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 GLBTQ LEGAL ADVOCATES & DEFENDERS AND 27 OTHER LGBTQ ADVOCACY GROUPS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

J. ANTHONY DOWNS
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 00210
(617) 570-1929
jdowns@goodwinlaw.com

MARY L. BONAUTO
Counsel of Record
GARY D. BUSECK
PATIENCE CROZIER
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont Street,
Suite 950
Boston, MA 02108
(617) 426-1350
mbonauto@glad.org

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici seek to ensure LGBTQ people are included in and can contribute to our communities and our nation without regard to our LGBTQ status. Each of us work in some or all of the state and federal courts, in legislative and agency policy arenas, and/or among our communities to find paths forward that respect and include all our nation's inhabitants.

Amici include the following national and regional organizations: BiLaw; Equality Federation; Freedom for All Americans; GLBTQ Legal Advocates & Defenders; Human Rights Campaign; Movement Advancement Project; National Black Justice Coalition; National Center for Transgender Equality; National Equality Action Team; Transgender Law Center; and Transgender Legal Defense & Education Fund.

Amici also include the following state organizations: Basic Rights Oregon; Equality Florida Institute, Inc.; Equality Illinois; Equality Maine; Equality Ohio; Equality Utah; Equality Virginia; Fair Wisconsin; Fairness Campaign; Free State Justice – Maryland's LGBTQ Advocates; Georgia Equality; Massachusetts Transgender Political Coalition; MassEquality; Montana Gender Alliance; OutNebraska; OutFront Minnesota; and Tennessee Equality Project.

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

SUMMARY OF ARGUMENT

Amici have no doubt that petitioner Catholic Social Services ("CSS")[2] has long provided, and continues to provide, valuable services to vulnerable children in Philadelphia. This dispute involves just one of those services—the recruitment, screening, and certification of foster families to care for children in the City's custody. For this service, the City's standard foster care contract requires agencies to consider all applicants without regard to sexual orientation, among other characteristics unrelated to caregiving ability.

Although the children in the City's custody are in need of safe and nurturing placements with stable and socially engaged persons, CSS acknowledges that it has a policy of excluding same-sex couples even though it does not claim that those families are unable to meet the children's needs or the state's standards. CSS instead claims that the First Amendment gives it the right to an exemption from the City's contractual requirement. But, because the City requires all contractors assisting it in performing its obligations to children in its custody to comply with the non-discrimination provisions of the City's standard foster care agency contract, the City's actions do not violate the First Amendment.

Amici submit this brief to highlight the serious harms that would arise from the constitutional rule petitioners propose here. Elevating religious belief as the controlling factor governing obligations to others

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[2] *Amici* will refer throughout this brief primarily to CSS rather than all the petitioners since CSS is the party that contracted with the City of Philadelphia, whereas the individual petitioners are foster parents with whom CSS previously worked.

could displace non-discrimination laws and rules applicable not only to all government contracts and grants, but also to government employees and the private sector.

After generations of being subjected to laws that treated them as second-class citizens, LGBTQ people have recently begun to experience formal legal equality as more of society sees LGBTQ people as friends, family members, co-workers, and valuable community members. Both the democratic process and this Court's decisions establishing the right to equal treatment for LGBTQ people have helped bring the LGBTQ community from "outcasts," *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018), to full participants in society. At the same time, protections for people of faith and religious institutions allow the flourishing of faith in American life. The democratic process is better situated to address the path forward now, as it has in the past. Declaring a *constitutional* right for those with religious objections not to comply with nondiscrimination requirements would supplant more nuanced legislative solutions, would upend vital protections against discrimination, and would impose grave harms on LGBTQ people, as well as people of color, members of minority faiths, women, people living with disabilities, and our broader society.

ARGUMENT

I. The Petitioners' Proposed Religious Exemption Would Create "Classes Among Citizens"[3] By Denying The "Full Promise"[4] Of Liberty And Equality To LGBTQ People.

A. Judicial Rulings And Changes Through The Democratic Process Have Moved LGBTQ People Closer To Equal Citizenship In This Country.

This case occurs amidst increasing familiarity with, and acceptance and inclusion of, LGBTQ people in society. States and local jurisdictions have increasingly extended the protections of non-discrimination laws to LGBTQ people.[5] Philadelphia's Fair Practices Ordinance ("FPO") ensures respect and inclusion of the City's diverse communities, and is one of 55 municipal non-discrimination laws in Pennsylvania prohibiting discrimination in employment, housing and public accommodations.[6] From its inception in 1963, the City has steadily updated its law to include more protected characteristics, *inter alia*, "sexual

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[3] *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quotation marks omitted).

[4] *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

[5] Movement Advancement Project, "Non-discrimination Laws," https://www.lgbtmap.org/equality-maps/non_discrimination_laws (identifying state and local protections by topic).

[6] *See* Pennsylvania's Equality Profile: Quick Facts About Pennsylvania, *available at* https://www.lgbtmap.org/equality_maps/profile_state/PA.

orientation" in 1982 and "gender identity" in 2002.[7] Moreover, the FPO defines "public accommodations" to include City programs and services.[8]

The addition of these characteristics into non-discrimination laws "reflects … the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups," and "serves compelling … interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-26 (1984). Non-discrimination laws do not "as a general matter, violate the First or Fourteenth Amendments." *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727 (quoting *Hurley v. Irish-American Gay Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995)).[9] The contractual commitment CSS challenges here also reflects Philadelphia's commitment to equal access to all City programs and services.

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[7] *See* Phila. Code § 9-1102(aa) (sexual orientation); *id.* § 9-1102(k) (gender identity).

[8] *See* Phila. Code § 9-1102(w) (public accommodations include "services … extended, offered, … or otherwise made available to the public" as well as "all … services provided by "the City, its departments, boards and commissions."); *id.* § 9-1106 (prohibition on discrimination).

[9] *Amici* assume *Employment Division, Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), governs here since the FPO is a neutral rule of general applicability. If this Court were to overturn *Smith*, *amici* believe respondents should still prevail because comprehensively enforcing non-discrimination laws is the least restrictive way of furthering the compelling government interests of maximizing the number of foster parents available to care for the children in the City's custody and preventing harmful discrimination as addressed by respondents and other *amici*.

In concert with changes effected through the democratic process, judicial decisions from this Court over the last 25 years have affirmed a first principle of this nation and our democracy—the idea that "the Constitution 'neither knows nor tolerates classes among citizens.'" *Romer*, 517 U.S. at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion)). *Romer* anchored the Court's invalidation of a state constitutional amendment limiting legal protections for LGBTQ people to the "principle" that "government and each of its parts remain open on impartial terms to all who seek its assistance." *Id*. at 633. The idea that we all come before our government as equals is "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection." *Id*.

This Court's cases stand for the equal citizenship of LGBTQ people, just as due process and equal protection are promised to all people in this nation under the Fourteenth Amendment, and have improved LGBTQ people's lives. Although beliefs involving "association," "moral disapproval," "religious beliefs," "views respecting the traditional family," "personal opposition," and "religious … objections to gay marriage," are worthy of respect, this Court has rejected discrimination against LGBTQ people in the face of such beliefs, whether by the government or in the private sector, as discussed below. Some in our nation hold, and are permitted to hold, different beliefs about marriage, gender and sexuality. LGBTQ people remain committed to the difficult and always long-term project of ameliorating deeply embedded stereotypes, misunderstandings, or rejection of LGBTQ people and their relationships.

Starting in *Romer*, this Court rejected "respect" for the "liberties" and "freedom of association" of landlords and employers "who have personal or religious objections to homosexuality" as legitimate bases for a Colorado state constitutional amendment that prohibited discrimination claims brought on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices, or relationships." 517 U.S. at 624. By selectively withdrawing—only from lesbian, gay, and bisexual people—the opportunity for legal protection for injuries caused by public and private discrimination, the amendment impermissibly "deem[ed] a class of persons a stranger to its laws." *Id*. at 635.

Seven years after *Romer*, this Court construed the Constitution's "liberty" guarantee to hold that gay people may engage in "intimate conduct with another person" without criminal sanction. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003). For LGBTQ people, too, "our laws and tradition afford constitutional protection to personal decisions relating to marriage … family relationships, child rearing and education." *Id*. at 574, 578.

Lawrence reversed *Bowers v. Hardwick*, which had endorsed moral condemnation of "homosexuality" as a sufficient basis for such disparate treatment. 478 U.S. 186, 196 (1986). As in *Romer*, the Court in *Lawrence* refused to allow "religious beliefs" and views "respect[ing] … the traditional family" to be imposed "on the whole society" when "defin[ing] the liberty of all." 539 U.S. at 571. Justice O'Connor's separate opinion reinforced the point that "moral disapproval, without any other asserted state interest," is insufficient under equal protection "to justify a law that

discriminates among groups of persons." *Id*. at 582 (citation and internal quotation marks omitted).

Ten years later in *United States v. Windsor*, 570 U.S. 744 (2013), the Court confronted the devastating impact and complications stemming from the federal Defense of Marriage Act ("DOMA") for same-sex couples who were legally married at the state level but legal strangers for purposes of all federal marital protections and responsibilities. DOMA's categorical non-recognition of a class of valid marriages violated the Fifth Amendment, not only because it denied them protection, but also because it relegated these couples to a "second-tier marriage," undermining the "stability and predictability of basic personal relations," "demean[ing] the couple, whose moral and sexual choices the Constitution protects," and "humiliat[ing]" and confounding their children as to the "integrity … of their own family." *Id*. at 772.

In 2015, the Court's opinion in *Obergefell v. Hodges*, also drew on principles of equal citizenship to hold that LGBTQ people have a constitutional right to marry and be accorded the same marital protections and responsibilities as others. 576 U.S. at 668-69, 675-76. The exclusion of same-sex couples from marriage denied them both the freedom to marry and violated "central precepts of equality" by "disrespect[ing] and subordinat[ing]" them. *Id*. at 675. The Court was certainly aware of opposition to state-licensure of marriages for same-sex couples based on "decent and honorable religious or philosophical premises." *Id*. at 672. Once again, however, the Court recognized that "personal opposition" could not become "enacted law and public policy" without placing the government's

"imprimatur … on an exclusion that … demeans or stigmatizes" others. *Id.*

Even more recently, in *Masterpiece Cakeshop* the Court affirmed that objections by businesses or "other actors in the economy and in society" will not suffice "to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." 138 S. Ct. at 1727 (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968)). All of the Justices either explicitly embraced this conclusion or did not dispute it, recognizing that "[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," notwithstanding "religious … objections to gay marriage." *Id.*[10]

Most recently, in *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020), this Court issued a statutory construction ruling of profound significance for LGBTQ people's ability to sustain themselves and their families and to participate in the economic life of our nation. By virtue of the Court's recognition that discrimination based on LGBTQ status is sex discrimination for purposes of Title VII, LGBTQ persons applying for jobs and working at companies subject to Title VII can now participate on a level playing field. *Id.* at 1737.

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[10] *See id.* at 1732 (Kagan, J., concurring) (agreeing with this principle); *id.* at 1748 (Ginsburg, J., dissenting) (same); *id.* at 1734 (Gorsuch, J., concurring) (not disputing same and focusing on errors of the Colorado Civil Rights Commission); *id.* at 1740 (Thomas, J., concurring) (same). The majority ruled for the objector on other grounds. *See id.* at 1731 (majority opinion).

Together, these decisions exemplify the powerful promise of equal treatment and respect for LGBTQ people under the Constitution. These changes have been important for all LGBTQ people, especially for young people who long to grow up in a world free from violence and discrimination because of who they are, so they can live openly, interact on equal terms with their peers, and reach their full potential as individuals.

B. The Proposed Exemption Would Undermine Legal Equality For LGBT People In The Near "Limitless ... Transactions And Endeavors That Constitute Ordinary Civic Life In A Free Society."[11]

The constitutional rule petitioners seek—allowing government contractors to assert their religious beliefs as a basis to avoid compliance with government non-discrimination requirements—puts LGBTQ people's incipient equal citizenship at serious risk. If the government must permit discrimination by its contractors, the exemption could readily extend to government workers and even to those subject to non-discrimination laws—possibly allowing religious beliefs about LGBTQ people or others to displace the operation of those laws. In contexts now moderated by non-discrimination laws, exemptions would become commonplace, thereby establishing *exclusion* rather than *inclusion* as the governing legal principle in our diverse nation.

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[11] *Romer*, 517 U.S. at 631.

This would be a destructive outcome. Petitioners' proposed constitutional rule is so broad that it would invite and increase discrimination against LGBTQ people as well as people of color, women, and adherents of minority religions.[12] As a result, many people in this nation would be faced with being treated as "social outcasts" and "inferior in dignity and worth." *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727.

Where religious beliefs may extend to the "orientation, conduct, practices or relationships" of LGBTQ people, LGBTQ people already regularly face denials of opportunities and services others take for granted. *Romer*, 517 U.S. at 624 (quoting Colo. Const., Art. II, §30b (enforcement enjoined)). The breadth of the constitutional exemption sought here, if granted, would be a dramatic setback for all LGBTQ people no matter where they reside.[13] The burden would fall most

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[12] *See generally, e.g.*, Brief for Leadership Conference on Civil and Human Rights et al., Brief for National Women's Law Center et al., Brief for Advocacy & Services for LGBTQ Elders et al., as Amici Curiae Supporting Respondents.

[13] A. Hasenbush et al., "The LGBT Divide: A Portrait of People in the Midwestern, Mountain & Southern States, Williams Institute (2014), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Divide-Dec-2014.pdf (addressing measures of increased insecurity for LGBTQ people and non-LGBTQ people across regions); *see also* Horizons Foundation, San Francisco Bay Area LGBTQ Community Needs Assessment, at 7 (2018), *available at* https://www.horizonsfoundation.org/wp-content/uploads/2019/03/SF-Bay-Area-LGBTQ-Needs-Assessment-Report-2018-.pdf (addressing LGBTQ people's needs in the San Francisco Bay Area counties showing that people "report feeling unsafe in living their daily lives; have had trouble meeting basic needs such as housing, food, and medicine in the past 12 months; and have had unmet need for critical services such as

harshly on those for whom the barriers to equity and equality are the greatest, that is, Black, Indigenous, and other people of color, women and disabled persons, those who are economically marginalized, and those who remain in rural areas or move to be near their families in parts of the nation where LGBTQ people experience higher rates of discrimination.[14] This was true even before the COVID-19 pandemic, which has exacerbated the situation.

The constitutional exemption petitioners seek here is breathtakingly broad and would vastly increase the discrimination faced by LGBTQ people (and others). For example, some service providers and business owners with beliefs similar to CSS's currently avoid discriminating because doing so is unlawful, but would be likely to begin doing so if this Court rules that the government cannot prohibit discrimination that is religiously-motivated, even when they are carrying out government programs with taxpayer support. Resp. Interv. Br. at 5 (another provider stopped excluding same-sex couples only when the City became aware of the FPO violation). Particularly in communities where religious beliefs opposed to LGBTQ people and relationships are prevalent, business may feel pressure to discriminate if not doing so

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health care, legal, and housing services or have had negative experiences getting such services in the past three years").

[14] Movement Advancement Project, "Where We Call Home: LGBTQ People of Color in Rural America," at 6 (Sept. 2019), *available at* https://www.lgbtmap.org/file/LGBTQ-rural-poc-report.pdf; *id*. at 1-2 (LGBTQ people of color in rural America sometimes experience attitudes about their sexual orientation or gender that ripple through the social and faith networks they would otherwise count on for support, services, and economic opportunities).

would be perceived as endorsing LGBTQ people and relationships. Pet'r Br. 8, 38.

Likewise, LGBTQ people would face increased pressure to hide their identities to avoid triggering bias and exclusions. This would rob younger generations of the chance "to lead more open and public lives," *Obergefell*, 576 U.S. at 661, and healthier ones. While some LGBTQ persons will not, or cannot, hide their identities, as when seeking to foster children jointly or listing a spouse as an emergency contact or beneficiary on workplace forms, many otherwise ordinary encounters could become fraught because disclosure of their LGBTQ status could put them at risk of exclusion and discrimination. *Cf. Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042, at *2-*3, *8 (Mass. Super. Ct. Dec. 16, 2015) (job offer made for food services manager at a Catholic high school with no instructional duties rescinded when man listed his male spouse as emergency contact). Historically, the pressure for LGBTQ people to conceal their identities to avoid discrimination has had "high personal" and "aggregate costs." *See* Jane S. Schacter, *Romer v. Evans and Democracy's Domain*, 50 Vand. L. Rev. 361, 369 (1997). It has also prevented them from living normal lives or advocating for themselves openly in the political process. *Id.* at 371.

Changing the constitutional rules in the way CSS seeks would reverberate across many contexts, increasing both the pressure to discriminate and inflaming discrimination against LGBTQ people based on beliefs about marriage, sexuality, and gender.

1. Foster Care Services. In the context of foster care, the requested exemption would increase

balkanization of recruitment efforts by some agencies to find only those who conform to their religious views. Permitting an agency to exclude qualified applicants to become foster parents because the applicants do not meet the agency's religious standards means there would be a smaller applicant pool and fewer foster parents to care for children in need. If the Court accepts CSS's position, that would invite even more agencies to discriminate, resulting in more exclusion of same-sex couples and families (and others), which will not only stigmatize and injure families seeking to care for children but limit the opportunities for children in foster care to find loving families.

Current data show that same-sex couples are far more likely than other couples to foster and adopt children.[15] Accepting CSS's position would invite more agencies to discriminate, resulting in more exclusion of same-sex couples and more stigmatization and injury of other LGBTQ couples who are or are seeking to care for children. A constitutional exemption is also certain to result in the rejection of applicants of other faiths or no faith. *See generally* Brief for Anti-Defamation League, Brief for Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child Placement Agencies, as Amici Curiae Supporting Respondents. LGBTQ foster parents seek to offer love and support and afford nurturance to the next generation, and often provide homes for the

[15] S.K. Goldberg et al.," How Many Same-Sex Couples in the U.S. are Raising Children?", Williams Institute, at 1 & tbl. 2 (July 2018), *available at* https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/.

disproportionate number of young people in foster care who are LGBTQ.[16]

While a great many parents of all faiths support their LGBTQ children at home and as they encounter difficulties at school and in their larger communities, too many LGBTQ youth encounter rejection or physical abuse at home because of their sexual orientation, transgender status, or gender identity.[17] This rejection is often compounded in foster homes; a startling 42% of LGBTQ youth are removed from those homes because of issues about the youth's identity, including requests from those who do not want to foster an LGBTQ child.[18] The City certainly has compelling

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[16] Laura Baams, et al., LGBTQ Youth in Unstable Housing and Foster Care, 143 Pediatrics no. 3, at 1, 2, 4 (Mar. 2019) ("the proportion of LGBTQ youth in foster care and unstable housing is 2.3 to 2.7 times larger than would be expected from estimates of LGBTQ youth in nationally representative adolescent samples"), *available at* https://www.childrensrights.org/wp-content/uploads/2019/04/2019.02.12-LGBTQ-Youth-in-Unstable-Housing-and-Foster-Care.pdf.

[17] J.A. Puckett et al., "Parental Rejection Following Sexual Orientation Disclosure: Impact on Internalized Homophobia, Social Support, and Mental Health," LGBTQ Health 2, no. 3, at 265-69 (Sept. 2015), *available at* https://doi.org/10.1089/lgbt.2013.0024; *see also* K. Martinez, et al., Childhood Familial Victimization: An Exploration of Gender and Sexual Identity Using the Scale of Negative Family Interactions, J. of Interpersonal Violence (Nov. 8, 2017), *available at* https://doi.org/10.1177/0886260517739289.

[18] Massachusetts Commission on LGBTQ Youth: FY 2021 Report and Recommendations 39 (citing sources), *available at* https://www.mass.gov/doc/mcLGBTQy-executive-summary-and-special-reports-from-2021-annual-recommendations/download.

reasons to require non-discrimination from its contractors who certify foster parents.[19]

2. Government Services. Adopting the position that one's religious beliefs authorize a right to discriminate even by those paid by the government to deliver government services would have devastating impacts beyond the child welfare context. Care facilities for children, seniors, or those who are severely disabled, substance use disorder treatment programs, private prisons, and food and clothing banks, among many others, could engage in conduct that is now unlawful discrimination. Those same entities could also seek to deny employment benefits to LGBTQ employees, or their spouses or children.[20]

Because the government's ability to control the conduct of its contractors is closely aligned with the government's ability to control the way its employees perform their jobs, the ruling CSS seeks also risks allowing government employees to turn away those who qualify for services, resulting in nearly endless problems. For example, someone applying for a driver's

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[19] The rule CSS asks this Court to adopt could also affect the ability of publicly funded religious agencies to apply their religious standards to young people in government custody. *E.g.*, *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 406 (6th Cir. 2007) (provider imposed religious services and programming on youth); *Children of the Immaculate Heart v. Johnson*, No. 37-2019-0061761 (Cal. Super. – San Diego Cty. Nov. 27, 2019) (TRO filed on behalf of youth residential therapeutic program that rejected state guidelines for LGBTQ youth and health services).

[20] *See* Sharon Otterman, "Employee Sues for Benefits to Cover Same-Sex Spouse," N.Y. Times (June 19, 2012), https://www.nytimes.com/2012/06/20/nyregion/st-josephs-medical-center-sued-over-benefits-by-same-sex-couple.html.

license could face a clerk exhorting the applicant to "change her life for God" and to "ask forgiveness" because she is transgender. *See* Brief for Transgender Law Center as Amicus Curiae Supporting Respondents, at 35, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. Oct. 30, 2017) ("TLC Br."). When an individual visits a government office for an appointment, tax payment, building permit, or to file incorporation papers, government employees could refuse to meet or offer assistance based on their beliefs about LGBTQ people. *Cf. Somers v. EEOC*, C.A. No. 6:13-00257, 2014 U.S. Dist. LEXIS 40050 (D.S.C. Mar. 25, 2014) (dismissing job discrimination complaint of employee who claimed religious burden in investigating complaints alleging sexual orientation discrimination).

For all of the "constellation of benefits" opened up to married same-sex couples and their children by virtue of *Obergefell* and the invalidation of DOMA in *Windsor*, both government employees and contractors governed by non-discrimination laws could attempt to revive invalidated marriage-related exclusions by refusing to process or approve requests that contravene their beliefs about marriage, sexuality, or gender. This could extend to Family Medical Leave for an employee to care for a spouse after medical treatments, a Social Security lump-sum death benefit, an income tax return for a same-sex couple filing as "married filing jointly," a spousal annuity for a retiring federal employee, and much more. *See, e.g.*, *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 299 (D. Conn. 2012) (program benefits denied to married individuals challenging DOMA).

3. Health Care. Too many medical providers simply refuse to treat LGBTQ people and families as they treat others because of their personal and religious beliefs. When Lisa Marie Pond suffered an aneurysm and collapsed on a family vacation with her life partner and three of their children in Florida in 2008, she was rushed to one of the largest public hospitals in the country—Jackson Memorial in Miami. Janice Langbehn, her partner of 21 years and the woman with whom Lisa had fostered 22 children and adopted four, and their children were denied access to Lisa by hospital staff for eight hours as Lisa lay suffering and advanced to brain death. Ms. Langbehn had explained the relevant relationships, had the power of attorney faxed to the hospital, and repeatedly asked to be provided access to Lisa, but she and their children were unable to see Lisa even as other families and children were allowed into the restricted area to say their goodbyes. As a hospital staff member explained to them, they were in "an anti-gay city and state" and could expect no acknowledgement or access as a family. Not until Lisa's sister arrived were Ms. Langbehn and her children able to be with Lisa one last time.[21] A health care worker whose religious beliefs reject the marriages and families of LGBTQ

[21] *See* Amended Compl., *Langbehn v. The Public Trust of Miami-Dade County*, No. 1:08-cv-21813-AJ, (S.D. Fla. Sept. 2, 2008), ECF No. 25 ¶¶ 3, 28, 29, 41, 43, 52, 55, 60-61, 130(b); 661 F. Supp. 2d 1326 (S.D. Fla. 2009) (dismissing complaint); *see also* Lambda Legal, University of Maryland Medical System to be Sued Wednesday by Gay Man Prevented from Visiting His Dying Partner (Feb. 27, 2002), *available at* https://www.lambdalegal.org/news/md_20020227_university-md-medical-system-to-be-sued-by-gay-man (similar story of patient in Maryland being excluded from his partner despite legal-authorization documents).

people could expose many more people to similar horrors across health care settings.

Sometimes medical providers simply refuse to work with LGBTQ people or their children because of their religious beliefs. A married lesbian couple in Michigan met with a pediatrician who agreed to be the child's doctor when the baby was born. However, when the couple brought their 6-day-old baby to the office, a different doctor greeted them and explained that their chosen doctor could not meet with them after having "prayed on it."[22] Even an existing doctor-patient relationship can be vulnerable, as reflected by an example of an Alabama pediatrician who discharged a 13-year old boy from her "Christian practice" when he came out as gay.[23]

Transgender people similarly face denials of health care and related support in disproportionate numbers, often because of the religious beliefs of providers.[24] One Mississippi woman called numerous medical providers, disclosed she was transgender and asked if they would care for her if she had the flu. As

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[22] Sherry F. Colb, *Pediatrician Refuses to See Baby of Lesbian Couple*, Verdict Justia (Mar. 4, 2015), *available at* https://verdict.justia.com/2015/03/04/pediatrician-refuses-see-baby-lesbian-couple.

[23] Human Rights Watch, "All We Want is Equality": Religious Exemptions and Discrimination against LGBT People in the United States 22 (2018) ("HRW Report"), *available at* https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf.

[24] *See* Sandy E. James, et al., Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 93, 97 (2016), *available at* www.ustranssurvey.org/reports.

she summarized, "They say, no, we don't deal with that stuff here." HRW Report, *supra* note 23, at 29.

Discomfort and bias deny and degrade the care LGBTQ people do receive. Some medical practices refuse to provide fertility treatments to lesbian women because of the religious beliefs of providers at the practice. *See N. Coast Women's Care Med. Grp. Inc. v. San Diego Cty. Super. Ct. (Benitez)*, 189 P.3d 959, 967 (Cal. 2008). One doctor's office in Mobile, Alabama refused to provide assisted reproductive services to a lesbian woman because of the religious beliefs of the doctors in the practice. When the woman asked for a referral, she was told, "I really don't know who else would want to treat you." *See* HRW Report, *supra* note 23, at 20-21.

One transgender man who had a routine breast cancer exam only later learned that he had been diagnosed with an aggressive cancer weeks after the fact when his radiologist called to see how he was doing. When the patient ultimately spoke with the treating physician, the physician admitted he had been uncomfortable providing care to a transgender patient, and that his first impulse had been to recommend psychiatry rather than chemotherapy or radiation. *See* TLC Brief, at 22-23.

Some providers impose their religious beliefs on others notwithstanding professional standards and laws requiring nondiscriminatory treatment. *E.g.*, *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868-69 (11th Cir. 2011) (counseling student responded that she would advise a student in crisis, questioning his sexual orientation, "that it was not okay to be gay" and that "if a client discloses that he is gay, … [she would] tell the client that his behavior is morally wrong and

then try to change the client's behavior, and if she were unable to help the client change his behavior, she would refer him to someone practicing conversion therapy"); *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 161 (2d Cir. 2001) (public nurse meeting with home-bound AIDS patient experienced "compassion" and a "leading of the Holy Spirit" to talk with the man and his partner about salvation, and that "although God created us and loves us, He doesn't like the homosexual lifestyle"). One Alabama doctor treating a hospital patient responded to the patient's disclosure that he was gay and had a partner with "I'm sorry for that." During a later hospitalization, an uninvited person came to his room to pray over him, and on the patient's tray, a pamphlet was left stating "you must repent and be filled with the holy spirit or you will go to hell." *See* Brief for Lambda Legal Defense and Education Fund et al., as Amicus Curiae Supporting Respondents, at 12, *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. Oct. 30, 2017) ("Lambda Legal Br.").

Non-discrimination laws have improved access to health care for LGBTQ people, but the broad exemption sought here would reverse that progress.

4. Public Accommodations and Schools. This Court is already familiar with cases in which individuals and businesses assert First Amendment interests to avoid equality obligations of state public accommodations laws in the context of providing

wedding-related services and accommodations[25] and housing accommodations.[26]

A religiously-based denial of treatment can arise across LGBTQ people's lifespans. It can occur within days of a child's birth, as with the pediatrician who refused a 6-day old child, or in their public and private schools.[27] The exemption sought here could deprive LGBTQ youth of an equal educational environment, such as when school staff single out LGBTQ students to read the Bible and change their ways.[28]

Discrimination occurs when a Lyft driver vilifies a passenger wearing a yarmulke with a rainbow flag, telling him that "the Bible forbids gay sex," and then kicks him out of the car before arriving at his destination, Lambda Legal Br. at 10-11, or when a

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[25] *See*, *e.g.*, *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019), *cert. petition pending*, No. 19-333 (S.Ct.).

[26] *E.g.*, *Cervelli v. Aloha Bed & Breakfast*, 415 P.3d 919, 924 (Haw. Ct. App. 2018) (lesbian couple denied short-term housing by B&B owner based on her and her husband being "strong Christians").

[27] Some states include schools within their non-discrimination laws as "public accommodations" or "educational institutions." *See*, *e.g.*, *Sullivan v. Vallejo City Unified School Dist.*, 731 F. Supp. 947, 954 (E.D. Cal. 1990) (California); Fla. Stat. § 413.08; Mich. Comp. Laws § 37.2301; Penn. Stat. Tit. 43, § 954; Va. Code § 2.2-3900; Wyo. Stat., § 6-9-101.

[28] *See* M. Haag, "LGBT Students in Oregon Were Bullied and Forced to Read the Bible, Report Says," N.Y. Times (May 16, 2018), *available at* https://www.nytimes.com/2018/05/16/us/oregon-school-lgbt-students-bible.html; *see also* Americans United for Separation of Church and State, Gay Arkansas Student Forced to Read Bible at Public School, (May 2003), *available at* https://www.au.org/church-state/may-2003-church-state/people-events/gay-arkansas-student-forced-to-read-bible-at-public.

transgender man is denied a haircut because of the barber's religious belief that this individual is a woman and that women should have long hair, TLC Br., at 13-14.

This discrimination can continue into the senior years. For example, a lesbian couple, ages 72 and 68, sought to move from their single-family home to a senior community in Missouri. When the couple disclosed their marriage, the facility reneged on its offer because their union was not one "understood in the Bible."[29] In a horrific case, Marsha Wetzel, a disabled woman whose long-term partner had just died when she moved into an assisted living facility "faced a torrent of physical and verbal abuse from other residents because she is openly lesbian." *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 859 (7th Cir. 2018). One resident and a prominent "culprit" of the abuse warned Marsha that "homosexuals will burn in hell," spat at Marsha and hurled slurs at her, and one time rammed her wheelchair into a table where Marsha sat, causing the table to flip and land on Marsha. *Id*. at 860. Despite these and many other assaults, some witnessed by staff, and despite her requests for assistance, the provider failed to protect her and instead "limit[ed] her use of facilities" and tried to evict her. *Id.* at 859, 860-61.

Public accommodations discrimination can even arise as spouses try to care for the last remains of their beloved. Jack Zawadski and his (eventual) spouse Robert Huskey had been together 52 years and

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[29] *Walsh v. Friendship Vill. of S. Cnty*, 352 F. Supp. 3d 920 (E.D. Mo. 2019), *vacated* No. 19-1395 (8th Cir. July 2, 2020) (vacating in light of *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020)).

moved to Mississippi for their final years. Despite their pre-arranged plans with a funeral home, when Robert died, the funeral home refused to fulfill its contract when they realized Robert was part of a same-sex couple. The funeral home worker refused because "This goes against everything I believe in. I'm a Christian." *See* Lambda Legal Br. at 16-17.[30]

C. The Exemption Sought Here Is Unwarranted; Our Democracy Has Long Proved Capable Of Addressing These Issues.

1. Amici are well aware that our country is in a particular moment historically where the changes in the legal status of LGBTQ people also provoke discomfort in some persons, perhaps even more so as they feel their beliefs disrespected. *See Windsor*, 570 U.S. at 763. Just as religious beliefs about marriage, gender, and sexuality are invoked to exclude people on the basis of their sexual orientation or transgender status, similar and related beliefs are also invoked to deny equal treatment for racial minorities and women under non-discrimination laws. *E.g.*, *Piggie Park Enters., Inc.*, 390 U.S. at 402 n.5 (restaurant owner refusing to allow all customers to be served together because of religious views about race); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364-65 (9th Cir. 1986) (challenging differential pay based on sex based on

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[30] *See also* Sandhya Somashekhar, "They lived as a gay couple in Mississippi for 20 years. The worst indignity came in death, lawsuit says," Wash. Post (May 4, 2017), *available at* https://www.washingtonpost.com/news/post-nation/wp/2017/05/02/they-lived-as-a-gay-couple-in-mississippi-for-20-years-the-worst-indignity-came-in-death-lawsuit-says/.

belief that men are Biblically charged as heads of households).

Many supporters of racial discrimination and segregation relied on widespread, deeply entrenched interpretations of religious doctrine to support their views. *See, e.g.*, William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 672-77 (2010-2011) (noting that the enactment of the Civil Rights Act of 1964 "triggered a wave of legal clashes between civil rights for blacks and religious liberty of some religious whites"). Notwithstanding the diminishment of segregation theology, there is still religious opposition to interracial marriage.[31] Similarly, discrimination against women has often been supported by widely shared religious views. *See*, *e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."). If beliefs had triumphed over equal treatment, efforts to end racial and sex discrimination would be even more difficult. Instead, this Court has rightly rejected the invocation of such religious views as a sufficient basis for non-compliance with non-discrimination laws in other contexts and it should do so here as well.

2. Non-discrimination laws and religious beliefs have and can continue to co-exist. Our nation perpetually strives to achieve a real balance between religious practice and avoiding harm to third parties. The

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[31] H. Pape, "Christian Opposition to Interracial Marriage is Still a Problem," Sojourners (Oct. 9, 2019), *available at* https://sojo.net/articles/christian-opposition-interracial-marriage-still-problem.

exemption sought here would be anomalous on several fronts. It would discard the rough balance in place that has allowed faith institutions to govern their internal affairs, even at a high price to others, but has provided that they may not themselves, or through religiously motivated individuals, impose those beliefs on the wider public. The constitutional exemption sought here would shred non-discrimination protections that facilitate people's daily lives as well as coexistence among diverse people. Nor is the exemption sought necessary, for the reasons stated by respondents. This Court should abstain from authorizing a constitutional exemption when the democratic process is fully capable of attending to these issues.

According to National Review writer, blogger and former religious-liberty litigator David French, "People of faith in the United States of America enjoy more liberty and more real political power than any faith community in the developed world."[32] Particularly as to employment, federal law forbids job discrimination on the basis of religion, and there are existing accommodations specifically for religious organizations and educational institutions to favor co-religionists in hiring.[33] In addition, religious institutions may decide matters of "faith and doctrine," an aspect of "church government," and hire and fire employees

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[32] David French, "The Case for Religious Liberty is More Compelling than the Case for Christian Power," The French Press (July 12, 2020), *available at* https://frenchpress.thedispatch.com/p/the-case-for-religious-liberty-is (noting that the "string of court victories that have secured religious liberty from state interference [is of] a degree that's unprecedented in American constitutional history").

[33] 42 U.S.C. §§ 2000e-1(a), 12113(d).

who engage in religious instruction free from government intervention. *See Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049, 2060-61 (2020). Outside of religious organizations, the Equal Employment Opportunity Commission has advised employers about *how* to accommodate religious concerns in the workplace in light of existing law,[34] and the Court may in coming terms also revisit *when* the employers must accommodate religion. *See, e.g.*, *Small v. Memphis Light, Gas and Water,* No. 19-1388 (S. Ct.) (petition for cert.) (June 15, 2020); *Dalberiste v. GLE Assocs., Inc.*, No. 19-1461 (S. Ct.) (petition for cert.) (June 24, 2020).

Numerous provisions of the United States Code also prohibit religious discrimination. These include protections in places of public accommodation, 42 U.S.C. § 2000a; in public facilities, *id.* § 2000b; in public education, *id.* § 2000c-6; in employment, *id.* §§ 2000e, 2000e-2, 2000e-16; in the sale or rental of housing, *id.* § 3604; in the provision of certain real-estate transaction or brokerage services, *id.* §§ 3605, 3606; in federal jury service, 28 U.S.C. § 1862; in access to limited open forums for speech, 20 U.S.C. § 4071; and in participation in or receipt of benefits from various federally-funded programs, 15 U.S.C. § 3151; 20 U.S.C. §§ 1066c(d), 1071(a)(2), 1087-4, 7231d(b)(2), 7914; 31 U.S.C. § 6711(b)(3); 42 U.S.C. §§ 290cc-33(a)(2), 300w-7(a)(2), 300x-57(a)(2),

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[34] EEOC, "Religious Discrimination" (summary of pressing issues with links for further information), *available at* https://www.eeoc.gov/religious-discrimination; EEOC, "Best Practices for Eradicating Religious Discrimination in the Workplace," *available at* https://www.eeoc.gov/laws/guidance/best-practices-eradicating-religious-discrimination-workplace.

300x65(f), 604a(g), 708(a)(2), 5057(c), 5151(a), 5309(a), 6727(a), 9858l(a)(2), 10406(2)(B), 10504(a), 10604(e), 12635(c)(1), 12832, 13791(g)(3), 13925(b)(13)(A). Likewise, all states with antidiscrimination laws in the workplace include religion as a protected characteristic, except Alabama.[35]

The First Amendment governs when religious institutions or individuals assert that a law burdens their religious exercise, and specific statutes apply strict scrutiny to substantial burdens on religion. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1; Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5. Likewise, strict scrutiny applies under the First Amendment whenever a governmental entity targets a religious practice or religion. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).

Clearly, our nation and the democratic process recognize the value of religious pluralism in our diverse society. *Amici* share that value. Faith is deeply meaningful to many Americans, including many LGBTQ people, and religious organizations play a valuable role in securing the common good. *See* Br. for President of the House of Delegates of the Episcopal Church et al. as Amici Curiae Supporting Respondents.

Amici believe denying the exemption sought here fits within our nation's respect for religious pluralism. Pluralism is not advanced by simply allowing some to

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[35] Nat'l Conference of State Legislatures, "Discrimination and Harassment in the Workplace," (Mar. 18, 2019), *available at* https://www.ncsl.org/research/labor-and-employment/employment-discrimination.aspx.

follow their own path at the expense of others. *See* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 Yale L.J. Forum 201, 224 (2018) ("an accommodation regime's pluralism is measured not only by its treatment of objectors, but also by its attention to protecting other citizens who do not share the objector's beliefs"); *see also* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts can Support Democracy by Lowering the Stakes of Politics*, 114 Yale L. J. 1279, 1310 (2005) (courts can undermine pluralistic democracy by prematurely taking away issues from the political system or "demonizing an outgroup").

Here, the constitutional exemption sought extends far beyond internal practices in religious organizations and into our shared public spaces and institutions. This Court should stay its hand and allow the democratic process time to resolve any conflicts, just as it has before.

3. The proposed exemption requested by petitioners would deny to LGBTQ persons the equality required by the Constitution and would significantly erode the progress LGBTQ people have made toward fuller participation in their communities and society. Although LGBTQ people now have a chance at equal employment opportunities in all workplaces large enough for Title VII of the Civil Rights Act to apply, *see Bostock*, 140 S. Ct. at 1754, a religious belief exemption to act on one's beliefs would reverse that long-denied and much-needed progress.

The courts have repeatedly recognized that religious views do not override the rights of LGBTQ persons. In the case of Aimee Stephens, the Sixth Circuit

rejected her employer's argument that his religious views about gender were a proper ground to terminate her when she notified him of her plan to transition. *See EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560, 566 (6th Cir. 2018); *see also*, *e.g.*, *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 553-55 (7th Cir., Mar. 31, 2011) (upholding summary judgment for employer in discharging an employee who violated zero-tolerance anti-harassment policy by repeatedly speaking against gay people in religious terms, and screaming at a lesbian employee that God does not accept gays, that they should not "be on earth," and will "go to hell"); *Prowel v. Wise Bus Forms, Inc.*, 579 F.3d 285, 287-88 (3d Cir. 2009) ("effeminate" gay man harassed by co-workers, including by coworkers who left notes about salvation or stated "Rosebud will burn in hell"); *Terveer v. Billington*, 34 F. Supp. 3d 100, 105-08 (D.D.C. 2014) (Library of Congress employee's supervisor lectured gay plaintiff on religion at the beginning of work conversations, purporting to educate him "on Hell and that it is a sin to be homosexual," and "to repent because [of] … what God does to homosexuals" before giving him a poor annual review); *Salemi v. Gloria's Tribeca Inc.*, 115 A.D.3d 569, 569-70 (N.Y. Sup. Ct. 1st App. Div. 2014) (upholding jury verdict for damages under New York City Human Rights Law to a lesbian employee whose employer, *inter alia*, repeatedly stated homosexuality is "a sin" and that "gay people" were "going to go to hell").

Under current law, same-sex couples may legally marry and "live … in a status of equality with all other married persons," *Windsor*, 570 U.S. at 764, and raise children in any part of this country, secure in the knowledge that their marriages and parental rights must be respected in every state. *See Obergefell*, 576

U.S. at 679-80; *V.L. v. E.L.*, 136 S. Ct. 1017, 1019 (2016) (holding that Alabama could not deny full faith and credit to a same-sex parent's adoption judgment granted in another state); *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (holding that Arkansas must treat married same-sex parents equally). The exemption sought here could be employed in ways that would challenge the stability and integrity of LGBTQ people's family relationships.

The assurance that LGBTQ people "may exercise … their freedom on terms equal to others" means little if it can be so easily cast aside by individuals in civil society. *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1727. Discrimination also hurts the wider society denying individuals an "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). Allowing discrimination against LGBTQ people and same-sex couples—particularly by government contractors paid with tax dollars to provide government services—creates a stigmatizing hierarchy of persons and marriages. "Equal protection of the laws is not achieved through the indiscriminate imposition of inequalities," *Romer*, 517 U.S. at 633 (citations omitted), and so it should remain.

CONCLUSION

The Court should affirm the court of appeals.

Respectfully submitted.

J. ANTHONY DOWNS
GOODWIN PROCTER LLP
100 Northern Ave.
Boston, MA 00210
(617) 570-1929
jdowns@goodwinlaw.com

MARY L. BONAUTO
Counsel of Record
GARY D. BUSECK
PATIENCE CROZIER
GLBTQ LEGAL ADVOCATES
& DEFENDERS
18 Tremont Street,
Suite 950
Boston, MA 02108
(617) 426-1350
mbonauto@glad.org
Counsel for Amici Curiae

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