No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL., *Petitioners*,

V.

THE CITY OF PHILADELPHIA, ET AL., *Respondents*.

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

BRIEF OF BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, THE PRESIDING BISHOP OF THE EPISCOPAL CHURCH, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, AND THE EVANGELICAL LUTHERAN CHURCH IN AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

K. Hollyn Hollman
Jennifer L. Hawks
BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY
200 Maryland Ave., NE
Washington, D.C. 20002
(202) 544-4226
bjc@bjconline.org
Counsel for Amicus Curiae Baptist Joint Committee for Religious Liberty

Mark W. Mosier
David M. Zionts
Counsel of Record
Nicole Antoine
Alexander N. Ely
Sarah Suwanda
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
dzionts@cov.com
Counsel for Amici Curiae

Additional counsel listed on inside cover

August 20, 2020

Heather E. Kimmel
UNITED CHURCH OF CHRIST
700 Prospect Avenue East
Cleveland, OH 44115
Counsel for Amicus Curiae United Church of Christ

Mary E. Kostel
Chancellor to the Presiding Bishop of The Episcopal Church
3737 Seminary Road, PMB200
Alexandria, VA 22304
Counsel for Amicus Curiae Presiding Bishop of the Episcopal Church

Thomas A. Cunniff
EVANGELICAL LUTHERAN CHURCH IN AMERICA
8765 W Higgins Road
Chicago, IL 60631
Counsel for Amicus Curiae Evangelical Lutheran Church in America

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are organizations and representatives who serve religious institutions and individuals. *Amici* support strong protections for the free exercise of religion, believe that *Employment Division v. Smith*, 494 U.S. 872 (1990), was wrongly decided, and were part of the campaign to secure passage of the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-4 *et seq*. *Amici* further believe that, in our pluralistic society, the free exercise of religion is not burdened—to the contrary, it is advanced—when government contractors voluntarily performing public functions are asked to adhere to governmental nondiscrimination policies.

The Baptist Joint Committee for Religious Liberty ("BJC") serves sixteen supporting organizations, including national and state Baptist conventions and conferences. It is the only denomination-based organization dedicated to religious liberty and church-state separation issues. It believes that strong enforcement of the First Amendment is essential to religious liberty for all Americans, and since 1936, has worked tirelessly to support the free exercise of religion, including the successful passage of RFRA.

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), all parties have given consent to the filing of this brief or provided blanket consent to the filing of timely amicus briefs.

The Most Reverend Michael Bruce Curry is the 27th Presiding Bishop of The Episcopal Church, a hierarchical religious denomination in the United States and seventeen other countries. Under the Church's polity, he is charged with "[s]peak[ing] God's words to the Church and to the world, as the representative of [the] Church." The Church has adopted a resolution "affirm[ing] its support for religious freedom for all persons" and "affirm[ing] religious freedom as a goal to be sought in all societies." The Church has also adopted a rule which provides that "[n]o one shall be denied rights, status or access to an equal place in the life, worship, governance, or employment of [the] Church because of race, color, ethnic origin, national origin, marital or family status (including pregnancy or child care plans), sex, sexual orientation, gender identity and expression, disabilities or age, except as otherwise specified [in Church rules]." In 2015, the Church adopted a trial rite for the celebration of same-sex marriage, and at the same time "honor[ed]" "the theological diversity of this Church in regard to matters of human sexuality" and confirmed that no ordained person "should be coerced or penalized in any manner" because of his or her "theological objection to or support for" the Church's action in adopting the trial rite, and further required every bishop to "make provision for all couples asking to be married in this Church to have access" to the trial rite.

The General Synod of the United Church of Christ is the representative body of the denomination of the United Church of Christ, a Protestant denomination with more than 800,000 members and nearly 5,000 churches. The General Synod has con-

sistently spoken on issues of religious liberty and the separation of church and state, resolving to "share the blessings of our heritage of religious freedom, and to sustain that precious heritage by extending the right of religious freedom to groups with which we are not in theological agreement," as well as urging the restoration of religious liberty for all, recognizing that "the United Church of Christ, a denomination devoted to religious liberty" must "raise its voice in protest" when religious freedom is abrogated. The General Synod has also consistently adopted social policy statements urging the full inclusion of all individuals in all institutions of society, from marriage to the marketplace to ministry, regardless of their sexual orientation, race or ethnicity, gender identity, religion, disability, economic status, or citizenship, and was the first Protestant denomination to support a right to marriage for same-sex couples.

The Evangelical Lutheran Church in America ("ELCA") is the largest Lutheran denomination in North America and is the fifth largest Protestant body in the United States. The ELCA has over 9,000 member congregations which, in turn, have approximately 3.5 million individual members. These congregations are grouped into and affiliated with 65 synods that function as the regional organizations of this church body. The ELCA was formed in 1988 by the merger of the Lutheran Church in America, the American Lutheran Church, and the Association of Evangelical Lutheran Churches. The ELCA and its predecessor denominations have continually declared opposition to any attempts by government to curb religious liberty through statutory or administrative

measures. The ELCA vigorously supports legislation and policies to protect civil rights and to prohibit discrimination in housing, employment, and public accommodations or services.

* * *

Amici hold differing theological views and maintain different religious teachings and practices regarding a wide range of matters, including about human sexuality and family relationships. Recognizing such religious diversity across the theological spectrum, *Amici* respect the right of religious institutions to maintain and practice their own religious tenets, including with respect to marriage. *Amici* are likewise committed to protecting human dignity and believe that nondiscrimination policies like the ones enforced by the City of Philadelphia in its service contracts serve an important purpose. Far from burdening the free exercise of religion, a government's ability to ensure that those who carry out government functions do so in accordance with that government's nondiscrimination policy advances the cause of religious liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

When religious organizations decide as part of their ministry to contract with a state or local government to assist in the delivery of child-welfare services, that is both laudable and valuable. Governments, religious organizations, and the people have long benefitted from such governmental partnerships with religiously affiliated charitable groups. Indeed, partnerships between the government and

faith-based groups playing a role in social services is a strength of this country's pluralistic tradition. At the same time, no organization—religious or secular—is entitled to veto the government's choices on how a public program is to be run. Requiring government contractors to adhere to nondiscrimination policies in their performance of a public function does not burden religion. To the contrary, it protects the integrity of government-funded services and religious freedom. Granting government contractors a constitutional veto over nondiscrimination policies would *harm* the cause of religious liberty.

We agree with Petitioners and their *Amici* that *Employment Division v. Smith*, 494 U.S. 872 (1990) is insufficiently protective of free exercise values and was incorrectly decided. But the Court need not decide whether to overrule that precedent in this case, because the City of Philadelphia's nondiscrimination policy would survive under any standard, whether or not *Smith* remains good law.

The City has a clear compelling interest in prohibiting discrimination, particularly when such discrimination occurs in the administration of a government program. In fact, in addition to its interest in ensuring equal access to service and individual dignity, the City's nondiscrimination policy plays a critical role in *advancing* religious liberty. Like many nondiscrimination policies, the City's Fair Practices Ordinance protects against discrimination on a number of grounds. Not only does it ensure that foster care agencies cannot reject same-sex couples on the basis of sexual orientation, it likewise guarantees that agencies cannot reject prospective families on the basis of religion. The City's nondiscrimination

policy also does not impose any burden, much less a substantial burden, on the free exercise of religion. There is no burden where internal government conduct incidentally affects religion, even where the government's conduct may significantly impact an individual's religious exercise. *See Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). That is particularly true where, as here, the government has contracted with a private party for the performance of a public function. Indeed, the City is free to condition participation as a government contractor based on Catholic Social Services' adherence to the City's nondiscrimination policy, even if it impinges on otherwise-protected conduct. *Rust v. Sullivan*, 500 U.S. 173, 192–93, 196 (1991).

If governments like the City of Philadelphia are told that they may not contract out a social program without losing the ability to ensure that the program adheres to its public policy, many such governments may decide to simply perform these services themselves through public employees, and not create opportunities for faith-based organizations to play a role. There is no question that such a choice would be constitutional—and that it would be a loss for those driven by their faiths to serve.

Ultimately, any qualified organization, religious or otherwise, remains free to participate as a government contractor in helping the City carry out its public duty of delivering foster care services. The City properly requires that in carrying out this delegated public function, its contractors must adhere to the City's policy of not discriminating on the basis of protected characteristics, including against individu-

als in same-sex marriages or with differing religious beliefs, while certifying potential foster parents. Nothing in the Constitution denies the City that latitude, and a decision to the contrary would ultimately harm this country's traditions of religious liberty and cooperation between government and faith-based service providers.

ARGUMENT

I. *Smith* Was Wrongly Decided, But Need Not Be Overruled in This Case.

Amici agree with Petitioners that *Smith* was wrongly decided. While both legislative and judicial developments since *Smith* have mitigated the negative consequences of that decision, the standard adopted in *Smith* does not pay sufficient regard to free exercise values and should be revisited in an appropriate case.

This, however, is not that case. At issue here is the special circumstance of a religiously affiliated organization voluntarily choosing to contract with a government agency to perform public functions that the government must provide and has chosen to contract out. Because the City of Philadelphia has a compelling interest in ensuring that its programs—whether performed directly or through contractors—are carried out in compliance with its nondiscrimination policies and in a manner that best protects the children in its care and is respectful of the rights of would-be foster families, the City should prevail under any standard. Deciding whether to overrule *Smith* is unnecessary to resolve the case before the Court.

Smith deviated from the constitutional text, history, and tradition, as well as this Court's prior precedents. The result was an interpretation of the Free Exercise Clause that is insufficiently protective of religious liberty and the principles of freedom of conscience that undergird the Constitution's protections for religious thought and practice. *Smith*'s approach effectively shields free exercise claims from the heightened review afforded to other constitutional protections. Yet "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such . . . If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Two particular problems with *Smith* stand out.

First, *Smith* paid insufficient attention to constitutional history and the founding-era evidence about the scope of the Free Exercise Clause. Distilled to its core, the Free Exercise Clause is a substantive right protecting freedom of conscience and worship for individuals. As James Madison observed, religion "must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS ¶ 1 (1785).

Before (and indeed after) *Smith*, the Supreme Court has recognized that the free exercise of religion is a vital constitutional right rooted in freedom of individual conscience. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause

embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment . . ."). Properly construed, the Free Exercise Clause exists "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). Although it is not the focus of this brief to provide such a detailed historical analysis, an appropriately nuanced treatment of the clause would benefit from such an inquiry—an important omission in *Smith*.

Second, *Smith* was in tension with other Supreme Court case law from the moment it was decided. For instance, in *Wisconsin v. Yoder*, in which Amish parents challenged compulsory school attendance, the Court noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion," and that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." 406 U.S. 205, 215 (1972). And in *Sherbert v. Verner*, 374 U.S. 398 (1963)—a case concerning whether a member of the Seventh-day Adventist Church could be compelled to work on Saturdays—the Court found it was clear that the requirement of Saturday work "imposes a[] burden on

the free exercise of appellant's religion." *Id.* at 403.[2] In analyzing the law's consistency with the Free Exercise Clause, the Court held that such a requirement could be sustained only if the "burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" *Id.*; *see also Roy*, 476 U.S. at 728 (O'Connor, J., concurring) ("Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.").

There was no pressing need for the Court to depart from this prior precedent in *Smith*. The *Sherbert* balancing test was already, and appropriately, respectful of the governmental interest in applying generally applicable laws even-handedly. Determinations of when particular laws burden religious exercise to the point that the Constitution mandates an exemption calls for judgment, and federal courts are well-suited to supply that judgment in a case-by-case manner. *See Smith*, 494 U.S. at 899, 902 (O'Connor, J., concurring) ("[T]he sounder

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[2] As noted in the brief of the Support Center for Child Advocates and Philadelphia Family Pride, *see* Intervenor-Respondent Br. 12–13, the government contracting aspect of this case renders it distinct in meaningful ways from the *Sherbert/Yoder* line of cases, which generally have assessed the Free Exercise implications of "direct regulation of private conduct or the provision of benefits to the public at large," *id.* at 14, rather than a voluntary choice to contract with the government to perform a government function.

approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling.").

The rule adopted in *Smith* was likely not even necessary to reach the result of *Smith*. Indeed, "established free exercise jurisprudence" might reasonably have supported the conclusion that the State of Oregon had a compelling interest "in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct 'will unduly interfere with fulfillment of the governmental interest.'" *Smith*, 494 U.S. at 907 (O'Connor, J., concurring) (quoting *United States v. Lee*, 455 U.S. 252, 259 (1982)).

Subsequent developments both in Congress and the Judiciary have helped to avoid some of the potentially harmful consequences that religious liberty advocates, such as *Amici*, feared would result from *Smith*. For instance, the enactment of RFRA, for which *Amici* campaigned, applies heightened scrutiny to governmental actions that interfere with religious practices, requiring that the federal government use the least restrictive means possible to achieve its compelling interests. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring); *see also Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (noting that RFRA "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*"). This test has proven both workable and

appropriately respectful of both religious exercise and the government's legitimate interests, resulting in an approach that is similar to the pre-*Smith* standard for federal law. Many state legislatures have passed similar laws.

Additionally, this Court has properly recognized that facially neutral and generally applicable laws may in fact be pretextual attacks on religious exercise, or applied in a way suggesting animus toward particular religious beliefs.[3] *See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). This Court's cases "forbid[ing] subtle departures from neutrality," *Gillette v. United States,* 401 U.S. 437, 452 (1971), have thus clearly survived *Smith*, even if reasonable people could disagree on the application of these principles in particular cases.

In short, in the view of *Amici*, *Smith* was not correctly decided. It does not, however, need to be overruled to resolve the case now before the Court. This is not a case about generally applicable laws regulating the general public and in so doing incidentally burdening religious exercise. Rather, it concerns voluntary contracting with a government to perform a public function on its behalf. The standard for reviewing generally applicable laws that burden religious exercise should be decided in a case

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[3] *Amici* recognize that Petitioners make that claim here, but the district court found on the evidentiary record before it that there was no pretextual attack or animus toward religion. *See* Pet. App. 85a.

in which a generally applicable law burdens religious exercise, not one in which a religiously affiliated organization wishes to be a contractor to perform a governmental function without adhering to the government's standards.

Religious institutions participating in government-administered social programs like foster care services perform an immensely valuable function. Indeed, the reality of faith-based groups playing such a role in public life is a great strength of our pluralistic society. It is precisely because these services are so important that an entity making a voluntary choice to participate in such a public program is not entitled to displace the government's nondiscrimination laws and policies in administration of the government's own program.

Put another way, and as further explained below, because the Free Exercise Clause exists "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," it is "necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Schempp*, 374 U.S. at 223. A religious entity cannot make a showing of such "coercive effect" when it makes a voluntary choice to participate in carrying out the government program in question. *See Smith*, 494 U.S. at 894 (O'Connor, J., concurring) (collecting cases) ("To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct . . ."). The proper result in this case does not depend on whether *Smith* is overruled.

II. The First Amendment Does Not Prohibit Conditioning Receipt of a Government Contract to Perform a Government Function on Adherence to a Nondiscrimination Policy.

The Free Exercise Clause does not require the City to provide a contract to perform a government function to a contractor unwilling to do so in the manner prescribed by the government. A City's nondiscrimination policy governing the performance of public services represents a paradigmatic example of a valid compelling interest. And requiring would-be government contractors to carry out a government function in line with public policy does not substantially burden religion. To the contrary: enforcing nondiscrimination in the delivery of public services *advances* the cause of religious liberty, and is a vital predicate for the ability of faith-based organizations to participate in social services on equal footing.

A. Preventing Discrimination In the Delivery of Government Services Is a Compelling Governmental Interest That Offers Critical Protection To Religious Liberty.

Hard cases can arise when a government's important interests must be balanced against substantial burdens on religious exercise. This is not such a case. Here, the City's nondiscrimination policy reflects not only a valid and compelling interest, but one that *advances* religious liberty, rather than infringes upon it. Nondiscrimination laws like the Fair Practices Ordinance offer critical protection to religious liberty in a pluralistic society, as do nondis-

crimination provisions included in government contracts.

The United States is comprised of a rich tapestry of cultures, beliefs, and creeds. At our core, "we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' . . . and [] we value and protect that religious divergence." *Smith*, 494 U.S. at 888–89 (internal citation omitted). Not surprisingly, this intersection of varying religious beliefs and creeds leads to differences of opinion. And yet the American experiment contemplates that individuals may not only coexist peacefully in spite of their differences, but may participate in society with equal dignity. This belief in human dignity, and that individuals can peacefully coexist despite our differences, unifies *Amici* as a foundational matter of faith.

It is also recognized in the law. As the Court has confirmed, "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece*, 138 S. Ct. at 1727. "[W]hile . . . religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Id.*; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260–61 (1964) (prohibition of discrimination in public accommodations does not interfere with personal liberty). Ensuring respect for the equal dignity of all people is certainly no less important when the *government* administers a

program, in this case one focused on the best interests of children that are in that government's own custody.

This Court's recognition of the government's compelling interest in prohibiting discrimination on the basis of sexual orientation also applies to prohibiting discrimination on the basis of religion. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Where, as here, a government delegates to a contractor the responsibility for carrying out a government function, *see* 55 Pa. Code §§ 3700.61, 3700.62 *et seq*., it surely must be within that government's power to prohibit those contractors from discriminating against some, or all, religious denominations. That is exactly what the City's Fair Practices Ordinance, incorporated expressly into the City's contract with Catholic Social Services, does, stipulating that a provider may not discriminate based on a number of protected characteristics, including religion and sexual orientation. JA 654. If a foster care agency were unwilling to accept a prospective family on the basis of its religion, the City's nondiscrimination policy would make that organization ineligible to receive a government contract. Even if that agency had a religious reason for preferring some families over others, that cannot affect the legitimacy of the government's compelling interest in enforcement of its nondiscrimination policy.

Such discrimination on the basis of religion is hardly speculative. In fact, it is already happening. For instance, a state-contracted foster care agency in South Carolina, which only accepts families that

agree with the agency's doctrinal statement and who are active members of a particular church, excluded a prospective foster parent "because of her Catholic faith." *Maddonna v. United States Dep't of Health & Human Servs.*, No. 19-cv-03551, Dkt. No. 43, at 1 (D.S.C. Aug. 10, 2020). Some people of faith might sincerely believe that it would be detrimental to place a child with a family of a different religious faith. For example, they might see placing a child with a parent or parents of a certain religion as endangering that child's spiritual wellbeing—either by depriving the child of the opportunity to observe spiritually necessary religious practices, or by subjecting that child to what they believe are spiritually harmful practices. Others might oppose interfaith marriage and be unwilling to play a role in a child being placed in such an environment. Or, someone with secular beliefs might hold the view that any religious affiliation would not be in the best interests of the child, and could therefore discriminate against religious families.

To be very clear, *Amici* do not intend to denigrate such beliefs. They represent entirely legitimate reasons not to volunteer to contract with the government to perform foster care services on its behalf. At the same time, if the City were not allowed to prohibit its contractors from discriminating, would-be foster parents could face governmental discrimination for their religious beliefs. The City's decision to require government-sponsored foster care agencies to consider all qualified parents thus ensures that all communities—including religious communities—are treated by their government with equality and dignity. It also furthers the ultimate

purpose of a public program for foster placement: safeguarding the best interests of children within the government's custody by recruiting the broadest possible pool of qualified foster parents to care for them.

Contrary to Petitioners' suggestion, the City's compelling interest in prohibiting discrimination does not become less valid or compelling merely because other contractors are willing to adhere to the City's nondiscrimination policies. *See* Pet. Br. 36. If, for example, a city placed a sign on certain public buses saying "No Baptists Allowed," it would hardly be a defense to say that the city operates other buses on which Baptists are permitted. A prospective foster parent that is rejected for being Baptist, or for being in a same-sex marriage, or another protected characteristic, is likewise a victim of discrimination, whether or not some other agency is willing to consider them. Rejection as a foster parent by an agency carrying out a delegated government function, whether for reasons of sexual orientation or religion, carries with it the sting of public rejection, and at least the implication of state-sanctioned discrimination. These harms are grave and destructive to the human dignity in a pluralistic society. To require the City to allow its contractors carrying out a public mission to discriminate on the basis of prospective parents' sexual orientation—or on the basis of their religion or other protected characteristic—would gravely undermine the City's compelling interests.

B. A Government's Ability To Establish Policies for its Own Programs Helps Ensure The Viability of Governmental Partnerships With Faith-Based Groups.

The ability of a government to require its contractors to adhere to a nondiscrimination policy also protects religion in another way: it is a bulwark for religious participation in the delivery of social services. *Amici* greatly respect and value the religious reasons behind an organization's mission to help children find loving homes. Faith-based groups are often inspired by their religious values to partner with government entities in beneficial social programs, and Catholic Social Services is a prime example of the good that a faith-driven organization can do. This is beneficial for both faith-based organizations and government, but most of all the people that benefit from these services—here, the children in need of safe homes. Because of this, the federal government has sought to encourage inclusion of religiously affiliated organizations in performing public services, particularly those directed at helping the needy, and "welcome[d] them as partners." Exec. Order No. 13199, 66 C.F.R. 8499 (2001) (establishing White House Office of Faith-Based and Community Initiatives).

But this whole enterprise would falter if participation by religious organizations means dictating public policy. Allowing the views of religious partners to control policy in this way risks improper

entanglement.[4] And if governments like the City of Philadelphia are told that they may not contract out a social program without losing the ability to ensure the program adheres to public policy, many such governments may well decide to simply perform these services themselves through public employees. *Cf. Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (explaining that, in holding that subsidies for private education must extend to religious and non-religious institutions alike, "[a] State need not subsidize private education"). Such a decision would be perfectly constitutional, but would mean fewer opportunities for participation in some kinds of religiously meaningful work, like helping the City recruit and support stable families to temporarily care for abused and neglected children in the City's custody. That would hardly be a victory for religious liberty.

The City's nondiscrimination policy thus makes it possible for the City to delegate a role in foster placement services; for religious and secular agencies alike to participate on equal footing in that public program; for the City to ensure it is not compromising on its ability to place the children within its custody in appropriate homes; and for the City to en-

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[4] The Court recently affirmed the constitutional independence of churches and other religious institutions to decide "matters of faith and doctrine," noting, however, that it did not entail a "general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Protection of a religious entity's internal decisions about faith and doctrine cannot dictate government policies or alter government's ability to decide how to operate its programs.

sure that prospective parents are not singled out for rejection on the basis of their religion, their sexual orientation, or other protected characteristics. Far from burdening religious liberty, the City's choice protects the religious liberty of prospective foster parents and ensures that faith-based organizations have the ability to serve.

C. Conditioning a Government Contract to Perform a Government Service on Adherence to the Government's Nondiscrimination Policy Does Not Substantially Burden Religion.

The City could not burden the free exercise of religion where, as here, it merely requires organizations contracting with the City to fulfill a government function in compliance with its nondiscrimination policy. There is no free exercise right to extract a subsidy for religious work in a government program that contravenes the City's own, democratically determined conception of the public interest.

To begin, there is no free exercise burden where internal government conduct incidentally affects religion, even where the government's conduct may significantly impact an individual's religious exercise. *See Roy*, 476 U.S. at 699–700 (holding that requirement that appellees obtain and use a Social Security number to access public benefits did not violate the Free Exercise Clause even though it impacted appellees' religious practices); *Lyng*, 485 U.S. 439 (holding that government plan to build a road through a forest sacred to appellants' religion did not burden their free exercise). As the Court ob-

served in *Roy*, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 476 U.S. at 699–700. That is true even where "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." *Lyng*, 485 U.S. at 449.

Nor does this case involve a "condition[] upon public benefits," such that an exception for religious conduct would be necessary. *Sherbert*, 374 U.S. at 404–05 (holding that denial of unemployment benefits based on petitioner's religious refusal to work on the Sabbath violated the Free Exercise Clause because it "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship"). The opportunity at issue in this case is the ability to contract with the City to provide a public service on behalf of the City, namely, certifying potential foster families. Contracting with the City to certify foster families on behalf of the City—a delegated government function that is paid for by the public[5]—is not a "public benefit" akin to receipt of unemployment payments. *Cf. id.* at 404. It is not a benefit available to all, and it does not subsidize private action.[6] Nor is conditioning receipt of a government contract to perform a

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[5] *See* 55 Pa. Code §§ 3700.61, 3700.62 *et seq*.

[6] This case does not implicate private adoptions, but rather the government's discharge of its responsibilities to children in its own custody. *See* Intervenor-Resp. Br. 24.

government function on the contractor's agreement to follow the City's nondiscrimination policy a "fine" on worship. *Id.* Instead, Catholic Social Services seeks to assert a "veto over public programs" that do not comport with its religious views. *Lyng*, 485 U.S. at 452. Thus, here, as in *Lyng*, "[w]hatever rights" Catholic Social Services may have to apply to be a government contractor certifying potential parents in the foster system, "those rights do not divest the Government of its right to [direct] what is, after all, *its* [foster program.]" *Id.* at 453.

That the government's management of its internal affairs does not burden religion is particularly true where, as here, the government conduct involves provision of government contracts to private entities to perform a public service. The government is free to condition funding for a government program on the recipient's willingness to adhere to the government's public policy goals as long as those goals are constitutional while implementing the government's program, even if implementing those policy goals impinges on otherwise-protected conduct. *See Rust*, 500 U.S. at 192–93, 196 (holding that rule prohibiting projects receiving funding through Title X of the Public Health Services Act from counseling or referring women regarding abortion did not violate the First Amendment).

Thus, as this Court has explained, the government can constitutionally require the recipient of government funding to use those funds in the manner prescribed by the program, so long as the government's requirements do not extend to the recipient's conduct *outside* the program. *Id.* at 196–98. The relevant distinction is whether the conditions

"define the limits of the government spending program," by "specify[ing] the activities Congress wants to subsidize," or "seek to leverage funding to regulate speech outside the contours of the program itself." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) (holding that government's requirement that participating organizations entirely adopt a specific view violates the First Amendment because it "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program").

The recipient of the government funding therefore does not give up their right to speak on contrary views—or, as here, to maintain and exercise their religious views—only the right to speak or act on those views *through the particular project* funded by the government. *Rust*, 500 U.S. at 197. In doing so, "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Id.* at 196. That is wholly constitutional. *Id.*; *Agency for Int'l Dev.*, 570 U.S. at 218.

And it is exactly the situation here. The City has a valid interest in administering a public program to be run in accord with its own public policies, and the City's nondiscrimination policy is indisputably an important public policy. If anything, the rationale behind *Rust* is doubly true here. Certifying potential foster families is a core government function, one that the City has a "duty" to provide under state law. *See* 62 Pa. Stat. § 2305 ("The local authorities of any institution district shall have the power, and . . . duty to provide those child welfare services designed to

. . . provide in foster family homes or child caring institutions adequate substitute care for any child in need of such care."). The City is not merely funding a program to further policy goals, as the federal government was in *Rust*, but "delegat[ing]" to a private entity a mandatory government function to perform. 55 Pa. Code § 3700.61.

The nondiscrimination provision is intimately linked to that core function. The City's policy ensures that the opportunity to foster a child is available to all people who can provide a safe environment for children in need of a home, and that this opportunity is not denied on account of protected characteristics. Further, the nondiscrimination provision only applies to the organizations' actions *within* that program performing that function. *Cf. Agency for Int'l Dev.*, 570 U.S. at 218. It does not leverage the program to compel Catholic Social Services, or any other agency, to adopt the City's viewpoint outside the program. *See id.* As the City has repeatedly affirmed, Catholic Social Services is free to espouse and follow its views on same-sex marriage outside the confines of government-sponsored foster-family certification. The City has continued to contract with another organization, Bethany Christian Services, to provide family-certification services, though Bethany Christian opposes same-sex marriage. The City requires that Bethany Christian not discriminate against potential foster-placement parents in same-sex marriages *while it performs a delegated governmental function*—and Bethany Christian is adhering to that requirement.

Neither is Catholic Social Services barred from providing other foster care services under the auspi-

ces of the City. The City still contracts with Catholic Social Services to provide child welfare services, including congregate care services and case management services. Pet. App. 16a, 187a; JA 208–09, 505. Catholic Social Services just cannot vet and certify potential foster families, unless Catholic Social Services is willing to follow the City's nondiscrimination policies in carrying out that government function on its behalf. Far from "leverag[ing] funding to regulate [religion]," *Agency for Int'l Dev.*, 570 U.S. at 218, the City is merely ensuring that the City's duty of vetting and certification of potential foster families is carried out in conformity with the City's nondiscrimination policies and its objective of identifying a broad pool of qualified foster parents to care for children in need.

This Court's cases concerning the free speech rights of public employees present a useful analogy. The First Amendment of course protects an individual's right to criticize the government, but public employees lack a free speech right to contradict the government's policy while performing government functions. *See Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006). Indeed, "[r]estricting 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 exercise of employer control over what the employer itself has commissioned or created." *Id.*

The same is true here, the only difference being that the City has contracted out a government function to a private contractor, rather than hired its own employees to perform the same function. Just as a

government can limit its employees' on-the-job speech without running afoul of the First Amendment, so too can a government require its contractors, who voluntarily agree to perform a government function, to do so in a manner consistent with its public policies. *See, e.g.*, *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 150, 153 (2011) (holding, in the context of constitutional challenge to background checks, that government's interest in managing contractors was as strong as its interest in managing employees); *see also Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 673–74 (1996) (explaining in the context of free speech protections for government contractors that the "similarities between government employees and government contractors with respect to this issue are obvious"); *Rust*, 500 U.S. at 198–99 (explaining that the free speech rights of employees of organizations receiving federal grants were not impinged by the grant program's restrictions on speech).

Here, Catholic Social Services' refusal to certify potential foster families because of its religious beliefs on same-sex marriage is done pursuant to its duties as a government contractor implementing the public foster care system. Similar to *Garcetti*, the government's enforcement of a nondiscrimination policy in the operation of those *public* duties is fully within the government's power to ensure that government contractors implement the government's mission while performing public duties.

These cases confirm that the Free Exercise Clause cannot compel the government to modify a public program to align with Petitioners' beliefs. *Roy*, 476 U.S. at 699–700 ("The Free Exercise Clause

simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."). This is the case even where the contract involves services that the religious organization considers to be part of its ministry. *See* Pet. Br. 4. As the Court explained in *Lyng*, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." 485 U.S. at 452. Indeed, as here, "[a] broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs." *Id.* If import and sincerity were the only deciding factors for whether a religious belief required government accommodation, there would be no limit to the number of concessions required. Many different religious doctrines will interact with many different government services, and the Court is rightly loathe to second-guess the sincerity of belief or the centrality of that belief to the religion. "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Id.*

Finally, contrary to Petitioners' argument, *see* Pet. Br. 51–52, this case is not like *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), nor is it like *Espinoza*, 140 S. Ct. 2246. The principle at stake in those cases was that "once a State decides to [subsidize private education], it cannot disqualify some private schools solely because they are religious." *Espinoza*, 137 S. Ct. at 2261.

Thus, the key inquiry in *Trinity Lutheran* and *Espinoza* was whether the government's policy "disqualif[ies] otherwise eligible recipients from a public benefit 'solely because of their religious character.'" *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). The City's policy does not do so: the nondiscrimination policy applies to religious and nonreligious agencies alike. In fact, far from disqualifying some foster care organizations because they are religious, the City welcomes participation in this government function by religious and non-religious organizations alike, as evidenced by their longstanding and continued participation in the program. Consequently, the nondiscrimination provision does not run afoul of *Espinoza* because it does not bar participation based on religious *status*. *Espinoza*, 140 S. Ct. at 2257. Ultimately, Catholic Social Services is free to act as a government contractor and participate in the foster parent vetting program while promoting its religious beliefs in ways that are consistent with the Constitution and the government contract. Catholic Social Services cannot, however, demand the opportunity to perform a delegated government function while refusing to vet potential foster parents in same-sex marriages, in violation of the City's democratically determined public policies. The City's nondiscrimination policy, as applied to all its contractors, is both perfectly constitutional and protective of religion, as nondiscrimination provisions do as much to protect religious communities as they do people of different races, genders, and sexual orientation.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

K. Hollyn Hollman
Jennifer L. Hawks
BAPTIST JOINT COMMITTEE
FOR RELIGIOUS LIBERTY
200 Maryland Ave., NE
Washington, D.C. 20002
(202) 544-4226
bjc@bjconline.org
Counsel for Amicus Curiae Baptist Joint Committee for Religious Liberty

Heather E. Kimmel
UNITED CHURCH OF CHRIST
700 Prospect Avenue East
Cleveland, OH 44115
Counsel for Amicus Curiae United Church of Christ

Mary E. Kostel
Chancellor to the Presiding Bishop of The Episcopal Church
3737 Seminary Road, PMB200
Alexandria, VA 22304
Counsel for Amicus Curiae Presiding Bishop of the Episcopal Church

Mark W. Mosier
David M. Zionts
Counsel of Record
Nicole Antoine
Alexander N. Ely
Sarah Suwanda
COVINGTON & BURLING LLP
850 Tenth Street NW,
Washington, DC 20001
(202) 662-6000
dzionts@cov.com
Counsel for Amici Curiae

Thomas A. Cunniff
EVANGELICAL LUTHERAN CHURCH IN AMERICA
8765 W Higgins Road
Chicago, IL 60631
Counsel for Amicus Curiae Evangelical Lutheran Church in America

August 20, 2020