

No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

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

**BRIEF OF LOCAL GOVERNMENTS, MAYORS,
AND U.S. CONFERENCE OF MAYORS AS
AMICI CURIAE IN SUPPORT OF
RESPONDENTS**

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INTEREST OF AMICI AND SUMMARY OF ARGUMENT¹

Amici curiae are 166 cities, towns, counties, and mayors representing more than 53 million Americans across the country.² Amici comprise both metropolises like New York, Chicago, Houston, and Los Angeles and smaller cities like Champaign, Illinois; Iowa City, Iowa; and Carrboro, North Carolina. Amici represent the level of government most closely connected to our Nation's communities, providing a wide range of essential services to enable the members of those communities to live healthy and stable lives and contribute to society.

The amici governments have long chosen to partner with private entities to provide publicly funded services touching many aspects of our residents' lives. These include important social services for the most vulnerable members of our communities—foster care being just one example. And many amici bar contractors from discriminating on the basis of race, religion, gender, sexual orientation, or other protected characteristics when they deliver government services.

¹ Pursuant to Supreme Court Rule 37, the parties to this matter have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

² Amici also include the U.S. Conference of Mayors, a nonprofit, non-partisan organization of cities with a population of 30,000 or more. A complete list of amici is set forth in the appendix.

Amici have a strong interest in whether the First Amendment permits private providers under contract with local governments to opt out of such nondiscrimination requirements, designed, as they are, to ensure the fair, equitable, and neutral delivery of public services. Requiring amici to facilitate and fund the provision of services by private entities that refuse to work with certain members of our communities would implicate amici in conveying a message of exclusion that we find it of paramount importance to avoid.

Religious exemptions would also impair amici's ability to deliver essential government services effectively. Government-funded services are often the last resort for members of our communities most in need of assistance. Reaching those individuals and families—building their trust and fostering their connections to the community—can be a tremendous challenge. Adding barriers to access unrelated to eligibility for public services—such as provider-based exclusions of certain groups—would make it only more difficult to reach those in need of support. And it is by no means clear that in every community, particularly smaller communities, there will be alternative contractors to meet the needs of groups excluded because of a contractor's religious objections.

A ruling in petitioners' favor would open the door to a variety of claims for religious exemption from innumerable generally applicable provisions of public contracts. Petitioners' challenge, if successful, could therefore lead amici to curtail the use of contracting for public services, and thus to forgo the many benefits to local governments and their residents that come from partnering with private entities.

ARGUMENT

I. Amici rely on contracts to deliver a wide range of public services in their diverse communities.

Partnerships between government and private entities play a vital role in the delivery of public services. Governments have partnered with private parties for this purpose since the Founding—the First Congress authorized Treasury Secretary Alexander Hamilton to contract for the construction and maintenance of a lighthouse for the Chesapeake Bay. *See* 1 Stat. 54; *see, e.g.*, Kevin Kosar, Congressional Research Serv., *Privatization and the Federal Government: An Introduction 2* (Dec. 28, 2016), archived at <https://perma.cc/T3AR-3DM4>; Michael Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 Cal. L. Rev. 569, 581, 591 (2001). Beginning in the late nineteenth century, governments began turning to private entities to provide social services, in particular poverty relief. Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 Yale L. & Pol’y Rev. 263, 268 (2006).

In the modern era, the use of contracting for the delivery of public services has expanded, with “[a]ll levels of government ... increasingly employing private entities to undertake functions traditionally performed by the public sector.” *Id.* at 267. At the local level, by 1990, 80,000 governments had established public–private partnerships by contract or other means. Jeffrey R. Henig, *Privatization in the United States: Theory and Practice*, 104 Pol. Sci. Q. 649, 656–57 (Winter 1989–90).

Today, local governments use contracts with private parties to provide a host of essential services, touching on nearly every aspect of local governments’

relationships with their residents. For instance, some local governments contract with private parties to run public transportation or shuttle services;³ to prepare meals for students, the elderly, incarcerated individuals, or those in need;⁴ to run shelters for people displaced by natural disasters;⁵ to operate concessions in public parks or convention centers;⁶ to provide support services to parents to prevent their children from being placed in foster care;⁷ and to offer before- or after-school programs for schoolchildren.⁸ Recently, New York City alone entered into contracts for services totaling in excess of \$22 billion, at least \$8 billion of which was for social services.⁹

These public–private partnerships can confer significant benefits. They may reduce costs, ensure that

³ See, e.g., Stephen L. Reich & Janet L. Davis, Nat'l Ctr. for Transit Research, Univ. of S. Fla., *Analysis of Contracting for Fixed Route Bus Service* vi (June 2011), archived at <https://perma.cc/P9KK-V363>.

⁴ See, e.g., *Harris County Extends Contract with Houston Food Bank To Provide Meals to Families Struggling Due to COVID-19*, Houston Style Magazine, July 28, 2020, archived at <https://perma.cc/DB3F-F7JA>.

⁵ See, e.g., Cal. Health & Safety Code § 34070 *et seq.*

⁶ See, e.g., Food and Beverage Mgmt. Contract with City of Houston, archived at <https://perma.cc/JLL5-UZPK> (2007 contract to operate concessions at George R. Brown Convention Center).

⁷ See, e.g., N.Y.C. Admin. for Children's Servs., Preventive Services, archived at <https://perma.cc/SC7C-LZYJ>.

⁸ See, e.g., L.A. Cty., Before and After School Programs, archived at <https://perma.cc/2D7R-H2TJ>.

⁹ See Office of the N.Y.C. Comptroller, Annual Summary Contracts Report for the City of New York, Fiscal Year 2019, at App'x 7, archived at <https://perma.cc/A882-VBQB>.

service delivery is responsive to community conditions, and increase the quality of services by stimulating competition and innovation or by operating on a smaller scale. *See, e.g.*, Davidson, *supra*, at 270; Jon Michaels, *Privatization's Progeny*, 101 *Geo. L.J.* 1023, 1030–36 (2013); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *Harv. L. Rev.* 1229, 1242–43 (2003). They may also help bring to bear a diversity of perspectives and increase participation by ethnic, religious, and cultural groups within communities by drawing new people into operations previously handled by the government. Davidson, *supra*, at 270; Gilman, *supra*, at 596; Minow, *supra*, at 1245. Indeed, community-based groups, by virtue of their location in amici's diverse communities, are often intimately familiar with and thus well situated to address a community's needs.

Amici require that private entities providing public services under contract refrain from discriminating on the basis of protected characteristics. Some amici impose these requirements by contract, while others have enacted laws prohibiting government contractors from discriminating in the performance of the contracts they receive.¹⁰ The purpose of these requirements is not to force conformity of belief—amici value the religious diversity of our communities, and reject discrimination on the basis of religion—but to ensure that all our residents receive publicly funded

¹⁰ *See, e.g.*, Albany, N.Y., City Code § 48-26(E)(3); Cook Cty., Ill., Code of Ordinances § 42-40(a); N.Y.C. Admin. Code § 6-123(b); Cty. of Santa Clara, Santa Clara Cty. Bd. of Supervisors Policy Manual § 5.5.5.4 (2020), archived at <https://perma.cc/35GR-KJP2>; *see also* Cal. Gov't Code § 11135(a) (barring discrimination under state-funded programs).

services with dignity and respect and without experiencing exclusion. Nondiscrimination requirements are critical, both because of the message of inclusion they send to amici's diverse residents, and because they are directly tied to the effective delivery of essential services.

II. Granting contractors exemptions from nondiscrimination requirements would implicate amici in conveying a message of exclusion.

Petitioners contend that they have a constitutional right to continue providing public services under a government contract, and to receive government funds, while refusing to abide by the requirement that all contractors deliver services without regard to personal characteristics such as race, religion, gender, or sexual orientation. Requiring local governments to contract with religious providers that engage in status-based discrimination would frustrate amici's commitment to nondiscrimination and dilute the message of inclusion that amici have worked to convey through their programs.

Government has an interest "of the highest order" in eliminating all forms of discrimination. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). Prohibiting discrimination by contractors conveys the government's message that all members of the community are valued and are entitled to services and support. The Court has long recognized that the conduct of publicly funded service providers can send a message about the government's own judgments and values. See *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2328 (2013); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). When a private entity receiving public funds under a government contract

tells amici's residents to seek public services elsewhere, whether because of the color of their skin, the substance of their beliefs, or whom they love, it sends the message that the government does not view those individuals as full members of our communities entitled to equal respect. That message constitutes a dignitary harm of the first order. *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 670–71 (2015); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

It makes little difference to the individuals receiving this message whether the messenger is a government agency or a private contractor acting in the government's place. It also makes little difference whether there are other providers willing to offer the same services, since dignitary harms occur whenever members of amici's communities are turned away by an entity that receives and spends government funds.

A thought experiment helps illustrate this point for foster care. Some amici, such as Los Angeles County, publish guidance listing the private entities it contracts with to deliver services.¹¹ Under petitioners'

¹¹ *See* L.A. Cty. Dep't of Children & Family Servs., Foster Family Agencies, archived at <https://perma.cc/KL6V-E9ZU>; *see also* N.Y.C. Dep't of Homeless Servs., Providers, archived at <https://perma.cc/MJ94-WHJ5> (listing shelter providers in New York City); Cty. of Santa Clara, Office of Gender Based Violence, Resources for Survivors During the Covid-19 Crisis, archived at <https://perma.cc/EBS7-HLSX> (listing private gender-based violence service providers); City of Madison, Wis., Cmty. Dev. Div., 2020 Contracts, archived at <https://perma.cc/S6FR-DU42> (listing private community-support service providers); Lane Cty., Or., Emergency Services Provider List, archived at <https://perma.cc/ZSH7-C934>; Tex. Dep't of Family & Prot. Servs., Search for Child Placing Agencies for Foster Care, archived at <https://perma.cc/DB83-GAJE>.

position, these local governments would face an untenable choice. One option would be to specify, in the government's own guidance, which of the listed organizations would not entertain applications from members of which groups. The other would be to withhold that important information and leave people to discover it for themselves, wasting their time and exposing them to arguably more pointed acts of exclusion. Neither choice is acceptable. The solution is clear: local governments should be allowed to "define the limits" of their programs and require nondiscrimination in the performance of government contracts. *Rust*, 500 U.S. at 194.

III. Granting contractors exemptions from nondiscrimination requirements would impair the delivery of services offered through public-private partnerships.

Exemptions from nondiscrimination requirements would also impair the delivery of important public services. Nondiscrimination requirements remove barriers to access to services—often services of last resort—for the most vulnerable members of amici's communities. These services benefit both the individuals who receive them and the community at large. Exemptions would only add to existing barriers to access faced by vulnerable members of our communities. They would also exacerbate the challenges that local governments already face in delivering many of those services. We discuss three examples here.

1. Nondiscrimination helps local governments provide the best possible foster care for children who might otherwise have little or no family support. Some of the amici responsible for foster care award contracts, as Philadelphia does, to private providers

to place abused or neglected children with prospective foster parents, or to provide those parents with support services.¹² Last year, for example, the City of New York entered into contracts valued at more than \$550 million for foster-care services for the nearly 8,000 children in the city's care.¹³

As we all know, having a stable and supportive home environment is crucial for a child to achieve a productive and fulfilling life. Thus, in making foster-care placements, amici strive to ensure that children are placed in the most stable, supportive, and loving homes available, not just minimally suitable ones, so they can thrive and ultimately contribute to society.

To achieve that goal, amici must seek out as many well-qualified foster parents as possible. There is a critical shortage of foster homes, with many families discontinuing fostering within the first few months,¹⁴ and foster parents often asked to provide homes for more youth than they deem optimal and eventually burning out. Amici can scarcely afford the potential loss of qualified foster parents who would be turned away by a provider with a religious objection, based on traits that amici have determined bear no rela-

¹² See, e.g., N.Y.C. Admin. for Children's Servs., *Become a Foster or Adoptive Parent*, archived at <https://perma.cc/X4L4-6UHV> (stating that foster-care agency will approve prospective parent's application to foster a child); Cty. of Santa Clara, Soc. Servs. Agency, archived at <https://perma.cc/EC9E-CE42> (listing private therapeutic foster-care service providers).

¹³ See N.Y.C. Admin. for Children's Servs., *Foster Care Statistics for FY19*, archived at <https://perma.cc/RCC5-37HJ>.

¹⁴ K.W. Rhodes, et al., *Foster Family Resources, Psychosocial Functioning, and Retention*, 27 *Soc. Work Research* 135, 135 (2003).

tionship to individuals' suitability to be foster parents. Thus, in New York City, for instance, every private provider must ensure that "all qualified prospective foster or adoptive parents who wish to provide homes to children and youth in care have the opportunity to do so without discrimination," including discrimination on the basis of race, religion, gender, or sexual orientation.¹⁵

Same-sex couples represent an especially key population to reach and welcome into amici's foster-care programs. Same-sex couples are seven times more likely to raise adopted or foster children than different-sex couples and are also more likely to adopt older children and children with special needs, who are statistically less likely to be adopted.¹⁶ Nondiscrimination also protects a substantial portion of the children in amici's care, as around one-fifth of youth in the Nation's foster-care systems identify as lesbian, gay, bisexual, transgender, or queer (LGBTQ).¹⁷

¹⁵ N.Y.C. Admin. for Children's Servs., Guidance #2008/05, archived at <https://perma.cc/935R-LXSJ>; *see also* Cal. Wel. & Inst. Code § 16013 (barring discrimination, including on the grounds of race, religion, sex, or sexual orientation, against "all persons engaged in providing care and services to foster children").

¹⁶ *See* Shoshana K. Goldberg & Kerith J. Conron, Williams Inst., *How Many Same-Sex Couples in the U.S. Are Raising Children?* (July 2018), archived at <https://perma.cc/DRN3-QAHK>; David M. Brodzinsky, *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians* 8 (Oct. 2011).

¹⁷ Bianca D. M. Wilson et al., Williams Inst., *Sexual & Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* 6 (2014), archived at <https://perma.cc/LPR6-S298>; Megan Martin et al., Ctr. for the Study of Soc. Pol'y, *Out of the Shadows: Supporting LGBTQ*

Where nearly 500,000 children are in foster care nationwide,¹⁸ nondiscrimination helps maximize the pool of prospective parents who can provide loving homes, and helps ensure that amici can continue to meet the needs of all children in their care as effectively as possible.

2. Similarly, nondiscrimination helps local governments maximize use of shelters by persons experiencing homelessness. Many amici provide shelter services by contracting with private entities. The City of Chicago, for instance, contracts with 29 providers at 50 sites to offer 3,000 shelter beds and requires providers operating shelters to keep families together, regardless of whether a family includes same-sex partners or an unmarried couple with children.¹⁹ And the City of New York contracts with over 20 private entities, including many faith-based organizations, to run shelters and provide beds in the city, where, in July of this year, over 55,000 people, including over 10,000 families with children, were in shelters.²⁰ Contracting with private entities for the operation of the city's shelters helps conserve limited taxpayer dollars, and working with these

Youth in Child Welfare Through Cross-System Collaboration 7 (2016), archived at <https://perma.cc/TFF6-VJAU>.

¹⁸ U.S. Dep't of Health & Human Servs., The AFCARS Report 1 (2017), archived at <https://perma.cc/E3EN-3TB2>.

¹⁹ Chi. Dep't of Family & Support Servs., Homeless Services 13, archived at <https://perma.cc/VLT7-ZZ86>; Chi. Dep't of Family & Support Servs., Shelter, archived at <https://perma.cc/MSD6-BDXF>.

²⁰ N.Y.C. Dep't of Homeless Servs. Daily Report, archived at <https://perma.cc/STH6-8SKW>; N.Y.C. Dep't of Homeless Servs., Providers, archived at <https://perma.cc/MJ94-WHJ5>.

entities enables the city to more rapidly deploy resources when individuals experience homelessness or when changing weather conditions make it especially dangerous for people to be living on the street.

Nondiscrimination by shelter operators signals to homeless individuals—among those most in need of support in amici’s communities—that they are welcome. This signal may be important to individuals who do not share a provider’s religious affiliation and worry that they will not be accommodated, or will be made to feel uncomfortable if they are taken in. And it is especially important for shelters to welcome LGBTQ people, who face systemic barriers to obtaining stable housing and comprise a disproportionate share of the homeless population. For instance, in New York City alone, more than one-sixth of LGBTQ residents have experienced homelessness.²¹ Additionally, 40% of the Nation’s homeless youth identify as LGBTQ.²²

Transgender people are particularly likely to avoid shelters that fail to respect their gender identity; lack safe access to basic facilities and necessary medical care; or permit bullying or harassment.²³ For

²¹ S. Frazer & E.E. Howe, The LGBT Cmty. Ctr., *LGBT Health and Human Services Needs in New York State* 19 (2016), archived at <https://perma.cc/M6TWPAMB>.

²² See L.A. Hunter et al., Soc. Justice Sexuality Project, CUNY, *Intersecting Injustice: Addressing LGBTQ Poverty and Economic Justice for All* 5 (2018), archived at <https://perma.cc/TAJ9-KD8R>.

²³ See, e.g., Richard Bränström & John E. Pachankis, *Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries: A Total Population Study*, 177 *Am. J. Psych.* 727, 727 (2020) (observing that transgender individuals are at higher risk of psychological

transgender people experiencing homelessness, as for anyone facing that circumstance, safe access to clean bathrooms and working showers at a shelter may be their only option to fulfill basic human needs. And according to a national survey of transgender people, 30% of respondents experienced homelessness at some point in their lives, 26% who were homeless in 2015 avoided staying in a shelter for fear of discrimination, and 70% of those who stayed in shelters that year reported such discrimination.²⁴ Given these stark numbers, amici must be able to know that any facility it contracts with will be able to provide shelter or services to LGBTQ people in need.

3. Nondiscrimination requirements also facilitate access to rehabilitation and reentry services for formerly incarcerated persons—another area where trust is fragile and effective delivery of services can be critical. Some amici contract with community-based organizations to provide these services, which run the gamut from substance-abuse treatment, anger-management training, and therapy, to education services and job training, transportation, connection to child-care options, and assistance with enrolling in benefit programs.²⁵ Nondiscrimination is

distress due to “stigma-related stress” and “stress associated with a lack of gender affirmation”).

²⁴ S.E. James, et al., Nat’l Ctr. for Transgender Equality, *The Report of the 2015 Transgender Survey 176* (2015), archived at <https://perma.cc/AE4A-QQ9Z>.

²⁵ See, e.g., S.F. Adult Probation Dep’t, *Catalog of Reentry Services Funded by SFAPD*, archived at <https://perma.cc/LN4E-KDBU>; N.Y.C. Dep’t of Citywide Administrative Servs., *The City Record Online, Solicitation for Jail to Jobs Re-entry Program*, available at <https://a856-cityrecord.nyc.gov/RequestDetail/20171002003> (last visited Aug. 16,

essential when amici contract to provide these services. Opening the door to providers' religious exemptions would frustrate the project of getting aid to those most in need.

For instance, it would frustrate the goal of reentry for a private provider to refuse to assist a client in identifying transitional or permanent housing because the client is unmarried and seeks to live with a partner or because of the client's sexual orientation or gender identity. And many individuals returning to society require therapy or counseling services, which call for a compassionate understanding of the person's life, background, and circumstances. LGBTQ clients in particular, who in many instances have faced rejection by their families and discrimination in society, could be discouraged from seeking vital services by a counselor who denies the validity of their sexual orientation or gender identity or sends them elsewhere for services.

Persons returning to society after a period of incarceration already face substantial obstacles to reentry, which would only increase if a provider based in their community, or the one with the best programming for their particular needs, could turn them away. Nondiscrimination thus helps those reentering amici's communities following a period of incarceration by connecting them with education, jobs, and support. These services do not just benefit the recipients; they help make our communities safer

2020); N.Y.C. Dep't of Citywide Administrative Servs., The City Record Online, Solicitation for In-Home Therapy Program, available at <https://a856-cityrecord.nyc.gov/RequestDetail/20190422023> (last visited Aug. 16, 2020).

and stronger by reducing recidivism and cycles of incarceration

4. As these examples illustrate, permitting contractors to opt out of providing services to certain members of the community would exacerbate the challenges that local governments already confront in delivering many of those services. To take one example, local governments face myriad tests in meeting the needs of individuals and families experiencing homelessness, including finding suitable locations for homeless shelters near where clients work, go to school, and have important support structures; maintaining an adequate supply of bed space; keeping conditions safe for residents; and providing wrap-around services such as counseling, life skills, job training, and help finding permanent housing.²⁶ In New York City, for instance, where availability of suitable permanent homes can be exceptionally tight, matching individuals and families who have lost their housing with appropriate services or temporary shelter beds is a daily exercise in multidimensional chess. Adding religious exemptions by private contractors to the mix would amplify the level of complexity by fragmenting delivery of services not only by contractor but also by location, requiring local governments to figure out how to link persons in need with other providers willing to serve them, lest they slip through the cracks.

²⁶ See, e.g., Nat'l Alliance To End Homelessness, *Many Western and Southern States Lack Sufficient Shelter Capacity for Individual Homeless Adults* (Apr. 24, 2019), archived at <https://perma.cc/2NHZ-BA2Y>.

Additionally, it would not always even be possible for a local government to fill gaps in coverage created by exemptions for religious contractors. In certain parts of the country or in some smaller jurisdictions, given the sparse population, there is only one contracted service provider. In Michigan's Upper Peninsula, for instance, some counties have only a single provider of foster-care services: Catholic Social Services of the Upper Peninsula.²⁷

In these communities, same-sex couples could end up with no place to turn to become foster parents. Claims of exclusion of this kind have already arisen. *See, e.g., Marouf v. Azar*, 391 F. Supp. 3d 23, 28 (D.D.C. 2019) (same-sex couple unable to foster unaccompanied refugee child because religious service provider was only available agency near Fort Worth); *see also Rogers v. U.S. Dep't of Health & Human Servs.*, No. 6:19-cv-01567-TMC, 2020 U.S. Dist. LEXIS 148885, at *25–26 (D.S.C. May 8, 2020) (discussing allegation that faith-based child-placement agency's discrimination against same-sex couples denied plaintiffs access to "the largest and most well-resourced [agency] in the state" with "substantial government funding" that allowed it to "provide comprehensive support to foster families"). The requirement not to discriminate in the performance of a government contract is thus directly tied to the effective delivery of essential public services.

²⁷ *See* Mich. Adoption Res. Exch., Mich. Adoption & Foster Care Agencies by Cty., archived at <https://perma.cc/QDB9-GK29>.

IV. Petitioners' position could affect nearly every aspect of public services offered through public-private partnerships.

The exemption that petitioners seek would have widespread implications for amici's use of contractors because it cannot be limited to objections to same-sex couples or to social services like foster care. Because local governments may not evaluate "the relative merits" of the religious beliefs of the members of their diverse communities, *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 887 (1990), no limiting principle would prevent contractors from lodging religious objections to a broad range of neutral, generally applicable contract requirements. And the scope of potential objections would be even broader if exemptions could be made not just by religiously affiliated providers, but also by unaffiliated providers with religious convictions. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) (for-profit corporation may assert violation of religious rights under Religious Freedom Restoration Act).

For one thing, a ruling in petitioners' favor would open the door to claims for exemptions from providers unwilling to serve any number of groups within our diverse communities. Similar claims of religious liberty have already been made regarding protected characteristics other than LGBTQ status. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 580, (1983) (discussing university sponsors' religious opposition to interracial dating and marriage); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (addressing barbecue vendor's asserted religious objection to serving black customers); *Maddonna v. U.S. Dep't of Health & Human Servs.*, No. 6:19-cv-03551-TMC, ECF No. 43,

at 8–9 (D.S.C. Aug. 10, 2020) (discussing allegation that foster-care agency would serve only evangelical Protestant Christians and had turned away plaintiff because she is Catholic); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 276 (Alaska 1994) (enforcing state and local nondiscrimination laws against landlord who refused to rent to unmarried couple on basis of religious beliefs).

Religious objections could also reach a wide range of services that local governments provide through contracts with private parties. For instance, some amici contract with private entities to provide transportation.²⁸ Those amici should not have to accommodate a private bus operator’s religious objection to close physical proximity between unmarried men and women by allowing the operator to mandate separate seating for male and female passengers. Some amici rely on private contractors to perform emergency repairs 24/7 when they receive reports of unsafe conditions in apartments.²⁹ It would be infeasible to allow a contractor to refuse to do this time-sensitive work on the Sabbath. Some amici contract to offer after-school programs, cultural programs, or anti-gang initiatives in schools. Those amici should not have to accommodate the contracting instructors’ religious objections to the messages amici wish them to convey. And where many amici fund shelters or

²⁸ See, e.g., Stephen L. Reich & Janet L. Davis, Nat’l Ctr. for Transit Research, Univ. of S. Fla., *Analysis of Contracting for Fixed Route Bus Service* vi (June 2011), archived at <https://perma.cc/P9KK-V363>.

²⁹ See, e.g., N.Y.C. Dep’t of Hous. Preservation & Dev., *Emergency Repair Program*, archived at <https://perma.cc/WJ2D-QVAS>.

group homes run by private contractors, access to transitional housing should not be conditioned on prayer or adherence to the provider's religious beliefs. *Cf. Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 406–07 (6th Cir.), *cert. denied*, 552 U.S. 1039 (2007) (state agency responsible for foster children discontinued referring children to religious provider that “coerced” participation in religious activities).

Given the diversity of faith and identity in many of amici's communities, the full impact of petitioners' position is difficult to foresee. Though the obligation not to discriminate in the performance of some of these services would likely satisfy even strict scrutiny, requiring amici to justify the application of neutral, generally applicable policies on a case-by-case basis would be unduly burdensome and would stymie the provision of services. *See Smith*, 494 U.S. at 888 (“[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”).

* * *

For all these reasons, a ruling in petitioners' favor could prompt local governments across the country to pull back from partnering with private parties for the provision of government services. This change would undermine the significant benefits of these partnerships, raising costs to the taxpayer, removing opportunities for innovation and competition, and inhibiting the responsiveness, participation, and engagement that flows from involving a variety of community-based organizations in serving amici's diverse communities.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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