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 FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners on its own behalf.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF champions the ability of all Americans regardless of race, sex, religion, sexual orientation, or other characteristic to enjoy equal protection under the law and access to the advantages of civil society. LGBTQ couples should and do have access to foster and adoptive services in Philadelphia. The City can protect pluralism and help families meet their individual needs by working with an array of foster agencies to meet those diverse needs.

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case exemplifies the lasting tension between a vigorous volunteer society in which diverse participants supply abundant solutions to common problems and the propensity of the state to limit participation to those who conform to the prevailing point of view. In *Democracy in America*, Alexis de Tocqueville marveled at the peculiar talent of Americans to spontaneously join forces to achieve goals, great and small—notwithstanding wide-ranging viewpoints—and the mutually reinforcing relationship between voluntary association in civil society and political self-governance. But he also noted the risk that an encroaching state could subdue the skill of spontaneous association to the peril of civil society and self-governance.

The questions presented here are important because the rights protected by the First Amendment are interdependent and cannot be robustly defended in isolation. A jurisprudential divergence in the treatment of free speech cases from free exercise cases has resulted in (and from) cases in which greater protection is conferred on the expression of an idea than on the belief from which that expression arose—if that belief is religious. Hence, this case, in which the City of Philadelphia has excluded Catholic Social Services ("CSS") from providing fostering services, not based on their conduct, but because, in the City's opinion, CSS believes the "wrong" thing and thus refuses to say the "right" thing as dictated by the City.

The Third Circuit exacerbated this dilemma by imposing an additional burden on religious actors: to prove hostility on the part of the state before their free exercise rights can be vindicated. In doing so, the City

deprived children and prospective parents of much needed fostering services.

This Court should protect CSS's First Amendment rights and, in doing so, provide a bulwark against state erosion of the entrepreneurial civil society Tocqueville rightly lauded.

INTRODUCTION

Alexis de Tocqueville warned that "[f]or men to remain civilized or to become so, the art of associating must become developed among them and be perfected," observing that "[i]n democratic countries the science of association is the mother science; the progress of all the others depends on the progress of the former."[2] Indeed he considered there to be a necessary connection between the principle of association and that of equality, because, if equal—*i.e.*, equally powerless—individuals never "acquire[d] the habit of forming associations in ordinary life, civilization itself would be endangered."[3] He marveled at the alacrity with which Americans spontaneously formed associations and "most perfected the art of pursuing in common the object of their common desires . . . [applying] this new science to the greatest number of things."[4]

Tocqueville's observations are as true now as they were then. But the characteristically American art of spontaneously forming voluntary associations is at

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[2] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 902 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835), *available at* https://bit.ly/36Sm7QQ (LF Printer PDF format) [hereinafter "DEMOCRACY IN AMERICA"].

[3] *Id.* at 897-98.

[4] *Id.* at 897.

peril where, as here, the state excludes participants based on viewpoint rather than respecting the capacity of voluntary associations to "achieve the object of their common desires" by accommodating differences of opinion.[5]

In addition to building a society of equals, Tocqueville saw associations playing another more-personal role—developing the minds and morals of the people and fitting them for self-government.[6] He observed that "[s]entiments and ideas are renewed, the heart grows larger and the human mind develops only by the reciprocal action of men on each other."[7] These complementary competencies form a virtuous cycle to sustain a free and democratic society: external emerging associations create the building blocks of society, and internal morals and ideals, developed through association, in turn feed the ability to work

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[5] "If men who live in democratic countries had neither the right nor the taste to unite for political ends, their independence would run great risks, but they could for a long time retain their wealth and their enlightenment; while, if they did not acquire the custom of associating in ordinary life, civilization itself would be in danger." *Id*. at 898.

[6] Daniel Stid, *Civil Society and the Foundations of Democratic Citizenship*, Stanford Social Innovation Review (Aug. 16 2018), https://bit.ly/3duvj0E (last visited May 28, 2020). "The second role that Tocqueville saw associations playing . . . was indirect: drawing individuals out of their private concerns, where they would otherwise stay focused and striving, and enabling them to be part of something larger than the circumstances of their own existence. In doing this, they invariably had to rub elbows and learn to work with others with different interests and points of view. And in this way, those participating in associations became better collaborators, leaders, and citizens." *Id.*

[7] 2 DEMOCRACY IN AMERICA 902.

together to preserve a free society and the progress of all other arts within it.

Tocqueville also saw associations as the bulwark against isolated individuals becoming subdued by a government that alone acted as the font of ideas, opinions, and the energy necessary to undertake great goals. Without voluntary associations, a destructive cycle would ensue, weakening the will and the ability of individuals to manage their own affairs. "The more [government] . . . puts itself in the place of associations, the more individuals, losing the idea of associating, will need it to come to their aid. These are causes and effects that engender each other without stopping."[8]

Perhaps we have always lived on the cusp of such a disaster; but now much of the populace can isolate in their homes or limited social circles and avoid challenging opinions and ideas from those who think differently from themselves. Unknown "others" can be excluded from the public discourse or ostracized from society because powers that be pronounce them to be *backward*, *hateful*, or just plain *wrong*.

Yet, that is what is occurring here.[9] CSS has been providing adoptive and foster services in Philadelphia

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[8] *Id.* at 900. *See also* Stid, *supra* note 6 ("Tocqueville feared a scenario in which the great mass of Americans . . . would submit to a paternalistic and despotic central government that would rule over them as a shepherd would 'a flock of timid and hardworking animals.'").

[9] The irony, of course, it that sexual orientation has been used to exclude people from public life for decades. For government to discriminate against groups based on their popularity in the public square is wrong, plain and simple—no matter who that group is.

since at least 1917—decades before the City became involved. For over a hundred years, without compulsion or quarrel, CSS has voluntarily addressed the needs of children and the prospective parents who wish to offer those children a home. But due to a public statement of the Archbishop's religious opinion, CSS has now been excluded from providing foster-care services. Their offense: they refuse to agree to pre-certify that same-sex couples meet their own standards for placement. The supposed clash, however, is entirely hypothetical. CSS has never turned a same-sex couple away for that reason and has a practice of referring prospective couples to one of the thirty other foster-care agencies in Philadelphia if another agency would provide a better fit. Nevertheless, substituting Orwell for Tocqueville, the City targeted CSS, requiring that its "thoughtcrime"[10] be eliminated. CSS thus could either change its beliefs, lie about them, or be excluded from a valuable role it has played in the public square for over a century.

It is undisputed that CSS is "not unwilling to work with LGBTQ individuals as foster parents." *Fulton v. City of Philadelphia*, 922 F.3d 140, 148 (3d Cir. 2019). The City's action was a solution in search of a problem, which caused all prospective foster families that work through CSS to be excluded by the City from fostering children. The children were left to do without a placement or hope that, at some point, another family might be provided by a different agency. The risks and lifelong damage imposed on children who are deprived of a loving and secure home

[10] George Orwell, *Nineteen Eighty-Four*, 20 (1949).

are well-documented and frequently irreversible.[11] For special needs and hard-to-place children the risk is particularly acute. But the City disregarded that cost when it ostracized CSS.

At its heart, this case is about forcing CSS to publicly state that which it does not believe. Here, those views have a religious foundation. Under free speech precedent, strict scrutiny would place the burden on the government to justify infringement that is presumptively invalid. Under free exercise, the analysis is made thornier by the Third Circuit's novel theory that CSS has the burden to show, not just infringement, but that the City's actions were based on hostility. This jurisprudential divergence creates a conflict this Court should reconcile or risk excising volunteers from public life whose beliefs and public statements are founded in religion.

Purging thoughtcrime from the public square is not without cost. In the limited realm of child placement, and other need-based social services, religious actors provide a disproportionately large percentage of support to people in need. Even if that were not the case, the cumulative effect of excluding volunteers *seriatim* as new movements emerge would strip civil society of its needed depth and resiliency.

FACTUAL BACKGROUND

CSS is a religious foster-care agency and ministry of the Archdiocese of Philadelphia. *See* Pet. Br. 3–5. CSS serves the people of Philadelphia through immigration assistance, providing homes for

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[11] *E.g.*, Expert Report of Karen Strachan, *Buck v. Gordon*, No. 1:19-cv-00286-RJJ-PJG, ECF 42-3, at 11 (W.D. Mich., filed 06/12/19).

unaccompanied minors, running residential homes for at-risk teens, providing food and shelter for the homeless, and other ministries. Cert. Pet. 5–6. In Philadelphia, more than 6,000 children are in foster care.[12] In March 2018, Philadelphia's Department of Human Services ("DHS") made an "urgent" plea for 300 new foster homes.[13] Finding and working with families to provide foster care for Philadelphia children has been a crucial part of CSS's religious ministry, dating back to at least 1917. Pet. App. 12a. In the 1950s, DHS began partnering with private agencies to facilitate foster care. *See* Pet. App. 255a–256a. Foster care placements are now controlled by the City and it is unlawful to provide foster-care services without a city contract. *See* Pet. Br. 5–6. CSS has had an annually-renewed contract with the City for decades. *See* Pet. App. 137a.

CSS is one of thirty foster agencies that contract with the City. Pet. App. 13a, 56a–57a. Some agencies specialize in serving the Latino community, some focus on those with disabilities, and several specialize in caring for children with special needs. Cert. Pet. 6; *see* Pet. App. 197a. Potential foster families may work through any of these agencies. Pet. App. 197a, 289a. If an agency is unable to partner with a potential foster family, the standard practice is to refer the family to another agency. *See* Pet. Br. 8–9; J.A. 46–47. Examples include referrals for geographic proximity,

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[12] *See* Julia Terruso, *Philly Puts out 'Urgent' Call—300 Families Needed for Fostering*, Philadelphia Inquirer (March 18, 2018), https://perma.cc/C7UH-GGWZ.

[13] *See id.*

medical expertise, specialization in pregnant youth, language needs, and tribal affiliation. *See* Pet. Br. 8.

If an agency believes it can partner with a potential foster family, the agency will then conduct a detailed assessment of the applicant and the relationships of those in the home. *See* Pet. Br. 6–8. This process is called a home study. The City is not involved in home studies and they are not funded under the contract between the City and the agency. *See* Pet. Br. 8. At the conclusion of a home study, the foster agency determines whether it can certify the family for placement. Cert. Pet. 7–8. The City then decides whether to place children in the family's home. Cert. Pet. 8. Philadelphia pays the agencies a *per diem* for each foster child placed in one of its certified homes. *Id*. CSS sends most of these funds directly to foster parents to defray the costs of caring for children. And it also raises additional private funds to cover costs. *Id*.

In March 2018, after the *Philadelphia Inquirer* ran an article discussing the Archdiocese's position on same-sex marriage, the City's Commission on Human Relations opened an inquiry into CSS, and the head of DHS investigated whether religious agencies certified same-sex couples. *See* Pet. Br. 9–11. As a Catholic agency, CSS cannot provide written endorsements for same-sex couples that contradict its religious teachings on marriage. *See* Pet. Br. 9; J.A.171–172; Pet. App. 14a. Philadelphia then cut off CSS's foster-care referrals. Pet. Br. 11. This meant that no new foster children could be placed with any foster parents certified by CSS. *See* Pet. Br. 11. CSS's beliefs about marriage have not prevented anyone from fostering. Philadelphia has a diverse array of foster agencies,

and not a single same-sex couple approached CSS about becoming a foster parent between its opening and the start of this case. *See* Pet. Br. 9.

The effect of excluding religious service providers from adoption and fostering services based on their religious beliefs and teachings is not trivial. For example, in 2012, Catholic Charities affiliates nationwide provided adoption services to more than 31,000 individuals.[14] "Of the more than 3,000 adoptions that Catholic Charities helped complete in 2012, almost 600 infants found families and over 1,700 children were adopted from foster care. That same year, more than 1,600 special needs or 'hard-to-place' children found permanent homes with the help of Catholic Charities."[15]

Without vindication of charities' First Amendment rights, the adverse effect on children can be expected to continue. Philadelphia is not the first governmental entity to ban agencies with "disapproved" beliefs from providing foster care services. For more than 100 years, Catholic Charities in Boston had a successful record of connecting children to permanent families, placing more children in adoptive homes than any other state licensed agency. But state policy that required all state-licensed adoption providers to be willing to place children with same-sex couples ended its participation. In the two decades before it was excluded from providing services, Boston's Catholic

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[14] *See* Ryan Anderson & Sarah Torre, *Marriage And Family Adoption, Foster Care, and Conscience Protection*, The Heritage Foundation, Backgrounder No. 2,869, at 5 (Jan. 15, 2014), *at* https://go.aws/3gEZhRo (accessed May 29, 2020).

[15] *Id*.

Charities helped roughly 700 children find permanent homes.[16]

ARGUMENT

I. THE CITY HAS NOT IDENTIFIED ANY INJURY FROM RELIGIOUS ACTORS' PARTICIPATION IN CIVIL SOCIETY.

As Thomas Jefferson famously wrote in *Notes on the State of Virginia*, "it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[17] So too here. The City derides CSS's conviction but has identified no injury to any person to warrant banning CSS from performing its traditional services.

CSS is "not unwilling to work with LGBTQ individuals as foster parents." *Fulton*, 922 F.3d at 148. Nor has a single same-sex couple approached CSS about becoming a foster parent between its opening and the start of this case. *See* Pet. Br. 9; J.A. 171–172. Moreover, CSS has a practice, common among the agencies that provide fostering services in Philadelphia, of referring prospective families to another agency if it is unable to partner with them. *See* Pet. Br. 9, 36. Those referrals may be made for a variety of reasons, including geographic proximity, medical expertise, specialization in pregnant youth,

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[16] *Id*. at 7.

[17] *See St. Mark Roman Catholic Par. v. City of Phx.*, No. CV 09-1830-PHX-SRB, 2010 U.S. Dist. LEXIS 145304, at *32 (D. Ariz. Mar. 3, 2010) (quoting Thomas Jefferson, Notes on the State of Virginia 159 (Query 17) (William Peden ed., Univ. of N.C. Press 1982) (1784)).

language needs, and tribal affiliation. *See* Pet. Br. 8–9.

Nevertheless, in response to a public statement of the Archbishop's position regarding the Catholic Church's views on marriage, DHS bade CSS and Bethany Christian, another religious provider, to report their policies. When both organizations confirmed that they shared the same view of marriage, DHS called other agencies—all but one of which were non-religiously-affiliated—to ask whether they had similar policies. None did. *Fulton*, 922 F.3d at 148. Rather than taking those findings as evidence of the diverse array of service providers, or even evaluating whether this hypothetical harm was likely to manifest and how it might be ameliorated, the City concluded that dissent by voluntary nonprofit associations like CSS would not be tolerated.

A. Voluntary Association is a Necessary Component of Liberty.

Voluntary associations—large and small, political and civil, commercial and charitable—form the foundation of a free and democratic society. Instilling the habit of associating voluntarily to achieve a mutual goal not only strengthens the skill of spontaneous association, but also develops other characteristics that are crucial to self-government, including the practice of speaking freely, circulating and challenging ideas, and holding government accountable. This aspect of American life is something of an historical oddity, and as such, should be nurtured by preserving participation at all levels lest our talent for self-government should wither.

Tocqueville noted three critical features of the relationship between voluntary civil associations and

the practice of self-government. *First*, associations cannot be limited to only certain aspects of life or the fertile fields of associating will go fallow. Voluntary association must be exercised continually to maintain the people's vitality to undertake great things.[18]

Second, voluntary associations provide stability in a democratic society and reduce risks to the state by allowing people to apply their skill of give-and-take in the political sphere, diffusing the risks of faction and ennui.[19]

Third, civic associations guard against tyranny by providing a font and outlet for fresh and competing ideas so government does not become the sole source of leadership and counsel, allowing these mediating institutions to provide the critical check against

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[18] *See* 2 DEMOCRACY IN AMERICA 915. Tocqueville wrote: "When citizens have the ability and the habit of associating for all things, they will associate as readily for small ones as for great ones. But if they can associate only for small ones, they will not even find the desire and the capacity to do so. In vain will you allow them complete liberty to take charge of their business together; they will only nonchalantly use the rights that you grant them; and after you have exhausted yourself with efforts to turn them away from the forbidden associations, you will be surprised at your inability to persuade them to form the permitted ones." *Id.*

[19] *See id*. at 916. According to Tocqueville: "It is within political associations that the Americans of all the states, all minds and all ages, daily acquire the general taste for association and become familiar with its use. There they see each other in great number, talk together, understand each other and become active together in all sorts of enterprises. They then carry into civil life the notions that they have acquired in this way and make them serve a thousand uses.

So it is by enjoying a dangerous liberty that the Americans learn the art of making the dangers of liberty smaller." *Id.*

government overreach that individuals acting alone cannot.[20]

All three of these beneficial characteristics of voluntary association are imperiled when certain people are excluded from the public square. The give-and-take among ideas and the development of skill in achieving a common goal is necessarily diminished, which in turn undermines the ability of a great people to sustain self-governance.

B. Duty Drives Participation.

Excluding volunteers from providing social services based on religious belief does more than trim the tree of liberty—it takes an axe to the roots. Religious inspiration can manifest in emergent organizations that provide needed services, and religious duty drives responsiveness in times of need. The ubiquitous array of hospitals, food pantries, schools, emergency relief services, substance-abuse

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[20] *Id*. at 901 ("A government can no more suffice for maintaining alone and for renewing the circulation of sentiments and ideas among a great people than for conducting all of the industrial enterprises. From the moment it tries to emerge from the political sphere in order to throw itself into the new path, it will exercise an unbearable tyranny, even without wanting to do so; for government only knows how to dictate precise rules; it imposes the sentiments and ideas that it favors, and it is always difficult to distinguish its counsels from its orders. . . . Associations, among democratic peoples, must take the place of the powerful individuals that equality of conditions has made disappear.").

programs, and countless other social services stand testament to the power of religious motivation.[21]

Tocqueville observed that "[t]here is hardly any human action, no matter how particular you assume it to be, that is not born out of a very general idea that men have conceived of God, of God's relationships with humanity, of the nature of their soul and of their duties toward their fellows. You cannot keep these ideas from being the common source from which all the rest flows."[22] More than a century's experience bears out the durability of charitable services provided by religious organizations for children. From the 1882 founding of St. Vincent's Infant Asylum, and the 1907 founding of the Jewish Home Finding Society in Chicago,[23] to the establishment of CSS in Philadelphia and the 1917 founding of Boys' Town in Omaha,[24] religious institutions have formed the backbone of services to in-need children.

This historical trend continues to hold true. For example, foster parents who become aware of the need for fostering through religious organizations have

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[21] *See generally* Br. of The Catholic Association Foundation, Eternal Word Television Network, Inc., and Religious Sisters of Mercy in Alma, Michigan, *The Little Sisters of the Poor Saints Peter and Paul Home v. Penn. et al.*, Nos. 19-431, 19-454 (U.S. Sup. Ct., filed March 9, 2020).

[22] 2 DEMOCRACY IN AMERICA 743.

[23] *See* E. Wayne Carp, *Adoption in America: Historical Perspectives*, 7 (2002).

[24] *See* History, Boys' Town, *at* https://bit.ly/2TWM1Os (last visited May 28, 2020).

been shown to foster for more years;[25] and foster families who belong to a place of worship have been found to be more willing to foster children who have been deprived or abused.[26] Similarly, "research shows that Christians have engaged in adoption, foster care and other ways of aiding vulnerable children more than the norm. Practicing Christians (5%) are more than twice as likely to adopt than the general population (2%). Catholics are three times as likely. And evangelicals are five times as likely to adopt as the average adult."[27] And, over a hundred years after its creation, Boys' Town has expanded to include a national research hospital for children with hearing and speech disorders that helps 60,000 deaf and hard-of-hearing students each year.[28]

The needs fulfilled by these organizations and others like them are not going away. The child welfare system is "in chronic need of foster and adoptive parents."[29] Excluding willing and able parents from serving would only make a tough situation worse. "It has been well established that the system itself is sorely in need of capacity at every level. Social

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[25] Mary Ellen Cox et al., *Recruitment and Foster Family Service*, 29 J. of Sociology & Social Welfare 151, 166, 169 (2002), *available at* https://bit.ly/3eFX3iK (last visited May 29, 2020).

[26] *Id*. at 171 (citation omitted).

[27] Barna Group, *Three Trends on Faith, Work and Calling* (Feb. 11, 2014), *at* https://bit.ly/3dpRapE (last visited May 29, 2020).

[28] History, Boys Town, *at* https://bit.ly/2TWM1Os (last visited May 28, 2020).

[29] Michael Howell-Moroney, *Faith-Based Partnerships And Foster Parent Satisfaction*, 36 U. of Memphis J. of Health and Human Services Admin. 228, 229 (2013), *available at* https://bit.ly/2MiTwuH (last visited May 29, 2020).

workers in the system are overwhelmed and have little time to engage in capacity-building activities such as foster parent recruitment."[30] And, as a review of state child welfare systems, found: "At least half of the states in the U.S. have seen their foster care capacity decrease between 2012 and 2017."[31]

Moreover, diversity in recruitment of foster parents is critical to finding the best match between parents and child, including:

- Geography: "'When talking about this issue we often get a response saying we appear to have enough placements . . . when we are really in desperate need of more foster homes in order to keep children in their local communities.'"[32]
- Characteristics of Individual Children: "'Providers have restrictions on the types of children they will accept based on age, gender, sibling group size, and level of care, . . . Which translates to: Just because there's an open bed does not mean the foster home or the provider has the capacity to take another child.'"[33]
- Demographics: "One of the demographic shortages experienced by many states is in the area of Latino children. This challenge was noted in the CFSR [federal Child and Family Service Reviews] reports of states including

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[30] *Id*.

[31] John Kelly et al., *The Foster Care Housing Crisis*, at 1 (2017), *at* https://bit.ly/2ArnERW (last visited May 29, 2020).

[32] *Id*. at 7 (quoting Susan Boatwright, Georgia Division of Family and Children Services ("DFCS")).

[33] *Id*. (quoting Susan Boatwright, Georgia DFCS).

> Connecticut, Illinois, Mississippi, Utah and Virginia. . . . The CFSR for several northern states—including Minnesota, Montana, North and South Dakota, and Wyoming—noted a lack of beds available in Native American households."[34]

Free and voluntary involvement of religious organizations in foster and adoptive family recruitment is not a panacea. But it is a critical aspect of diverse and robust placement processes.

C. The Cheese Stands Alone—the Public Square with no Public.

The City's pursuit and condemnation of CSS is but one example of seeking to exclude "disfavored" viewpoints. After all, the "accepted wisdom" is constantly changing. As new opinions come to the fore—arising from robust and free exchange of ideas—must all who disbelieve the newly adopted canon be expunged *seriatim* until the state alone decrees who may participate in civic life?

A cursory review of this Court's association jurisprudence displays the kaleidoscope of participants in public life, the associated efforts of the state to check those with whom it disagrees, and the duty to reject such efforts—regardless of whom they seek to marginalize—that this Court has found time and time again:

- 1930s–1970s: Communist adherents. *E.g.*, *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385

[34] *Id.*

U.S. 589 (1967); *Application of Stolar*, 401 U.S. 23 (1971).

- 1940s–2010s: Union representation. *E.g.*, *Thomas v. Collins*, 323 U.S. 516 (1945); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) *overruled by Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, *Council 31*, 138 S. Ct. 2448 (2018).

- 1950s–1980s: NAACP. *E.g.*, *Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Nat'l Ass'n for Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

- 1920s–present: Families. *E.g.*, *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Over time, perspectives rise and fall but the right to exist, associate, and participate endures.

Here, private agencies provided foster care services for decades before the City became involved. But the government has since made itself the gatekeeper, using comprehensive regulation and mandatory contracts to occupy the public square when it comes to fostering services. *See Fulton,* 922 F.3d at 147–49. In that role, the City has determined that gatekeeping is not enough—it has also commanded that anyone suffered to enter must also proclaim the City's viewpoint. This is because foster agencies are *required* to consider and incorporate familial status into their evaluation of potential foster parents. *Id.* at 147 ("state regulations require [the agency] to

consider an applicant's 'existing family relationships' as part of the certification process."). The government first requires the agency to form an opinion and then dictates what that opinion must be. This it cannot do. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) ("It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say.") (cleaned up).

A single non-conforming viewpoint, on a hypothetical question, was enough for the City to exclude CSS. While this case affects a single agency, it sends a clear message: the City will expel from the public square anyone who is not prepared to echo the City's present views.

As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W.V. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

II. DIVERGENT STANDARDS DICTATE DIFFERENT OUTCOMES FOR RIGHTS PROTECTED BY THE FIRST AMENDMENT.

Justice Thomas recently highlighted the unexplained discrepancy between the Court's treatment of the Speech and Religion clauses in his concurrence in *United States v. Sineneng-Smith*, 590 U.S. ___ (2020).[35] Indeed, there may be cause for

[35] As Justice Thomas explained: "Such arguments are typically raised in free speech cases, but the Court has occasionally

concern that the Speech Clause of the First Amendment is pressed into service where another provision would be a more-comfortable fit.

The First Amendment does not purport to establish a hierarchy among its clauses. This Court has noted "it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme." *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944). Yet jurisprudence has diverged so that the standard applied to infringement of speech varies dramatically from the standard applied to religion, with speech more easily vindicated. To the extent the breach should be healed—or at least reconciled—it is this Court's province to do so.

Two key inquiries—burden and tailoring—may be dispositive in a case that could be decided on either free speech or free exercise grounds. Here, the issue is whether CSS, as a condition for participating in the City's foster-care system, can be required to make a certification with which it does not agree.

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entertained overbreadth challenges invoking the freedom of the press and the freedom of association. Curiously, however, the Court has never applied this doctrine in the context of the First Amendment's Religion Clauses. In fact, the Court currently applies a far less protective standard to free exercise claims, upholding laws that substantially burden religious exercise so long as they are neutral and generally applicable. The Court has never acknowledged, much less explained, this discrepancy." *Sineneng-Smith*, Slip Op. at 3 n.*, 590 U.S. ___ (2020) (Thomas, J. concurring) (cleaned up).

A. In Speech Cases, the Burden is on the Government and Tailoring Must be Narrow.

Requiring CSS to make a certification with which it disagrees would be compelled speech that is both content-based (limited to same-sex couples) and viewpoint specific (directed only at people who disagree). *See, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the . . . [regulation] plainly alters the content of petitioners' speech.") (cleaned up). As such, it is fundamentally at odds with the free speech protection of the First Amendment. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus*, 138 S. Ct. at 2463.

If this case were evaluated under the free speech rubric, the burden would fall squarely on the government to rebut the presumption that the infringement is unconstitutional. That is because "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 828 (1995). That the burden must be borne by the government would be pellucid given the content-based and viewpoint-specific nature of the infringement. "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. "This Court's precedents do not

permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371–72. (cleaned up).

Moreover, the Court has resisted attempts to expand exclusions from free speech protection. *See, e.g.*, *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC,* 518 U.S. 727, 804 (1996) (The Court has "been reluctant to mark off new categories of speech for diminished constitutional protection."); *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371–72 ("Speech is not unprotected merely because it is uttered by 'professionals.'"). This is particularly true regarding exemptions that would be content-based. *See, e.g., United States v. Alvarez,* 567 U.S. 709, 722 (2012). These standards reflect the principle that governments have "'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citation omitted). There is no reason to believe making CSS write certifications contrary to its beliefs would fall into a known exclusion.

To carry its burden under the free speech rubric, the government would have to demonstrate that the infringement passes strict scrutiny—that it "is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 799 (2011). This means the "State must specifically identify an actual problem in need of solving, . . . and the curtailment of free speech must be actually necessary to the solution." *Id.* (citations omitted). Moreover, to be narrowly drawn, a restriction may not be

overinclusive (prohibiting too much protected speech), or underinclusive (restricting too little speech) to meet its goal. *See City of Ladue v. Gilleo*, 512 U.S. 43, 50–51 (1994). "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. This case presents the issue of compelled rather than restricted speech, but the principle is at least as strong: "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

Here, the dominoes fall neatly and quickly. The City has identified no long tradition of compelling speech here, nor could it in light of the voluble national discussion within recent memory. It is undisputed that no same-sex couple ever approached CSS seeking an opportunity to foster. Likewise, it is undisputed that foster agencies refer potential clients among themselves within the normal course of affairs to allow for the best fit between agency and individuals. The compulsion is woefully underinclusive—only compelling speech that agrees with the City's position on a single narrow topic, *e.g.*, the City does not attempt to compel CSS to certify couples in any other form of relationship. These are all burdens that rightfully and lawfully fall on the government that the City could not carry here.[36]

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[36] The Circuit Court's analysis of the Free Speech issue was limited to whether the government can elect to fund the

B. The Third Circuit Placed the Burden on CSS to Prove that Infringement was Based on Hostility.

Instead of placing the burden on the City to justify the infringement, the Third Circuit applied the "valid and neutral law of general applicability" framework from *Smith*. In doing so, it shifted the burden to CSS to prove, not just that its First Amendment rights were infringed, but also that "it was treated differently because of its religion." This required CSS to attempt to "show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Fulton*, 922 F.3d at 154. This burden shift is markedly different from the presumption of invalidity that attaches to a free speech restriction.

Going a step further, the Third Circuit added a metaphysical layer to this quasi-objective test by invoking *Masterpiece Cakeshop*, and *City of Hialeah* to impose a novel burden on CSS to demonstrate the infringement was motivated by "hostility," "animosity," or "lack of sincere commitment," *and* that the City's defenses were "pretextual." *See id.* at 158–159. Thus, the evidence of hostility that was sufficient to show infringement in *Masterpiece Cakeshop* and *City of Hialeah* was transmuted into a necessary element of proof here. *See id.* at 157.

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promotion of certain viewpoints. There is no assertion that the City in this case is funding a program to promote fostering by married same-sex couples nor that CSS would want to participate in such a program. Nor does the City fund the home studies, which is the point in the process in which the agency evaluates the family relationships. The Circuit Court eluded the relevant framework by focusing on a strawman argument.

Requiring a plaintiff to prove the government had a culpable state of mind has no corollary in other First Amendment jurisprudence. Indeed, this Court has made clear that illicit intent "is not the *sine qua non* of a violation of the First Amendment." *Reed*, 135 S. Ct. at 2228 (cleaned up). In cases of viewpoint suppression, the government must justify the basis and scope of the infringement. At no time is the plaintiff required to prove the government had guilty intent. Here, the Third Circuit reversed the burden, relying on *Smith*, *Masterpiece Cakeshop*, and *City of Hialeah* to relieve the City of bearing any burden for the infringement. The gap between a presumption of invalidity in cases of speech infringement and requiring a plaintiff to *prove* the government's state of mind in cases of religious infringement is vast—and an open invitation to rely on the Speech Clause of the First Amendment in lieu of the Free Exercise Clause. This is not only unsupported by the text and history of the First Amendment but does damage to the full protection of all of First Amendment freedoms by placing pressure on some clauses to resolve cases that may be more naturally resolved under others.

CONCLUSION

The foundational freedoms expressed in the First Amendment are necessary to the health of a free society and self-governance. Expelling volunteers from the public square on the basis of "disfavored" views imperils the very building blocks of civil society. For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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