech of its employees that it could not impose on private citizens).

at 833 ("[T]he government [in *Rust*] did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) ("A government entity has the right to 'speak for itself.' '[I]t is entitled to say what it wishes,' and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom.") (alteration in original) (citation omitted).

*Rust* and subsequent decisions of this Court leave no doubt that, even when government speaks through grantees and contractual partners, it may impose requirements on public services, including on the speech inherent in those services. This is because that speech is attributable to the government, not the contractor or grantee.

The Court made this point explicit in *Rosenberger*. While the Court there invalidated a university policy of selectively denying funds to independent publications espousing religious viewpoints as an impermissible restriction on private speech, the Court expressly distinguished *Rust* as standing for the proposition that "the government [is permitted] to regulate the content of what is or is not expressed when it is the speaker or *when it enlists private entities to convey its own message*." *Rosenberger*, 515 U.S. at 833 (emphasis added); *cf. Garcetti*, 547 U.S. at 421-22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the ex-

ercise of employer control over what the employer itself has commissioned or created.").

In certifying the suitability of prospective foster parents, CSS is acting as a government contractor carrying out a government function under a government program, circumstances fully echoing this Court's many precedents on this issue. As such, CSS is conveying the City's message—speech the City has the right to control, including by application of its contractual nondiscrimination provision.

## II. THE CITY'S APPLICATION OF ITS CONTRACTUAL NONDISCRIMINATION REQUIREMENT TO THE PROVISION OF FOSTER CARE SERVICES IS A PERMISSIBLE EXERCISE OF THE CITY'S RIGHT TO PROMOTE ITS INTERESTS

Applying these government speech principles, the resolution of CSS's compelled speech argument is straightforward: because CSS is a government contractor performing government functions, and the condition at issue—requiring nondiscrimination in certifying prospective foster parents as suitable caretakers—is a legitimate dimension of performing those government functions, the City's contractual nondiscrimination provision is a legitimate limitation on the manner in which CSS carries out the foster care program.[4]

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[4] Moreover, as set forth in the City Respondents' Brief, a ban on discrimination has been viewed by the Court as a prohibition on conduct, and not on speech. *See* City Resp. Br. at 46

### A. Foster care services are a government function

Foster care services are an inherently governmental function. The services are government regulated, government funded, and public in nature. Indeed, foster care "is comprehensively regulated both by the Commonwealth of Pennsylvania and by the City of Philadelphia," with the state setting criteria for prospective foster families and establishing the duties of foster parents and foster care agencies, and the City selecting and contracting with specific foster care agencies and referring children to those agencies. *See Fulton v. City of Phila.*, 922 F.3d 140, 147 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020). The pervasive government role in foster care is not surprising, given that altering the custodial status of a child from the child's birth parents to someone else is a formal alteration of legal status. The City's foster care program is unequivocally not performed privately.[5]

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(citing *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006)). To the extent that the Court nevertheless views the nondiscrimination provision at issue here as regulating speech and not conduct, that provision is plainly permitted for all the reasons set forth in this brief.

[5] This is in stark contrast to the circumstances in *Wooley v. Maynard*, 430 U.S. 705 (1977), where the state sought to regulate speech by private citizens *engaged in private activity*. *See id.* at 713-15 (emphasis added); *see also* Pet. Br. at 30. In *Wooley*, "New Hampshire's statute in effect require[d] that appellees use their *private* property [their motor vehicles] as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Wooley*, 430 U.S. at 715 (1977). Unlike here, *Wooley*

### B. The condition that CSS contends infringes its free speech rights is clearly within the scope of the foster care services

The particular speech or conduct at issue here—home study certifications and foster parent selections—is necessary to the public services CSS provided pursuant to its previous contract with the City. Evaluating, certifying, and selecting prospective foster parents are actions required under the City's contracts with private foster agencies and constitute a necessary step for the City to place children in foster parents' care and for CSS to receive compensation.[6] Indeed, state regulations set the criteria for these evaluations and certifications. *See* 55 Pa. Code § 3700.64 (2020); *see also* 23 Pa. Cons. Stat. § 6344 (West 2018 & Supp. 2020). The certifications made pursuant to these state regulations are clearly within the contours of CSS's contract with the City. In performing these certifications, CSS acts on behalf of the government. Accordingly, the City is entitled

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involved the state imposing a message on private parties *engaged in private activity*.

[6] CSS's argument that the City "does not fund home studies" because the funding structure is based on the number of children placed with certified families, *see* Pet. Br. at 33, is a red herring. Home studies must be conducted before a child can be placed in a family and thus are necessary for CSS to undertake in order to receive compensation under its contract with the City.

to place conditions on these services performed under the contract.[7]

Here, the City sets conditions to which all of its contractors must adhere in completing the certifications of prospective foster parents. The City's contractual nondiscrimination provision requires that contractors cannot find applicants unqualified for a discriminatory reason, including their sexual orientation or same-sex relationship. Adherence to the City's nondiscrimination provision is required for all foster care providers. In applying this condition, the City seeks to maximize the pool of foster parents and make its foster care system more inclusive. CSS does not challenge the appropriateness of this condition.

Applying its contractual nondiscrimination requirement in an even-handed manner serves the City's interest in making its foster care system inclusive and welcoming. The requirement is undoubtedly

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[7] Petitioners point to *Janus*, *Hurley*, and *NIFLA* as support for their claim that the government cannot restrict speech in foster parent certifications. Pet. Br. at 30–32. However, these cases are inapposite: the contractual provision at issue here restricts speech or conduct related to the government's function and is applied equally to all foster care agencies that contract with the City. *See Janus v. Am. Fed'n of State, Cnty. & Mun. Employees, Council*, 138 S. Ct. 2448, 2460 (2018) (considering speech that was unrelated to the government's function); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (involving no government contractors but rather private parties); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2370 (2018) ("*NIFLA*") (emphasizing the fact that the restriction was not applied to all similarly situated organizations).

a "legitimate and appropriate" way to achieve this interest. *See Rosenberger*, 515 U.S. at 833.

The Court has explicitly affirmed government criteria that set forth conditions that contractors must follow to help ensure the achievement of the objectives of a government's program. *See Rust*, 500 U.S. at 194 ("[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").[8] Indeed, CSS's argument is identical to the unsuccessful argument made by the doctors and reproductive health care providers in *Rust*. In both circumstances, petitioners argued the government's restrictions on speech amounted to placing unconstitutional conditions on

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[8] Requiring government contractors to carry out their responsibilities pursuant to nondiscrimination requirements is not a new or novel development. Our nation's history is replete with examples of government contractors operating according to such requirements. For example, President Kennedy signed Executive Order 10925 nearly sixty years ago, requiring government contractors to "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin." Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961), *superseded by* Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965). And Executive Order 11246, first issued in 1965, "prohibits federal contractors and subcontractors from engaging in workplace employment discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin." *Guide for Small Businesses with Federal Contracts*, U.S. Dep't. of Labor, Office of Fed. Contract Compliance Programs (last visited Aug. 13, 2020), https://www.dol.gov/agencies/ofccp/compliance-assistance/guides/small-business-guide. *See also Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 299 (2007) (the government's "interest in enforcing its rules [can] sometimes warrant curtailing the speech of its voluntary participants.").

the use of government funds. The Court rejected the petitioners' argument in *Rust*, finding that "[t]he condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights." *Id.* at 198. Here, CSS is in a significantly weaker position than the grantees in *Rust* because CSS is a government contractor, not merely a grantee, and because CSS signed a contract that explicitly contained the nondiscrimination parameters of the government program.[9]

### C. The City does not address speech of its contractors outside the confines of the City's foster care program

As permitted under the Court's jurisprudence, the City's alleged speech restriction attaches only to the foster care program, and not more broadly. It does not restrict the non-program expression or conduct of contractors. The City is not asking CSS to change its religious beliefs about same-sex marriage in order to provide foster care services or receive government funding. *Cf. AOSI*, 570 U.S. at 210 (act required organizations to adopt a policy opposing prostitution as a condition of receiving government funds). The City does not prohibit CSS from voicing its opposition to same-sex marriage outside of its foster care work.[10] Rather, the City applies the

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[9] Unlike here, the doctors in *Rust* never explicitly agreed to limit the scope of the doctor-patient relationship, any more than the lawyers in *Velazquez*, 531 U.S. 533, agreed to limit the zealous defense of their indigent clients.

[10] Indeed, the City has made clear that it would permit CSS to voice its opposition even *within* the foster care program, demonstrating that the City is seeking to prohibit discriminato-

nondiscrimination condition to CSS solely in its role as a contractor providing foster care services. CSS's contract with the City leaves CSS "unfettered in its other activities," *Rust*, 500 U.S. at 196, and free to engage in whatever speech it chooses related to marriage or same-sex relationships "outside the scope of the [government] funded program." *Id*. at 197.

The scenario CSS challenges in this proceeding is precisely that which the Court held was constitutionally permitted in *AOSI*. In that case, the Court held that while the government could not require organizations to affirm their own agreement with the government's policy as a condition of accepting government funds, the government *could* prohibit use of government money to promote ideas with which the government disagreed. *See AOSI*, 570 U.S. at 213-14. As the Court explained in *AOSI*, when "a party objects to a [legitimate] condition on the receipt of [government] 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." *Id*. at 214; *see also Rust*, 500 U.S. at 175 (finding regulations permissible where they "do not force the Title X grantee, or its employees, to give up abortion-related speech" but rather "merely require that such activities be kept separate and distinct from the activities of the Title X project"); *cf*. *Garcetti*, 547 U.S. at 418 ("When a citi-

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ry conduct and not curtail speech. While the City will not permit CSS to refuse to certify an otherwise qualified same-sex couple because of their relationship, it would allow CSS to provide an express statement with any such certification that the certification does not constitute an endorsement by CSS of the couple's relationship. *See* City Resp. Br. at 46.

zen enters government service, the citizen by necessity must accept certain limitations on his or her [First Amendment] freedom.").[11]

Far from requiring religious organizations such as CSS to express support for same-sex marriage in all of their services, to all of their audiences, and throughout the entirety of their respective missions, the City instead has continued to work with religious organizations that disapprove of same-sex marriage, including CSS itself. Indeed, even since this dispute arose, "the City has expressed a constant desire to renew its full relationship with CSS as a foster care agency." *Fulton*, 922 F.3d at 159.

The City, for example, has maintained substantial contracts with CSS for related services concerning congregate care and case management.

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[11] Petitioners' argument that CSS's right under *Obergefell* to advocate for the condemnation of same-sex marriage is impaired, Pet. Br. at 32, is without merit. In *Obergefell*, the Court made clear that "religions, and those who adhere to religious doctrines," may continue to hold firm to an understanding of marriage as limited to different-sex couples, and "[t]he First Amendment ensures that religious organizations and persons are given proper protection" with respect to religious practices consistent with that understanding. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). Consistent with *Obergefell*, here, CSS is free to hold, express, and practice a religious understanding of marriage that is limited to the union of one man and one woman. If CSS believes that contracting with the City to provide foster care services in a nondiscriminatory way impairs that right, it is free to choose not to participate. The City in no way seeks to impair CSS's ability as a private institution, as opposed to a government contractor performing a discrete public function, to advocate for the condemnation of same-sex marriage.

*Id.* at 160. It has also continued to contract with CSS to provide ongoing services for the foster families it was already supporting and to refer new children to CSS when in the best interests of the particular child. *See* City Resp. Br. at 6.[12] Furthermore, the City has continued its foster care contract with Bethany Christian, another religious organization. It did so with full awareness that, while Bethany Christian agreed to adhere to its contractual obligations relating to foster care services, Bethany Christian maintains its religious opposition to same-sex marriage. *Id.* Neither CSS nor its peer organizations are compelled *as private institutions* to condone same-sex marriage as a condition of contracting with the City to perform foster care services.

Ultimately, granting CSS the constitutional right to re-write a contract governing the performance of a core governmental function would produce perverse and unworkable consequences. Allowing government contractors to unilaterally modify the terms of a voluntary contract would render government powerless to use contractors to achieve its objectives. And allowing government contractors to ignore nondiscrimination provisions within that contract would mean that a government could prevent the discriminatory implementation of its programs only by not hiring contractors. In the context of fos-

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[12] Moreover, CSS also is free to continue to pursue opportunities to work with at-risk children in its community and care for them without state support. In any event, the consequences of CSS's choice not to continue to contract with the City on account of a condition that restricts CSS only in carrying out the City's contracted-for services provide no basis to invalidate the City's program-related policy.

ter care services, for example, a contractor could refuse to certify a family because that family supported a particular political candidate, because they belong to a church or synagogue, or because of their race. These unacceptable outcomes only confirm the wisdom of this Court's longstanding rule that the First Amendment does not compel the government to surrender control of its programs or undercut the objectives they are designed to achieve.

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Under the Court's free speech precedents, the City has put CSS to an entirely ordinary, constitutional choice: it may continue contracting to provide foster care family certification services under the City's contract subject to the City's prohibition against discrimination or it may stop providing those services. The First Amendment's protection of speech does not require otherwise. The plain and simple fact is that, from a free speech perspective, this case is no different from a case in which an organization sought to participate in this program but refused to engage with prospective foster parents who are Catholic or who vote Republican or who support Black Lives Matter. When acting as an agent of the government, it has no First Amendment right to impose their views on the performance of the government's program.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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